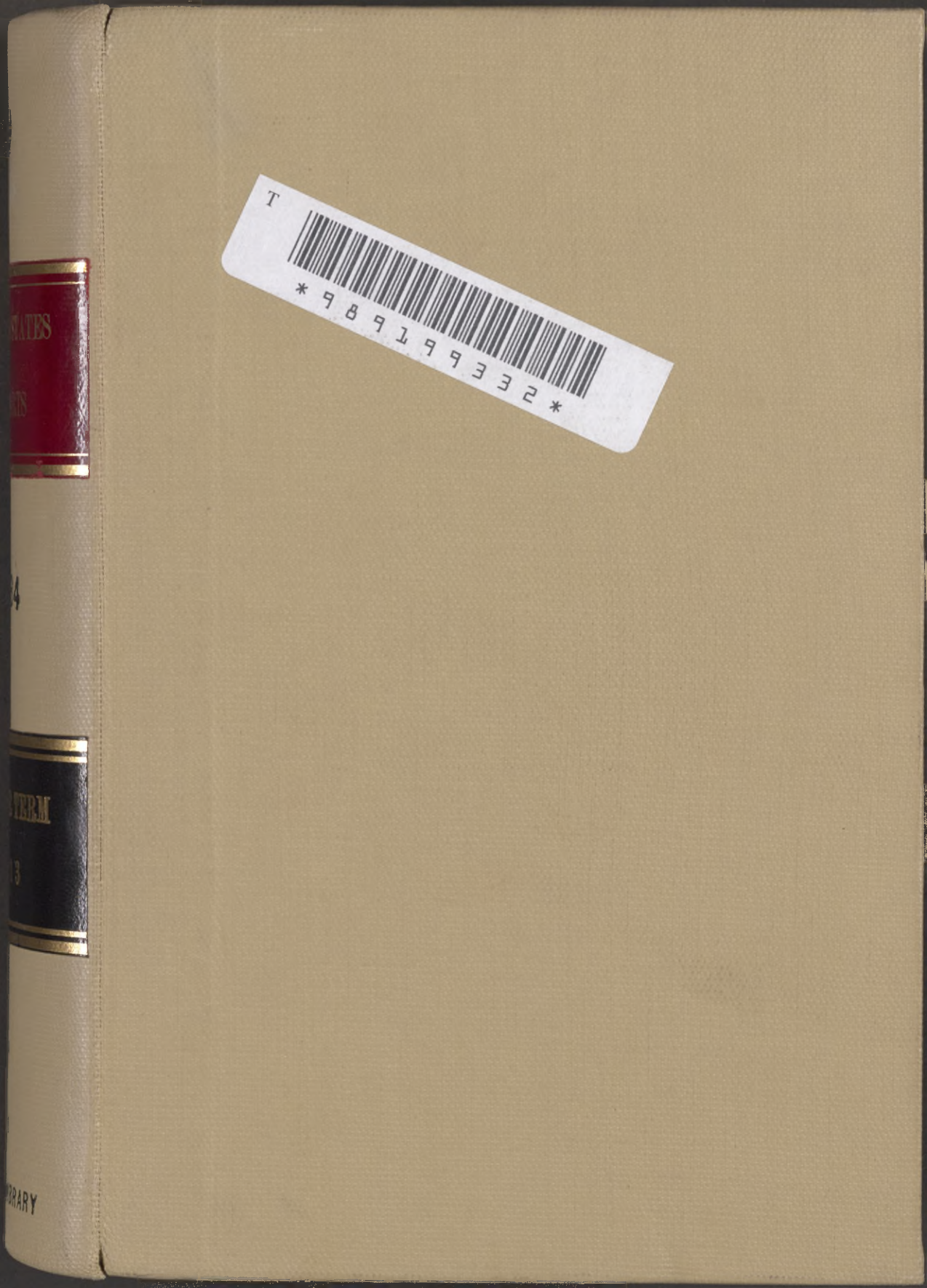

UNITED STATES REPORTS

VOLUME 234

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1913

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1914

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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 will appear in a later volume. During vacation President Wilson appointed, and the Senate confirmed, James Clark McReynolds, of Tennessee, as Associate Justice to succeed Mr. Justice Lurton; he took his seat on the bench on the opening of October Term 1914.

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. At the opening of October Term 1914 a new allotment was announced which was the same as the above except that Mr. Justice McReynolds was allotted for the Seventh Circuit in place of Mr. Justice Lurton, deceased.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1913.

THE TAP LINE CASES.[1]

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 829, 830, 831, 832, 833, 834, 835, 836. Argued April 8, 9, 13, 1914.—Decided May 25, 1914.

An order of the Interstate Commerce Commission, based on its finding that the service rendered by a connecting line is not a service of transportation by a common carrier railroad, but a plant service by a plant facility, to the effect that allowances and divisions of rates

[1] Docket titles of the Tap Line Cases are: No. 829. United States and Interstate Commerce Commission *v.* Louisiana & Pacific Railway Co.; No. 830. Atchison, Topeka & Santa Fe Railway Co. *v.* Louisiana & Pacific Railway Co.; No. 831. United States and Interstate Commerce Commission *v.* Woodworth & Louisiana Central Railway Co.; No. 832. Atchison, Topeka & Santa Fe Railway Co. *v.* Woodworth & Louisiana Central Railway Co.; No. 833. United States and Interstate Commerce Commission *v.* Mansfield Railway & Transportation Co.; No. 834. Atchison, Topeka and Santa Fe Railway Co. *v.* Mansfield Railway & Transportation Co.; No. 835. United States and Interstate Commerce Commission *v.* Victoria, Fisher & Western Railroad Co.; No. 836. Atchison, Topeka & Santa Fe Railway Co. *v.* Victoria, Fisher & Western Railroad Co.

are unlawful and must be discontinued, is affirmative in its nature and subject to judicial review by the Commerce Court.

Where the validity of an order of the Interstate Commerce Commission directing discontinuance of divisions of rates with another railroad depends upon whether the latter is a common carrier or a plant facility, the determination of that question upon undisputed facts is a conclusion of law which is subject to judicial review.

Although a railroad may have originally been a mere plant facility, after it has been acquired by a common carrier duly organized under the law of the State and performing service as such and regulated and operated under competent authority, it is no longer a plant facility but a public institution, even though the owner of the industry of which it formerly was an appendage is the principal shipper of freight thereover.

The extent to which a railroad is in fact used does not determine whether it is or is not a common carrier, but the right of the public to demand service of it.

Railroads owned by corporations properly organized under the laws of the State in which they are and treated as common carriers by the State, authorized to exercise eminent domain, dealt with as common carriers by other railroad corporations, and engaged in carrying for hire goods of those who see fit to employ them, are common carriers for all purposes, and cannot be treated as such as to the general public and not as to those who have a proprietary interest in the corporations owning them.

Congress has expressly excepted the transportation of lumber from the operation of the commodities clause, and had power so to do. *United States* v. *Del. & Hudson Co.*, 213 U. S. 366.

Debates in Congress may be resorted to for the purpose of showing that which prompted the legislation.

This court will not, in interpreting the power of the Interstate Commerce Commission in regard to a particular traffic, ignore a declaration of public policy in regard to that traffic as shown by an enactment of Congress.

Congress, by the exemption of lumber from the operation of the commodities clause, shows that it regarded railroad tap lines for lumber, owned and operated by the owners of the timber, as essential for the development of the timber interests of the country.

It is beyond the authority of the Interstate Commerce Commission to order a tap line to cease a division of rates as to lumber owned by it or by those having proprietary interest therein, if it is allowed such division as to lumber shipments by others.

If the division of joint rates between the principal carrier and the tap line really amounts to a rebate or discrimination in favor of the tap line owners, it is within the power and duty of the Interstate Commerce Commission to reduce such division to a proper point.
209 Fed. Rep. 244, affirmed.

THESE are all appeals from decrees of the United States Commerce Court (209 Fed. Rep. 244) annulling orders of the Interstate Commerce Commission refusing in whole or in part to compel certain common carriers which had filed schedules cancelling former schedules covering through routes and joint rates with the Louisiana & Pacific Railway Company, the Woodworth & Louisiana Central Railway Company, the Mansfield Railway & Transportation Company and the Victoria, Fisher & Western Railroad Company, appellees, hereinafter referred to as tap lines, to establish or reëstablish through routes and joint rates and to grant allowances and divisions to the tap lines.

The Commission, after an extensive investigation of the tap lines in the lumber regions, particularly in the States of Arkansas, Missouri, Louisiana and Texas, on April 23, and May 14, 1912, filed its report and supplemental report (23 I. C. C. 277, 549). The report deals at some length with the manner in which logs and lumber are moved in that territory and the practices attending such traffic. The Commission found the identification of the road with the industry, the necessity of incorporation to secure divisions and allowances, the great amount in the aggregate paid by the trunk lines to the tap lines, and the resulting discrimination, the fact that allowances were dependent upon the bargain the tap lines might exact from the trunk lines for a proportion of their traffic and not upon the amount of service rendered, and the fact that most of the lumber mills were near public carriers and that the tap lines would not be kept in operation if the mills were removed. General principles for determining the character

of carriers were set forth, and the conclusion stated that the real relation of a tap line was a question to be decided upon the facts in each case.

The Commission entered upon a particular examination of the various lines under investigation, among others, the appellees in these appeals. It found:

The Louisiana & Pacific Railway Company, controlled by the R. A. Long interests, owning a controlling interest in the Hudson River Lumber Company, the King-Ryder Lumber Company, Longville Lumber Company and the Calcasieu Long Leaf Lumber Company, consists of the following tracks, all of which were originally constructed as private logging roads: (1) a track from De Ridder Junction, Louisiana (all of the lines involved in these cases are within that State), to Bundicks, a distance of eight miles. The mill of the Hudson River Lumber Company in whose interest this track is operated is located at De Ridder within a few hundred feet of the trunk lines; Bundicks is apparently a logging camp with a company store. (2) A track from Lilly Junction to Walla, about seven and one-half miles, the latter being a point in the woods where the King-Ryder Lumber Company has a commissary and where is located a small independent yellow-pine mill, owned by the Bundick Creek Lumber Company. The mill of the King-Ryder Company is at Bon Ami, a town of 2,000, located on the Lake Charles & Northern Railroad Company a short distance from and connected by it with Lilly Junction. (3) A track of two miles at Longville, a town of 2,000 people, where the Longville Lumber Company has its mill and a store, and where also are several independent stores. (4) A track of nine miles from Fayette to Camp Curtis, a place of 200 population, where the Calcasieu Long Leaf Lumber Company has a store, its mill being at Lake Charles. (5) A track of one mile from Bridge Junction to Lake Charles station. The towns De Ridder, Bon Ami, Lilly Junction, Longville, Fayette and

Lake Charles are connected by The Lake Charles & Northern Railroad, a Southern Pacific Railway Company line, originally built by the Long interests as a part of the Louisiana & Pacific, and sold to the Lake Charles & Northern with the reservation of trackage rights advantageous to the Louisiana & Pacific. By means of this arrangement the Louisiana & Pacific connects with the Kansas City Southern and the Santa Fe at De Ridder, with the Frisco at Fulton (a station south of Fayette) and with the Southern Pacific, Iron Mountain and Kansas City Southern at Lake Charles. Its equipment consists of 22 locomotives, 6 cabooses, 41 freight cars and 270 logging cars, and a private car used by its officers, who are connected with the lumber companies, in traveling around the country. The lumber companies have many miles of unincorporated logging tracks connecting with the Louisiana & Pacific at various points. There are a number of other stations on the line, among them Bannister, where the Brown Lumber Company owns a small independent mill.

The operation is this: The lumber companies load the logs and switch them over the logging spurs to connection with the tap line which hauls them to the mill, an average distance of 30 miles, for which no charge is made. The tap line switches the carloads of lumber from the mill at Lake Charles, a distance of three-quarters of a mile, to the Southern Pacific; at De Ridder only a few hundred feet to the trunk lines; from the Lake Charles mill to the Frisco a distance of 18 miles; from the Bon Ami mill to the Southern Pacific at Lake Charles a distance of 40 miles, and from the Longville mill to the Southern Pacific at Lake Charles a distance of 24 miles,—the average haul for the controlling companies being nearly 20 miles. By written agreement 50% of the lumber must be routed over the Frisco and 40% over the Southern Pacific, but this is not always done. 243,122 tons of lumber, as against 8,819 tons of merchandise were shipped in 1910, 98% of the whole ton-

nage being supplied by the controlling interests. The passenger receipts for 1910 were $473.77. A logging train runs daily on each branch and there is one "mixed" train, loaded chiefly with logs and lumber, between Lake Charles and De Ridder. The allowances paid by the trunk lines range from 1½ to 5½c per 100 pounds out of their earnings under the group-lumber rate. The operating revenue for the year ending June 30, 1910, was $220,985.94, with operating expenses of $145,433.69, and there was an accumulated surplus of $73,581.07 on that date.

The Commission found that no charge was made for hauling the logs to the mills by the tap line and that for the short switching service allowances were made as above stated, and concluded that it regarded the whole arrangement as indefensible and unlawful, and saw no ground upon which any allowance might lawfully be made.

The Woodworth & Louisiana Central Railway Company and the Rapides Lumber Company, situated at Woodworth, are identical in interest. The mill is near the Iron Mountain which has a spur track to the mill, and the tap line has a standard gauge track from the mill to La Moria, about six miles, where it connects with the Southern Pacific Railway, Texas & Pacific Railway and Chicago, Rock Island & Pacific Railway, and a narrow gauge track in the other direction for 18 miles whence spur tracks go into the timber. The equipment consists of 1 standard gauge locomotive, 5 narrow gauge locomotives and 2 standard and 9 narrow gauge cars. The steel in the logging spurs and 4 of the narrow gauge locomotives used by the lumber company on the spurs are owned by the tap line and leased to the lumber company; while the right of way for the narrow gauge track is leased from the lumber company.

The tap line hauls the logs from its terminus to the mill without charge, where they are dumped by the trainmen into the mill pond. The carloads of lumber are switched

by the tap line from the planing mill to the place where they are taken by the Iron Mountain, about 25 feet. About 95% of the lumber goes through La Moria, being switched there by the tap line; the allowances from the Iron Mountain out of through rates being from 1½ to 5½c per 100 pounds, while from the trunk lines at La Moria from 2 to 5½c. There are no joint rates except on lumber. For the year ending June 30, 1910, there was 40,707 tons of freight handled for the lumber company and 2,100 tons of outside traffic. It has no passenger business. Its operations for that year showed a deficit, but there was a surplus from previous years of nearly $10,000. It files annual reports with the Commission.

The Mansfield Railway & Transportation Company and the Frost-Johnson Lumber Company are identical in interest. The tap line extends from Mansfield to a logging camp in the woods known as Hunter, a distance of about 16 miles and the line which was originally incorporated by the citizens of Mansfield in 1881 consisting of 2 miles of track from the town to a connection with the Texas & Pacific at Mansfield Junction. Later the Mansfield Company acquired the two-mile track and equipment, and the interests controlling it purchased a large amount of timber lands near Mansfield at a point called Oak Hill where a mill was built, and spur tracks were laid into the timber, which were later turned over to the Mansfield Company, with the free privilege reserved to the Lumber Company to operate logging trains between the timber and the mill, which operation is performed by a subsidiary company. The purchase price did not reflect the value of the reservation. There are about 25 miles of unincorporated logging tracks. The tap line also has a connection with the Kansas City Southern. It owns a locomotive, a passenger coach and a box car.

The service performed by the tap line is switching cars between the mill and the Kansas City Southern about

three-fourths of a mile, although the mill is within 300 feet of the Kansas City Southern and was formerly connected by a spur track which was abandoned and taken up, and to the Texas & Pacific, a distance of two and one-half miles. The tap line bears the expense of maintaining its tracks extending into the woods.

No other yellow-pine mills are served by the tap line, but there is a hardwood mill adjacent to the Frost-Johnson mill, obtaining a substantial portion of its logs from the latter company or subsidiaries, the price including delivery at the hardwood mill, the logs being hauled by the logging company under its trackage right. Some logs are also obtained from the Texas & Pacific, for the switching of which the hardwood mill pays the tap line $2.50 a car or less. The tap line maintains joint rates on hardwood as well as yellow-pine.

Practically no traffic other than that in which the Lumber Company is interested moves over the track from Mansfield to Hunter, but a good deal of outside traffic moves over the original two miles from Mansfield to Mansfield Junction. 16,539 tons of miscellaneous freight was handled during the year ending June 30, 1910, most of which passed over the Mansfield Junction branch, and much of which was for the controlling interests or their employés; while during the same time 28,596 tons of lumber were handled, 91.4 per cent. of which was supplied by the Lumber Company. A daily train is operated by the tap line in each direction on regular schedule, handling passengers, mail and express; but in 1910 the passenger revenues were only $1,209.76, while its freight revenues were $25,617.19.

The Commission noticed the abandonment of the 300 foot spur track and then the payment of an allowance of 1 to 4c per 100 pounds, and held that it was a mere manipulation of the situation in order to establish an unlawful relation; and also held that since the tap line crosses the

right of way of the Texas & Pacific within a short distance, the allowance of a like amount by the Texas & Pacific for switching from the mill to Mansfield and down to the junction was unlawful.

The Victoria, Fisher & Western Railroad Company and the Louisiana Long Leaf Lumber Company have the same stockholders and officers. The tap line extends from Victoria, where it connects with the Texas & Pacific, to Fisher, where it crosses the Kansas City Southern Railway, and then extends to Cain, in all about 31 miles. A part of the track was built some time ago and was acquired by the Lumber Company in 1900. In 1902 the Railroad Company was incorporated and its stock exchanged as a stock dividend for the line. There are about 25 miles of logging spurs and sidetracks. The equipment consists of 5 locomotives, 4 cabooses, 3 box cars, 1 flat car and 105 logging cars. It does not operate any trains on regular schedule. There are two mills owned by the Lumber Company, one about a mile from the junction with the Texas & Pacific and the other about half a mile from the tracks of the Kansas City Southern.

The tap line hauls the logs from the forest to the mill, charging $1.50 per 1,000 feet, which is supposed to cover only the service performed on the logging spurs and not the haul over the main track. The greater part of the lumber from Fisher is turned over to the Kansas City Southern, involving a one-half mile switch by the tap line, and from Victoria is moved by the tap line one mile to the Texas & Pacific; a small amount of the lumber from each mill is taken by the tap line to the more distant trunk line, but the same divisions are paid. The allowances range from ¾ to 4c per 100 pounds, and the joint rates are the same as the rates published from adjacent mills on the trunk lines, except traffic moving to Texas, for which 1¼c per 100 pounds is added to the junction-point rate. No passengers are carried, and of 316,676 tons

of freight for the year 1910, over 99% was furnished by the proprietary company. And the accumulated surplus at the end of June, 1910, was $13,509.17.

The Commission held that the tap line could not participate as a common carrier in joint rates on the products of the proprietary company, but said that the lumber rate of the trunk lines applied from the adjacent mills and that they might make a reasonable allowance for switching.

The Commission made an order in such matter on May 14, 1912, which it amended on October 30, 1912. The amended order, so far as these appeals are concerned, provided:

"The Commission upon the record finds in the case of the . . . Woodworth & Louisiana Central Railway Company; Mansfield Railway & Transportation Company; Louisiana & Pacific Railway Company; Victoria, Fisher & Western Railroad Company; that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports," and it ordered that the trunk lines should cease and for two years abstain from making any such allowances to the tap lines named.

The Commission further ordered that if the trunk lines failed by a time stated, to reëstablish the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of certain proprietary com-

panies, among others, the appellees herein, it would upon proper petition enter an order requiring the establishment of such routes and rates or enter upon an inquiry with respect thereto, and further provided that all divisions of joint rates should be submitted to the Commission for approval.

The appellees thereupon by their several petitions filed in the United States Commerce Court sought to have the order of the Commission, so far as applicable to them, enjoined and annulled. The Interstate Commerce Commission, the Atchison, Topeka and Santa Fe Railway Company, the Gulf, Colorado and Santa Fe Railway Company and the Railroad Commission of Louisiana intervened. The Commerce Court said that the question was whether the Commission had acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be performing a mere plant service for a proprietary company, and held that as the service rendered to the proprietary and non-proprietary mills by the tap lines was the same, and as it was held to be a transportation service by an interstate common carrier as to the non-proprietary mills, it must be held to be a similar service as to the proprietary mills, and concluded that the Commission was without power to prohibit the making of joint rates by the trunk lines and the tap lines and the payment of some division of such rates to the tap lines for their services in hauling logs to and lumber from the proprietary mills, and annulled the order of the Commission in this respect and so far as it applied to the appellees.

The United States and the Interstate Commerce Commission, and the Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado and Santa Fe Railway Company entered separate appeals from the decrees of the Commerce Court in the four cases instituted by the appellees.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General*, and *Mr. Karl W. Kirchwey*, Attorney, were on the brief, for the United States:

Mr. Charles W. Needham, with whom *Mr. Joseph W. Folk* was on the brief, for the Interstate Commerce Commission:

The trunk lines sought to cancel their tariffs prescribing divisions and allowances to the tap lines. The latter filed petitions with the Commission, complaining of this action. They requested that an answer be required from each trunk line, that an investigation be entered into, and that through routes and joint rates be established between the trunk lines and the tap lines. The Commission found that the tap lines were plant facilities of the lumber companies, denied the relief prayed, and by a single order dismissed the several petitions. This order was a negative order. As no affirmative order was entered against the tap lines, which they might annul or enjoin, the Commerce Court was without jurisdiction. *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp*, 225 U. S. 302.

In cases of preference and discrimination, this court has held that judicial review is limited to the single inquiry, Was there substantial evidence before the Commission to support the order? In their petitions to the Commerce Court, the tap lines alleged much matter other and different from that which they adduced before the Commission. They also offered new evidence. Among other things, they sought to show conditions which they had created after the hearing before the Commission relating to the operation of the tap lines, and also to swell substantially the volume of the tonnage handled for others than the proprietary companies. They now seek to destroy the report and order of the Commission with a record which was not before it. Congress did not contemplate a retrial of the same issues of fact before another tribunal.

The Commerce Court was right in disregarding the testimony taken before it, and in striking it from the record. *I. C. C.* v. *Un. Pac. R. R. Co.*, 222 U. S. 541, 550; *I. C. C.* v. *Louis. & Nash. R. R. Co.*, 227 U. S. 88; *United States* v. *Balt. & Ohio R. R. Co.*, 225 U. S. 306, 323.

The Commission had the right to look behind the fact of separate incorporation to ascertain the actual relations of the parties. The tap lines are not *bona fide* common carriers of the traffic of the lumber companies, but they are mere devices created for the purpose of taking over the switch tracks and logging equipment of the several lumber companies, and converting allowances, which would otherwise be bald rebating transactions, into private divisions between the appellee tap lines and the trunk lines, in order to evade the provisions of the Act to Regulate Commerce, and simultaneously to maintain advantages over other shippers of lumber. *Miller & Lux* v. *Canal Co.*, 211 U. S. 293; *So. Pacific Co.* v. *I. C. C.*, 219 U. S. 498, 521; *United States* v. *Union Stock Yard*, 226 U. S. 286, 304; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *Fourche River Co.* v. *Lumber Co.*, 230 U. S. 316; *Crane Iron Works* v. *United States*, 209 Fed. Rep. 238.

The particular preferences and advantages to the lumber companies may be thus summarized: 1. The allowance of 1½c to 5c per 100 pounds from the freight rate, and the resultant advantages of these lumber companies over their competitors in the transportation and sale of lumber in the markets. Some of the mills turn out 2,500 cars per year; 4c per 100 pounds, on the basis of 50,000 pounds to the car, would amount to $50,000 to a single company within a single year. 2. The use by the lumber companies of the tracks, switches and sidings as holding yards for loaded and empty cars, which enables them to evade all demurrage and car service charges. The tap lines hold for the lumber companies the cars of the trunk lines on the basis of 50c a day after 6 days

free time, instead of the lumber companies paying the usual $1 and $2 per day over 48 hours free time. 3. The use of free interstate transportation over the trunk lines distributed wholesale to the officers and agents of the lumber companies and used by them in travelling in the interest of the lumber companies, or in their own interest.

In order to gain these preferences and discriminations, the lumber companies are making the transportation of their enormous traffic a matter of bargain with all of the trunk lines, and the sale of it to the one or two which pays the highest allowances. With the power wielded in controlling the routing, the lumber companies are forcing the trunk lines to make allowances to the tap lines, of which the stockholders of the lumber companies are getting the benefit.

The conclusions reached by the Commission did not proceed upon arbitrary and unlawful distinctions and are supported by substantial evidence.

The switching service within 3 miles of the trunk line, being one which the trunk line held itself out to perform under the through rate, was a service "connected with transportation" when performed by the shipper or its agent. Switching for a greater distance so performed was purely an accessorial service. *Taenzer & Co.* v. *C., R. I. & P. Ry. Co.*, 191 Fed. Rep. 543; *C. & A. Ry. Co.* v. *United States*, 156 Fed. Rep. 558; affirmed, 212 U. S. 563; *Central Yellow Pine Association* v. *V. S. & P. R. Co.*, 10 I. C. C. 193; *Fourche River Co.* v. *Bryant Lumber Co.*, 230 U. S. 316, 322; *United States* v. *B. & O. R. R. Co.*, 231 U. S. 274; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42; *Matter of the Transportation of Hutchinson Salt*, 10 I. C. C. 1, 9; *Star Grain Co.* v. *A., T. & S. F. Ry. Co.*, 17 I. C. C. 338; *Fathauer Co.* v. *St. L., I. M. & S. Ry. Co.*, 18 I. C. C. 517; *Industrial Lumber Co.* v. *S. L. W. & G. Ry. Co.*, 19 I. C. C. 50; *Santa Fe Ry.* v. *Grant Bros.*, 228 U. S.

177, 185; *Crane Iron Works* v. *United States*, 209 Fed. Rep. 238; *Kaul Lumber Co.* v. *Central of Georgia Ry. Co.*, 20 I. C. C. 450; *United States* v. *B. & O. Ry. Co.*, 231 U. S. 274; *General Electric Co.* v. *N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237; *Solvay Process Co.* v. *D., L. & W. R. R. Co.*, 14 I. C. C. 246; *Re Allowances for Sugar Transfer*, 14 I. C. C. 619; *C. & O. Ry. Co.* v. *Standard Lumber Co.*, 174 Fed. Rep. 107; *Industrial Railways Case*, 29 I. C. C. 212; *Le Roy Fibre Co.* v. *C., M. & St. P. Ry. Co.*, 232 U. S. 340, 354; *Am. Sugar Co.* v. *D., L. & W. R. R. Co.*, 200 Fed. Rep. 652, 656; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 264.

A plant facility tap line performing this service within the 3 mile limit was entitled to an allowance under § 15, but to no division out of the through rate. A common carrier tap line was entitled to a division or allowance out of the through rate on a haul of either more or less than 3 miles. The movement of the logs from the forest to the mill was not a transportation service to be paid for out of the through rate, but an accessorial service for which the shipper should pay.

Any allowance for switching within 1,000 feet of a trunk line was a mere device to effect an unlawful payment. These findings are within the principles approved by this court in *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 265, to the effect that an allowance to a tap line under § 15 "is lawful only when the trunk line prefers, for reasons of its own and without discrimination, to have the lumber company perform the service."

The Commerce Court affirmed in all respects the report and order of the Commission, with the single and sole exception that the Commission had arbitrarily found the tap lines to be plant facilities of the lumber companies, and impliedly recognized them as common carriers of an insignificant amount of traffic of a few other shippers, amounting to only 1 or 2 per cent of the whole.

The tap lines, the lumber companies, and the trunk lines, in all of their arrangements among themselves, and in various forms, carefully and clearly separated the traffic of the proprietary companies from the traffic of other shippers, and the Commission simply treated the case as the parties themselves had made it.

The preferences and discriminations found by the Commission do not arise out of the insignificant amount of traffic handled for shippers other than the proprietary companies. Such shippers do not receive the allowance of 1½c to 5c, or free demurrage and car service, or free passes. Rebates are not paid to the public on insignificant amounts of traffic, but they are paid to private parties on large volumes of traffic.

Any allowance whatever to as many as 57 tap lines was stricken down as unlawful, and the petitions were dismissed by negative orders. To 35 other tap lines the Commission allowed either a small division of the rate or an arbitrary switching charge, in the amounts which the Commission found they were entitled to receive for the service which they rendered. To 5 other tap lines the Commission refused any allowance on the traffic of the proprietary companies. No trunk line has come forward to challenge the validity of the order. Those which were brought in by summons have answered that they would allow the United States to defend. Out of a total of 97 tap lines against which the order was directed, 92 have accepted its terms. Only 5 have objected. Twice the report of the Commission has been sanctioned by this court to the extent of citing it as authority. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 264, 265; *Fourche River Co.* v. *Bryant Lumber Co.*, 230 U. S. 316, 322. The five objecting parties are met with the powerful presumptions of validity which accompany the order, which are reënforced by the nonaction of the great majority of the interested parties, and the sanction which this court

has already given to the report in the cases already cited.

Mr. Robert Dunlap and *Mr. James L. Coleman*, with whom *Mr. T. J. Norton* and *Mr. Gardiner Lathrop* were on the brief, for the Atchison, Topeka & Santa Fe Railway Company, and other trunk line railway companies, appellants in Nos. 830, 832, 834 and 836:

The tap line division is a rebate and the various steps taken by appellees in their attempts to legalize such rebate are mere devices to evade the payment of the published tariff rate in full.

The incorporation of the various tap line railroads and the other steps taken by them were for the sole purpose of continuing under the name of a division the old open rebate which was paid direct to the lumber companies. Masquerading as railroads, the lumber companies were making their traffic a matter of bargain and sale and by the device of a secret division were compelling the trunk lines to bid against each other in the dark for such business. Such was the proper finding of the Interstate Commerce Commission.

The points raised by appellees before the Commerce Court and before the Interstate Commerce Commission are without merit. The facts of record and the law are that:

The service performed by each of the appellee railroads herein is not a service of transportation by a common carrier railroad within the meaning of the Act to Regulate Commerce, but is an industrial service to the plant; the appellee railroads are plant facilities and perform a plant facility service for the proprietary lumber companies; there was abundant evidence upon which the Commission could base its finding that the participation by the appellee railroad in joint rates upon the logs and lumber of the proprietary lumber companies constitutes an undue and unreasonable preference and subjects other shippers to

unjust discrimination within the meaning of the Act to Regulate Commerce.

The Commission's order does not result in undue or unreasonable preference or unjust discrimination within the meaning of the Act to Regulate Commerce, either as between common carriers subject to the Act to Regulate Commerce, or as between shippers.

The order does not deprive the appellees of their rights under the Constitution of the United States.

The Commodities Clause does not repeal the Act to Regulate Commerce with respect to the prohibitions against rebating and discriminations.

Cases heretofore relied upon by appellees can be distinguished.

In support of these contentions, see *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Blackstone* v. *Miller*, 188 U. S. 206; *Brundred* v. *Rice*, 49 Oh. St. 640; *Central Pine Assn.* v. *Shreveport &c. R. R. Co.*, 10 I. C. C. 193; *Chicago & Alton R. R. Co.* v. *United States*, 156 Fed. Rep. 558; 1 Cook on Corporations, 6th ed., 31; 2 Cook on Corporations, 6th ed., 1972, 1974, 1975, 1983, 1985, 1986, 1987; *Corporation Tax Cases*, 220 U. S. 107; *Crane Iron Works* v. *United States*, 209 Fed. Rep. 238; *Crane Iron Works* v. *Central R. R. Co.*, 17 I. C. C. 514; *Crane Railroad Co.* v. *Phila. & Reading Ry. Co.*, 15 I. C. C. 248; *Demko* v. *Carbon Hill Coal Co.*, 136 Fed. Rep. 162; *Eastern & Western Ry. Co.* v. *Rayley*, 157 Fed. Rep. 532; *General Electric Co.* v. *N. Y. C. & H. R. R.*, 14 I. C. C. 237; *Hunter* v. *Baker Vehicle Co.*, 190 Fed. Rep. 665; *Ill. Cent. R. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441; *Industrial Railways Case*, 29 I. C. C. 212; *Re Divisions of Joint Rates*, 10 I. C. C. 661; *Re Hutchinson Salt*, 10 I. C. C. 1; *Re Investigation of Tap-line Connections*, 23 I. C. C. 277, 283; *Int. Com. Comm.* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 88; *Int. Com. Comm.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235; *Int. Com. Comm.* v. *L. & N. R. R. Co.*, 227 U. S.

88; *Re Rieger*, 157 Fed. Rep. 609; *Kendall* v. *Klapperthal Co.*, 202 Pa. St. 596, 52 Atl. Rep. 92; *Lehigh Mining Co.* v. *Kelly*, 160 U. S. 327; *Louis. & Nash. R. R. Co.* v. *Mottley*, 219 U. S. 467; *La. & Pac. Ry. Co.* v. *United States*, 209 Fed. Rep. 247; *Martin* v. *Martin Co.*, 88 Atl. Rep. 612; *Miller & Lux* v. *East Side Canal Co.*, 211 U. S. 293; *McKilvergan* v. *Alexander Lumber Co.*, 102 N. W. Rep. 332; *New York, N. H. & H. R. R. Co.* v. *Int. Com. Comm.*, 200 U. S. 361; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Peavey Elevator Case*, 222 U. S. 42; *Procter & Gamble* v. *United States*, 225 U. S. 282; *Santa Fe &c. Ry. Co.* v. *Grant Bros.*, 228 U. S. 177; *Seymour* v. *Spring Forest Assn.*, 144 N. Y. 333; *Solvay Process Co.* v. *D., L. & W. R. R. Co.*, 14 I. C. C. 246; *So. Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *Swift* v. *United States*, 196 U. S. 375; *Union Pacific R. R. Co.* v. *Updyke*, 222 U. S. 215; *Taenzer & Co.* v. *C., R. I. & P. Ry. Co.*, 170 Fed. Rep. 240; *S. C.*, 191 Fed. Rep. 543; *United States* v. *Bags of Coffee*, 8 Cr. 415; *United States* v. *B. & O. R. R. Co.*, 231 U. S. 274; *United States* v. *Del. & Hud. R. Co.*, 213 U. S. 366; *United States* v. *Milwaukee Transit Co.*, 142 Fed. Rep. 247; *United States* v. *Union Stock Yard*, 226 U. S. 286; *Wade* v. *Lutcher*, 74 Fed. Rep. 517; *Watson* v. *Bonfils*, 116 Fed. Rep. 157; *Williams* v. *Northern Lumber Co.*, 113 Fed. Rep. 382.

Mr. Luther M. Walter and *Mr. H. M. Garwood*, with whom *Mr. W. R. Thurmond* was on the brief, for appellees:

The service performed by each of the appellee railways is a service of transportation by a common carrier within the meaning of the Act to Regulate Commerce.

Appellee railways are not plant facilities and do not perform a plant facility service for the lumber companies, appellees herein.

There was no evidence upon which the Interstate Commerce Commission could base its finding that the participation by the appellee railways in joint rates upon the

logs and lumber of the appellee lumber companies constitutes an undue or unreasonable preference, or subjects any party to any illegal discrimination within the meaning of the Act to Regulate Commerce.

The Commission's order results in undue and unreasonable preference and unjust discriminations within the meaning of the Act to Regulate Commerce as between carriers subject to the Act to Regulate Commerce and as between shippers.

The order deprives appellees of their rights under the Constitution of the United States.

The order of the Commission expressly overrides the exception contained in the Commodities Clause of the Act to Regulate Commerce.

In support of these contentions, see *Amos Kent Co.* v. *Assessor*, 114 Louisiana, 862; *Butte & Pac. Ry. Co.* v. *Montana Union R. Co.*, 16 Montana, 504; *Bridal Veil Lumber Co.* v. *Johnson*, 30 Oregon, 581; 46 Pac. Rep. 790; *Beaumont &c. R. R.* v. *A., T. & S. F.*, 24 I. C. C. 161, 163; *Chapman* v. *Trinity Valley Ry. Co.*, 138 S. W. Rep. 440; *Columbia Conduit Co.* v. *Commonwealth*, 90 Pa. St. 307; *Contra Costa Ry. Co.* v. *Moss*, 23 California, 323; *Commodities Clause Case*, 213 U. S. 366–417; *Crane Iron Works* v. *United States*, 209 Fed. Rep. 238; *DeCamp* v. *Hibernia Ry. Co.*, 47 N. J. Law, 46; *Diffenbaugh Case*, 176 Fed. Rep. 409; *Elevator Cases*, 14 I. C. C. 324; 176 Fed. Rep. 409; 222 U. S. 42; *Federal Sugar Case*, 20 I. C. C. 200; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Greasy Creek Co.* v. *Ely Jellico Coal Co.*, 132 Kentucky, 692; *General Electric Co.* v. *N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237; *Kans. & Tex. Ry. Co.* v. *North West. Coal Co.*, 161 Missouri, 288; 61 S. W. Rep. 864; *Kettle River Ry. Co.* v. *Eastern Ry. Co.*, 43 N. W. Rep. 473; *La. & Pac. Ry. Co.* v. *United States*, 209 Fed. Rep. 247; *Manufacturers Ry. Co.* v. *St. L., I. M. & So. Ry.*, 21 I. C. C. 304, 312; *Madura Railway Co.* v. *Raymond Granth Co.*, 86 Pac. Rep. 27; *Mitchell Coal Co.* v.

Pennsylvania Ry. Co., 230 U. S. 247, 264; *Solvay Process Co.* v. *D., L. & W. R. R. Co.*, 14 I. C. C. 246; *Ulmer* v. *Railway Co.*, 98 Maine, 581; 57 Atl. Rep. 1001; *Union Stock Yard Case*, 226 U. S. 286; *United States* v. *Balt. & Ohio R. R. Co.*, 231 U. S. 274.

Mr. Wylie M. Barrow, with whom *Mr. Ruffin G. Pleasant*, Attorney General of the State of Louisiana, was on the brief, for the Railroad Commission of Louisiana, intervenor and appellee:

The interest of the State of Louisiana in these cases lifts them from the category of mere private controversy and places them on the plane of public questions.

Many important railroads now operating in Louisiana originated as tap lines.

There is a public necessity for the tap line railroads.

The questions here presented, being public in their nature, and not merely private controversy, are of great interest to the people of the State of Louisiana.

In support of the contentions of the State, see *Agee* v. *Louis. & Nash. R. R. Co.*, 152 Alabama, 344; *Amos Kent Brick Co.* v. *Tax Collector*, 114 Louisiana, 862; *Butte & Pac. R. Co.* v. *Montana Union Ry.*, 16 Montana, 504; *Caldwell* v. *Richmond &c. R. Co.*, 89 Georgia, 550; *Central Yellow Pine Ass'n* v. *Vicksburg &c. R. R. Co.*, 10 I. C. C. 193; *Chi., B. & Q. R. R. Co.* v. *Cutts*, 94 U. S. 155; *Chi., B. & Q. R. Co.* v. *Porter*, 43 Minnesota, 527; *De Camp* v. *Hibernia Ry. Co.*, 47 N. J. Law, 43; *Denver &c. R. Co.* v. *Cahill*, 8 Colo. App. 158; *Re Divisions of Joint Rates*, 10 I. C. C. 385; *Dock Co.* v. *Garrity*, 115 Illinois, 155; *Lake Superior R. R. Co.* v. *United States*, 93 U. S. 442; *McCloud Lumber Co.* v. *So. Pac. Co.*, 24 I. C. C. 89; *National Dock Co.* v. *Central R. R. Co.*, 32 N. J. Eq. 755; *N. Y. Cent. R. R. Co.* v. *Lockwood*, 17 Wall. 357; *Phillip* v. *Watson*, 63 Iowa, 28; 18 N. W. Rep. 859; *Star Grain Co.* v. *Atchison &c. Ry. Co.*, 17 I. C. C. 338; *S. C.*, 14 I. C. C. 364; *Tap Line*

Cases, 23 I. C. C. 277; *Re Transportation Hutchinson Salt*, 10 I. C. C. 1; *Ulmer* v. *Lime Rock Ry. Co.*, 98 Maine, 579; *United States* v. *Union Stock Yard*, 226 U. S. 286; *Winona R. R. Co.* v. *Blake*, 94 U. S. 180.

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

A preliminary objection is made to the jurisdiction of the Commerce Court in that the order of the Commission is not reviewable because merely of a negative character. The Commerce Court examined this question and in view of the amended order of October 30, 1912, reached the conclusion that the order was affirmative in its nature and of a character permitting of review by proper proceedings in that court under the act giving it jurisdiction in such cases. We find no reason to differ with this conclusion and are of opinion that the Commerce Court had jurisdiction in the case.

It is further insisted upon the authority of *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, and other cases in this court which have followed that decision, that in the present cases the decision rests upon conclusions of the Commission as to matters of fact only, which are within the sole jurisdiction of that body and not reviewable in the courts. But we shall consider the case upon the findings of fact preceding this opinion, which are identical with those made by the Commission, and test the conclusions reached as matters of law, giving proper consideration to matters of fact which are not in dispute.

The final decree of the Commerce Court vacated and set aside the portion of the Commission's order reading as follows:

"That the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the

respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports;

"3. It is Ordered, That the principal defendants [trunk lines, naming them], be, and they are hereby notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above named parties to the record in respect of any such above described service."

The question now before this court is the correctness of this decree.

A perusal of the findings and orders of the Commission make it apparent that the grounds of decision upon which it proceeded were two, first, that these roads were mere plant facilities, second, that they were not common carriers as to proprietary traffic. The Commission held that before incorporation they were plant facilities and that after incorporation they remained such. What the Commission means by plant facilities may be gathered from a consideration of some of its decisions. In *General Electric Co.* v. *N. Y. C. & H. R. R. R.*, 14 I. C. C. 237, a network of interior switching tracks constructed to meet the necessities of the business, were held to be mere plant facilities. The same principle was applied to the internal trackage of large industrial plants in *Solvay Process Company* v. *Delaware, Lackawanna & Western R. R. Co.*, 14 I. C. C. 246. These systems of internal trackage were not common carriers, and, however extensive, were intended to and did furnish service for the plants which owned and

operated them. But a common carrier performing service as such, regulated and operated under competent authority, as observed by Commissioner Prouty in *Kaul Lumber Co.* v. *Central of Georgia Railway Co.*, 20 I. C. C. 450, 456, is no longer a mere appendage of a mill "but a public institution." It thus becomes apparent that the real question in these cases is the true character of the roads here involved. Are they plant facilities merely or common carriers with rights and obligations as such?

It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decisions of the courts. We need not cite the many state cases in which it has been so held, in view of the fact that the same principle was laid down in the late case of *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211. In that case the Supreme Court of Wisconsin sustained the extension of a spur track to reach the quarries and lime kilns of a single company as a public use authorizing the exercise of the right of eminent domain, and this court affirmed the judgment. Dealing with the contention that the Wisconsin statute was invalid because it authorized action appropriating property upon the exigency of a private business, this court said (p. 221):

"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) [208 U. S. 598]: '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."

The Commission has recognized this principle as applicable to tap lines, for in the *Central Yellow Pine Association* v. *The Vicksburg, Shreveport & Pacific R. R. Co.*, 10 I. C. C. 193, 199, it said:

"While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises,

do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight."

This representation it is contended by the Attorney General of Louisiana, who appears here in behalf of the Louisiana Railroad Commission, intervenor, is aptly descriptive of the growth and development of railroads in that State.

Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the State. They are so treated by the public authorities of the State, who insist in this case that they are such and submit in oral discussion and printed briefs cogent arguments to justify that conclusion. They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in decisions of this court. *Coe* v. *Errol*, 116 U. S. 517; *Covington Stock Yds. Co.* v. *Keith*, 139 U. S. 128; *Southern Pac. Term. Co.* v. *Interstate Com. Comm.*, 219 U. S. 498; *United States* v. *Union Stock Yard Co.*, *supra*.

Applying the principles which we have stated as determinative of the character of these roads and without repeating the facts concerning them, they would seem to fill all the requirements of common carriers so employed, unless the grounds upon which they were determined not to be such by the Commission are adequate to that end. The Commission itself as to all shippers other than those controlled by the so-called proprietary companies, treated

them as common carriers, for it has ordered the trunk lines to reëstablish through routes and joint rates as to such traffic. But says the Government, and it insists that this fact alone might well control the decision, the roads are owned by the persons who also own the timber and mills which they principally serve.

This fact is not shown to be inconsistent with the laws of the State in which they are organized and operated. On the contrary the public authorities of that State are here insisting that these companies are common carriers. Congress has not made it illegal for roads thus owned to operate in interstate commerce. While Congress in enacting the Commodities Clause amending § 1 of the Act to Regulate Commerce (June 29, 1906, c. 3591, 34 Stat. 584) sought to divorce transportation from production and manufacture and to make transportation a business of and by itself unallied with manufacture and production in which a carrier was itself interested, the debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show that the situation in some of the States as to the logging industry and transportation was sharply brought to the attention of Congress and led to the exemption from the Commodities Clause of timber and the manufactured products thereof, thus indicating the intention to permit a railroad to haul such lumber and products although it owned them itself. And that Congress had the constitutional power to enact such exemption was held in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 416–7. This declaration of public policy which is now part of the Commerce Act cannot be ignored in interpreting the power and authority of the Commission under the act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essential to the development of the timber regions in the Southwest

and the necessity of such roads was dwelt upon and set forth with ample illustration by Commissioner Prouty in his concurring opinion in this case.

As we have said, the Commission by its order herein required the trunk lines to reëstablish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves.

It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to participate in joint rates with other common carriers that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the

authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does.

For the reasons stated, we think the Commerce Court did not err in reaching its conclusion and decision, and its judgment is

Affirmed.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* BUTLER COUNTY RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 837. Argued April 13, 1914.—Decided May 25, 1914.

The *Tap Line Cases*, *ante*, p. 1, followed to the effect that:

The fact that the same ownership controls the freight offered and the stock of a railroad company which is a common carrier, does not justify a different rate imposed upon the same kind of traffic.

Under the Commodities Clause it is not unlawful for a common carrier to carry lumber owned by it, and until the law otherwise provides, it may treat freight owned by it in the same manner as like freight independently owned.

If the division of rates between a trunk line and a common carrier controlled by the same interest as controls the bulk of the freight moved by the carrier, is a mere cover for rebates and discriminations, the Interstate Commerce Commission has power to prevent such practices.

209 Fed. Rep. 260, affirmed.

THE facts, which involve the status of a lumber tap line and the powers of the Interstate Commerce Commission in regard to establishment of joint rates thereover, are stated in the opinion.

Mr. Blackburn Esterline, with whom *The Solicitor General* and *Mr. Karl W. Kirchwey* were on the brief, for the United States.

Mr. Charles W. Needham, with whom *Mr. Joseph W. Folk* was on the brief, for the Interstate Commerce Commission.

Mr. William A. Glasgow, Jr., with whom *Mr. James M. Beck* was on the brief, for appellee:

The Commerce Court had jurisdiction of the complainant's bill and power to grant the relief prayed.

The Interstate Commerce Commission by its supplemental report of May 14, 1912, finds that the Butler County Railroad Company is a common carrier subject to the Act to Regulate Commerce.

The Interstate Commerce Commission required the Butler County Railroad Company, with the St. Louis & San Francisco Railroad Company and the St. Louis, Iron Mountain and Southern Railway Company, respectively, to reestablish the through routes and joint rates theretofore in effect "in accordance with their respective tariffs," thereby fixing what was and is the proper and legal joint rate on lumber and forest products, from stations on the Butler County Railroad.

Having fixed the proper and legal joint rate on lumber and forest products, the Commission had no power to prescribe the "proportion or division of such rate to be received by each carrier party thereto," unless the carriers "shall fail to agree among themselves upon the apportionment or division thereof."

It was beyond the power of the Commission to require that the Butler County Railroad Company should not receive out of the joint rate a greater division that $1.50 per car on lumber and forest products carried for the Brooklyn Cooperage Company, when at the same time providing for proper divisions of the joint rate to the Butler County Railroad Company on traffic carried for other shippers under the same tariffs containing the provision as to milling in transit.

In support of these contentions, see Act to Regulate Commerce, §§ 1 and 15; *Central Yellow Pine Ass'n* v. *Vicksburg S. & P. R. Co.*, 10 I. C. C. 193; *Chicago & N. W. Ry. Co.* v. *Osborne*, 52 Fed. Rep. 912; *S. C.*, 146 U. S. 354; *Crane Railroad Co.* v. *Phila. & Reading Ry. Co.*, 15 I. C. C. 248; *Division of Joint Rates*, 10 I. C. C. 385; *Hooker* v. *Knapp*, 225 U. S. 302; *Int. Com. Comm.* v. *Nor. Pac. Ry. Co.*, 216 U. S. 538; Judicial Code of March 3, 1911, § 207; *Malvern &c. R. R. Co.* v. *Chicago &c. Ry. Co.*, 182 Fed. Rep. 685; *Procter & Gamble* v. *United States*, 225 U. S. 282; *Re Allowances to Elevators*, 14 I. C. C. 309; *Star Grain Case*, 17 I. C. C. 338.

MR. JUSTICE DAY delivered the opinion of the court.

The appellee, the Butler County Railroad Company, filed with the Interstate Commerce Commission its petition asking for the reëstablishment of through routes and joint rates with certain trunk lines, which was consolidated with and decided upon the same record as the complaints before the Commission in the *Tap Line Cases* involved in

the previous cases, Nos. 829 to 836, just decided, *ante*, p. 1. The general statement of the Commission in its report and supplemental report filed April 23, and May 14, 1912 (23 I. C. C. 277, 549) referred to in those cases preceded the following findings of fact:

The Butler County Railroad Company, the Brooklyn Cooperage Company, which owns the Railroad Company, and the Great Western Land Company, owning most of the timber reached by the railroad, are all subsidiaries of the American Sugar Refining Company.

The tap line, which was acquired from the Cooperage Company, consists of a section of track at Linstead, near Poplar Bluff, Missouri, extending into the plant of the Cooperage Company and connecting it with the St. Louis, Iron Mountain & Southern Railway and the St. Louis & San Francisco Railroad, which are within three-quarters of a mile of the plant, and the principal track extending about seven miles from Lowell Junction, a station on the Iron Mountain 7½ miles from Poplar Bluff, to Baileys, with a branch about 3 miles from Rossville, an intermediate point, and with trackage rights over unincorporated spurs from Baileys belonging to the Cooperage Company, and over the Iron Mountain from Lowell Junction to Poplar Bluff, paying for the latter 65c a train mile for 25 cars. It has 2 locomotives, 2 passenger coaches, 3 cabooses and about 100 freight and log cars.

The tap line hauls the logs, all of which are hardwood, from a connection with the unincorporated track to Lowell Junction, then over the Iron Mountain to Linstead and thence to the mill over its own track, where they are unloaded by the Cooperage Company. The regular manufacturing rate under the Missouri distance tariff is charged the Cooperage Company by the tap line, 1 to 1½c per 100 pounds, approximately $4 per car. The loaded cars are switched to the Frisco or Iron Mountain, less than one

mile, and the appellee receives from them an allowance of from 2 to 5c per 100 pounds. The rates from tap line points, including the mill at Linstead, are in all cases 2c higher than the rates of the trunk lines from Poplar Bluff, excepting to New Orleans and New York, to which points most of the shipments of the Cooperage Company go, and to which Poplar Bluff rates apply.

One hundred and eighty-four thousand six hundred and eighty-eight tons of forest products and 2,475 tons of other freight were hauled during the year ending June 30, 1910; of the first amount 107,527 tons being furnished by the controlling interests, 77,161 tons by outsiders, but all the timber coming from the lands of the Great Western Land Company, and of the miscellaneous freight 1,195 tons of inbound machinery and coal being for the proprietary companies. Passenger revenues were $4,104.22. Three mixed trains in each direction are operated daily between Linstead and Melville, a point beyond Baileys on the unincorporated track, two being used principally for passenger service.

The Great Western Land Company furnishes timber to several independent industries on the tracks of the tap line near Linstead, the tap line switching their product to the trunk lines. Their factory sites are leased from the Cooperage Company, the purpose of making such leases being to secure traffic upon which the tap line might obtain divisions. A few independent producers on the main track of the tap line team their supplies and ship their products over the tap line. They pay the local rate of the tap line and the trunk line rate, or a through rate that is 2 cents higher than the Poplar Bluff rate.

The Commission found that the Sugar Company, having refineries at New Orleans and New York, so adjusted the rates to such places as to induce movements to them and restrict movements to other points, and limited the amount the tap line might receive on proprietary traffic

moved from the mill to the Iron Mountain and Frisco to a switching charge fixed at $1.50 per car.

The order of the Commission, so far as it related to the appellee, required the trunk lines named to reëstablish and maintain with it the through interstate routes and joint rates in effect, in accordance with their respective tariffs filed with the Commission on April 30, 1912; provided that the rates on yellow-pine lumber and articles taking the same rates from points on the line of the appellee should not exceed the current rates in effect from the junction points, and

"Provided further, That the allowances or divisions out of such joint rates to be paid by said principal defendants [the trunk lines], respectively, to the said last-named parties to the record [the appellee and others] on the products of the mills of the said respective proprietary companies named in said report shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the Commission [in this instance the switching charge of $1.50 per car] which are hereby fixed as maximum divisions or allowances thereon, until further order, the Commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful."

The appellee then brought suit in the United States Commerce Court seeking to enjoin and annul the order of the Commission in so far as it forbade a division out of the joint rates of more than $1.50 per car. The Commerce Court held, after stating that the Commission had found this road to be a common carrier both of logs and of lumber, and not a plant facility, but had denied it the right to receive either a division or allowance for the log traffic and only an allowance for the lumber traffic of the proprietary mill, while permitting it to receive a division out of the joint rate for both log and lumber traffic of non-proprietary companies, that the reasons stated in the other

opinion applied here and that the distinctions made were arbitrary and the order beyond the power of the Commission, and the Commerce Court decreed that that part of the order of the Commission above quoted, with reference to the divisions and allowances to be made out of the joint rates, be vacated and set aside as to the appellee. 209 Fed. Rep. 260.

The United States and the Interstate Commerce Commission, the latter having intervened in the proceeding in the Commerce Court, prosecuted this appeal.

This case was argued on the same day with the other tap line cases, and much that is said in those cases is applicable here. The Commission ordered the restoration of the schedule of tariffs of April 30, 1912, thus recognizing the right of this road to participate in joint tariffs with other common carriers and to receive a division out of the joint rates. But the Commission excepted from this right traffic offered to the appellee by its proprietary company, evidently upon the theory enforced in the other cases before the Commission that as to such traffic the Railroad Company had not the rights of a common carrier, and as to such traffic limited the compensation of the Railroad Company to a switching charge of $1.50 per car.

We think the Commerce Court correctly held that the fact that the same ownership controlled the freight offered and the Railroad Company would not justify the different rate imposed upon the same kind of traffic. Under the Commodities Clause of the Act to Regulate Commerce, as amended (June 29, 1906, c. 3591, 34 Stat. 584), the right of a carrier, as we have said in the former opinion in these cases, to carry this class of freight although owned by it, is recognized as lawful. This being so, such carrier, until the law otherwise provides, has the right to treat such freight in the same manner as it does like freight independently owned. Of course, if the division of the rates

is a mere cover for rebates or discriminations, such practices may be controlled by the Commission under the authority given to it in the Act to Regulate Commerce.

We find no error in the disposition the Commerce Court made of this case, and its judgment is therefore

Affirmed.

UNITED STATES OF AMERICA *v.* AXMAN.

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

No. 242. Argued March 9, 1914.—Decided May 25, 1914.

Where, after default of the original contractor, the contract is relet, the original contractor is not bound for difference unless the contract as relet is the same as the original contract.

Where a contract for dredging requires the dredged material to be deposited in a specified location, changes made as to the location for depositing such materials amount to such an important variation that the first contractor cannot be held for difference. *United States* v. *McMullen*, 222 U. S. 460, distinguished.

Change in location for depositing material dredged under a government contract is not to be regarded as a minor change; it is clearly an important one.

193 Fed. Rep. 644, affirmed.

THE facts, which involve the rights and liabilities of a contractor and his surety under a contract with the Government, are stated in the opinion.

The Solicitor General for the United States:

After the annulment of the contract by reason of the contractor's default it became the duty of the Government to complete the work at reasonable cost and to diminish

as far as possible the loss which it had suffered and for which it proposed to hold the defendants liable.

The change which was made in the terms was to the manifest ease of the defendants and lessened the cost of the work as relet without increasing in any particular the burden which either the principal or the surety had assumed.

Where the Government relets a contract, the sureties—and *a fortiori* the principal—are not relieved because there are differences in the terms which diminish the cost of the work as relet. See *United States* v. *McMullen*, 222 U. S. 460, which is controlling and decisive of the case at bar, in fact, the similarity of incident and issues is unique. This decision followed in time the first opinion of the Circuit Court of Appeals herein, and it may fairly be assumed that the latter court was as yet unadvised of it at the time of its final action.

Mr. Frank W. Aitken, with whom *Mr. John R. Aitken* was on the brief, for appellee Axman:

The action is not for damages, but is on a contract to pay the cost of certain work.

There can be no recovery except for completing the work.

The change made was material; the Government did not proceed to complete the contract, but did other work instead.

The contractor's rights after annulment are subject to the same rules as those of a surety.

The change was detrimental and new obligations were imposed.

The contract did not authorize such change unless made by agreement.

In support of these contentions, see *Alcatraz Masonic Ass'n* v. *U. S. F. and G. Co.*, 85 Pac. Rep. 157–8; *Am. Bonding Co.* v. *United States*, 167 Fed. Rep. 910; *Am. Bonding Co.* v. *Gibson County*, 127 Fed. Rep. 671; *American*

Surety Co. v. *Woods*, 105 Fed. Rep. 741; *S. C.*, 106 Fed. Rep. 263; *Axman* v. *United States*, 47 Ct. Cl. 537; *S. C.*, 48 Ct. Cl. 376; *Burnes* v. *Fidelity Co.*, 96 Mo. App. 467; *Calvert* v. *London Dock Co.*, 2 Keen, 638; *Chesapeake Co.* v. *Walker*, 158 Fed. Rep. 850; *Durrell* v. *Farwell*, 88 Texas, 98; 30 S. W. Rep. 539; *Holme* v. *Brunskill*, L. R. Q. B. Div. 495; *Prairie Bank* v. *United States*, 164 U. S. 227; *Miller* v. *Stewart*, 2 Cr. 700; *O'Connor* v. *Bridge Co.*, 27 S. W. Rep. 251, 983; *Reese* v. *United States*, 9 Wall. 13; *Reissaus* v. *White*, 106 S. W. Rep. 607; *State* v. *Medary*, 17 Oh. St. 565; *Taylor* v. *Johnson*, 17 Georgia, 521; *United States* v. *Corwine*, Fed. Cases, No. 14,871; *United States* v. *Freel*, 92 Fed. Rep. 306; *United States* v. *Freel*, 186 U. S. 309; *United States* v. *Freel*, 99 Fed. Rep. 239; *United States* v. *McMullen*, 222 U. S. 460; *United States* v. *O'Brien*, 220 U. S. 321; *United States* v. *Robeson*, 9 Pet. 319, 327; *White* v. *Sisters of Charity*, 79 Ill. App. at 649.

Mr. Edward Duffy, with whom *Mr. Jesse W. Lilienthal* was on the brief, for appellee American Bonding Company:

The contract and evidence excluded did not tend to prove issues.

The contract fixed method of proving damages.

No change could be made after annulment. See *Baer* v. *Sleicher*, 163 Fed. Rep. 129; *United States* v. *Freel*, 186 U. S. 309; *United States* v. *McMullen*, 222 U. S. 460; *United States* v. *O'Brien*, 220 U. S. 321.

Mr. Justice Day delivered the opinion of the court.

Suit was brought by the United States to recover on a contract between the United States and Axman with the American Bonding Company, as surety, for dredging in San Pablo Bay, California. The first trial resulted in a judgment for the United States, which was reversed by the Circuit Court of Appeals for the Ninth Circuit. 167 Fed.

Rep. 922. On new trial judgment directed in favor of the defendants was affirmed by the Circuit Court of Appeals (193 Fed. Rep. 644), and the case is brought here.

It appears that on the twenty-fifth of August, 1902, the United States called for bids for dredging in San Pablo Bay. On September 30, 1902, Axman submitted his proposal to furnish all the plant, labor and materials for the work. On November 21, 1902, a written contract was entered into between Axman and the United States for the work. Axman was to do such dredging in the Bay as might be required by the Government engineer in accordance with certain specifications for the sum of 11.44 cents per cubic yard. The specifications, which were made a part of the contract, contained, among others, the following paragraphs:

"35. The shoal to be dredged is in San Pablo Bay, California, is about five miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant 1¼ to 1½ statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet.

"36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract.

"39. All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the Engineer officer in charge.

"31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months, after the date of commencement.

"46. The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contract requires the work to be commenced."

A place for the building of the bulkhead was designated in accordance with paragraph 36 of the specifications, and Axman built a bulkhead 2400 feet long, consisting of two arms, one of 1800 feet and one of 600 feet. The outlines of the channel to be dredged were also indicated. Axman began work and continued intermittently until December 24, 1903, up to which date he had removed 196,000 cubic yards, but had not in any month removed 100,000 cubic yards. It appears that the barges in Axman's outfit were of such draft that they were unable to get behind the bulkhead except at high tide; that he applied to the engineer officer in charge to be allowed to dump the spoil on the north side of the channel or down at "The Sisters," but permission was refused him so to do. This place is the one where the material was subsequently dumped when the contract was relet.

Paragraph 4 of the contract provides:

"4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Engineer in charge, fail to prosecute faithfully and diligently the

work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successors legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part, under this contract, shall cease, and all money or reserve percentage due, or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part, and the party of the first part may deduct all the above mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice, the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract, or otherwise, in accordance with law."

There are other paragraphs permitting the Chief of Engineers, if he sees fit, to employ additional plant or purchase materials, etc., to insure the completion of the work within the time specified, charging the cost thereof to the contractor, such provision, however, not to be construed so as to affect the right of the Government to annul the contract. The Government, on the ground that Axman

had failed to comply with the requirements of the specifications, proceeded under the provisions of paragraph 4, wherein it will be seen it was stipulated that the United States might have the right to recover from the party of the second part whatever sums might be expended by the party of the first part in completing the contract.

When the contract was relet it was advertised in the alternative, giving the contractor the right to deposit spoil where Axman was required to deposit it within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by the engineer officer and to impound the material behind bulkheads of suitable construction, subject to the approval of the engineer officer, to be built and maintained at the expense of the contractor, or to deposit the spoil in water exceeding 50 feet in depth lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The bid accepted and the contract made provided for the deposit of the spoil in deep water at The Sisters. At the trial the Government offered evidence of witnesses as to the fairness of the price paid the North American Dredging Company, the new contractor, under the relet contract and as to whether it cost more to dredge and dump the spoil behind the line drawn between Pinole Point and Lone Tree Point than to dredge and dump in deep water. All of the opinion evidence offered by the Government was received by the court under objection, and at the conclusion of the case ruled out and the jury instructed to render a verdict for the defendants.

It is thus apparent that the real question in the case is whether the contract relet for the completion of the work under paragraph 4 of the original contract was a contract for work for which Axman was bound and which he had failed to carry out, or whether it was a different contract and therefore one for which Axman and his surety cannot

be held and which cannot be used for the measure of recovery for breach of the original contract.

The Government insists that the main purpose of the original contract was to secure the dredging of the channel and that the place of dumping the spoil was but incidental. The contract, however, does not so read. It specifically made the place of dumping the spoil an essential and particular term of the contract. It is not necessary to inquire into the reason which actuated the Government in making this requirement. It may be that it desired the spoil to be retained at a place outside of the channel and that such retention was a better way of doing the work than to deposit the spoil in deep water. It is enough to say that the contract, part of which we have heretofore set forth, specifically provided for dumping the spoil behind the bulkhead. As we have said, the engineer refused permission to dump the spoil at a place other than that designated in the specifications. This position of the engineer was warranted by the terms of the contract, for by paragraph 36 of the specifications the depositing of material and impounding it behind bulkheads as provided in the contract were made an essential part of the work to be done, and it is provided by specification 38 that material deposited otherwise than as specified will not be paid for, and by paragraph 39 that all dredged material was to be deposited within the area specified in paragraph 36, and by paragraph 53 that all material must be excavated and deposited under the supervision of the engineer officer in charge. It therefore follows that not only was Axman to dredge the channel as required by the contract, but he was to deposit the spoil as therein specified. Dredging the channel would not be enough to show performance of his contract, unless he complied with the other material requirement as to the deposit of the spoil. The new contract contained a different stipulation as to the dumping of the spoil. Upon the showing made in this case we think the change in the

place of dumping the spoil was very material, and could not be made consistently with the terms of the agreement under which Axman undertook to perform the work or be liable as stipulated in paragraph 4.

Both sides refer to the case of *United States* v. *McMullen*, 222 U. S. 460. In that case a suit was brought upon a contract and bond, the contract providing for certain dredging. The contractor asked for leave to dump the spoil in deep water instead of on shore, which was at first refused, but afterwards granted. The contractor, however, failed to do the work and abandoned it. The Navy Department declared the contract void, and, after advertising, entered into a new contract. The defense principally made and treated of in the opinion of the court rested upon the alleged extension of time which it was contended worked a discharge of the surety. After disposing of that question in favor of the Government, this court said (p. 471):

"The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform."

We thus observe that in the *McMullen Case* it was found that the liberty given to the second contractor to dump in deep water did not change the contract, because in the

first contract the Government reserved an absolute right of choice in this regard. In the present case there was no such right of choice. The place of dumping spoil was made as we have said, a specific requirement of the contract. Under paragraph 6 such changes as are here involved must be agreed upon in writing by the contracting parties, the agreement setting forth clearly reasons for the change, giving quantity and prices, to take effect only upon the approval of the Secretary of War. Minor changes are provided for in paragraph 58 of the specifications, but clearly such an important change as this one has proven to be is not of that character.

In the *McMullen Case,* in treating of the right reserved in the first contract giving the Government an absolute choice of the dumping ground, it was concluded, "whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform." We are clearly of the opinion in this case that the work done under the second contract was not the work which the first contractor had agreed to perform. While it is true it accomplished the dredging of the channel in the same Bay, it did this with a disposition of the spoil not permitted under the first contract and in a material matter was different from the contract first entered upon.

We reach the conclusion that the Circuit Court of Appeals rightly decided this case, and its judgment is accordingly

Affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* WOODFORD.

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

No. 531. Motion to dismiss submitted March 23, 1914.—Decided May 25, 1914.

In order that the denial of a Federal right may be the basis of reviewing the judgment of the state court, the claim of Federal right must be made in the state court in the manner required by the state practice, and unless there is an unwarranted resort to rules of practice by the state court to evade decision of the Federal question, this court will not review the judgment.

Raising the Federal claim of right on motion for new trial is not sufficient unless the court actually passes upon and denies the claim; and a decision by the appellate court that the Federal claim was not properly raised is not a denial of the Federal right but merely an enforcement of a rule of state practice.

Writ of error to review 152 Kentucky, 398, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. Robert B. Franklin and *Mr. Robert C. Talbott*, for defendants in error, in support of the motion.

Mr. Charles H. Moorman, *Mr. Benjamin D. Warfield*, *Mr. Henry L. Stone* and *Mr. Robert A. Thornton*, for plaintiff in error, in opposition to the motion:

By operation of law, the Carmack Amendment was written into the live-stock contract under which the shipment in this case was made, and that amendment repealed § 196, Ky. Const., as to such shipment. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Adams Exp. Co.* v. *Walker*,

119 Kentucky, 121; *C., B. & Q. Ry. Co.* v. *Miller*, 226 U. S. 513; *C., M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133; *C., N. O. & T. P. Ry. Co.* v. *Dodd*, 153 Kentucky, 845; *Same* v. *Goode*, 153 Kentucky, 247; *S. C.*, 155 Kentucky, 153; *Same* v. *Rankin*, 153 Kentucky, 730; *C., St. P. &c. Ry. Co.* v. *Laita*, 226 U. S. 519; *K. C. Sou. Ry. Co.* v. *Carl*, 227 U. S. 639; *M., K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Southern Ex. Co.* v. *Fox*, 131 Kentucky, 257.

The Court of Appeals of Kentucky erred in holding that the live-stock contract was not pleaded; in refusing to apply the Carmack Amendment; and in holding that the Kentucky law applied in the absence of express reliance upon the Federal law in plaintiff in error's pleadings. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *M. C. R. Co.* v. *Vreeland*, 227 U. S. 59; *M., K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570; *St. L. & S. F. Ry. Co.* v. *Seale*, 229 U. S. 156; *Wells, Fargo Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469.

This case does not fall under the third clause, but under the second clause, of § 709, Rev. Stat. *Chapman* v. *Goodnow*, 123 U. S. 540, 548; *Columbia Water Co.* v. *C. E. St. Ry. Co.*, 172 U. S. 475, 488; *Erie R. Co.* v. *Purdy*, 185 U. S. 153; *French* v. *Hopkins*, 124 U. S. 524; *Morrison* v. *Watson*, 154 U. S. 111; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Second Employers' Liability Cases*, 223 U. S. 1, 53, 54; *Y. & M. V. R. Co.* v. *Adams*, 180 U. S. 1.

There was no intentional relinquishment by plaintiff in error of a known right; therefore, there was no waiver amounting to an estoppel. 29 Am. & Eng. Encyc. Law (2d ed.), 1091, 1095; *Cable* v. *U. S. Life Ins. Co.*, 111 Fed. Rep. 19, 31; *Christianson* v. *Carleton*, 69 Vermont, 91; *First Nat. Bank* v. *Hartford Ins. Co.*, 45 Connecticut, 25, 44; *Rice* v. *Fid. & Dep. Co.*, 103 Fed. Rep. 427, 435; *Stackhouse* v. *Barnston*, 10 Vesey, Jr. 466; *Wells, Fargo Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469.

MR. JUSTICE DAY delivered the opinion of the court.

Catesby Woodford and John T. Ireland, defendants in error, plaintiffs below, brought suit in the Fayette Circuit Court, of Kentucky, against The Louisville and Nashville Railroad Company, plaintiff in error, defendant below, to recover damages for the loss of a number of race horses and injury to others shipped by them on November 17, 1910, over the lines of the defendant from Lexington, Kentucky, to Juarez, Mexico. There was a verdict for the plaintiffs in the trial court, judgment upon which was affirmed by the Court of Appeals of Kentucky (152 Kentucky, 398), and the case is here upon writ of error.

The amended petition contained an allegation that the defendant agreed by contract entered into in Fayette County, Kentucky, to transport the horses from Lexington to Juarez, and set forth the cause and extent of the loss to plaintiffs. The defendant answered, traversing the allegations of the petition and pleading contributory negligence, and the plaintiffs filed their reply. The defendant by motion sought to have the contract sued upon, which it alleged was in writing, filed as an exhibit to the petition, and subsequently the plaintiffs filed the contract of shipment and the same was noted of record. It provided, among other things, that, in consideration of the reduced rate, the extent of the damages for which the defendant would be liable should not exceed $150 for a stallion or jack, and $100 for a horse or mule, the agreed value of the animals, and across the face of the contract were stamped the following words: "The attention of shippers has been called to the terms, conditions, value, etc., herein named." It also appears that the contract of shipment was produced and filed in evidence by the plaintiffs.

One of the instructions requested by the defendant was to the effect that if the jury found for the plaintiffs they

should fix the damages at the fair market value of the horses killed and the difference in value before and after the injury of the other horses. After verdict and judgment for plaintiffs, the defendant filed its motion and grounds, and additional grounds, for a new trial, none of which, however, were based upon the provisions of the contract of shipment or any act of Congress. The court in overruling the motion said, however, that it had also heard counsel "upon the Federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky, to Juarez, in the Republic of Mexico, was in violation of the provisions, or of any of them, of an act of Congress of the United States entitled an act to regulate commerce, approved February 4, 1887," as amended, "and having considered the said motion and grounds for a new trial of this cause, and having also considered the said Federal question and being of the opinion that said contract did not and does not violate any of the provisions of said act of Congress, the motion is hereby overruled and a new trial is refused."

The case was taken by appeal to the Court of Appeals of Kentucky. After submission of the case to that court, the defendant filed a supplemental brief, urging the application of the law of the case of *Adams Express Co.* v. *Croninger*, 226 U. S. 491, and further insisted upon such application in its brief in reply to the plaintiffs' reply brief. The Court of Appeals noticed that the claim that the law of the *Croninger Case* controlled was first suggested by defendant in its supplemental brief, after submission of the case to that court, and that the case had been tried under the rule of law in Kentucky that a contract relieving a carrier from its common-law liability and limiting recovery to less than the value of the property carried is in violation of the Kentucky constitution, and held that it was elementary that questions not raised in the trial court in an ap-

propriate way, which by the Code of Practice of Kentucky is in writing, would not be considered on appeal, and, after detailing the proceedings in the trial court, concluded that no Federal question had thus been made. The defendant by petition for rehearing again insisted that the Federal question had been properly presented, but the Court of Appeals, admitting that state courts must take judicial notice of acts of Congress and that it was not essential that the Federal question should have been raised in any special form in the trial court, held that the facts on which such question rested must be presented in the record; that the provisions of the written contract, upon which the defendant then relied, not having been pleaded, no Federal question was presented, and moreover, that the defendant had asked for an instruction inconsistent with the view then presented, and conducted its case throughout the trial on that basis (153 Kentucky, 185).

That the defendant was entitled to make a defense under the Act to Regulate Commerce, as amended (June 29, 1906, c. 3591, 34 Stat. 584) is evidently an afterthought. The case was tried upon the theory that the Kentucky constitution and statutes were controlling, and it was not until after the decision of *Adams Express Co.* v. *Croninger*, *supra*, that an attempt was made to claim the benefit of the bill of lading based upon schedules filed with the Interstate Commerce Commission. It is true that a written bill of lading showing a limitation of $100 in value for each horse was filed in the case by the plaintiff below after the motion of the defendant had been filed, as the amended record discloses, but in order to assert this defense it was necessary not only to have the contract filed but that the defendant below should set up the facts showing that such defense was available to it. No pleading was filed by the defendant alleging compliance with the Act to Regulate Commerce by the filing of schedules containing the limitation as to the liability upon which

reliance is now placed. As we have already said, the record discloses that at the trial the defendant instead of relying upon the limited liability now claimed, entirely ignoring such limitation, itself asked and obtained an instruction that if the jury should find for the plaintiff it should fix the damages in such sum as would represent the loss suffered. Of course, the request to give this instruction was entirely inconsistent with the claim of limited liability under the Federal statute.

If a Federal question can be said to be involved at all, it was introduced into the record upon the argument of the motion for a new trial. Disposing of that question the Court of Appeals of Kentucky set forth that the question was not raised by the pleadings or requested instructions, or by motion for a new trial or written motion of any kind, and concluded that it must have been raised orally. It pointed out that under the Kentucky Code of Practice such contentions were required to be in writing, and that if the defendant desired to take advantage of its limited liability it must under the code of the State specifically rely upon that defense in its answer. In making this holding, the Kentucky court but enforced a rule of practice of that State. The decisions of this court not only have repeatedly held that a Federal right in order to be reviewable here must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice. *Schuyler Nat'l Bank* v. *Bollong*, 150 U. S. 85; *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148; *Layton* v. *Missouri*, 187 U. S. 356. In this case there is no reason to believe that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice, and upon this

point this case comes within former rulings of this court, as we have seen.

As to the contention that the case really raised a Federal question because it involved the constitutional validity of a state statute when opposed to the exclusive rights secured under a Federal law,—an examination of the record shows that no such question was made in the state court, nor was it necessarily involved in the decision made in such sense as to make the case reviewable here on that ground.

It follows that the case must be dismissed for want of jurisdiction.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA *v.* IMBROVEK.

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

No. 215. Argued January 29, 30, 1914.—Decided May 25, 1914.

As a general principle, the test of admiralty jurisdiction in tort in this country is locality.

Admiralty has jurisdiction of a suit *in personam* by an employé of a stevedore against the employer to recover for injuries sustained through the negligence of the latter while engaged in loading a vessel lying at the dock in navigable waters.

The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history, *The Blackheath*, 195 U. S. 361, and *quære* whether the admiralty jurisdiction extends to a case where the tort is not of a maritime nature although committed on navigable waters.

A tort committed on a vessel in connection with a service thereto may be maritime even if there is no fault on the part of, or injury to, the ship itself.

Stevedores are now as clearly identified with maritime affairs as are the mariners themselves.

Whether the employer failed to provide a safe place to work is a question properly determinable by the Circuit Court of Appeals in last resort, and this court will not disturb such a finding if concurred in by both courts below and justified by the record.

193 Fed. Rep. 1019, affirmed.

THE facts, which involve the admiralty jurisdiction of the United States courts over suits for personal injuries sustained on a vessel in port while being loaded by a stevedore, and questions of negligence of the stevedore, are stated in the opinion.

Mr. Edward Duffy, with whom *Mr. Nicholas P. Bond* and *Mr. Ralph Robinson* were on the brief, for petitioner:

Admiralty has not jurisdiction; locality is not the sole test of jurisdiction; the tort is not of a maritime nature; the master did not fail to furnish a safe place to labor; failure to use pins was not the proximate cause; there was no evidence to show that the master failed to use reasonable care.

In support of these contentions, see *Atlee* v. *Packet Co.*, 21 Wall. 389; *Alaska Mining Co.* v. *Whelan*, 168 U. S. 86; *Amer. Bridge Co.* v. *Seeds*, 144 Fed. Rep. 605; Black Book of Admiralty (Twiss); Bacon's Abridg. Actions, Local and Transitory; *British African Co.* v. *The Compania*, App. Cas. (1893) 602; 2 Brown's Admiralty (1 Amer. ed.), 94–95; Benedict's Admiralty (4th ed.), 39, 46, 47; *The Blackheath*, 195 U. S. 361; 2 Bailey's Personal Injuries, §§ 2885 and 2993; *Brown* v. *People's Gas Light Co.*, 81 Vermont, 477; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368; *Campbell* v. *Hackfeld*, 125 Fed. Rep. 696; *Cleveland &c. R. R.* v. *Cleveland S. S. Co.*, 208 U. S. 316; 9 Columbia Law Rev. 1; *Cleveland* v. *R. R. Co.*, 73 Fed. Rep. 970; *DeLovio* v. *Boit*, 2 Gall. 399; Gilbert's Practice (3d ed.), 84, 85; 16 Harv. Law Rev. 210; 18 *Id.* 299; 25 *Id.* 381; *Hussey* v. *Coger*, 112 N. Y. 614; *Hogan* v. *Henderson*, 125

N. Y. 774; *Kelly* v. *Norcross*, 121 Massachusetts, 508; *Kelly* v. *New Haven Stmb. Co.*, 74 Connecticut, 343; *Kelly* v. *Jutte Co.*, 104 Fed. Rep. 955; *Leathers* v. *Blessing*, 106 U. S. 626; *The Morris Max*, 137 U. S. 1; *Mostyn* v. *Fabrigas*, 1 Smith L. Cases (11th ed.), 591; Malloy de Jure, Bk. II, Ch. III, § XVI; *Martin* v. *West*, 222 U. S. 191; *Martin* v. *Railroad Co.*, 166 U. S. 399; *McKenna* v. *Fiske*, 1 How. 240; *McDonnell* v. *Oceanic Nav. Co.*, 143 Fed. Rep. 480; *The Noranmore*, 113 Fed. Rep. 367; *The Osceola*, 189 U. S. 158; *Phila. &c. R. R.* v. *Phila. &c. Co.*, 23 How. 209; *The Plymouth*, 3 Wall. 20; *The Pickands*, 42 Fed. Rep. 239; *The Picqua*, 97 Fed. Rep. 649; *Queen* v. *Judge*, 1 Q. B. (1892) 273; *The Queen*, 40 Fed. Rep. 694; *Regina* v. *Keyn*, 2 Ex. D. 63; *Railroad Co.* v. *Baugh*, 149 U. S. 368, 386; *Skinner's Case*, 6 State Trials, 712; *Stevens* v. *Sandwich*, 1 Pet. Ad. Dec. 233; *The Strabo*, 90 Fed. Rep. 110; *Tilly* v. *Rockingham*, 74 N. H. 316; *Westinghouse* v. *Callaghan*, 155 Fed. Rep. 397.

Mr. W. H. Price, Jr., and *Mr. John E. Semmes, Jr.*, with whom *Mr. John E. Semmes*, *Mr. Jesse N. Bowen* and *Mr. Matthew Gault* were on the brief, for respondent:

Admiralty has jurisdiction in the cases at bar, for the following reasons:

The admiralty courts having properly assumed jurisdiction when the libel was brought against both the ship and the stevedore company, should retain jurisdiction to determine the liability of the stevedore company, even though the libel be subsequently dismissed as to the ship.

Jurisdiction once assumed by the Federal court because jurisdictional amount is alleged in good faith to be involved, is not lost because it subsequently develops by the evidence that less than the jurisdictional amount is actually involved.

Where the requisite diversity of citizenship exists at the commencement of a suit, no subsequent change in the

situation of the parties ousts the jurisdiction of the Federal court.

Where Federal and non-Federal questions are involved in the same suit, and jurisdiction has properly attached for the purpose of determining the Federal question, it is proper for the Federal court to decide the local question only and omit to decide the Federal question. *Campbell* v. *Hackfeld*, 125 Fed. Rep. 696, can be distinguished.

The sole test of admiralty jurisdiction over torts is the locality of the person or thing injured at the time of the impact with the intentional or negligent force.

There is a distinction between admiralty jurisdiction of the United States and that of England.

Locality is the sole test.

The constitutional extent of admiralty jurisdiction is involved in this case.

The tort in this case was essentially maritime in its nature.

On the evidence the master failed in his duty to provide a safe place.

The gang boss was a vice-principal, as was also the foreman.

The evidence was sufficient as to the proximate cause of the accident and as to lack of safety of place of work.

In support of these contentions, see *Barry* v. *Edmonds*, 116 U. S. 550; *The Blackheath*, 95 U. S. 361; *Balt. & Ohio Ry. Co.* v. *Baugh*, 149 U. S. 368; *Clark* v. *Mathewson*, 12 Pet. 164; *Chappell* v. *United States*, 160 U. S. 499; *Campbell* v. *Hackfeld*, 125 Fed. Rep. 696; *Cleveland R. R. Co.* v. *Cleveland S. S. Co.*, 208 U. S. 316; *The Coningsby*, 202 Fed. Rep. 814; *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *C., R. I. & P. Ry. Co.* v. *Brown*, 229 U. S. 317; *The Conqueror*, 166 U. S. 110; *The Carib Prince*, 170 U. S. 655; *The Clan Graham*, 153 Fed. Rep. 977; *DeLovio* v. *Boit*, 2 Gallison, 398; *Ex parte Easton*, 95 U. S. 72; *The Genesee Chief*, 12 How. 443; *The Gilbert Knapp*, 37 Fed. Rep. 209;

The George T. Kemp, Fed. Cas. No. 5341; *Gaynor* v. *Klander-Weldon Co.*, 174 Fed. Rep. 477; *Grand Trunk R. R.* v. *Ives*, 144 U. S. 408; *Insurance Co.* v. *Dunham*, 11 Wall. 1; *The Iriquois*, 194 U. S. 240; *The Lottawanna*, 21 Wall. 558; *Leathers* v. *Blessing*, 105 U. S. 626; *Morgan's Heirs* v. *Morgan*, 2 Wheat. 290; *Mollan* v. *Torrance*, 9 Wheat. 537; *Moorewood* v. *Enequist*, 23 How. 493; *Martin* v. *West*, 222 U. S. 191; *Miller's Case*, Fed. Cas. No. 300; *Manchester* v. *Massa*, 139 U. S. 240; *The Mattie May*, 47 Fed. Rep. 69; *Mullan* v. *P. & S. Mail S. S. Co.*, 78 Pa. St. 25; *N. J. Steam Nav. Co.* v. *Merchants Bank*, 6 How. 344; *Omaha Horse R. R. Co.* v. *Cable Tramway*, 32 Fed. Rep. 727; *O'Brien* v. *Buffalo Furnace Co.*, 183 N. Y. 317; *The Plymouth*, 3 Wall. 36; *Peters* v. *George*, 154 Fed. Rep. 634; *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Smith* v. *Greenhow*, 109 U. S. 669; *Schunk* v. *Moline M. & S. Co.*, 147 U. S. 500; *Smithers* v. *Smith*, 204 U. S. 632; *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175; *Simmons* v. *S. S. Jefferson*, 215 U. S. 130; *The Segurranca*, 58 Fed. Rep. 908; *The Senator*, 21 Fed. Rep. 191; *Tennessee* v. *Davis*, 100 U. S. 257; *Thomas* v. *Lane*, 2 Sumner, 1; *The Troy*, 208 U. S. 321; *Tex. & Pac. R. R. Co.* v. *Howell*, 224 U. S. 577; *United States* v. *Bailsford*, 5 Wheat. 184; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Grush*, 5 Mason, 290; *United States* v. *Wilson*, 28 Fed. Cases, No. 718; *United States* v. *Bevans*, 3 Wheat. 336; *United States* v. *Rodgers*, 150 U. S. 255; *Warring* v. *Clark*, 5 How. 441, 464; *Williamson* v. *United States*, 207 U. S. 425.

Mr. Justice Hughes delivered the opinion of the court.

This is a libel to recover for personal injuries sustained by the libelant as a stevedore in the employ of the Atlantic Transport Company (the petitioner) which was engaged in loading the Pretoria, belonging to the Hamburg-American Steam Packet Company, while lying in the port

of Baltimore. The libel was brought against both the owner of the ship and the stevedore company. It was dismissed as to the former, but a recovery against the latter was allowed by the District Court (190 Fed. Rep. 229) and sustained by the Circuit Court of Appeals (193 Fed. Rep. 1019). This writ of certiorari was granted.

The libelant was one of a gang engaged in loading and stowing copper. He was working on the ship, under one of the hatches. The covers of the hatch were in three sections, the division being made by two movable iron beams placed athwart the ship. The coverings of the middle section had been removed and placed on top of the fore and after sections. On the dock, the copper was piled upon a rope mat which was lifted by a winch, swung over the hatch, and lowered into the hold. On one of its return trips the mat caught under the after crossbeam which was instantly jerked out of its support and, with the lengthwise timbers resting on it and the hatch covers, fell into the hold severely injuring the libelant. The District Court (referring to the petitioner, the Atlantic Transport Company, as the stevedore) said, p. 231: "There would have been no accident had the entire hatch been uncovered. To uncover a hatch takes time and labor. If bad weather comes, it must be covered. Unnecessary uncovering is to be avoided. It is easy to make a partially covered hatch absolutely safe. The crossbeams of the hatch have holes in their ends. There are corresponding holes in the hatch combings. Pins can be put through these holes. It takes about five minutes to put them in. When in place, an accident such as gave rise to this case cannot happen. The ship's carpenter of the Pretoria keeps the pins when not in use. Accidents often happen because an opened hatch has been left unguarded, or because the hatch coverings fall into the hold. When they do, there is usually a dispute as to whether the ship or the stevedore is to blame. In the case at bar the ship and the stevedore were repre-

sented by the same proctors and by the same advocates. The stevedore acquits the ship . . . The stevedore proved that, when the ship came into port, it took complete charge of the hatches. It uncovered so much of them as it saw fit. If the pins were in and it wanted them out, it took them out. It laid them on the deck. The ship's carpenter gathered them up. If the pins were out and it wanted them in, it told the ship's carpenter. He put them in." For its failure to use due diligence in seeing that the libelant had a safe place in which to work the District Court held the Transport Company liable.

The principal question is whether the District Court had jurisdiction; that is, whether the cause was one 'of admiralty and maritime jurisdiction.' Const. Art. III, § 2; Rev. Stat., § 563; Judicial Code, § 24; Act of Sept. 24, 1789, c. XX, § 9, 1 Stat. 73, 76. As the injury occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met. The petitioner insists, however, that locality is not the sole test, and that it must appear that the tort was otherwise of a maritime nature. And this was the view taken by the Circuit Court of Appeals for the Ninth Circuit, in affirming a decree dismissing a libel for want of jurisdiction in a similar case. *Campbell* v. *Hackfeld & Co.*, 125 Fed. Rep. 696.

At an early period the court of admiralty in England exercised jurisdiction 'over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas.' *De Lovio* v. *Boit*, 2 Gall. 398, 406, 464, 474. While its authority was denied when the injurious action took place *infra corpus comitatus*, it was not disputed that jurisdiction existed when the wrong was done 'upon the sea, or any part thereof which is not within any county.' (4 Inst. 134.) The jurisdiction in admiralty of the courts of the United States is not controlled by the restrictive statutes and judicial prohibitions

of England (*Waring* v. *Clarke*, 5 How. 441, 457, 458; *Insurance Company* v. *Dunham*, 11 Wall. 1, 24; *The Lottawanna*, 21 Wall. 558, 576); and the limitation with respect to torts committed within the body of any county is not applicable here. *Waring* v. *Clarke*, *supra*; *The Magnolia*, 20 How. 296. "In regard to torts"—said Mr. Justice Story in *Thomas* v. *Lane*, 2 Sumn. 1, 9—"I have always understood, that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." This rule—that locality furnishes the test—has been frequently reiterated, with the substitution (under the doctrine of *The Genesee Chief*, 12 How. 443), of navigable waters for tide waters. Thus, in the case of *The Philadelphia, Wilmington & Baltimore R. R. Co.* v. *The Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209, 215, the court said: "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." Again, in the case of *The Plymouth*, 3 Wall. 20, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land and not on navigable water, the court said, p. 35: "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.—A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the

fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." See *Manro* v. *Almeida*, 10 Wheat. 473; *Waring* v. *Clarke*, *supra*, p. 459; *The Lexington*, 6 How. 344, 394; *The Commerce*, 1 Black, 574, 579; *The Rock Island Bridge*, 6 Wall. 213, 215; *The Belfast*, 7 Wall. 624, 637; *Ex parte Easton*, 95 U. S. 68, 72; *Leathers* v. *Blessing*, 105 U. S. 626, 630; *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280, 285; *The Blackheath*, 195 U. S. 361, 365, 367; *Cleveland Terminal & Valley R. R. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316, 319; *Martin* v. *West*, 222 U. S. 191; *The Neil Cochran*, Fed. Cas. No. 10,087; *The Ottawa*, Fed. Cas. No. 10,616; *Holmes* v. *O. & C. Rwy. Co.*, 5 Fed. Rep. 75, 77; *The Arkansas*, 17 Fed. Rep. 383, 384; *The F. & P. M.* No. 2, 33 Fed. Rep. 511, 513; *The H. S. Pickands*, 42 Fed. Rep. 239, 240; *Hermann* v. *Port Blakely Mill Co.*, 69 Fed. Rep. 646, 647; *The Strabo*, 90 Fed. Rep. 110; 2 Story on the Constitution, § 1666. It is also apparent that Congress in providing for the punishment of crimes committed upon navigable waters has regarded the locality of the offense as the basis for the exercise of its authority. Act of April 30, 1790, c. IX, § 8, 1 Stat. 112, 113; act of March 3, 1825, c. LXV, 4 Stat. 115; Rev. Stat., §§ 5339, 5345, 5346; Criminal Code, § 272, 35 Stat. 1088, 1142; *United States* v. *Bevans*, 3 Wheat. 336, 387; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Rodgers*, 150 U. S. 249, 260, 261, 285; *Wynne* v. *United States*, 217 U. S. 234, 240.

But the petitioners urge that the general statements which we have cited, with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort apart from the mere place of its occur-

rence has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on board a ship by one passenger against another. See Benedict, Admiralty, 4th ed., § 231. The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; it is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common-law courts of transitory causes of action and thus arose by virtue of necessity.

We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle or of very accurate history,' *The Blackheath, supra.* And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship caused by the negligence of a ship or a person or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow.

The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the

safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' See *The George T. Kemp*, 2 Lowell, 477, 482; *The Circassian*, 1 Ben. 209; *The Windermere*, 2 Fed. Rep. 722; *The Canada*, 7 Fed. Rep. 119; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Gilbert Knapp*, 37 Fed. Rep. 209; *The Main*, 51 Fed. Rep. 954; *Norwegian Steamship Co.* v. *Washington*, 57 Fed. Rep. 224; *The Seguranca*, 58 Fed. Rep. 908; *The Allerton*, 93 Fed. Rep. 219; Hughes, Adm. 113; Benedict, Adm., 4th ed., § 207. The libelant was injured because the care required by the law was not taken to protect him while he was doing this work. We take it to be clear that the District Court sitting in admiralty was entitled to declare the applicable law in such a case, as it was within the power of Congress to modify that law. *Waring* v. *Clarke, supra; The Lottawanna, supra.* The fact that the ship was not found to be liable for the neglect is not controlling. If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. Even with respect to contracts where subject-matter is the exclusive test, it has been said that the true criterion is "whether it was a maritime contract, having reference to maritime service or maritime transactions." *Insurance Company* v. *Dunham*, 11 Wall. 1, 26. The Constitution provides that the judicial power shall extend 'to all cases of admiralty and maritime jurisdiction,' and the act of Congress defines the jurisdiction of the District Court, with respect to civil causes, in terms of like scope. To hold that a case of a tort committed on board a ship

in navigable waters, by one who has undertaken a maritime service, against one engaged in the performance of that service, is not embraced within the constitutional grant and the jurisdictional act, would be to establish a limitation wholly without warrant.

The remaining question relates to the finding of negligence. It is urged that the neglect was that of a fellow-servant and hence that the petitioner was not liable. Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place of work. *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 386. As the question belongs to a class which under the distribution of judicial power is determinable by the Circuit Court of Appeals in last resort, we shall not undertake to discuss it at length or to restate the evidence. *Chicago Junction Rwy. Co.* v. *King*, 222 U. S. 222, 224; *Chicago, R. I. & Pac. Rwy. Co.* v. *Brown*, 229 U. S. 317, 320; *Grand Trunk Rwy. Co.* v. *Lindsay*, 233 U. S. 42, 50. It is sufficient to say that we are satisfied from an examination of the record that the ruling was justified.

Affirmed.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA *v.* STATE OF MARYLAND TO THE USE OF SZCZESEK.

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

No. 216. Argued January 29, 30, 1914.—Decided May 25, 1914.

Decided on the authority of *Atlantic Transport Company* v. *Imbrovek*, *ante*, p. 54.

193 Fed. Rep. 1019, affirmed.

THE facts are stated in the opinion.

Mr. Edward Duffy, with whom *Mr. Nicholas P. Bond* and *Mr. Ralph Robinson* were on the brief, for petitioner.

Mr. W. H. Price, Jr., and *Mr. John E. Semmes, Jr.*, with whom *Mr. John E. Semmes, Mr. Jesse N. Bowen* and *Mr. Matthew Gault* were on the brief, for respondent.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a libel filed on behalf of the widow and infant children of Martin Szczesek to recover damages for injuries resulting in his death. Szczesek was a stevedore in the employ of the Atlantic Transport Company, the petitioner, and was engaged in loading the ship Pretoria. The District Court allowed a recovery against the petitioner (190 Fed. Rep. 240) which the Circuit Court of Appeals affirmed. 193 Fed. Rep. 1019.

The questions presented are the same as those which were considered in *Atlantic Transport Company* v. *Imbrovek*, *ante*, p. 52, decided this day and, for the reasons stated in the opinion in that case, the decree is affirmed.

Affirmed.

SCHMIDT *v.* BANK OF COMMERCE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 281. Argued March 19, 1914.—Decided May 25, 1914.

This court accepts the rulings of the territorial courts on local questions of pleading and practice. *Santa Fe Ry. Co.* v. *Friday*, 232 U. S. 694.

Where some of the signatures of defendant makers had been obtained by means of fraudulent representations by the plaintiff holder of the paper, the whole transaction is vitiated even as to those makers

who were liable on former existing paper of which that in suit was a renewal.

Where a renewal note constitutes a new promise with distinct legal consequences, it cannot be enforced if fraudulently induced, even if there were no defense to the older note in renewal of which it is given.

Under the Negotiable Instrument Act of 1907 of New Mexico, the title of a person negotiating commercial paper is defective if any signature thereto has been obtained by fraud, and if any one person is relieved from liability by proof of fraudulent inducement, all other persons who signed the paper are likewise relieved although they did not participate in and were ignorant of such fraud.

Where the court, on plaintiffs' motion, has denied the right of defendants to show that the note sued on was void as to them because of subsequent alteration by addition of signatures of other comakers, the plaintiff cannot defeat defendants' defense of fraud in obtaining the later signatures on the ground that the notes were completed instruments and binding upon the makers before the others had signed.

16 New Mex. 414, reversed.

THE facts, which involve the effect of fraudulent inducement to make commercial paper and the rights of comakers to be relieved of liability in such case, are stated in the opinion.

Mr. Francis E. Wood, with whom *Mr. O. N. Marron* was on the brief, for plaintiffs in error.

Mr. Harry M. Dougherty, with whom *Mr. James G. Fitch* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by the Bank of Commerce in the District Court for Socorro County in the Territory of New Mexico to recover upon two promissory notes. The plaintiff bank was the payee and the defendants Broyles, Schmidt & Story, Crossman, Brown, Pratt (alias Anderson), Lewis and Evans, were the makers. Broyles de-

faulted; the other defendants answered, alleging in substance that they had signed the notes for Broyles' accommodation and had been induced to sign by the fraudulent representations of the bank. Upon the trial, the motion of the plaintiff for a direction of a verdict was granted as against all the defendants except Lewis, and as to him the plaintiff was permitted to take a non-suit. The judgment on the verdict was affirmed by the Supreme Court of the Territory. 16 New Mex. 414.

Several questions of pleading and practice are presented, but in view of their local character we accept, as to these, the rulings of the territorial court. *Phœnix Rwy. Co.* v. *Landis*, 231 U. S. 578; *Work* v. *United Globe Mines*, 231 U. S. 595; *Santa Fe Rwy. Co.* v. *Friday*, 232 U. S. 694. We shall therefore assume that the complaint was sufficient; and that the defenses of alteration, the unauthorized filling of blanks, and the failure to credit certain payments, were not available because not suitably pleaded. The Supreme Court of the Territory also held that although both parties had requested peremptory instructions, the defendants were entitled, upon the denial of their motion, to ask that the case be submitted to the jury and that this request was properly made. See *Empire State Company* v. *Atchison Company*, 210 U. S. 1.

The question before us then is whether, in view of the state of the evidence upon the defense that the notes were procured by fraud, the trial court erred in directing a verdict for the plaintiff. It is apparent that there was evidence sufficient to go to the jury that the signatures of some of the defendants had been obtained by means of fraudulent representations. Upon this point, the Supreme Court of the Territory said, p. 423: "The defense, as we have seen, was principally that the signing of the notes was procured by fraud. There was undoubtedly evidence that the defendants Anderson" (impleaded as Pratt), "Evans, Brown and Lewis were told by plaintiff's repre-

sentative prior to signing the notes that Broyles was solvent and were further told that plaintiff had ample collateral for the notes, and there was also evidence from which the jury might have concluded that the defendants signed the notes in reliance upon these representations. We find also upon the record room for a conclusion by the jury that these statements were untrue and that they were known when made to be untrue. Indeed the trial court recognized this, for as to Lewis, in whose favor the testimony on this point was no stronger than on behalf of Anderson, Evans and Brown, the court held that the matter was one for the jury." Notwithstanding this estimate of the evidence, the court sustained the recovery against the last named defendants holding that as they were liable upon former notes for the same amount, which were renewed by the notes in suit, the defense was not available. It was said that, even assuming the notes in suit to have been given 'as the result of a wilful misrepresentation,' the defendants being bound by the former notes were 'held to no greater duty than previously rested upon them' and hence could not defend upon the ground that they were induced to sign the notes by fraudulent representations.

We are unable to agree with this conclusion. The question was not one of a recovery of damages in deceit. *Ming* v. *Woolfolk*, 116 U. S. 599, 602, 603. If there was fraud, it vitiated the transaction and the plaintiff could not avail itself of its own wrong by enforcing the notes. The fact that the three defendants, Anderson, Evans and Brown, were liable on the former notes did not place them under any legal obligation whatever to make the notes in suit. It appeared that the former notes were signed by Broyles, Anderson, Evans and Brown; the last three being in effect sureties for Broyles; and as the court states, 'upon the giving of the present notes, these former notes were surrendered by plaintiff bank and destroyed.' On the new notes Lewis, Schmidt & Story and Crossman were addi-

tional makers and in effect new co-sureties. Not only was there new paper but the legal position of Anderson, Evans and Brown was materially changed. Broyles was discharged from liability on the old notes and, with respect to the new, there were six (treating the firm of Schmidt & Story as one) in the position of co-sureties instead of three. No one of the three defendants in question who were parties to the original paper could pay it and hold the other two to their original measure of contribution. The new notes constituted new promises with distinct legal consequences. It is clear that the plaintiff could not enforce them if they were fraudulently induced.

There was no evidence of fraudulent representations to the defendants Schmidt & Story and Crossman, but they contend that they are not bound if their co-makers were relieved from liability by reason of the plaintiff's fraud. Reference is made to § 55 of the Negotiable Instruments Act, Laws of 1907 (New Mexico), c. 83, which provides: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." It has been held by the Supreme Court of Wisconsin, in construing the same language in the Wisconsin act, that if one of the signatures of several co-makers is obtained by fraud, the defense is also available to the other makers since the equality of burden is disturbed. *Hodge* v. *Smith*, 130 Wisconsin, 326; *Aukland* v. *Arnold*, 131 Wisconsin, 64, 66, 67. In the case last cited the court said, referring to *Hodge* v. *Smith*, *supra:* "It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the party so defrauded be relieved from liability thereon, then such fraud makes such paper void-

able by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that, when several persons assume such an obligation, it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if, through the fraud of the person holding it, such equality of burden is disturbed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it." While this construction of the statute was apparently accepted, it was held that the defense was not open to Schmidt & Story and Crossman for the reason that they signed the notes several days before the signatures of the other defendants upon whom the fraud was practiced were obtained and that there was no evidence in the record 'as to whether the defendants Schmidt, Story and Crossman or any of them had any knowledge that there were to be any other signers than themselves.' Accordingly, it was said that so far as the record showed the notes were 'complete and binding obligations' upon these defendants at the time they executed the same and that fraud in obtaining the signatures of the subsequent co-signers would not affect the equality of the burden they had assumed.

This, as it seems to us, is not an adequate answer to the defendants' contention. It is true that these defendants have endeavored to maintain that the notes were altered by the addition of the other signatures, relying upon Negotiable Instruments Law, § 125. See Daniel, Negot. Inst., § 1387. But the Supreme Court of the Territory ruled that under the pleadings this defense was not available and could not be considered. The plaintiff could not maintain this position and at the same time defeat the defense of fraud upon the ground that the notes were complete instruments, and as such had become the binding

obligations of these defendants, before the others signed. Taking the notes as they stood upon the pleadings and proof, we think that these defendants (Schmidt & Story and Crossman) must be regarded as co-makers with the other defendants, to whom the representations are said to have been made, and it follows that if any of the signatures of these co-makers were obtained by fraud the equality of burden was altered. The plaintiff's fraud, assuming it to have been committed, changed the legal effect of the promise of these defendants. For these reasons we think that they were entitled to have the evidence as to fraudulent representation submitted to the jury and that the direction of the verdict in favor of the plaintiff was error.

The judgment 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. It is so ordered.

EX PARTE ROE.

PETITION FOR WRIT OF MANDAMUS.

No. 13, Original. Argued April 6, 1914.—Decided May 25, 1914.

When a Federal court decides that a case removable from a state court on independent grounds is not made otherwise by § 6 of the Employers' Liability Act, the decision is a judicial act done in the exercise of jurisdiction conferred by law, and, even if erroneous, is not open to collateral attack, but only subject to correction in an appropriate appellate proceeding.

The authorized mode of reviewing such a ruling in an action at law is by writ of error from the final judgment. Judicial Code, §§ 128, 238.

The writ of mandamus lies to compel the exercise by a judicial officer of existing jurisdiction but not to control his decision.

Mandamus may not be used to correct alleged error in a refusal to remand, especially where the order may be reviewed after final judgment on writ of error or appeal. *Ex parte Harding*, 219 U. S. 363.

THE facts, which involve the Removal Acts and also the construction of the provisions of § 6 of the Employers' Liability Act of 1908 as amended in 1910 relating to removal of causes arising under the latter act, are stated in the opinion.

Mr. S. P. Jones for petitioner.

Mr. Joseph W. Bailey and *Mr. F. H. Prendergast* for respondent.

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

By an action begun in a state court in Harrison County, Texas, W. L. Roe sought to recover from the Texas & Pacific Railway Company, a Federal corporation, $30,000 as damages for personal injuries sustained through its negligence while he was in its employ as a brakeman and while both were engaged in interstate commerce. In due time and in the accustomed way, the case was removed into the District Court of the United States for that district upon the sole ground that it was one arising under a law of the United States in that the defendant was chartered by an act of Congress. The plaintiff then moved that the case be remanded upon the ground that it also arose under the Federal Employers' Liability Act (April 22, 1908, 35 Stat. 65, c. 149; April 5, 1910, 36 Stat. 291, c. 143) and therefore was not removable. After a hearing, the motion was denied, for reasons assigned in the second branch of the opinion in *Van Brimmer* v. *Texas & Pacific Railway Co.*, 190 Fed. Rep. 394, 397. The plaintiff then petitioned this court for a writ of mandamus commanding

the judge of the District Court to remand the case. A rule to show cause was granted, and the respondent answered that the motion to remand had been denied because, upon consideration, he believed the case was lawfully removed.

As the case arose under a law of the United States, namely, the defendant's Federal charter (see *Pacific Removal Cases*, 115 U. S. 1; *Texas & Pacific Railway Co.* v. *Cody*, 166 U. S. 606), and the requisite amount was in controversy, it is conceded that it was removable unless made otherwise by the fact that it also arose under the Federal Employers' Liability Act. In the sixth section, as amended in 1910, that 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." A like restriction upon removals appears in § 28 of the Judicial Code.

The question presented to the District Court by the motion to remand was, whether these provisions were intended to forbid a removal in every case falling within the Employers' Liability Act, regardless of the presence of some independent ground of removal, as in this instance, or only to declare that the fact that a case arises under that act shall not be a ground of removal. Regarding the latter of these alternatives as sustained by the better reasoning, the court denied the motion; and upon this petition for mandamus we are asked to review that ruling, pronounce it erroneous, and direct the respondent to retract it and remand the case.

Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. *Chesapeake & Ohio Railway Co.* v.

McCabe, 213 U. S. 207; *In re Metropolitan Trust Co.*, 218 U. S. 312. Like any other ruling in the progress of the case, it will be regularly subject to appellate review after final judgment, and the authorized mode of obtaining such a review, the action being at law, is by a writ of error. Judicial Code, §§ 128, 238; *Missouri Pacific Railway Co.* v. *Fitzgerald*, 160 U. S. 556, 582.

The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal. *Bank of Columbia* v. *Sweeny*, 1 Pet. 567; *Life and Fire Insurance Co.* v. *Adams*, 9 Pet. 571, 602; *Ex parte Taylor*, 14 How. 3, 13; *Ex parte Many*, *Id.* 24; *Ex parte Newman*, 14 Wall. 152, 169; *Ex parte Sawyer*, 21 Wall. 235; *Ex parte Flippin*, 94 U. S. 348; *Ex parte Loring*, *Id.* 418; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566; *American Construction Co.* v. *Jacksonville &c. Co.*, 148 U. S. 372, 379; *In re Atlantic City Railroad*, 164 U. S. 633; *Ex parte Oklahoma*, 220 U. S. 191, 209; *Ex parte First National Bank*, 228 U. S. 516. And this is true of a decision denying a motion to remand. *Ex parte Hoard*, 105 U. S. 578; *In re Pollitz*, 206 U. S. 323; *Ex parte Nebraska*, 209 U. S. 436; *Ex parte Gruetter*, 217 U. S. 586; *Ex parte Harding*, 219 U. S. 363. In the last case the subject was extensively considered and it was held that the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error or an appeal. To that view we adhere, and therefore we are not here at liberty to consider the merits of the question involved in the District Court's ruling.

Rule discharged; petition dismissed.

TAYLOR *v.* ANDERSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 338. Submitted April 30, 1914.—Decided May 25, 1914.

Whether a case begun in a District Court is one arising under the Constitution or a law or treaty of the United States in the sense of the jurisdictional statute (Judicial Code, § 24), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the declaration unaided by anything alleged in anticipation or avoidance of defenses which may be interposed by defendant.

197 Fed. Rep. 383, affirmed.

THE facts, which involve the jurisdiction of the District Court of the United States under § 24, Judicial Code, are stated in the opinion.

Mr. Napoleon B. Maxey for plaintiffs in error.

Mr. H. A. Ledbetter for defendants in error.

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

The judgment here under review is one of dismissal for want of jurisdiction. The action was in ejectment. The petition alleged that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in a sum named. Nothing more was required to state a good cause of action. Snyder's Comp. Laws Okla., §§ 5627, 6122; *Joy* v. *St. Louis*, 201 U. S. 332, 340. But the petition, going beyond what was required, alleged

with much detail that the defendants were asserting ownership in themselves under a certain deed and that it was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians. However essential or appropriate these allegations might have been in a bill in equity to cancel or annul the deed, they were neither essential nor appropriate in a petition in ejectment. Apparently, their purpose was to anticipate and avoid a defense which it was supposed the defendants would interpose, but, of course, it rested with the defendants to select their ground of defense, and it well might be that this one would not be interposed. In the orderly course, the plaintiffs were required to state their own case in the first instance and then to deal with the defendants' after it should be disclosed in the answer. Snyder's Comp. Laws, §§ 5634, 5642, 5668; *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 639. Diversity of citizenship was not alleged, and, unless the allegations respecting the invalidity, under the legislation of Congress, of the defensive claim attributed to the defendants operated to bring the case within the jurisdiction of the Circuit Court, the judgment of dismissal was plainly right.

It is now contended that these allegations showed that the case was one arising under the laws of the United States, namely, the acts restricting the alienation of Choctaw and Chickasaw allotments, and therefore brought it within the Circuit Court's jurisdiction. But the contention overlooks repeated decisions of this court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute (now § 24, Judicial Code), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which

it is thought the defendant may interpose. *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, 460, 464; *Third Street Railway Co.* v. *Lewis*, 173 U. S. 457, 460; *Florida Central Railroad Co.* v. *Bell*, 176 U. S. 321, 329; *Boston &c. Mining Co.* v. *Montana Ore Co., supra; Joy* v. *St. Louis, supra; Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U. S. 149; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133–135. Tested by this standard, as it must be, the case disclosed by the petition was not one arising under a law of the United States.

Whether or not in other respects the plaintiffs overlooked an authorized mode of securing relief to which they may be entitled need not now be considered. See 35 Stat. 312, 314, c. 199, § 6; *Bowling* v. *United States*, 233 U. S. 528, and cases cited.

Judgment affirmed.

WASHINGTON SECURITIES CO. *v.* UNITED STATES.

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

No. 367. Argued May 7, 8, 1914.—Decided May 25, 1914.

Findings of fact concurred in by two lower Federal courts will not be disturbed by this court unless shown to be clearly erroneous.

A purchaser from a patentee is bound to take notice that the land was acquired under the homestead law when that appears in the patent, and if the other circumstances show that the purchase was made with knowledge that the land was known to be coal land when it was entered by the patentee, the purchaser must be deemed to have

taken with notice of the fraudulent obtaining of coal lands under the homestead law.

Where the application and proof of an entryman is strictly *ex parte*, the proceedings are not adversary, and while the findings of the land officer may not be open to collateral attack, they are not conclusive, but only presumptively right, against the Government in a suit to cancel the patent on the ground that it was obtained by fraud.

194 Fed. Rep. 59.

THE facts, which involve the validity of patents for lands issued under the homestead law and claimed by the Government to have been fraudulently obtained because the lands were known to be valuable for coal at the time, are stated in the opinion.

Mr. H. R. Clise, with whom *Mr. Charles Kennedy Poe* and *Mr. Charles Poe* were on the brief, for appellant.

Mr. Assistant Attorney General Knaebel for the United States.

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

This was a suit to cancel four patents issued under the commutation provision of the homestead law and embracing a full section of land in King County, Washington. The bill charged that the patents were fraudulently procured by falsely representing to the land officers that the lands were agricultural in character, and therefore subject to homestead entry, when in truth they were at the time known to be valuable coal lands and therefore excepted from the operation of the homestead law. After the patents were issued the lands were conveyed to the appellant, and there was a further charge that it took the title with notice and knowledge of the fraud. The Circuit Court found that these charges were true and entered

a decree for the Government; and the Circuit Court of Appeals, taking a like view of the evidence, affirmed the decree. 194 Fed. Rep. 59.

The rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous. *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Towson* v. *Moore*, 173 U. S. 17, 24; *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20, 23; *Texas & Pacific Railway Co.* v. *Railroad Commission of Louisiana*, 232 U. S. 338. Applying the rule to the evidence in this case, we think the findings below should not be disturbed.

Only two of appellant's contentions merit special notice.

Without any uncertainty the evidence demonstrated that the lands were known to be valuable coal lands when the homestead entries were made and commuted, and that the affidavits and proofs to the contrary, upon which the patents were procured, were false. Not only were the lands in a well known coal region and generally reputed to be coal lands, but a tunnel, slope and other openings upon them, costing about $8,000, had disclosed that they contained coal of such quality and quantity as to render them valuable for coal mining. The entrymen so understood, and resorted to severe measures to keep coal prospectors off the lands.

The appellant's chief contention is, that there was no evidence, or at least no substantial evidence, that it took the title with notice or knowledge of the fraud perpetrated by the entrymen. But the record shows otherwise. The appellant's vice-president, who represented it in the negotiations, had theretofore, as agent of another company, learned that the latter was interested in the coal development work before mentioned and was, with others, bearing the expense of that work with a view to acquiring the lands as coal lands. This was recalled to his mind at the time of the negotiations. He caused the section to be

examined by an engineer, who found and reported the tunnel and other openings disclosing the coal, and, following that report, the transaction was consummated on the theory that the lands were valuable for their coal contents. There was no claim that there was any development work or coal discovery after the entries were made, and it is quite apparent from what was said of the engineer's report that the tunnel and openings gave visible evidence that they were not recently made. Of course, the appellant was bound to take notice that the patentees with whom it was dealing had obtained the lands under the homestead law, for it was so recited in the patents. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 437. In these facts there was, as we think, persuasive evidence that the appellant took the title with notice or knowledge of the fraud.

It is contended also that the proceedings resulting in the patents were not *ex parte* but adversary; that the land officers found the lands to be agricultural in character, and that this finding was conclusive upon the Government. No doubt those officers found from the proofs submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents, but the proceedings were not adversary in any true sense of the term. The applications and proofs of the entrymen were strictly *ex parte*. The Government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the Government save in the sense that the land officers did so. As this court has often held, the findings of the land officers in such a proceeding, although not open to collateral attack, are not conclusive against the Government when it sues to cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. *United States* v. *Minor*, 114 U. S. 233; *McCaskill Co.* v. *United States*, 216 U. S. 504, 509, and cases cited. In such

a suit the action of the land officers is given appropriate effect by treating it as presumptively right and as requiring the Government to carry the burden of proving the fraud by that class of evidence which commands respect and that amount of it which produces conviction. *Diamond Coal & Coke Co.* v. *United States*, 233 U. S. 236, 239.

Decree affirmed.

NEW ORLEANS & NORTHEASTERN RAILROAD CO. *v.* NATIONAL RICE MILLING CO.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 615. Argued February 27, 1914.—Decided May 25, 1914.

Where the judgment of a state court rests upon an independent ground not only adequate to sustain it but in entire harmony with an asserted Federal right, there is no denial of that right in the sense contemplated by § 237 of the Judicial Code, and the writ of error will be dismissed.

Where the initial carrier sets up the Carmack Amendment and also denies negligence, but the state court finds from conflicting evidence that the loss was occasioned by the negligence of the connecting carrier, the judgment rests on that finding as an independent ground, and this court has not jurisdiction.

A party is entitled to the benefit of all the testimony in the case from whatever source it comes; and, although having the burden of proof, need not prove any fact otherwise established.

Writ of error to review 132 Louisiana, 615, dismissed.

THE facts, which involve the jurisdiction of this court to review the judgment of a state court within § 237, Judicial Code, are stated in the opinion.

Mr. J. Blanc Monroe, with whom *Mr. John K. Graves* and *Mr. Monte M. Lemann* were on the brief, for plaintiff in error:

The sole issue in the case is not merely an issue of fact; nor is the Federal question frivolous.

The judgment of the lower court does not rest upon a question of general law, broad enough to sustain it, so that the decision of the Federal question is unnecessary.

In support of these contentions, see *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300; *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Bachtel* v. *Wilson*, 204 U. S. 36; *Baltimore & Ohio R. Co.* v. *Maryland*, 20 Wall. 643; *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Dower* v. *Richards*, 151 U. S. 658; *Elam* v. *St. Louis &c. R. R. Co.*, 93 S. W. Rep. 851; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592; *International R. R. Co.* v. *Gergman*, 64 S. W. Rep. 999; *Kansas City So. Ry. Co.* v. *Albers Com. Co.*, 223 U. S. 573; *Kaukauna Water Power Co.* v. *Green Bay Canal Co.*, 142 U. S. 254; *Leigh* v. *Green*, 193 U. S. 79; *Mackay* v. *Dillon*, 4 How. 421; *Mallett* v. *North Carolina*, 181 U. S. 589; *Memphis R. R. Co.* v. *Reeves*, 10 Wall. 176; *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1; *Stanley* v. *Schwalby*, 162 U. S. 255; *Terre Haute* v. *Indianapolis &c. Ry. Co.*, 194 U. S. 579.

Mr. W. Catesby Jones, with whom *Mr. Gustave Lemle* and *Mr. Arthur A. Moreno* were on the brief, for defendant in error.

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

This was an action to recover the value of two cars of rice destroyed by fire in August, 1908, while being transported over connecting railroads from New Orleans, Louisiana, to Charleston, South Carolina. The rice was shipped upon through bills of lading issued by the initial carrier and was destroyed while in the second carrier's custody at Old Hamburg, South Carolina. The two cars, with others

containing quicklime, were side-tracked in the yard at that place awaiting further movement towards their destination. The yard adjoined the Savannah River, which was then almost out of its banks and steadily rising as a result of extraordinary rains and cloudbursts extending up the river and its tributaries one hundred miles. The waters continued to rise, spread over the yard to a considerable depth, and ultimately reached the quicklime, thereby causing the cars to burn and destroying the rice. The cars had been in the yard about sixteen hours when the fire started. The action was against both carriers, and it was alleged in the petition, which based the right of recovery upon the Carmack Amendment to the Interstate Commerce Act (June 29, 1906, 34 Stat. 584, 595, c. 3591, § 7), that the loss of the rice was caused by the negligence of the second carrier, and that the two carriers were jointly liable. Issue was joined, and, after a trial, the district court of the parish rendered a judgment against the carriers jointly and *in solido*, which the Supreme Court of the State at first reversed and then, after a rehearing, affirmed. 132 Louisiana, 615; 61 So. Rep. 708. The carriers sued out this writ of error, basing their right so to do upon a claim that by the judgment of affirmance they were denied a right or immunity asserted under a law of the United States.

A motion to dismiss was presented along with the merits, and we think it is well taken.

The bills of lading contained these stipulations:

"This company or other carriers over whose line the property may pass, shall not be held responsible for loss or damage [unless through proved carelessness or negligence of their employés] resulting . . . from heat, cold, fire, flood, storms, mobs or other causes not subject to the carrier's control.

"Neither this company nor any of its connecting carriers shall be liable for any damage to, or destruction of

said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence or that of their employés, and unless such negligence shall be affirmatively established by the owner of said property."

In the Supreme Court of the State the carriers contended that, under the combined operation of the Carmack Amendment as interpreted in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, the stipulations in the bills of lading, and the common-law rule applied in *Railroad Co.* v. *Reeves*, 10 Wall. 176, and other cases,[1] they were entitled to exoneration upon showing that the rice was destroyed by the extraordinary flood, unless it also was shown that the second carrier contributed to the loss by negligently failing to take reasonable precautions to avoid it when the rising waters gave warning of the danger; and it was particularly urged as a part of this contention that the burden was upon the plaintiff to show such negligence, and not upon the carriers to show the absence of it. But the court, although disapproving the latter phase of the contention and thinking the carriers were charged by the law of Louisiana with the burden of showing that there was no negligence, did not rest its judgment upon that ground. On the contrary, it examined the evidence, which comprehensively covered the subject, to ascertain whether, upon the hypothesis that the contention of the carriers was sound, they were liable, and from that examination it found as matter of fact that the second carrier had negligently permitted the cars of rice to remain within the influence of the rising flood and in immediate proximity to the quicklime when ordinary prudence required that they be moved to a place of safety; and that this was

[1] *Clark* v. *Barnwell*, 12 How. 272, 280, 281, 283; *Transportation Co.* v. *Downer*, 11 Wall. 129, 133; *Cau* v. *Texas & Pacific Railway Co.*, 194 U. S. 427, 432.

made an independent ground of the judgment is shown by the court's extended discussion of the evidence and by the following excerpts from its opinion:

"A close reading of the evidence compels the conclusion that there was not sufficient forethought on the part of the officers in charge of the railroad yards. We have seen that the river was rising rapidly on the morning of the 26th of August. Some of the witnesses testified that by 7 o'clock it had covered the switch tracks, and yet nothing was done to protect property. Leisurely enough, the employés went about their business and gave very little concern to the rising waters. Those who did attempt to save property (if what they did can be considered in that light) displayed very little activity, beginning at 8 o'clock, taking out a few cars and leaving others in the Old Hamburg yards. That is all they did. These yards were submerged by water to a height above the floor of the cars. The question arises: Was it possible, before the waters reached their greatest height, to move the cars to a safer place than where they were hauled to on the morning of the 26th of August; that is, to the Old Hamburg yards? We have noted, before 8 o'clock or 8.30 o'clock a. m., not the least attempt was made to move the cars out of the yard where they had been placed. Mr. Benson, inspector of the Southern Railway Company, testified that on the morning of the 26th of August, he reported at the Hamburg yard at 7 o'clock to go to work, and at that time the water had just reached the rail in front of the block office. There were a crew and an engine in the yard. Why were they not put at work at that time to save the freight?

"Another witness, the night operator, renders it still more evident that it was possible to move the train in the morning, for he says that when he went to work the yard was entirely free from water on the 26th of August in the morning. An attempt was made to rescue the cars between 8 and half past 8 o'clock a. m. It failed. They

went too late to rescue these cars. There had been ample time to save them. (132 Louisiana, p. 643.)

* * * * * * * *

"These floods were frequent, and yet defendant remained indifferent, and even sent its cars to the lowest places on the yard, where they were permitted to remain without making a serious and timely attempt to take them away.

"From all this evidence we are led to the inference, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to successfully defend itself.

"Unquestionably the river was rising rapidly on the morning of the 26th at 7 o'clock; in 35 minutes it covered the switch tracks. It does not seem that anything was done to prevent the destruction of the cars. Leisurely enough, the employés went about their respective occupations, and now, when they give an account of themselves, it does seem as if they wish to lay all the trouble on the rising waters, although they remained indifferent when they should have exerted themselves (p. 645).

* * * * * * * *

"Admitting for a moment all that is claimed under the Carmack Amendment, under any of the laws of this country, indifferent railroad people, who receive freight to be transported some distance, and who, just before the waters of a storm have flowed down, stop the cars on the way, and run them to the lowest part of their yards, and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place while other cars are taken out, and who make no attempt to haul them out, although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law" (p. 649).

True, the testimony upon which the court rested its conclusion that negligence was proved did not come from the plaintiff's witnesses but from those for the carriers, and was largely elicited by cross-examination, but that is quite immaterial. The plaintiff was entitled to the benefit of all the testimony in the case, from whatever source it came, and was not required, even though having the burden of proof, to go through the ceremony of proving any fact otherwise established.

As it clearly appears that the judgment rested upon a ground which was not only adequate to sustain it but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right in the sense contemplated by § 237 of the Judicial Code. Whether the right was well founded we therefore need not consider.

Writ of error dismissed.

WABASH RAILROAD COMPANY *v.* HAYES.

ERROR TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 843. Motion to dismiss submitted April 27, 1914.—Decided May 25, 1914.

Plaintiff, an injured employé of an interstate common carrier by rail, sued for personal injury, alleging that he was employed in interstate commerce, and stating a good cause of action under the Federal Employers' Liability Act, if so employed, and, if not, under the state law; the defendant asked for an instruction that the proof did not show that the injury occurred in interstate commerce, which the court gave, and then, over defendant's objection, treated the allegation to that effect as eliminated from the declaration and submitted the case to the jury as one under the state law, and plaintiff

had a verdict. *Held*, that defendant having asked for the instruction that the case could not be maintained under the Federal act, was bound thereby, and, therefore, was denied no right under the Federal law by the action of the state court, and the writ of error must be dismissed.

Where the state court treats a mistaken allegation that the injury occurred in interstate commerce as eliminated, it merely gives effect to a rule of local practice and does not deprive defendant of any Federal right.

Quære, as to what the effect would be if the shift from a claim under the Federal act to one under the state law cut the defendant off from presenting a defense open under the latter or deprived him of a right of removal.

Writ of error to review 180 Ill. App. 511, dismissed.

THE facts, which involve the jurisdiction of this court to review a judgment of the state court in an action by a railroad employé for personal injuries which did not occur in interstate commerce, are stated in the opinion.

Mr. James C. McShane for defendant in error in support of the motion.

Mr. J. L. Minnis, *Mr. John M. Zane* and *Mr. Charles F. Morse* for plaintiff in error, in opposition to the motion:

A Federal question is here involved; the Federal right was claimed and denied in the state court.

This court has jurisdiction of this writ of error.

In support of these contentions, see *Acardo* v. *N. Y. &c. T. Co.*, 116 App. Div. N. Y. 793; *Adams* v. *Capital State Bank*, 74 Mississippi, 307; *Atkinson* v. *Bullard*, 80 S. E. Rep. 220; *Chambers* v. *Balt. & Ohio R. R. Co.*, 207 U. S. 142; *C. & G. T. R. Co.* v. *Spurney*, 197 Illinois, 471; *Clark* v. *Southern Pacific Co.*, 175 Fed. Rep. 122; *Consolidated Coal Co.* v. *Peers*, 97 Ill. App. 188; *Cound* v. *Atchison &c. Ry. Co.*, 173 Fed. Rep. 527; *El Paso &c. R. R. Co.* v. *Gutierrez*, 215 U. S. 87; *Erie R. R. Co.* v. *Kennedy*, 191 Fed. Rep. 332; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58;

Hall v. *Chicago, R. I. & P. Ry. Co.*, 149 Fed. Rep. 564; *Howerton* v. *Southern Ry. Co.*, 101 N. E. Rep. 121; *Ill. Cent. R. R. Co.* v. *Kentucky*, 218 U. S. 551; *Jones* v. *C. & O. R. Co.*, 149 Kentucky, 566; *Ky. Union Co.* v. *Kentucky*, 219 U. S. 140; *Kleps* v. *Bristol Mfg. Co.*, 189 N. Y. 516; *Leathe* v. *Thomas*, 207 U. S. 93; *Mallett* v. *North Carolina*, 181 U. S. 589; *McKay* v. *Kalyton*, 204 U. S. 458; *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1; *Nor. Car. R. R. Co.* v. *Zachary*, 232 U. S. 248; *Nutt* v. *Knut*, 200 U. S. 12; *Payne* v. *N. Y. &c. R. Co.*, 201 N. Y. 436; *Payne* v. *N. Y., S. & W. R. R. Co.*, 201 N. Y. 436; *Powell* v. *Brunswick County*, 150 U. S. 440; *St. Louis &c. R. Co.* v. *Seale*, 229 U. S. 156; *St. Louis &c. R. Co.* v. *McWhirter*, 229 U. S. 265; *Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434; *Vandalia R. Co.* v. *South Bend*, 207 U. S. 359.

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

This was an action against a railroad company to recover for a personal injury sustained by the plaintiff through the negligence of the company while he was employed as a switchman in its railroad yard in Cook County, Illinois. The action was brought in the Superior Court of that county, and a trial to the court and a jury resulted in a verdict and judgment for the plaintiff. The judgment was affirmed by the Appellate Court for that district (180 Ill. App. 511), which was the highest court of the State in which a decision of the case could be had, and this writ of error was then sued out by the company. By a motion to dismiss the writ our jurisdiction to review the judgment is challenged. Shortly stated, the facts bearing upon the disposition of the motion are these:

The plaintiff's declaration alleged that the injury occurred while the defendant was engaged, and while the plaintiff was employed by it, in interstate commerce. The

other allegations were such that, with that one, they stated a good cause of action under the Federal Employers' Liability Act, April 22, 1908, 35 Stat. 65, c. 149, and, without it, they stated a good cause of action under the common law prevailing in the State. There was a plea of not guilty; and upon the trial, the proof failing to show that the injury occurred in interstate commerce, the court, at the defendant's request, instructed the jury that the Federal Employers' Liability Act had no application to the case. Then, over the defendant's objection, the court treated the allegation respecting interstate commerce as eliminated, and submitted the case to the jury as one controlled by the common law prevailing in the State. The plaintiff recovered under that law. In the Appellate Court the defendant contended that, even though the allegation that the injury occurred in interstate commerce proved unwarranted, the declaration could not be treated, consistently with the Federal act, as affording any basis for a recovery under the law of the State, common or statutory. But the court held otherwise and sustained the recovery under the state law. Whether that ruling operated as a denial of a right or immunity to which the defendant was entitled under the Federal act is the question, and the only question, sought to be presented by the assignments of error.

Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative. *Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1, 53–55; *St. Louis &c. Railway Co.* v. *Seale*, 229 U. S. 156, 158; *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, 256; *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492. On the other hand, if the injury occurred outside of interstate

commerce, the Federal act was without application and the law of the State was controlling. *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473. That the injury did occur outside of interstate commerce was declared in the court's instruction to the jury, and the defendant, having requested the instruction, is bound by it. It therefore must be taken as settled that the right of recovery arose under the state law.

The plaintiff asserted only one right to recover for the injury, and in the nature of things he could have but one. Whether it arose under the Federal act or under the state law, it was equally cognizable in the state court; and had it been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, the propriety of proceeding to a judgment under the latter count, after it appeared that the first could not be sustained, doubtless would have been freely conceded. Certainly, nothing in the Federal act would have been in the way.

Instead of presenting his case in an alternative way, the plaintiff so stated it as to indicate that he was claiming only under the Federal act. And when the proofs demonstrated that the injury arose outside of interstate commerce and therefore that no recovery could be had under the Federal act, the court was confronted with the question whether the declaration could be amended, or regarded as amended, to conform to the proofs. Holding that this could be done, the court treated the mistaken allegation that the injury occurred in interstate commerce as eliminated. Therein the court merely gave effect to a rule of local practice, the application of which was not in anywise in contravention of the Federal act. See *Mondou* v. *New York, New Haven & Hartford Railroad Co.*, *supra*, pp. 56–57.

It follows that the contention that the defendant was denied a right or immunity to which it was entitled under

the Federal act is not only untenable but so devoid of color as to furnish no basis for this writ of error. See *Sawyer* v. *Piper*, 189 U. S. 154.

As it is not claimed that by reason of the shifting from one law to the other the defendant was cut off from presenting any defense which was open only under the latter, or that the course taken by the plaintiff deprived the defendant of a right of removal otherwise existing, we intimate no opinion in either connection.

Writ of error dismissed.

OCAMPO *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 270. Argued March 12, 13, 1914.—Decided May 25, 1914.

Section 2 of act No. 612 of the Philippine Commission of February 3, 1903, providing that in cases triable before the Court of First Instance in the City of Manila the accused should not be entitled as of right to a preliminary examination in any case in which the prosecuting attorney after due investigation shall have presented an information against him, necessarily operated to repeal inconsistent provisions previously in force in the City of Manila.

The Philippine Bill of Rights, as contained in § 5 of the act of July 1, 1902, contains no specific requirement, such as is contained in the Fifth Amendment, of a presentment or indictment by grand jury, nor is such a requirement included within the guaranty of due process of law.

The guaranty of equal protection of the law in the Philippine Bill of Rights does not require territorial uniformity. It is not violated if all persons within the territorial limits of their respective jurisdictions are treated equally.

Section 2 of Act No. 612 is not in conflict with that paragraph of § 5 of the act of July 1, 1902, which provides that no warrant shall issue but upon probable cause supported by oath or affirmation; a pre-

liminary investigation by the prosecuting attorney upon which he files a sworn information is a compliance with such provision.

A finding of probable cause for arrest by a prosecuting attorney is only *quasi*-judicial; and a statute, otherwise valid, is not invalidated by delegating the duty of investigation to a prosecuting attorney.

On the evidence in this case the trial court properly held that the defendant was, under the law of the Philippine Islands, the responsible proprietor of the newspaper which published the libel on which the prosecution was based.

The appellate jurisdiction of the Supreme Court of the Philippine Islands is not confined to errors of law but extends to a review of the whole case. It has power to reverse the judgment of the Court of First Instance in a criminal case and find the accused guilty of a higher crime and increase the sentence. *Trono* v. *United States*, 199 U. S. 521.

18 Philippine, 1, affirmed.

THE facts, which involve the validity of a judgment of the Supreme Court of the Philippine Islands in a prosecution for criminal libel and the validity of Act No. 612 of the Philippine Commission, are stated in the opinion.

Mr. William R. Harr, with whom *Mr. Clement L. Bouve* was on the brief, for plaintiffs in error.

The Solicitor General for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

On November 5, 1908, an information was filed in the Court of First Instance of the City of Manila, charging plaintiffs in error, with others, as editors, proprietors, owners, directors, writers, managers, administrators, printers, and publishers of the newspaper "El Renacimiento," with publishing in that city a libel against Dean C. Worcester, then a member of the Philippine Commission. The information was subscribed and sworn to by the acting prosecuting attorney, and appended to it, and likewise sworn to by him, was the following declara-

tion: "A preliminary investigation has been conducted under my direction, having examined the witnesses under oath, in accordance with the provisions of section 39 of Act 183 (Manila Charter), as amended by section 2 of Act 612 of the Philippine Commission." Both affidavits were made before the judge of the Court of First Instance, who thereupon issued warrants of arrest, pursuant to which the parties accused were on the same day brought before the court. The information was read to them, and the court allowed them until November 7th to answer. Their attorney, being present, asked that they be furnished with a copy of the information, which request was granted, and a copy was delivered to each of the accused. Thereafter, and on November 7th, before entering any demurrer or answer, they moved to vacate the order of arrest, upon the ground that it was made without any preliminary investigation held by the court, and without any tribunal, magistrate, or other competent authority having first determined that the alleged crime had been committed, and that there was probable cause to believe the defendants guilty of it; the procedure adopted being, as was claimed, in violation of §§ 12 and 13 of General Orders, No. 58, issued by the Military Governor April 23, 1900, and of paragraphs 1, 3, 11, and 18 of § 5 of the Philippines Bill, enacted by the Congress of the United States on July 1, 1902; and it was insisted that § 2 of Act No. 612 of the Philippine Commission, which took from accused persons in the City of Manila the right to a preliminary investigation, was contrary to the cited paragraphs of the Philippines Bill, because it provided that accused persons in that city might be deprived of their liberty without due process of law, denied to the inhabitants of that city the equal protection of the law, deprived persons detained there to answer for a criminal offense of the "proper judicial proceedings," and violated the guaranty against arbitrary detention.

This motion being overruled, defendants moved for an order requiring the prosecuting attorney to submit to the court and to them for examination the proceedings of the preliminary investigation alleged to have been conducted by him. This motion was likewise overruled.

Defendants then asked the court to hold a preliminary investigation before calling upon them to either demur to or answer the complaint. This motion being denied, demurrers were filed, which were overruled, and the defendants were called upon to plead to the information. They stood mute, and a plea of not guilty was entered for each of them. Upon their request, separate trials were granted. Ocampo was found guilty, and sentenced to six months imprisonment and to pay a fine of 2000 pesos and one-fifth of the costs of the action. Kalaw was also found guilty, and sentenced to nine months imprisonment and to pay a fine of 3000 pesos and one-fifth of the costs. Upon their writ of error, the Supreme Court of the Philippine Islands affirmed the judgment as to Ocampo, and modified the sentence imposed upon Kalaw so as to increase the period of his imprisonment to twelve months. 18 Phil. Rep. 1. The present writ of error was then sued out.

The insistence is here renewed, that the arrest and trial of plaintiffs in error was without a preliminary finding of probable cause, and therefore in violation of rights secured to them by the Philippine Bill of Rights (Act of July 1, 1902, § 5, c. 1369, 32 Stat. 691, 692). This act, following the provisions of certain of the Amendments of the Constitution of the United States, declares, *inter alia:*

"SEC. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws

* * * * * * * *

"That no person shall be held to answer for a criminal offense without due process of law; . . .

* * * * * * * *

"That no warrant shall issue, but upon probable cause, supported by oath or affirmation. . . ."

Prior to its enactment, and under date April 23, 1900, General Orders, No. 58, had been promulgated by the Military Governor, amending the Criminal Code of Procedure in certain respects, and providing by §§ 12 and 13 that every person making complaint charging the commission of a crime must inform the magistrate of all persons believed to have any knowledge of its commission, whereupon the magistrate must issue subpœnas requiring them to attend as witnesses, and must examine the informant or prosecutor and the witnesses and take their depositions in writing, and if satisfied from the investigation that the crime complained of had been committed and that there was reasonable ground to believe that the party charged had committed it, the magistrate must issue an order of arrest.

By § 40 of Act No. 183 of the Philippine Commission (the Manila Charter, enacted July 31, 1901), municipal courts with criminal jurisdiction were established, and were empowered to conduct preliminary examinations and to release, or commit and bind over any person charged with an offense to secure his appearance before the proper court; it being among other things provided that "every person arrested shall, without unnecessary delay, be brought before a municipal court or a court of first instance for preliminary hearing, release on bail or trial."

Section 44 provided for two justices of the peace for the City of Manila, to exercise within the city the civil jurisdiction conferred upon justices of the peace in Act No. 136; but they were debarred from exercising any criminal jurisdiction, such jurisdiction within the city being confined to Courts of First Instance and the municipal courts.

By Act No. 186 (August 5, 1901), the existing courts of justices of the peace in the City of Manila were abolished, and civil actions and proceedings then pending therein were transferred to the courts of justices of the peace established under Act No. 183, while pending criminal actions and proceedings were transferred to the municipal courts established under Act No. 183.

Act No. 194 (August 10, 1901), in its first section provides: "Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which is by law now vested in the Judges of Courts of First Instance." And it is by the same section made the duty of every justice of the peace, when written complaint under oath is made to him that a crime has been committed within his municipality, and there is reason to believe that any person has committed it, or when he has knowledge of facts tending to show the commission of a crime within his municipality by any person, to issue an order for the arrest of the accused and have him brought before the justice for preliminary examination. Section 2 prescribes the procedure, which accords to the accused the right to examine the complaint and affidavits, to be present and hear and cross-examine the witnesses for the Government, to offer witnesses in his own behalf, and give his own testimony if he desires; and "upon the conclusion of the preliminary investigation, if the Justice of the Peace is of the opinion that there is reasonable cause to believe that an offense has been committed and that the accused is guilty thereof, he shall so declare and shall adjudge that the accused be remanded to jail for safe-keeping to await the action of the Judge or Court of First Instance, unless he give bail," etc.; . . . "On the other hand, if the Justice of the Peace be of the opinion that no crime has been committed, or that there is no reasonable ground to

believe the accused guilty thereof, the Justice of the Peace shall order the discharge of the accused. Such discharge, however, shall not operate as a final acquittal of the accused, but he may be again arrested and prosecuted for the same offense."

It was and is contended by plaintiffs in error that the procedure thus indicated ought to have been followed in their case.

The prosecution proceeded upon the theory that the above requirements as to preliminary examination and the finding of probable cause were repealed as to the City of Manila by Act No. 612 of the Philippine Commission (February 3, 1903), § 2 of which provides:

"In cases triable only in the Court of First Instance in the City of Manila, the defendant shall have a speedy trial, but shall not be entitled as of right to a preliminary examination in any case where the Prosecuting Attorney, after a due investigation of the facts, under section thirty-nine of the Act of which this is an amendment [Act No. 183,] shall have presented an information against him in proper form: *Provided, however,* That the Court of First Instance may make such summary investigation into the case as it may deem necessary to enable it to fix the bail or to determine whether the offense is bailable."

Section 39 of the Charter Act, here referred to, provides:

"The Prosecuting Attorney of the city of Manila shall have charge of the prosecution of all crimes, misdemeanors and violations of city ordinances, in the Court of First Instance and the municipal courts of the city of Manila. He shall investigate all charges of crimes, misdemeanors, and violations of ordinances, and prepare the necessary informations or make the necessary complaints against the persons accused, and discharge all other duties in respect to criminal prosecutions enjoined upon provincial fiscals in the General Provincial Act and the Criminal Code of Procedure. . . . The Prosecuting Attorney or any

of his assistants may, if he deems it wise, conduct investigations in respect to crimes, misdemeanors and violations of ordinances by taking oral evidence of reputed witnesses, and for this purpose may, by subpœna, summon witnesses to appear and testify under oath before him, and the attendance or evidence of an absent or recalcitrant witness may be enforced by application to the municipal court or the Court of First Instance."

It was this procedure that was followed in the present case. If Act No. 612 is consistent with the Declaration of Rights contained in § 5 of the act of Congress of July 1, 1902, there can be no question that it necessarily operates to repeal, with respect to the City of Manila, inconsistent provisions previously in force there, as above mentioned.

Section 5 of the act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the Fifth Amendment of the Constitution of the United States. And in this respect the Constitution does not, of its own force, apply to the Islands. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; *Dowdell* v. *United States*, 221 U. S. 325, 332.

That the requirement of an indictment by grand jury is not included within the guaranty of "due process of law" is of course well settled. *Hurtado* v. *California*, 110 U. S. 516; *McNulty* v. *California*, 149 U. S. 645; *Dowdell* v. *United States, supra; Lem Woon* v. *Oregon*, 229 U. S. 586, 589, and cases cited.

It is contended that since Act No. 612 denies to the inhabitants of Manila the right to a preliminary examination which is accorded to all other people in the Islands, it denies the equal protection of the laws guaranteed by the act of Congress. But it was long ago decided that this guaranty does not require territorial uniformity. In *Missouri* v. *Lewis*, 101 U. S. 22, 30, this court (by Mr. Justice Bradley) said:

"The last restriction [of the Fourteenth Amendment],

as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto."

And see *Hayes* v. *Missouri*, 120 U. S. 68, 72; *Chappell Chemical Co.* v. *Sulphur Mines Co.* (No. 3), 172 U. S. 474; *Mallett* v. *North Carolina*, 181 U. S. 589, 598.

It is, however, further contended that Act No. 612 only undertakes to deny to the inhabitants of the city the right to a preliminary investigation when the prosecuting attorney sees fit to conduct an *ex parte* examination, and that it does not cover the subject of probable cause for the arrest of the accused, or affect the right accorded by §§ 12 and 13 of General Orders, No. 58, and by that paragraph of § 5 of the act of Congress of July 1, 1902, which declares "That no warrant shall issue but upon probable cause, supported by oath or affirmation." In overruling this contention the Supreme Court of the Philippine Islands followed its previous rulings in *United States* v. *Wilson*, 4 Phil. Rep. 317, 322; *United States* v. *McGovern*, 6 Phil. Rep. 621, 623; *United States* v. *Raymundo*, 14 Phil. Rep. 416, 436.

It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally, or under General Orders, No. 58, as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. It is expressly so provided by § 14 of General Orders, No. 58, as it is by § 2 of Act 194, above quoted. Such was the nature of the duty of a committing magistrate in the common-law practice, and it is recognized in Rev. Stat., § 1014. *Benson* v. *McMahon*, 127 U. S. 457, 462, 463; *In re Luis Oteiza y Cortes*, 136 U. S. 330, 335; *Todd* v. *United States*, 158 U. S. 278, 283. In short, the function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal. By § 9 of the act of July 1, 1902 (32 Stat. 691, 695, c. 1369), Congress enacted: "That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the Government of said Islands, subject to the power of said government to change the practice and method of procedure. The municipal courts of said Islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law;" etc. Here we find clear warrant for modifications of the practice and procedure; and since § 5 of the same act (quoted above) does not prescribe how "probable cause" shall be determined, it is, in our opinion, as permissible for the local legislature to confide this duty to a prosecut-

ing officer as to entrust it to a justice of the peace. Consequently, a preliminary investigation conducted by the prosecuting attorney of the City of Manila, under Act No. 612, and upon which he files a sworn information against the party accused, is a sufficient compliance with the requirement "that no warrant shall issue but upon probable cause, supported by oath or affirmation."

The views above expressed render it unnecessary for us to consider whether the objections thus far dealt with were waived by the plaintiffs in error when they gave bond at the time of their arrest.

It is next insisted that the conviction of Ocampo was erroneous for want of evidence that he was a proprietor of the newspaper or participated in the publication of the libel. The law is to be found in Act No. 277 of the Philippine Commission (Phil. Pen. Code 1911, p. 167), of which two sections may be quoted:

"SEC. 2. Every person who wilfully and with a malicious intent to injure another publishes or procures to be published any libel shall be punished by a fine of not exceeding two thousand dollars or imprisonment for not exceeding one year, or both."

"SEC. 6. Every author, editor, or proprietor of any book, newspaper, or serial publication is chargeable with the publication of any words contained in any part of such book or number of each newspaper or serial as fully as if he were the author of the same."

The evidence abundantly supports the conclusion of the courts below that Ocampo was the administrator, manager, and one of the owners of the newspaper known as "El Renacimiento," and there was no error in holding him to be a proprietor within the meaning of § 6.

Finally, it is contended that the Supreme Court of the Philippines had no jurisdiction to increase the punishment of Kalaw. The court was established by Act No. 136 of the Philippine Commission (June 11, 1901), with original

and appellate jurisdiction. By § 18 it was given appellate jurisdiction over the courts of first instance; and by § 39 it was enacted that "The existing Audiencia or Supreme Court is hereby abolished, and the Supreme Court provided by this Act is substituted in place thereof." It is in effect conceded that under the Spanish system the courts of first instance were deemed examining courts, having a sort of preliminary jurisdiction, and that their judgments of conviction or acquittal were not final until the case had been passed upon in the Audiencia or Supreme Court. But it is contended that this was so far changed by General Orders, No. 58, §§ 42, 43, 44, and 50, and by Act No. 194 of the Philippine Commission, § 4 (August 10, 1901), that the judgments of the court of first instance are final unless an appeal be taken. And so it was held, with respect to cases other than capital, in *Kepner* v. *United States*, 195 U. S. 100, 121. But this does not settle the question of the jurisdiction of the Supreme Court of the Islands where an appeal is taken. In the acts referred to, the right of the Government, as well as of the defendant, to appeal from the judgment in a criminal case was recognized. In the *Kepner Case* it was held that § 5 of the act of Congress of July 1, 1902, in declaring that "no person for the same offense shall be twice put in jeopardy of punishment," prevented an appeal by the Government from a judgment of acquittal in the court of first instance. But in *Trono* v. *United States*, 199 U. S. 521, where the defendants appealed from a judgment of the court of first instance, which upon an indictment for murder had found them guilty of the lower crime of homicide, it was held the Supreme Court of the Islands had power to reverse the judgment and find the accused guilty of the higher crime of murder; distinguishing the *Kepner Case*. In *Flemister* v. *United States*, 207 U. S. 372, a judgment of the insular Supreme Court, increasing the sentence imposed by the court of first instance, was affirmed. See,

also, *Dowdell* v. *United States*, 221 U. S. 325, 327; *Pico* v. *United States*, 228 U. S. 225, 230. In short, the appellate jurisdiction of the Supreme Court of the Philippine Islands in criminal cases is not confined to mere errors of law, but extends to a review of the whole case. And such is the settled practice of that court. *United States* v. *Abijan*, 1 Phil. Rep. 83, 85; *United States* v. *Atienza*, 1 Phil. Rep. 736, 738.

Judgment affirmed.

CARLSON *v.* STATE OF WASHINGTON, ON THE RELATION OF CURTISS.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 307. Submitted March 17, 1914.—Decided May 25, 1914.

Although plaintiff in error, after setting up a Federal defense in the trial court, may not have based any exceptions upon the failure of that court to recognize it, if the appellate court did recognize, and by its decision necessarily overruled, that defense, this court must deal with the Federal question. *North Carolina R. R.* v. *Zachary*, 232 U. S. 248.

While, in ordinary cases, this court is bound by the findings of the state court of last resort, that court cannot, by omitting to pass upon basic questions of fact, deprive a litigant of the benefit of a Federal right properly asserted; and it is the duty of this court, in the absence of adequate findings, to examine the record in order to determine whether there is evidence which furnishes a basis for such a Federal right. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601.

After reviewing the congressional and state legislation in regard to the construction of the Lake Washington Waterway, *held* that Congress has refrained from authorizing any work on behalf of the Federal Government with reference to lowering the level of Lake Washington, and that all responsibility in that respect was assumed by the State and county; and, notwithstanding the contract was made by

an officer of the United States Army, it was not on behalf of the United States, but as representing the State of Washington.

Under the acts of Congress relative to the Lake Washington Waterway, no agency of the Federal Government could have arisen prior to the action involved in this case with respect to anything done in connection with the construction of the canal.

Orders given by an officer of the United States in connection with work not authorized by any act of Congress will not justify one violating the injunction of a state court as doing the act under the direction of officers of the United States in charge of Government work.

The fact that title to right of way for a canal has vested in the United States and after completion the Secretary of War is to take charge of the canal, does not make the United States responsible, prior to completion, where Congress has expressly declared that the canal will only be accepted after completion, and that the local authorities shall meanwhile assume all responsibility in connection therewith.

66 Washington, 639, affirmed.

THE facts, which involve a review of the legislation, state and Federal, in regard to the construction of the Lake Washington Waterway to Puget Sound, and the extent of the responsibility of the Federal Government therefor, are stated in the opinion.

Mr. Corwin S. Shank for plaintiff in error.

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

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error was adjudged by the Superior Court of Thurston County, in the State of Washington, to be in contempt of that court, in that, with notice of a decree made by it restraining and enjoining any further excavation of the Lake Washington Canal, or any lowering of the waters of Lake Washington, he proceeded to blow out an embankment at the head of the canal, which until that

time held the waters of the lake at their natural level, so as to permit these waters to flow into the canal and thereby lower the level of the lake. The Supreme Court of the State affirmed the judgment (66 Washington, 639), and the case comes here under § 237, Jud. Code, upon the ground that the acts done by plaintiff in error, and because of which he was held to be in contempt of court, were done under the direction and authorization of officers of the War Department of the United States, acting in the performance of their duties in constructing a public improvement consisting of a ship canal extending from Lake Washington to Salmon Bay, in pursuance of statutes of the United States.

Our examination of the Federal question is somewhat embarrassed because the findings and statements of fact by the state courts contain no finding respecting some of the facts that are alleged as the basis of the present contention of plaintiff in error. The inadequacy is attributable, no doubt, to the mode in which the alleged Federal right was asserted. Plaintiff in error having been brought before the trial court upon an order to show cause, based upon a sworn complaint or information made by the relator setting forth circumstantially the blowing out of the embankment in question by one Erickson and by plaintiff in error as his foreman, the latter in his answer denied that he blew out the embankment upon the orders of Erickson, and on the contrary averred that he "did so by express orders of the engineering department of the United States Government." There was testimony tending to support this averment, but the trial court, while making no specific finding upon the subject, in effect held that the work was done in behalf of the State of Washington, one of the parties to the cause in which the restraining decree was made. To its findings numerous exceptions were taken, but in none of these was any Federal right asserted, nor was any deficiency in the findings suggested. The Su-

preme Court, however, instead of disregarding the claim of Federal right upon the ground that it had been abandoned in the trial court, recognized the contention of plaintiff in error that the "work was done under the direction of the United States engineers who had charge of the work for the Government," and by its decision necessarily overruled it. We must, therefore, deal with the Federal question. *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 257.

Among the assignments of error is one based upon the refusal of the Supreme Court to find as a fact that the acts for the performance of which plaintiff in error was held guilty of contempt were done under the direction and authorization of officials of the War Department of the United States, acting in pursuance of and in accordance with the acts of Congress. While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611, and cases cited.

Since the present record appears to contain all the evidence that was submitted to the state courts, we proceed to supplement the statement made by the Supreme Court by adding such further facts pertaining to the asserted

claim of Federal right as might reasonably have been found, with the following result:

One Erickson, a general contractor, had entered into a contract for excavating a part of the Lake Washington Canal. The contract was in writing, dated August 16, 1910, and was made between "Arthur Williams, Captain Corps Engineers, United States Army, hereinafter represented as the contracting officer representing the State of Washington, on the one part, and C. J. Erickson, of Seattle, in the County of King, State of Washington, hereinafter designated as the contractor, of the second part." The work covered by the contract was nearing completion when, on October 22, 1910, in an action pending in the Superior Court in and for the County of Thurston, between William L. Bilger and others, plaintiffs, and the State of Washington, King County, and Erickson, defendants, upon the application of the plaintiffs for an order enjoining defendants from removing the embankment between the excavated portion of the canal and Lake Washington, the court, being satisfied that such removal might tend to lower the waters of the lake to the detriment and damage of the plaintiffs, announced that a restraining order would issue. In accordance with this announcement a formal decree was made under date October 28. Erickson had notice of the announced decree, and plaintiff in error, who was acting as his foreman upon the work, had written notice of it on October 26, after which he proceeded to blow up the embankment, contrary to the prohibition. Under the state practice, the decree bound them from the time they were informed of it, although it was not yet formally entered. There was evidence tending to show that plaintiff in error acted under orders coming not from Erickson, but from Captain Williams; and his own testimony was to this effect. Other evidence tended to show that the canal strip or right of way was in the control of the War Department, with a watchman actually upon

the ground. The contract was not introduced in evidence, and there was only meagre testimony as to its contents, which left it doubtful whether the final work of excavating the opening between the head of the canal and the lake was within its provisions. Since there is no distinct finding upon this subject, we will consider the case in both aspects.

The act of Congress especially invoked as authority for what was done by plaintiff in error under direction of Captain Williams, is the River and Harbor Act of June 25, 1910 (36 Stat. 630, 666, c. 382), which contains the following:

"Puget Sound—Lake Washington waterway: Continuing improvement by the construction of a double lock, with the necessary accessory works, to be located at 'The Narrows,' at the entrance to Salmon Bay, in accordance with the project set forth in House Document Numbered Nine hundred and fifty-three, Sixtieth Congress, first session, one hundred and fifty thousand dollars; and the Secretary of War may enter into a contract or contracts for such material and work as may be necessary to complete said lock and accessory works, to be paid for as funds may be provided from time to time by law, not to exceed in the aggregate two million two hundred and seventy-five thousand dollars, including the amount herein appropriated: *Provided*, That before beginning said work, or making such contract or contracts, the Secretary of War shall be satisfied that King County, or some other local agency, will do the excavation in the waterway above the lock to the dimensions recommended in said project, and will also secure the United States from liability for any claims or damages on account of the grant made to James A. Moore or his assigns by the Act of Congress approved June eleventh, nineteen hundred and six, or on account of the lowering of the level of Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway."

In order to correctly appreciate the meaning and effect of this language, it is necessary to refer to House Document No. 953, 60th Cong., 1st Sess. (Vol. 20), and to certain previous acts of Congress therein mentioned; and while reviewing these acts we may at the same time consider whether any of them contains any justification of what was done by plaintiff in error.

By way of preface, it should be stated that the city of Seattle lies between the tidal waters of Puget Sound and Lake Washington, the latter being a body of fresh water two miles or more in width and nineteen miles or more in length, and having a natural level 30 feet or more above mean low water in the Sound. Between this lake and the Sound is Lake Union, a smaller body of fresh water (covering about 1,000 acres), and having a natural level much lower than that of Lake Washington, yet considerably above the tide. The lakes had independent natural outlets. Salmon Bay is a small body of water connected through Shilshole Bay with Puget Sound, and is (or was) affected by the ebb and flow of the tide. The outlet of Salmon Bay is known as "The Narrows." Salmon Bay and Lake Union are wholly within the exterior limits of Seattle, and the city has also a considerable frontage on Lake Washington. This lake, as well as the city, lies within the limits of King County.

As early as the year 1890, September 19, 1890, 26 Stat. 426, 452, c. 907, Congress authorized a survey and estimate to be made for a ship-canal to connect the waters of these lakes with Puget Sound. A survey and report were made accordingly, but nothing resulted until 1894, August 18, 1894, 28 Stat. 338, 360, c. 299, when Congress appropriated $25,000 for dredging Salmon Bay, and the improvement of the waterway connecting its waters with the lakes, but with a proviso that no part of the money should be expended upon the improvement of the connecting waterway until the entire right of way and a release

from all liability to adjacent property owners had been secured to the United States free of cost and to the satisfaction of the Secretary of War. By act of March 2, 1895, 28 Stat. 910, 948, c. 189, $5,000 of this amount was authorized to be expended in making a definite survey and location of the improvement and in preparing a cadastral map showing each property required to be deeded to the United States or from which a release was required. The act of June 3, 1896, 29 Stat. 202, 234, c. 314, appropriated $150,000, again with the proviso that no part of it should be expended on the improvement of the waterway connecting the Sound with the lakes until the entire right of way and a release from all liability to adjacent property owners had been secured to the United States; and with the further declaration that the canal might be constructed either by the Smith's Cove route or by the Shilshole Bay route, in the discretion of the Secretary of War.

In 1898 a Board of Engineer Officers was appointed to determine the choice, and recommended the Shilshole Bay route, with a lock at the Narrows near the foot of Salmon Bay. This recommendation was approved by the Secretary of War April 14, 1899, and right of way proceedings were completed and deeds obtained and accepted by the Secretary of War in 1900.

The legislature of Washington, by act approved February 8, 1901, Sess. Laws, p. 7, granted to the United States the right to construct and operate the ship canal upon any lands belonging to and waters of the State in King County, within limits to be defined by the plans and specifications for the improvement as approved by the Secretary of War, with the right to raise the waters of Salmon Bay and to lower the waters of Lake Washington in the prosecution of the improvement.

Congress was still unwilling to sanction any particular project for the canal, and by act of June 13, 1902, 32 Stat. 331, 347, c. 1079, while an appropriation of $160,000 was

made under the usual designation for "Improving waterway connecting Puget Sound with Lakes Union and Washington," it was provided that this sum, together with the unexpended balance to the credit of the improvement, should be expended in dredging a low-water channel 10 feet in depth from Shilshole Bay through Salmon Bay to the wharves at Ballard (at the head of the Bay); with a further proviso that a board of engineers should be appointed by the Secretary of War to make surveys, examinations, and investigations to determine the feasibility and advisability of constructing a canal with necessary locks and dams, connecting Puget Sound with the lakes, of sufficient width and depth to accommodate the largest commercial and naval vessels, to examine the route for a similar canal connecting Elliott Bay with the lakes, and to report upon the relative advantages of all proposed routes; and it was declared that "Nothing herein shall be construed as the adoption of any project for the construction of a waterway connecting Puget Sound with Lakes Union and Washington." The Board reported, January 6, 1903, that a canal sufficient to accommodate the largest commercial and naval vessels was feasible, but not advisable, chiefly because of the great cost, estimated at over $8,000,000.

The act of March 3, 1905, 33 Stat. 1117, 1144, c. 1482, made a further appropriation of $125,000, limited to dredging the channel to Ballard.

Meanwhile, it appears, the people of Seattle had become discouraged about the prospect of obtaining Government aid, and therefore accepted the proposition of one James A. Moore to build upon the Government right of way a canal with a suitable timber lock, if the County of King would contribute $500,000 toward it; and an act of Congress of June 11, 1906, 34 Stat. 231, c. 3072, was secured, authorizing him to proceed with this work, subject to such conditions and stipulations as should be imposed by the

Chief of Engineers and the Secretary of War for the protection of navigation and the property and other interests of the United States, to include provision for the discharge of waters from Lakes Union and Washington, and afford adequate protection against claims for damages for changing the level of Lake Washington, and subject to provisos which required that plans and specifications should be approved by the Secretary of War, that Moore and his assigns should be liable for any damage occasioned by the construction of the lock and canal by overflow, by a lowering of the waters affected, or otherwise, and that the canal and lock when completed should be turned over to the United States ready for use and free of all expense.

The Moore plan included a timber lock between the lakes, and seems to have contemplated another lock to be constructed by the Government at the mouth of Salmon Bay. Shortly after the passage of the act just mentioned King County pledged its credit to the extent of $500,000 in aid of the Moore project. A little later, however, the local interests inaugurated a movement for the installation of a permanent masonry lock in place of the timber lock, and legislative authorization was procured (act of March 18, 1907, Sess. Laws, p. 582), for the establishment of an assessment district in order to impose upon the shore lands benefited a part of the cost of the improvement. The same legislature supplemented the act of 1901 by a specific grant of a right of way over state lands between the lakes (act of March 16, 1907, Sess. Laws, p. 498).

About the same time Congress was again appealed to, and by act of March 2, 1907, 34 Stat. 1073, 1108, c. 2509, the Secretary of War was authorized to "make a survey and estimate of cost of said waterway or canal with one lock, with a view to the construction of the same, in conjunction with the county authorities of King County or other agency, of sufficient size to accommodate the largest commercial or naval vessels afloat; or, if deemed more

advisable, with a view to the construction of a canal of less dimensions, and to submit dimensions and estimate of cost of same, together with a report upon what portion of said work will be done or contribution to be made by said county or other agency." And the provisions of the act of June 11, 1906, were thereby so modified as to permit Moore or his assigns to excavate a channel from deep water in Puget Sound at the mouth of Salmon Bay to deep water in Lake Washington, in lieu of constructing the canal and timber lock specified in that act. In June, 1907, Moore assigned his rights to a corporation created for the purpose of taking them over and coöperating with the assessment district in carrying out the work proposed to be done by local agencies; and it appears that some preliminary work was done upon the ground. By act of Congress of February 6, 1909 (35 Stat. 613, c. 83), the time allowed to Moore or his assigns for completion of the canal was extended until June 11, 1912.

In view of the history of the matter, the phrase "waterway or canal with one lock" in the act of 1907 evidently indicated a lock at The Narrows, and a continuous waterway thence to Lake Washington; and so it was construed. Pursuant to the authorization of Congress, an elaborate report of a survey and estimate of the cost of the proposed waterway was made by Major Chittenden, of the Engineer Corps, under date December 2, 1907, and submitted with the approval of the Division Engineer to the Chief of Engineers at Washington. It was reviewed by the Board of Engineers for Rivers and Harbors, and approved by them under date March 30, 1908, transmitted by the Chief of Engineers, with his approval, to the Secretary of War, and by the Acting Secretary transmitted to Congress under date May 20, 1908. It is this report and the accompanying documents which constitute House Doc. No. 953, 60th Congress, 1st Sess., Vol. 20, referred to in the act of June 25, 1910, 36 Stat. 630, 666, c. 382, above quoted.

The project as thus submitted contemplated the construction of a double lock, to be located at The Narrows at the entrance to Salmon Bay, and an unbroken waterway through Salmon Bay and Lakes Union and Washington, the differences in level to be overcome by raising Salmon Bay and lowering Lake Washington approximately to the level of Lake Union. With reference to that part of the act of 1907 requiring report to be made as to what portion of the work would be done or contribution made by King County or other agency, the recommendation was that in lieu of a cash contribution the local interests should be asked to do a specific portion of the work. Major Chittenden proposed that the Government should build the lock, and that the local agency should excavate the canal. His recommendation to this effect was concurred in by the Division Engineer and by the Board of Engineers for Rivers and Harbors, and the Board further recommended—"That the undertaking of the project by the United States be made contingent upon the furnishing to the Secretary of War of satisfactory evidence—First. That King County or other local agency will do the excavation in the waterway above the lock to the dimensions recommended. Second. That the said King County or other local agency will hold the United States free from any claims or damages on account of the grant made to James A. Moore or his assigns on account of the act of June 11, 1906. Third. That the said King County or other local agency will hold the United States free against any claims or damages on account of lowering the level of Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway."

As will appear by reference to the act of 1910, these recommendations were approved and adopted by Congress as a part of the project, and the appropriation, as well as the authorization of the contract, was confined to the construction of a double lock at the Narrows. From the fore-

going review, it becomes evident that prior to this act all that was done by authority of Congress on the part of the Federal Government (aside from surveys and estimates and the acceptance of a conveyance of lands for the right of way of the canal), consisted of dredging work in Salmon Bay; and that the first construction work authorized in aid of the ship canal proper was that provided by the act of 1910, and was limited to the construction by the Government of a lock at the Narrows. It is further evident that at all times, and notably in the act of 1910, Congress has scrupulously refrained from authorizing anything to be done on the part of the Federal Government with reference to lowering the level of Lake Washington, raising the level of Salmon Bay, or otherwise altering the level of any part of the waterway, and that by the act of 1910 it was expressly provided that all responsibility for this should be assumed by King County or some other local agency.

Now, the *Bilger* suit, as appears by the decree therein already mentioned, was brought by parties who were owners of shore lands abutting upon Lake Washington, and riparian rights pertaining thereto, and the action was based upon the injury threatened to their property and rights by the material lowering of the water of that lake which was a necessary part of the public improvement. The defendants were the State, the County, and the contractor, and the object of the decree forbidding the further excavation of the canal was to prevent the lowering of the water to the detriment of plaintiff's property rights. There is nothing to show that the United States had acquired any rights as against these plaintiffs or other property owners of the same class, and any assumption by the War Department of responsibility for interfering with the natural level of the lake is inconsistent with the whole course of legislation to which reference has been made, and especially with the act of 1910. And this renders more

clear, what would probably be sufficiently plain from the language above quoted from the instrument, that the contract of August 16, 1910, between Captain Williams and Erickson was made not in behalf of the United States, but in behalf of the State of Washington. An engineer officer of the United States Army was probably selected to represent the State as a matter of convenience, in view of the fact that before acceptance of the finished work by the Government, the approval of the Secretary of War was a necessary prerequisite. But this did not in any wise enlarge the authority of Captain Williams with respect to the performance of the agreement. The act of Congress gave him no authority to act in behalf of the Federal Government with respect to the work of excavating the canal, or making a connection between it and Lake Washington which would necessarily lower the level of that lake. Hence it is a matter of no moment, for present purposes, whether the work for which plaintiff in error was held guilty of contempt of court, and which he claims was done under order of Captain Williams, was within or without the Erickson contract.

We are aware that the Supreme Court of the State of Washington, upon review of the decree in the *Bilger* suit, held that while the actual work of dredging the canal was done by the State and the County, it was done on behalf of the United States. It was for this reason, in part, that the decree awarding an injunction to restrain the further excavation of the canal was reversed. *Bilger* v. *State*, 63 Washington, 457, 467. So far as this view may have influenced the court in declaring the policy of the State, we have no concern with it. But we deem it clear that, under the acts of Congress, no agency for the Federal Government could arise with respect to anything done in the construction of the canal or the lowering of the level of Lake Washington. Neither the fact that the title to the right of way was vested in the United States, nor

the presumed purpose that the Secretary of War should take charge of the work when finished, can override the evident policy of Congress that the canal should be accepted only when completed and ready for use, free of cost to the United States, and that the local interests should do the work of excavation and assume sole responsibility for lowering the level of the water.

Since we are of the opinion that Captain Williams derived no authority from the acts of Congress, it follows that the immunity here asserted with respect to acts done under his command is without legal support. And this renders it unnecessary to consider whether plaintiff in error, being subject to the restraint of the decree of the state court in the *Bilger* suit as an agent of Erickson, one of the parties thereto, could, without modification of that decree, have successfully claimed immunity for a violation of the restraint upon the plea that he acted under the authority of the Federal Government. Upon this question, therefore, we express no opinion.

Judgment affirmed.

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

MOTION OF THE STATE OF WEST VIRGINIA FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER TO THE BILL OF COMPLAINT OF THE COMMONWEALTH OF VIRGINIA.

No. 2, Original. Argued April 16, 17, 1914.—Decided June 8, 1914.

The ordinary rules of legal procedure applicable to cases between individuals cannot be always applied to controversies between States involving grave questions of law determinable by this court under the exceptional grant of jurisdiction conferred by the Constitution.

In this case the defendant State is permitted to file a supplemental answer, the averments in which are to be considered as traversed by the complainant State, and the subject-matter of the supplemental answer is referred to the Master before whom previous hearings were had with directions to report at the commencement of the next term of this court.

THE facts, which involve the procedure and practice in an original case between two States of the Union and the rules to be applied in regard to the filing of a supplemental answer, are stated in the opinion.

Mr. William A. Anderson and *Mr. Randolph Harrison*, with whom *Mr. John B. Moon*, *Mr. John G. Pollard*, Attorney General of the State of Virginia, and *Mr. Samuel W. Williams*, former Attorney General, were on the brief, for complainant.

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

Mr. Sanford Robinson, with whom *Mr. Holmes Conrad* was on the brief, for the bondholding creditors.

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

This case, which was begun in 1906, was elaborately argued in 1907 on a demurrer, which was overruled. 206 U. S. 290. It was again argued in 1908 on a motion to appoint a Master. 209 U. S. 514. Before that officer there was an extended hearing and a full report of all the matters involved was filed in March, 1910. It was then argued on a motion to take further testimony, and was ultimately heard in an argument which extended many

days, every party in interest being represented, in the month of January, 1911.

Notwithstanding these facts when in March, 1911, the court came to decide the controversy, although it fully reviewed and passed upon the fundamental issues, as its obvious duty required it to do, and fixed the principal sum due by the State of West Virginia to the State of Virginia, in view of the consideration due to the parties as States and that the cause was, as then said, "no ordinary commercial suit, but, . . . a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies," the controversy was not completely and irrevocably disposed of but was left open for a time not specified to the end that any clerical errors that might have crept into the calculations of the sums due could be corrected and to give the States time to consider the subject of liability for interest in the light of what had been decided and to agree as to the rate and period of the interest to be paid on the principal sum which was determined. 220 U. S. 1, 36.

On the convening of the court in the following October, 1911, a motion was made on behalf of the State of Virginia to proceed at once to a final decree. Listening to the suggestion of the State of West Virginia to the effect that it desired further time to consider the subject, and in view of the public considerations which had prevailed when the decree was entered, the motion of Virginia was overruled. 222 U. S. 17.

Yet further, when in November, 1913, another motion on the part of Virginia was made to set the case down to be finally disposed of at once upon the statement that no agreement between the parties was possible, again giving heed to the request of West Virginia through its constituted officers for a postponement for a stated time and to the statement that they were engaged in an honest en-

deavor to deal with the controversy and if possible to come to an agreement as to the subjects left open, the motion of Virginia was again refused, 231 U. S. 89, and as it was possible to give to the State of West Virginia all the time which that State in resisting the motion asked and yet secure against the possibility of the hearing being carried over to another term, the case was assigned for hearing on the thirteenth of April of this year. When that day was reached, the State of West Virginia, in accord with a motion filed some days before, prayed leave to be permitted to file a supplemental answer asserting the existence of credits, which if properly considered would materially reduce the sum fixed as due to the State of Virginia, the said answer in addition asserting various grounds why interest should not be allowed in favor of Virginia and against West Virginia on the sum due. Resisting this request the State of Virginia insists that the items embraced in the supplemental answer asked to be filed had in effect already entered into the considerations by which the principal sum due was fixed, and that if not, the case should not be postponed for the purpose of permitting the rights urged in the answer to be availed of because every item concerning such alleged rights was proved in the case before the Master, was mentioned in his report and was known or could have been known by the use of ordinary diligence by those representing West Virginia. And it is this controversy we now come to dispose of.

Without intimating any opinion whatever as to whether the items with which the proposed supplemental answer deals entered into the processes of calculation or reasoning by which the sum due was previously fixed, and moreover, without intimating any opinion as to how far the items embraced in the answer could serve as credits upon the sum previously found due and therefore to that extent reduce the amount, we think it is obvious that most of the

items embraced in the answer were contained in the Master's report, and in any event all were available then for every defense now based upon them if their consideration had been pressed in the aspect and with the assertions of right now made.

The question then is, Under these conditions ought the permission to file the supplemental answer be granted? We think it must be conceded that in a case between ordinary litigants the application of the ordinary rules of legal procedure would render it impossible under the circumstances which we have stated to grant the request. We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States involving grave questions of public law determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving State, also in our opinion operates no injustice to the opposing State, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

Because of these convictions, we therefore make the following order:

That the motion on the part of the State of West Virginia to file the supplemental answer be and the same is hereby granted; and that the averments in such answer be and the same shall be considered as traversed by the State of Virginia; that the subject matter of the supplemental answer as traversed be at once referred for consideration and report to Charles E. Littlefield, Esq., the Master before whom the previous hearings were had, with directions to hear and consider such evidence and testimony as to the matters set forth in the supplemental answer as the State of West Virginia may deem advisable to proffer and such counter showing on the part of the State of Virginia as that State may deem advisable to make. The report on the subject to embrace the testimony so taken and the conclusions deduced therefrom as well as the views of the Master concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous decree of this court. Nothing in this order to vacate or change in any manner or in any particular the previous decree, and the same to stand wholly unaffected by the order now made or any action taken thereunder until the examination and report herein provided for is made and this court acts upon the same. It is further directed that the proceedings before the Master be so conducted as to secure a report on or before the second Monday of October, 1914.

MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK *v.* COHEN, EXECUTOR.

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

No. 160. Submitted April 17, 1914.—Decided June 8, 1914.

A Federal question may not be imported into a record for the first time by way of assignment of error made for the purpose of review by this court.

As a general rule, for the purpose of review by this court, rights under the full faith and credit clause of the Federal Constitution are required to be expressly set up and claimed in the court below.

Denial of full faith and credit to the statutes of another State cannot be made the basis of review by this court where it appears that the court below reached the same result that plaintiff contended for on grounds wholly independent of the Federal question and sufficient to sustain its action.

This court has already decided that state statutes, such as that of Texas imposing a 12% penalty and an attorney's fee, for damages for delay in payment of proper claims, are not unconstitutional under the Fourteenth Amendment as depriving life insurance companies of their property without due process of law or as denying them the equal protection of the law.

A payment made by a life insurance company to one of two claimants on receiving a bond of indemnity, *held*, under the circumstances of this case, not to have been the payment of a stakeholder seeking to discharge his duty but of a person espousing the cause of one claimant against the other and thereby subjecting himself to the legal consequences arising from his action.

This court cannot review on its merits a case which it must dismiss for want of jurisdiction.

THE defendant in error was the plaintiff below and sued the Manhattan Life Insurance Company, which we shall speak of as the Company, on two policies on the life of Jacob Cohen in his own favor, written in 1893 in Texas where Cohen resided, the Company then doing business in that State through an agency. It was averred that although the Company had admitted liability on the policies, it had not paid the loss and was therefore responsible

not only for the sum due insured with interest, but also for 12 per cent. as statutory penalty or damages and $1000.00 attorneys' fees.

The answer denied liability to the plaintiff. It admitted issuing the policies, but averred that in 1907 the insured, Cohen, borrowed $875 on each and pledged the policies as security, which loans were unpaid. It was averred that in July, 1907, Cohen sold to Hilsman, of Atlanta, Georgia, his interest in the policies and executed assignments and orders on the Company to deliver the policies to him on payment of the debts for which they were pledged. These documents were annexed to the answer. The origin and course of the negotiation which ultimated in the assignments were thus stated: Hilsman had an agent at San Antonio, Texas, where Cohen lived. The transactions "were begun" and "definitely agreed upon" between Cohen and the agent, "the agreement being that Hilsman would pay Jacob Cohen $460.00 for his equity in said policies, whereupon Cohen wired Hilsman to send papers, and the following correspondence, by letter and telegram, passed between them." Hilsman in answer to the first telegram from Cohen wrote enclosing him assignments of the policy and necessary notices to the Company with directions for their execution and asking besides for certain papers which he required to show Cohen's ownership free from the claims of other persons, the letter ending with the statement, "Send all the papers, that are herewith enclosed, duly executed in a sealed envelope, with this draft attached, (evidently the draft for the price) and upon arrival if in good shape—we will duly honor." Cohen replied by letter explaining that he did not have particular papers which had been asked for, but had others which he thought were their equivalent and proposing to execute the assignment and send these papers, the letter concluding with the statement, "if this meets with your approval please wire me upon receipt of this letter and I

shall forward papers." Hilsman answered by telegram favorably and confirmed it by letter saying that if the papers were sent, "we will promptly honor the draft, provided the papers are in good shape." On the day the telegram last referred to was received, Cohen transmitted the executed papers with the accompanying documents by mail saying, "I beg to inclose all documents . . . which I trust you will find correct and will honor my draft for $460.00 attached to these documents." The answer specifically alleges that the draft was sent from San Antonio for collection through a bank in that place and as the answer states that the draft was attached to the papers and this conformed to the instructions which we have seen were given by Hilsman to Cohen, the answer therefore in effect averred that the papers and draft were delivered to a bank in San Antonio to be transmitted to Atlanta, the papers to be delivered to Hilsman if after examination he found the papers satisfactory and paid the draft. The answer then in paragraph 8 contained the following averments:

"Said Jacob Cohen, Hilsman and his said agent were engaged in speculative transactions, and said assignments were made as a part of and in connection with a certain transaction in what is commonly called 'cotton futures,' the money being paid to and received and used by Jacob Cohen to speculate in the future price of cotton, without its being contemplated that there would be actual delivery thereof, or bargain and sale, the said Hilsman or his said agent, being interested in the transaction, and the purpose of the transaction being known by all the parties, which purpose was carried into effect, through the said agency of J. H. Hilsman and J. H. Hilsman he being engaged in the brokerage business."

It was averred that after the death of Cohen both his executor and Hilsman, as owners of the policies, made demand upon the Company for payment; that the Company admitted liability to some one and simply professed its

desire to have the matter as to who was owner of the policies settled so that it might make payment with safety. To reach this result it was alleged that an unsuccessful effort was made to have the parties agree to appear in a suit where as to both of them, the Company admitting liability, their rights might have been determined; and that failing in this respect and being advised that under the law of Georgia where the assignment to Hilsman was made, it was legal and therefore his claim was valid, as the most expeditious way of clearing up the matter the Company paid Hilsman and took from him an indemnity bond. While admitting that before the assignment and at the time of its delivery Hilsman had no interest whatever in the life of Cohen, it was nevertheless averred that the assignment of the policies was valid and authorized under the laws of the States of Georgia and New York. Averring moreover that all the acts of the Company in the premises had been in good faith and arose not from any desire to deny liability but simply from an honest purpose to have it determined who owned the claims under the policy, it was asserted that there could be in no event any liability for interest by way of damages and for the attorney's fees as prayed.

By leave the plaintiff amended his petition "in replication and answer to . . . the answer of the defendant, Manhattan Life Insurance Co.," and asserted among other things that the assignments of the policies alleged in the answer were void upon two distinct grounds: (1) Because "under and by virtue of the laws of the State of Texas, the State of New York and the State of Georgia, and each of them, an assignment of a life insurance policy to a person without insurable interest in the life of the insured, is invalid and not binding upon the assignor or his representative." (2) Because "said alleged assignments of the policies of insurance sued upon herein are invalid and not binding upon it and were without legal consideration un-

der the laws of the State of Texas, the State of New York, and the State of Georgia, for this, that at the time that said assignments and each of them were made, executed and delivered, that the said Jacob Cohen, J. H. Hilsman and his said agent, were engaged in speculative transactions and that said assignments and each of them, were made as a part of and in connection with the said transactions, in what is commonly called 'cotton futures,' the money being paid to and received and used by the said Jacob Cohen to speculate in future prices of cotton without its being contemplated that there would be actual delivery thereof, or bargain and sale; the said Hilsman and his agent being interested in the transaction and the purpose of the transaction being at and before the time known to and by all the parties which said purpose was carried into effect through the said agency J. H. Hilsman and J. H. Hilsman, he being engaged at that time in the brokerage business; all of which said facts were well known to the defendant Insurance Company at and before the time that it paid the said policies to the said Hilsman, as in its said answer alleged and set forth."

For the purpose of the trial by the court without a jury a written statement of facts was agreed to by both parties in the form of petitioner's case, the case of the defendant company and the reply of the petitioner. The statement of the plaintiff admitted the issue of the policies, the lending of the money by the Company and the pledging of the policies to secure it, the transfer or assignment by Cohen for the consideration we have stated and under the circumstances which we have detailed, the gambling nature of the transaction being expressly stated in accordance with the averment of the answer of the Company and with the allegation of the amended pleading of the plaintiff, the death of Cohen, the claim of both parties on the insurance company, the effort of the Company to secure a suit to which both the claimants should be parties in order to

relieve it from responsibility, its failure to secure that result and its payment to Hilsman of the amount upon the giving by him of indemnity, all substantially as alleged in the pleadings we have stated. The agreed facts contained this statement:

"It was not the purpose of the Insurance Company to contest or delay payment, and the payment to Hilsman was made under the circumstances above set out. It is not the purpose of this agreement to determine how far, if at all, the facts in respect to notice and good faith are material issues in this case, that being deemed a question of law, nor is this agreement to be construed as admitting as a matter of law that Hilsman had any right to said policies or their proceeds, or that said payment, or any part thereof, was rightfully made to him. It is, however, agreed as a fact that Hilsman has not been repaid said sum of $460.00, and the Insurance Company has not been repaid the amount of said loan, except as above stated, and that nothing has yet been paid to the plaintiff."

The Company as part of its case introduced certain statutes of the State of Georgia and decisions of the court of last resort of that State interpreting the same for the purpose of showing that Cohen had a right to sell and Hilsman to purchase in Georgia the insurance policies, although Hilsman had no insurable interest in Cohen's life. In rebuttal the plaintiff introduced certain decisions of the court of last resort of Georgia deemed to establish the contrary result and also offered statutes of that State dealing with gambling transactions and the right to sue concerning the same. The trial court found the facts substantially as embodied in the statements referred to.

Mr. William J. Moroney for plaintiffs in error:

The Texas statute, as construed and applied in this case by the state court, is repugnant to the Fourteenth Amendment.

The judgment of the state court denied full faith and credit to the statutes of Georgia that were pleaded and proved in defense of this suit, in violation of the full faith and credit provision of the Constitution of the United States.

In support of these contentions, see Rev. Stat. Texas, Art. 3071; Civil Code Georgia, §§ 2114, 2116, 3077; *Atchison T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55; *Atlantic Coast Line Ry. Co.* v. *Wharton*, 207 U. S. 328; *Attorney General* v. *Lowrey*, 199 U. S. 639; *Bacon* v. *Texas*, 163 U. S. 216; *Beer* v. *Landman*, 88 Texas, 450; *Bolin* v. *St. Louis Ry. Co.*, 61 S. W. Rep. 444; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Cawthorne* v. *Perry*, 76 Texas, 338; *Cheeves* v. *Andres*, 87 Texas, 287; *Clark* v. *San Francisco*, 124 U. S. 639; *Collins* v. *Texas*, 223 U. S. 288; *Dartmouth College Case*, 4 Wheat. 518; *El Paso Ry. Co.* v. *Gutierrez*, 215 U. S. 87; *Estay* v. *Luther*, 142 S. W. Rep. 649; *Farmers' Ins. Co.* v. *Dobney*, 188 U. S. 301; *Fidelity Life Ins. Co.* v. *Mettler*, 185 U. S. 308; *Fidelity Life Ins. Co.* v. *Zapp*, 160 S. W. Rep. 139; *Furman* v. *Nichol*, 8 Wall. 44; *Ex parte Garland*, 4 Wall. 333; *Grigsby* v. *Russell*, 222 U. S. 149; *Gulf, C. & S. Fe Ry. Co.* v. *Dennis*, 224 U. S. 503; *Gulf, C. & S. Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Illies* v. *Fitzgerald*, 11 Texas, 429; *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 264; *Ludy* v. *Larson*, 37 L. R. A. (N. S.) 907; *Martin* v. *West*, 224 U. S. 191; *Murdock* v. *Memphis*, 20 Wall. 590; *Northwestern Life Ins. Co.* v. *McCue*, 223 U. S. 234; *Pacific Life Ins. Co.* v. *Williams*, 79 Texas, 633; *St. Louis Ry. Co.* v. *Wynne*, 224 U. S. 354; *Schofield* v. *Turner*, 75 Texas, 324; *Southwestern Ins. Co.* v. *Woods Nat'l Bank*, 107 S. W. Rep. 114; *Stanley* v. *Schwalby*, 162 U. S. 255; *Tilt* v. *Kelsey*, 207 U. S. 42; *Vandalia Ry. Co.* v. *Indiana*, 207 U. S. 359; *Washington Life Ins. Co.* v. *Gooding*, 49 S. W. Rep. 123; *Wilson* v. *Black Bird Creek Co.*, 2 Pet. 245; *Yazoo &c. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

Mr. Wilmer S. Hunt, Mr. Sterling Myer and *Mr. C. A. Teagle* for defendant in error:

The Supreme Court will not consider questions not raised and passed on in the court below, nor consider other Federal questions than the one raised.

The assignment of the insurance policies was a Texas contract.

If the contract was a Georgia contract, yet if invalid under the laws of Texas, the law of comity between States does not require its enforcement by the Texas courts.

The contract of assignment was even void under the laws of Georgia.

Article 3071, Texas Rev. Stat., is constitutional.

There was no right of the insurance company to recover the $460.00 paid to Cohen by Hilsman.

A general assignment raising a Federal question will not be considered.

On error from a state court, the Supreme Court will only consider the Federal question which gives it jurisdiction.

In support of these contentions, see Acts Texas Legislature 1907, p. 172; 24 Am. & Eng. Ency. of Law, 1052; *Armstrong* v. *Toler*, 11 Wheat. 258; *Arnott* v. *Coal Co.*, 23 Am. Rep. (N. Y.) 190; *Association* v. *Mettler*, 189 U. S. 150; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Beardsley* v. *Beardsley*, 138 U. S. 262; *Beer* v. *Landaman*, 88 Texas, 450; *Bigelow* v. *Benedict*, 70 N. Y. 206; *Cameron* v. *Barcus*, 71 S. W. Rep. 423; *Capitol City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Cheeves* v. *Anders*, 87 Texas, 291; *Clark* v. *McDade*, 165 U. S. 170; *Cothran* v. *Telegraph Co.*, 83 Georgia, 25; *Dewey* v. *Des Moines*, 175 U. S. 193; *Dugger* v. *Ins. Co.*, 81 S. W. Rep. 335; *Embree* v. *McLean Co.*, 11 Tex. Civ. App. 493; *Falkner* v. *Hyman*, 142 Massachusetts, 53; *Farmers Ins. Co.* v. *Dabney*, 189 U. S. 301; *Fletcher* v. *Williams*, 66 S. W. Rep. 861; *Fowler* v. *Bell*, 90 Texas, 150; *Furman* v. *Nichols*, 8 Wall. 75; Georgia Code,

Arts. 3537, 3668, 3671; *German Society* v. *Dormitzer*, 192 U. S. 124; *Green* v. *Van Buskirk*, 7 Wall. 139; *Hamblen* v. *Western Land Co.*, 147 U. S. 531; *Hill* v. *Spear*, 50 N. H. 253; *Horner* v. *United States*, 143 U. S. 570; *Insurance Co.* v. *Bank*, 107 S. W. Rep. 114; *Insurance Co.* v. *Williams*, 79 Texas, 633; *Insurance Co.* v. *Hazelwood*, 75 Texas, 351; *Irvin* v. *Williams*, 110 U. S. 508; *Jones* v. *Aiken*, 80 S. W. Rep. 285; *Keokuk & H. B. Co.* v. *Illinois*, 175 U. S. 193; *Maxwell* v. *Newbold*, 18 How. 511; *McLaughlin* v. *Fowler*, 154 U. S. 663; 1 Meechum on Sales, §§ 8430, 484; *Messenger* v. *Mason*, 10 Wall. 507; *Murdock* v. *Memphis*, 20 Wall. 590; *Myrick* v. *Thompson*, 99 U. S. 297; *Norris* v. *Logan*, 97 S. W. Rep. 20; *Osborne* v. *Florida*, 164 U. S. 650; *Oscanyon* v. *Arms Co.*, 103 U. S. 261; *Pope* v. *Hanke*, 40 N. E. Rep. 842; *Railway* v. *Dennis*, 224 U. S. 503; *Railway* v. *Wynne*, 224 U. S. 354; Rev. Stat. Texas, Art. 3071; *Schonfield* v. *Turner*, 75 Texas, 329; *Seligson* v. *Lewis*, 63 Texas, 220; *Storey* v. *Solomon*, 71 N. Y. 422; *Sweeney* v. *Ousley*, 53 Kentucky, 413; *Telegraph Co.* v. *Blanchard*, 68 Georgia, 299; *Tilt* v. *Kelsey*, 207 U. S. 43; *Tracey* v. *Talmage*, 67 Am. Dec. (N. Y.) 132; *Wheeless* v. *Myer*, 12 S. W. Rep. 712; *Wilson* v. *Namie*, 102 U. S. 572; *Wilton* v. *Ins. Co.*, 78 S. W. Rep. 403; *Zipcey* v. *Thompson*, 1 Gray (Mass.), 242.

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

Upon the pleadings which we have just stated and the facts stipulated, the trial court gave judgment for the plaintiff, Cohen, against the defendant company for the amount of the policies less the sums which had been loaned thereon by the Company with interest and with the statutory penalties and attorney's fees claimed.

To recapitulate, it suffices to say that the assignments of error made by the Company in the court below for the

purpose of the appeal by it taken but expressed the defenses resulting from its answer and the stipulated facts which we have stated. That is to say, reliance was placed (1) upon the proposition that in any event the recourse of the plaintiff was against Hilsman and not against the Company; (2) that the transfer of the policies to Hilsman was a Georgia contract and valid under the law of that State because the existence of insurable interest at the time of the transfer, although necessary under the Texas law, was not necessary under the Georgia law; (3) that as in any event the transaction out of which the assignment of the policies from Cohen to Hilsman grew was admittedly a gambling one, the court would not allow the executor of Cohen to derive any rights from assailing that transaction, but would leave the parties where their illegal contract had placed them, that is, let the assignment to Hilsman stand, and hence leave no right in Cohen, executor, to recover; (4) that the court erred in giving judgment for the statutory penalties and damages because under the circumstances stated the liability to pay them was not embraced by the statute under which they were imposed and that if the statute, as construed, imposed the damages and attorney's fee which were allowed, it was in violation of § 1, of the Fourteenth Amendment.

In an elaborate opinion the court disposed of all these contentions. It held that the suit need not be brought against Hilsman but that it could be brought directly against the Company. It decided that the contract of assignment was a Texas contract and for want of insurable interest in Hilsman was invalid under the laws of that State, although it was in substance admitted that it would have been valid, so far as the question of insurable interest was concerned, if it had been a Georgia contract. Coming to consider the fact that both parties had conceded that the transaction out of which the assignment of the policies grew was purely of a gambling nature and that that fact

had been stipulated, the court refused to sustain the following proposition which was insisted upon by the defendant company: "When an insurance policy is assigned as part of a gaming transaction, the law will give no relief to either party, or to their heirs, executors or assigns, regardless of all other questions, but will leave the parties where they have voluntarily placed themselves." On the contrary the court, relying upon the Texas law upon that subject, the Georgia law on the same subject and the principles of general law applicable thereto, held that instead of leaving the assignment growing out of the gambling transaction enforceable in the hands of Hilsman it would in consequence of the illegality, strike down the whole transaction and therefore leave the policy in the hands of Cohen the insured, to whom it belonged before the assignment had been made. And for this reason also the court decided that the sum paid by Hilsman for the transfer need not be repaid by Cohen in order to recover. On the subject of the penalties the court referring to the cases of *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, and *Farmers' & Merchants' Insurance Company* v. *Dobney*, 189 U. S. 301, held that the statute under which they were imposed was not repugnant to the Fourteenth Amendment and said: "The action of the Insurance Company in paying the money due on the policies was not, as in *Insurance Co.* v. *Woods Nat. Bank*, 107 S. W. Rep. 119, an offer of the Insurance Company to pay to the one of the two real claimants when it should be determined whom he was, but a voluntary payment to the rival claimant who had no right whatever to the amount due on the policy. The company has indemnified itself against its act in paying the money due on the policy to one who was not entitled to receive it; now let it resort to its indemnity."

At the threshhold we must dispose of a motion to dismiss. It is apparent from the statement of the case that the only express assertion of Federal right had reference to

the statutory penalty and the attorney's fee. The assignments of error however, assert violations of rights under the Constitution in many particulars, but more especially with reference to the action of the court in treating the sales of the policies as Texas contracts and refusing to apply the Georgia law which admittedly differed fundamentally from that of Texas. It is elementary that a Federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this court. Moreover as a general rule it is true that for the purposes of review by this court rights under the full faith and credit clause, § 1, Article IV of the Constitution, come within that class which are required to be expressly set up and claimed in the court below. *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491; *El Paso and Southwestern R. R.* v. *Eichel*, 226 U. S. 590, 597; *Chicago, Ind. and L. Ry. Co.* v. *Hackett*, 228 U. S. 559, 565. Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been expressly asserted below (see *Tilt* v. *Kelsey*, 207 U. S. 43, 51); the right to review under such condition being in effect but a result of the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided. But these concessions are irrelevant, even although it be further conceded that the ruling of the court below as to the necessity for an insurable interest and its governing the case by the law of Texas instead of by the law of Georgia brings this case within the doctrines just stated. We say this because of the existence of another and fundamental question which causes the concessions stated to be immaterial. Both parties, as we have seen, wholly independent of the existence of an in-

surable interest, affirmed the illegality of the transaction out of which the assignments of the policies grew because of the alleged gambling nature of the transaction and the admitted facts without dispute established that situation. There being thus an admission by both parties and no dispute concerning the illegality of the transaction and a difference only as to the consequences to arise from such illegality, it follows that the case reduces itself to a consideration of that subject. But on coming to its consideration it is plain that no question concerning the full faith and credit clause was involved in any contention made below by the plaintiff in error in that regard, since the rights deduced from the admitted illegality of the transaction were placed solely on considerations of the local law of the State of Texas and of the State of Georgia deemed to be applicable to such condition of things or upon what was deemed to be the controlling principles of general law on the subject. Indeed, so absolutely is this the case, that, as we have seen, the Company itself insisted on the illegality and based rights upon it. And it was only on behalf of the defendant in error that considerations involving the full faith and credit clause were suggested as controlling the results in consequence of the admitted illegality of the transaction as a gambling one. A condition which is illustrated by the fact that the reply petition of the plaintiff while accepting and reiterating the averment of illegality made in the answer of the defendant Company, in addition specially alleged that the illegality resulting from the gambling transaction caused the assignment of the policies to be void under the law of New York where the Company was organized and under the law of Texas, as well as under the law of Georgia. And it was for this reason that the proof which was offered as to the statute law of Georgia on the subject of gambling transactions and the decision or decisions of that State which it was deemed made the statute applicable were tendered on behalf of the plaintiff

and not by the defendant company. It would be indeed anomalous when the parties had both relied upon the illegality of the transaction upon grounds wholly independent of any Federal right and the case had been decided upon that ground, which in and of itself is sufficient to sustain the action of the court below, to permit one of the parties because of his dissatisfaction with the application of such principles to assert the existence of jurisdiction because the case rested on a Federal issue. It becomes hence obvious that the assignments of error outside of the one referring to the repugnancy to the Fourteenth Amendment of the statute imposing damages and penalties, affords not the slightest pretext for the exercise of jurisdiction and they therefore may be put out of view.

Coming to consider the latter subject it may not be doubted that the non-repugnancy of the assailed statute to the Constitution of the United States has been directly determined by this court in the cases upon which the lower court based its ruling. (*Fidelity Mut. Life Ass'n* v. *Mettler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney*, 189 U. S. 301.) But it is said that as previously upheld the statute as construed by the state court contemplated a liability for the penalties or damages and attorneys' fees only in case there was a wilful refusal to pay and therefore those decisions have no application here since the statute as applied in this case enforces a liability against the Company in spite of its action in the utmost good faith, taken solely for the purpose of determining to whom it must pay the sum due, liability as to which was frankly conceded. But the deduction simply disregards the basis upon which the court below rested its conclusion and invites us upon a conception of injustice to commit a wrong by reviewing a matter of purely local concern which is not within our cognizance. We say this because clearly the court below rested its conclusion as to liability for the penalty and damages not upon the construction of the

statute suggested, but upon the premise that the payment to Hilsman by the Insurance Company of the sum of the policies under the circumstances stated was a payment which took it out of the category of a mere stakeholder seeking to discharge his duty in good faith and placing it in the position of a person espousing the cause of one as against the other and thereby subjecting himself to the legal consequences arising from such action. And the considerations which we have stated also dispose of the contention concerning the wrong which it was insisted was done in declaring the assignment of the policies void because of the gambling nature of the contract and yet permitting the assignor to hold on to the price paid for such assignment. That question was involved in and controlled by the court's ruling concerning the illegal nature of the transaction and the principles applicable thereto, and therefore it is beyond our competency to review.

As the repugnancy of the statute concerning the damages and attorney's fee was the only semblance of ground for invoking our jurisdiction and as that ground was conclusively established to be without merit when the writ of error was sued out, it follows that there is nothing upon which to base jurisdiction and the writ of error must be dismissed.

Dismissed for want of jurisdiction.

TEXAS & PACIFIC RAILWAY COMPANY *v.* AMERICAN TIE & TIMBER CO., LTD.

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

No. 180. Argued January 20, 21, 1914.—Decided June 8, 1914.

Whether a class tariff includes a particular commodity is a controversy primarily to be determined by the Interstate Commerce Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the Act to Regulate Commerce.

The courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission.

Whether crossties are or are not lumber and therefore within the tariffs filed for the latter is a question on which there is great diversity of opinion even among experts upon the subject, and one that should be determined in the first instance by the Interstate Commerce Commission.

190 Fed. Rep. 1022, reversed.

THE facts, which involve the jurisdiction of the Federal courts of cases to recover damages against a railway company for refusing to accept interstate shipments without action first taken thereon by the Interstate Commerce Commission, are stated in the opinion.

Mr. Hiram Glass, with whom *Mr. W. L. Hall* was on the brief, for plaintiff in error:

The Circuit Court did not have power to determine the issues and grant the relief prayed for under the facts disclosed by the record.

The trial court should have instructed a verdict for the plaintiff in error.

The damages of defendant in error caused by its consent

to the wrongful cancellation of the contract by the Union Pacific Railway Company are not recoverable.

The verdict of the jury and the judgment of the court awarded greater damages than sued for.

In support of these contentions, see § 6, Interstate Commerce Act, June 29, 1906; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Int. Com. Comm.* v. *Illinois Cent. Ry. Co.*, 215 U. S. 452; *Morrisdale Coal Co.* v. *Penn. R. R. Co.*, 230 U. S. 304; *Mitchell Coal Co.* v. *Penn. R. R.*, 230 U. S. 247; *Southern Railway* v. *Reid*, 222 U. S. 424; *Atl. Coast Line* v. *Macon Grocery Co.*, 166 Fed. Rep. 206; *Smith* v. *Detroit &c. Ry.*, 175 Fed. Rep. 506; *C. I. & S. Co.* v. *K. & M. Ry.*, 178 Fed. Rep. 261; *Franklin* v. *Penn. R. R. Co.*, 203 Fed. Rep. 134; *Pacific Coast B. Co.* v. *Railroad*, 20 I. C. C. 546; *United States* v. *Ill. Terminal Ry. Co.*, 168 Fed. Rep. 548; *So. Pac. Ry. Co.* v. *Int. Com. Comm.*, 200 U. S. 552; *Howard Supply Co.* v. *C. & O. R. R.*, 162 Fed. Rep. 188; *Greason* v. *St. L., I. M. & S. Ry. Co.*, 86 S. W. Rep. 722; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Mugg* v. *T. & P. Ry. Co.*, 202 U. S. 242; *McDonald* v. *K. C. B. & N. Co.*, 149 Fed. Rep. 360; *Beck* v. *Pauli*, 52 Fed. Rep. 700; *Shouse* v. *Doane*, 21 So. Rep. 807; *Lapsley* v. *Howard*, 119 Missouri, 489.

Mr. Rollin W. Rodgers, with whom *Mr. R. P. Dorough* was on the brief, for defendant in error:

Having in effect a joint through lumber tariff, covering "lumber, all kinds," a carrier must transport all articles offered embraced in the broad meaning of the term lumber.

The competent evidence required on which to base an instruction to the jury that plaintiff in error had a lawful rate in effect to transport ties was offered by defendant in error.

The tariff in effect when filed was intended to cover ties and the contention now set up is a subterfuge.

The defendant in error is entitled to recover in this cause under § 1 of the Act to Regulate Commerce.

The charge of the court on cancellation of contract was proper under the evidence.

Sections 1, 3, 6, 8, and 9, of the Act to Regulate Commerce, 24 Stat. 379, 34 Stat. 584, apply to this case.

In support of these contentions, see *Am. T. & T. Co.* v. *K. C. S. Ry. Co.*, 175 Fed. Rep. 28; *Balt. & Ohio Ry. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *C., B. & Q. Ry.* v. *Feintuch*, 191 Fed. Rep. 488; *Int. Com. Comm.* v. *D., L. & W. Ry.*, 220 U. S. 235; *Int. Com. Comm.* v. *I. C. R. R. Co.*, 215 U. S. 426; *Lyne* v. *D., L. & W. Ry.*, 170 Fed. Rep. 847; *Montague* v. *Lowry*, 193 U. S. 38; *Norrington* v. *Wright*, 115 U. S. 188; *N. Y., N. H. & H. Ry. Co.* v. *Int. Com. Comm.*, 200 U. S. 361; *Penn. R. R. Co.* v. *Int. Coal Co.*, 230 U. S. 184; 1 Beach Modern Law of Contracts, § 122. See also the following cases decided by the Interstate Commerce Commission. *Blume* v. *Wells-Fargo & Co.*, 15 I. C. C. 53; *Enterprise Trans. Co.* v. *Penn. R. R.*, 12 I. C. C. 326; *Foster Bros.* v. *Duluth S. S. & A. Ry.*, 14 I. C. C. 232; *Hurlburt* v. *L. S. & M. S. Ry.*, 2 I. C. C. 122; *S. C.*, 22 *Id.* 81; *Ind. Frt. Bureau* v. *C., C., C. & St. L. Ry.*, 15 I. C. C. 367; *Joynes* v. *Penn. R. R. Co.*, 17 I. C. C. 361; *Lanning-Harris Co.* v. *St. L. & S. F. Ry.*, 15 I. C. C. 37; *Newton Gum Co.* v. *C., B. & Q. Ry.*, 16 I. C. C. 341; *N. Y. Board of Trade* v. *Pa. R. R.*, 3 I. C. C. 417; *Pitts* v. *St. L. & S. F. Ry.*, 10 I. C. C. 684; *Pac. Coast Biscuit Co.* v. *O. R. & N. Co.*, 20 I. C. C. 178; *Pueblo Trans. Assn.* v. *So. Pac. Ry.*, 14 I. C. C. 82; *Reynolds* v. *Railway Co.*, 1 I. C. C. 685; *Woodward* v. *Louis. & Nash. Ry. Co.*, 15 I. C. C. 170; *Washer Grain Co.* v. *Mo. Pac. Ry.*, 15 I. C. C. 147.

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

Basing its cause of action on the Act to Regulate Commerce the American Tie & Timber Company, defendant

in error, hereafter called the Tie Company, commenced suits in the Circuit Court of the United States for the Northern District of Texas against the Texas & Pacific Railway Company, plaintiff in error, and the Kansas City Southern Railway Company to recover damages alleged to have resulted from the refusal of the railway companies to furnish, in September, October and November, 1907, cars for the loading of oak railway crossties at various points on the line of the railways in Arkansas and Louisiana for shipment to Linwood, Kansas, beyond the lines of the companies. The cases were consolidated for trial, subject to a plea to the jurisdiction filed by the Kansas City Southern Railway Company, which plea was afterward sustained and the suit as to that company dismissed. There was a trial, however, as to the Texas & Pacific Railway Company, resulting in a verdict and judgment thereon for $17,112.33, and the writ of error now before us is prosecuted by the Railway Company to a judgment of the court below affirming the trial court. (190 Fed. Rep. 1022.)

At the close of the evidence a motion was made to dismiss "because under the facts and circumstances now disclosed by the record, and compatibly with the act of Congress of the United States to regulate interstate commerce, this court has no power to consider and decide the subject matters which are complained of, or to award the relief prayed for by plaintiff." The denial of this motion is assigned as error and we come at once to consider it and state only so much of the pleadings and evidence as is necessary to adequately present the issue to be decided.

The amended petition after averring that the Tie Company was a Louisiana corporation and that the Railway Company was a corporation organized under the laws of the United States, alleged in substance that in 1901 the Railway Company issued and filed with the Interstate Commerce Commission "its joint through lumber tariff, T. & P. No. 8500–H, applying on lumber, all kinds (except

Walnut and Cherry), lath and shingles and articles taking same rates from points on the Texas & Pacific Railway Co. to points in Kansas," by which a joint through rate of twenty-four cents per hundred pounds was put into effect from points on the Railway Company's line in Arkansas and Louisiana to Linwood, Kansas, "on, amongst other things, oak lumber," which rate it was averred had been continuously in effect from the date of the filing of the said tariff up to the happening of the events complained of.

It was averred that on July 23, 1907, the Tie Company entered into a contract with the Union Pacific Railway Company to deliver to said company f. o. b. cars Linwood, Kansas, 150,000 oak railway crossties of specified dimensions at the rate of fifteen thousand per month, beginning on or before October 1, 1907, at the price of 86 cents per tie, which contract was by its terms based on the rate of 24 cents per hundredweight fixed in the tariff filed as above stated in 1901. That for the purpose of performing said contract the Tie Company accumulated at stations on the Railway Company's line in Arkansas and Louisiana 44,541 oak crossties for shipment to Linwood, Kansas, and on October 10, 1907, requested the railway to furnish cars for the loading of the crossties at such points. It was alleged that after furnishing three cars, which were loaded by the Railway Company and shipped at the rate of 24 cents per hundred pounds, the Railway Company refused to provide further cars or to receive the crossties for shipment upon the ground, as stated by it, that it had no through rate applicable to oak railway crossties from the several points on its line to Linwood, Kansas. The petition charged, however, that the joint through lumber tariff above referred to and the rate of 24 cents thereby established included oak ties and that the railway's refusal to provide cars and to carry the ties at its published rate was an unjust and unreasonable discrimination against the Tie Company, against the several places on the Railway

Company's line where the ties had been accumulated and against the ties as an article of commerce, which discrimination, it was averred, was practiced by the Railway Company with the object of preventing the movement of the crossties to points beyond its line and of thus compelling the Tie Company to sell the ties which it had accumulated to the Railway Company. It was alleged that the refusal to transport the ties had resulted in unreasonable prejudice and disadvantage to the Tie Company and to the traffic in ties, and in benefit to the Railway Company as a purchaser and consumer of crossties, all of which constituted a violation of the Act to Regulate Commerce. It was averred that in consequence of the refusal of the Railway to furnish the cars and the resulting inability of the Tie Company to deliver the ties to the Union Pacific Railway under the contract, that company had cancelled the contract to buy the ties. And the amount sought to be recovered was alleged to be the loss resulting to the Tie Company consequent on such cancellation, together with punitive damages based on the "wilful, wanton and malicious" conduct on the part of the Railway Company, and a reasonable attorney's fee.

The Railway Company besides denying generally the allegations of the amended petition alleged that its joint through lumber tariff did not include a rate on oak railway crossties, but that crossties were a separate and distinct and well-recognized freight commodity, and that at the time mentioned in the petition it had not filed with the Interstate Commerce Commission any tariff under which it could lawfully accept for interstate shipment, at a through rate, the crossties offered by the Tie Company. The answer further denied that its failure to have in effect such a rate was a discrimination against crossties or the Tie Company or any locality, and alleged that oak crossties had never before been offered to it in Arkansas and Louisiana for shipment to interstate points on its lines or

connections so as to render it advisable to establish such a rate. It was averred that when the Railway Company first learned, in September, 1907, of the purpose of the Tie Company to ship crossties it at once notified the Tie Company that it had no through rate on ties and therefore would not be able to offer such a rate but would seek to establish a through rate of fifty cents per hundredweight if sufficient time was allowed it to give the public notices of the filing of the tariff as required by the statute. It was then alleged that thereafter the first intimation that the Railway Company had of the purposes of the Tie Company was a letter transmitted to one of its officers from the Interstate Commerce Commission informing the Railway Company of the fact that the Tie Company had filed an informal complaint with the Commission on the ground that although the Railway Company's tariff on lumber embraced crossties, it had announced its intention not to receive them under the lumber schedule, and protesting in advance against permitting the Railway Company to file a specific tariff on crossties at fifty cents per hundredweight, because, as compared with the 24 cent lumber rate, it would be unreasonable. That at once to avoid difficulty the Railway Company applied to the Interstate Commerce Commission to be allowed immediately to put into effect a cross-tie rate at 24 cents per hundred pounds, the same as the lumber rate, and such request was refused by the Commission. Request was then made to put in such a rate after five days' notice, which was likewise refused, and thereupon in January, 1908, the Railway Company issued and filed with the Interstate Commerce Commission a joint through lumber tariff amended so as to include at the lumber rate "wood railroad crossties, all kinds, car loads." The answer then charged that at no time until such tariff became effective, February 13, 1908, could the Railway Company have lawfully accepted and carried oak railway crossties under the provisions of the

Act to Regulate Commerce. Referring to an averment in the petition concerning the acceptance of three cars of crossties at about this time for shipment at the lumber rate, the answer averred that if the facts were true it furnished no basis for recovery, as the receipt of the ties inadvertently or otherwise in the absence of a rate would have been a violation of law and afforded no ground for inferring the obligation to continue to do so, and besides did not aid the plaintiff's case, which was based upon the refusal of the Railway Company to take freight at an established and existing rate, not upon any supposed obligation by estoppel to do so when there was no established rate. And by an amendment to the answer it was insisted that under § 9 of the Act to Regulate Commerce the plaintiff could not prosecute its action because by making a complaint, as it had done, to the Interstate Commerce Commission concerning the failure to treat the lumber tariff as embracing a rate on crossties, the plaintiff had elected to proceed before the Commission.

The evidence at the trial tended to support the allegations of the amended petition as to the making of the contract with the Union Pacific Railway Company, the accumulation of crossties at the several stations on the Railway's line, the request for cars for the shipment of the ties to Linwood, Kansas, the refusal of the Railway to provide the cars, the cancellation of the contract by the Union Pacific Railway Company, and the consequent loss to the Tie Company. The Railway Company's joint through lumber tariff was introduced in evidence and it was not disputed that by it a rate of 24 cents per 100 pounds was established on oak lumber and that oak railway crossties were not specifically mentioned. The Railway Company also introduced in evidence the correspondence between it and the Interstate Commerce Commission showing among other things the request to be allowed to put immediately into effect the cross-tie rate and the refusal of the

Commission to grant the request, and the other facts and circumstances stated in the answer. It is not disputable that the pivotal question in the case was whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business as developed in the testimony it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy and upon which its decision therefore depends.

There is no room for controversy that the law required a tariff and therefore if there was no tariff on crossties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come with the jurisdiction of the Commission. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Balt. & Ohio R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304. No question is made as to the controlling effect of the doctrine as a general rule, but it is urged that it is not applicable to this case for the following reasons:

(a) The foundation upon which the doctrine rests, it is

insisted, is the necessity of a uniform enforcement of the Interstate Commerce Act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another. But the argument proceeds to insist that upon the principle that where the reason for the application of a law ceases to exist the law itself ceases to apply, the settled construction of the Act to Regulate Commerce, announced and enforced in the *Abilene* and other cases, has here no application because it is so plain that oak crossties were included in the lumber rate as fixed in the tariff of the Railway Company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves since on the face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demonstrate such result than does the conflict and confusion in the testimony concerning whether crossties were included in the filed lumber tariff. And indeed the same demonstration arises from a consideration of some decided cases, as, for instance, *American Tie & Timber Company* v. *Kansas City So. Ry. Co. et al.*, 175 Fed. Rep. 28, 33, presumably a report of this case, where it appears that at the first hearing the trial judge was so clearly of the opinion that crossties were not lumber that he so charged the jury and directed a verdict for the Railroad Company. See also *Greason* v. *St. Louis &c. R. Co.*, 112 Mo. App. 116, where it is apparent that the same conclusion was reached.

(b) Because the question has been determined by the Interstate Commerce Commission in *Reynolds* v. *Railway*

Co., 1 I. C. C. Rep. 600, 685. An examination of that report, however, discloses that the railway had in effect a published rate on crossties *eo nomine* and the complaint was that it was unreasonable because it was higher than the rate on lumber. The ruling of the Commission was not that the lumber rate included a rate on ties, but that the rate on ties was unreasonable as compared with the lumber rate and should be reduced.

(c) Because the Railway Company by loading and carrying the three cars of ties under the 24-cent rate had itself recognized the applicability of the lumber rate to crossties and was concluded thereby. But without stopping to consider the tendency of the proof establishing the want of foundation for the proposition we think it is wanting in merit for this obvious reason: If, as we have seen, the question of whether crossties were embraced in the filed tariff concerning lumber was involved in such conflict and doubt as to require the action of the Interstate Commerce Commission, the situation was such that the Railway Company could not do by indirection that which the statute permitted it to do only by compliance with the law, that is, filing its tariffs in the regular way. Nothing could better serve to demonstrate this self-evident truth than by recurring to the fact that at the very inception of the controversy the request made by the Railway Company to the Interstate Commerce Commission to be allowed to immediately put in the rate on crossties was refused by that body.

(d) Because the Railway Company did not refuse to transport the ties in good faith and insisted upon the absence of a scheduled rate simply as a pretext and device for preventing the shipment of the ties and their delivery in performance of the contract with the Union Pacific Railway, and with the ulterior and wrongful motive of keeping the ties on its line so as to be able to purchase them itself from the Tie Company. But without pausing

to do more than direct attention to the fact that this proposition is necessarily disposed of by what we have said, that is, by the lawfulness, in view of the state of the existing and filed tariff, of the refusal until the Commission had acted, we think all the contentions under this last head are completely answered by the statement that the suit was based upon the unlawfulness of the action of the Railway Company in refusing to carry the ties in view of the filed tariffs, and therefore the contentions are not open for our consideration.

It results that error was committed by the court in declining to sustain the motion to dismiss for want of jurisdiction and therefore it is our duty to reverse.

Reversed.

MR. JUSTICE PITNEY dissents.

NEW YORK LIFE INSURANCE COMPANY *v.* HEAD.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 254. Argued March 10, 1914.—Decided June 8, 1914.

There is a clear distinction between questions concerning the operation and effect of the law of a State within its borders and upon the conduct of persons within its jurisdiction, and questions concerning the right of the State to extend its authority beyond its borders with the same effect; and a decision upon the former does not constitute a ground for refusing to entertain a writ of error to review the judgment of the state court involving the latter.

A State may not extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as to destroy and impair the

right of persons not its citizens to make a contract not operative within its jurisdiction and lawful in the State where made.

Under the full faith and credit clause of the Federal Constitution the courts of one State are not bound to declare a contract, which was made in another State and modified a former contract, illegal because it would be illegal under the law of the State where the original contract was made and of which neither of the parties is a resident or citizen.

The power that a State has to license a foreign insurance company to do business within its borders and to regulate such business does not extend to regulating the business of such corporation outside of its borders and which would otherwise be beyond its authority.

The Constitution and its limitations are the safeguards of all the States preventing any and all of them under the guise of license or otherwise from exercising powers not possessed.

A statute of Missouri regulating loans on policies of life insurance by the company issuing the policy, *held* not to operate to affect a modifying contract made in another State subsequent to the loan by the insured and the company neither of whom was a resident or citizen of Missouri.

241 Missouri, 403, reversed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court and also the power of a State to regulate the business beyond its borders of a foreign corporation licensed to do business therein, are stated in the opinion.

Mr. James H. McIntosh, with whom *Mr. Gardiner Lathrop*, *Mr. Cyrus Crane*, *Mr. O. W. Pratt* and *Mr. S. W. Moore* were on the brief, for plaintiff in error:

The original contract of insurance was entered into between non-residents of Missouri, who agreed that it should be controlled by the laws of New York. This was a valid provision and cannot be annulled by the courts of Missouri. *Smith* v. *Mutual Benefit L. I. Co.*, 173 Missouri, 329; *Burridge* v. *New York Life Ins. Co.*, 211 Missouri, 158; *Gibson* v. *Connecticut Fire Ins. Co.*, 77 Fed. Rep. 561; *London Assurance* v. *Companhia de Moagens*, 167 U. S. 149;

Kroegher v. *Calivada Colonization Co.*, 119 Fed. Rep. 641, 652; *Mutual Life Ins. Co.* v. *Dingley*, 100 Fed. Rep. 408.

The cases relied on by defendant in error which dealt with contracts of residents or citizens of Missouri, such as *Cravens* v. *Insurance Co.*, 148 Missouri, 583, 593; *Price* v. *Insurance Co.*, 48 Mo. App. 281; *Horton* v. *Insurance Co.*, 151 Missouri, 604, 612; *Burridge* v. *Insurance Co.*, 211 Missouri, 162; *Smith* v. *Mutual Ins. Co.*, 173 Missouri, 329; *Whitfield* v. *Insurance Co.*, 205 U. S. 489; *Equitable Life Ins. Co.* v. *Clements*, 140 U. S. 226; *Life Ins. Co.* v. *Russell*, 77 Fed. Rep. 94, are distinguishable.

The policy loan agreement was not a Missouri contract. It was signed and delivered outside the State of Missouri by parties who were non-residents of that State and cannot be controlled or governed by the Missouri non-forfeiture laws.

The original contract could be lawfully amended or changed by the loan agreement. 1 Cooley's Briefs Insurance, 900; *S. S. White Co.* v. *Delaware Ins. Co.*, 105 Fed. Rep. 642; *Leonard* v. *Charter Oak Ins. Co.*, 65 Connecticut, 529; *Fireman's Fund Ins. Co.* v. *Dunn*, 22 Ind. App. 333; *Kattelman* v. *Fire Assn.*, 79 Mo. App. 447.

The right of plaintiff in error to make contracts is protected by § 1 of the Fourteenth Amendment and to attempt to deprive it of this right raises a constitutional question and gives this court jurisdiction. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45, 52; *Door Co.* v. *Fuelle*, 215 Missouri, 421, 458; *Pennoyer* v. *Neff*, 95 U. S. 714, 722; *Union Bank* v. *Commissioners*, 90 Fed. Rep. 7; *Olcutt* v. *Supervisors*, 16 Wall. 677, 690; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Keller* v. *Insurance Co.*, 58 Mo. App. 557; *Whitfield* v. *Insurance Co.*, 205 U. S. 480; Greenhood on Public Policy, 2.

Mr. Buckner F. Deatherage, with whom *Mr. Goodwin Creason*, *Mr. James S. Botsford*, *Mr. W. P. Borland* and

Mr. James A. Reed were on the brief, for defendant in error:

The defendant, although a foreign corporation created and existing under the laws of New York, came into Missouri under its license and permission and made the contracts of insurance sued upon in these actions, in the State of Missouri, with the same force and effect and subject to the insurance laws of Missouri the same as if it had been and were a corporation created under the laws of Missouri instead of the laws of New York, and for the purposes of this case defendant must be taken to be the same in all respects as a Missouri corporation.

The contracts in these cases having been entered into in Missouri, have the same legal effect and force as if the insured had lived in Missouri, in which State he was born, instead of living in New Mexico, at the time of making these contracts. The people of all the States and Territories of the United States have the right to buy and sell real estate in Missouri, own property therein and enter into contracts therein, the same as citizens and residents of Missouri. See § 748, Statutes Missouri, regarding aliens, 1 Rev. Stat. Missouri of 1909, p. 355.

Under the Fourteenth Amendment plaintiffs were guaranteed the same right as if they had lived in Missouri. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *R. W. Co.* v. *Mackey*, 127 U. S. 205, 209; *Duncan* v. *Missouri*, 152 U. S. 377; *Frazer* v. *McConway Co.*, 82 Fed. Rep. 257; *Templar* v. *Bankers Board Ex.*, 131 Michigan, 254; *Steed* v. *Hamey*, 18 Utah, 367; *Pearson* v. *Portland*, 69 Maine, 278.

The question of the situs of contracts in cases where the question of their validity depends upon the laws of the State where they are made does not depend upon the residence of the parties. *Napier* v. *Bankers Ins. Co.*, 100 N. Y. Supp. 1072.

The policy was issued upon the life of a man residing, at the date of the issuing thereof, in the city of Chicago

in the State of Illinois; and, so far as the evidence in this case shows, that continued to be his residence up to the date of his death. If this policy is to be construed as an Illinois contract, the statute above referred to would not apply. *Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551; *Mutual Life Ins. Co. of New York* v. *Cohen,* 179 U. S. 262. Notwithstanding the fact that the policy was written upon the life of a person residing out of the State of New York, upon the evidence in this case the contract must be deemed to be a New York contract. The policy purports to be signed and delivered at the city of New York.

The residence of the parties has no influence in determining the place where a contract is made. *Milliken* v. *Pratt,* 125 Massachusetts, 374; *Golden* v. *Ekerb,* 52 Missouri, 260; *Richardson* v. *DeGinesville,* 107 Missouri, 422; *Ruhe* v. *Byck,* 124 Missouri, 178; *Reed* v. *Telegraph Co.,* 135 Missouri, 661; *Horton* v. *N. Y. Life Ins. Co.,* 151 Missouri, 604; *Elliott* v. *Des Moines Life Ass.,* 163 Missouri, 132; *Thompson* v. *Traders Ins. Co.,* 169 Missouri, 12; *Park* v. *Connecticut Ins. Co.,* 26 Mo. App. 511; *Clothing Company* v. *Sharpe,* 83 Mo. App. 385; *Pietri* v. *Seguenot,* 96 Missouri, 258.

The contention of defendant's counsel that its offer to pay $89.00 to satisfy a liquidated indebtedness for which the judgment given was for about $7500.00 and that such offer of $89.00 extinguishes plaintiff's liquidated demands, is not supported by anything in the law. 1 Cyc. 319; *Wetmore* v. *Crouch,* 150 Missouri, 671, 672, 682, 683. See *Cravens* v. *Insurance Co.,* 148 Missouri, 583; aff'd *Insurance Co.* v. *Cravens,* 178 U. S. 389.

These policies were and are Missouri contracts. *Cravens* v. *Ins. Co.,* 148 Missouri, 583; *S. C.,* aff'd 178 U. S. 389; *Equitable Life* v. *Clements,* 140 U. S. 226; *Whitfield* v. *Ins. Co.,* 205 U. S. 489; *Moore* v. *Ins. Co.,* 112 Mo. App. 696; *Ins. Co.* v. *Russell,* 77 Fed. Rep. 94, 23 C. C. A. 43; *Ins.*

Co. v. *Twyman*, 92 S. W. Rep. 335; *Capp* v. *Ins. Co.*, 94 S. W. Rep. 734; *Horton* v. *Ins. Co.*, 151 Missouri, 604; Joyce on Ins., § 194; *Napier* v. *Ins. Co.*, 100 N. Y. Supp. 1072; *Burridge* v. *Ins. Co.*, 211 Missouri, 158, 178.

Defendant's proposition that the loan contracts of 1904 had the effect of wiping out the policies is erroneous. *Smith* v. *Insurance Co.*, 173 Missouri, 329, 341; *Burridge* v. *N. Y. Life Ins. Co.*, 211 Missouri, 158, 178; *Cristensen* v. *N. Y. Life Ins. Co.*, 152 Mo. App. 551.

Defendant had no right to come into Missouri and make contracts in defiance of law. The right of contract is not an unlimited, unqualified one, but is always subject to the law in force at the time of making the contract. *Wilson* v. *Drumrite*, 21 Missouri, 325; *Villa* v. *Rodriguez*, 12 Wall. 339; *State* v. *Fireman's Ins. Co.*, 152 Missouri, 1; *State* v. *Cantwell*, 179 Missouri, 245; *Holden* v. *Hardy*, 169 U. S. 366; *Karness* v. *Insurance Co.*, 144 Missouri, 413; *Havens* v. *Insurance Co.*, 123 Missouri, 403; *Henry* v. *Evans*, 97 Missouri, 47.

The relation between an insurance company and a policyholder is fiduciary in its character, and one that calls for the protection of the legislature by wholesome legislation. Cases *supra* and *Smith* v. *Mutual Benefit Ins. Co.*, 173 Missouri, 329; *Mutual Life Ins. Co.* v. *Twyman*, 92 S. W. Rep. 335.

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

In March, 1894, Richard G. Head, a citizen and resident of New Mexico, being temporarily in Kansas City, Missouri, made application at a branch office of the New York Life Insurance Company for two policies of insurance for ten thousand dollars each on his own life for the benefit of his minor son, Richard G. Head, Jr. The application stated the residence of Head in New Mexico and it was stipulated that the policy applied for when issued should

be considered as having been issued in New York and be treated as a New York contract. When Head made the application he handed a note for the premium to the agent with instructions when the policies came to turn them over to a friend to hold for him. The policies were issued, were delivered as directed and were subsequently turned over to Head when he again came to Kansas City. All the premiums but the first, with perhaps one exception were paid in New Mexico or at an agency of the company in Colorado. Nine years after the issue of the policies, that is, in 1903, in New Mexico, Head transferred one of the policies to his daughter, Mary E. Head, the transfer having been either by way of original authority or ratification duly sanctioned by the proper probate court in the county of New Mexico where Head was domiciled. In 1904, Mary E. Head, under the policy of which she thus became the beneficiary borrowed from the New York Life Insurance Company the sum of $2,270. The loan was requested by a letter written from Las Vegas, New Mexico, to New York, and accompanied by the policy and an executed loan agreement in the form usually required by the company and which conformed to the requirements of the New York law. The loan bore 5 per cent. interest and the agreement provided that it should be payable at the home office in New York and that if any premium on the policy or any interest on the loan were not paid when due, "settlement of said loan and of any other indebtedness on said policy shall be made by continuing said policy, without further notice, as paid-up insurance of reduced amount, in accordance with Section 88, Chapter 690, of the Laws of 1892 of the State of New York."

There was default in April, 1905, in the payment of the interest on the loan and the premium on the policy and pursuant to the terms of the loan agreement and the law of New York the policy was settled, the sum remaining from the accumulated surplus after paying the loan and

the past due premium being applied to the purchase of paid up insurance and the policy was at the request of Head and his daughter, sent to them in New Mexico in May, 1905, and was in the possession of the daughter when Head died in April, 1906.

In September, 1906, this suit was commenced in a court of the State of Missouri, by Mary E. Head, the beneficiary, to recover the full amount of the policy. Stating the grounds for relief which were relied upon not as literally expressed in the pleadings, but with reference to the ultimate assumption upon which the right to recover was essentially based, it was as follows: That although it was true that if the face of the policy was adhered to and the terms of the loan agreement were considered and the law of New York applied the settlement of the policy would be binding, it was not so binding, but on the contrary was void because at the time the policy was written there were statutes in force in the State of Missouri which made it the duty of the company to retain from the accumulated surplus a given percentage thereof and in case it was necessary to save forfeiture to apply the sum of such retained percentage to the payment of premium on temporary insurance as far as it would go and if this duty had been discharged when the failure to pay took place the sum of the retained percentage would have been adequate to extend the insurance to such a period as would have caused the full amount of the policy to be a valid and existing risk at the death of Head. Resting thus upon the Missouri statutes, of course the fundamental assumption upon which the right to recover was based was the controlling operation and effect of the Missouri law upon the policy, upon the terms of the loan agreement and upon the law of the State of New York which would otherwise govern, as New York was the place where the loan agreement was made and the adjustment of the policy took place. As there is no controversy concerning the meaning of the

Missouri statutes if they were controlling, we content ourselves with referring to the sections of the Revised Statutes of Missouri which are relied upon as having produced the consequences stated: Sections 5856–5859 of the Revised Statutes of Missouri of 1889, and 7897–7900 of the Revised Statutes of Missouri of 1899. And the defense, considered also in its ultimate aspect, but asserted the validity of the settlement made in New York under the loan agreement, denied the applicability of the statutes of Missouri to that settlement and expressly insisted that such statutes could not be applied to the situation without violating the due process clause of the Fourteenth Amendment and depriving of the right of freedom of contract guaranteed by that Amendment and giving rise to the impairment of the obligation of a contract contrary to the provisions of § 10, Article I of the Constitution of the United States.

There was recovery in the court of first instance for the amount claimed under the policy, the court maintaining the supremacy of the Missouri statutes. In the Supreme Court to which the case was taken after a hearing in a division thereof the judgment below was affirmed on an opinion which expressly held that the policy of insurance was a Missouri contract controlled by the Missouri law, and that by the operation and effect of that law the loan agreement made in the State of New York and the settlement effected in that State in accordance with that agreement conformably to the laws of New York was controlled by the Missouri statute and was void. And the opinion so holding was in express terms adopted by the court *in banc* where the case was reheard.

The rights under the Contract Clause of the Constitution of the United States and the Fourteenth Amendment which, as we have stated, were asserted below, form the basis of the assignments of error. As the conflicting contentions concerning these constitutional questions advanced to refute on the one hand and to sustain on the

other the reasons which led the court below to its conclusion involve the whole case, to briefly state at the outset the propositions upheld below will concentrate the issues and serve to give bold relief to the questions which require to be decided. (a) Determining whether the contract was a Missouri contract made in that State and governed by its laws, the court held that the express stipulation in the contract to the effect that the policy was to be considered as issued from the home office and be treated as a New York contract was overborne by the fact that the application for the policy was made to the Kansas City agency, that the policy was sent there for delivery and that the first premium was there paid. (b) In deciding that this view was not modified by the fact that the insured was a non-resident of Missouri and by the further fact that on the face of the policy it was clearly manifest that it was executed not for the purpose of having effect in Missouri but to be operative outside of that State, the court said:

"It has been repeatedly ruled in this State since the enactment of sections 5856 *et seq.* of the revision of 1889 (now R. S. 1909, sec. 6946) and the Act of 1891 (Laws 1891, p. 75), R. S. 1899, secs. 1024 and 1026 (now R. S. 1909, secs. 3037, 3040), that foreign insurance companies admitted to carry on their business in this State, can only contract within the limits prescribed by our statutes, and that in the conduct of the business under the license granted by this State, they 'shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers.' The effect of these decisions is to write into every insurance contract made by a foreign insurance company, so licensed, in this State all of the provisions of the statutes of this State appurtenant to the making of such contract, and which define and measure the reciprocal rights and duties of the parties thereto.

These statutes are declaratory of the public policy of this State, and inhibit the doing of the business of insurance in this State by any corporation contrary to their regulations by annulling all the stipulations which offend the provisions of the statutes. (*Horton* v. *Ins. Co.*, 151 Missouri, 604; *Smith* v. *Ins. Co.*, 173 Missouri, 329; *Burridge* v. *Ins. Co.*, 211 Missouri, 158; *Cravens* v. *Ins. Co.*, 148 Missouri, 583; *Ins. Co.* v. *Cravens*, 178 U. S. 389; *Whitfield* v. *Ins. Co.*, 205 U. S. 489, affirming *Keller* v. *Ins. Co.*, 58 Mo. App. 557.)" (241 Missouri, p. 413.)

(c) In disposing of the contention that as the loan agreement was made in New York by persons not citizens of Missouri and was sanctioned by the law of New York it could not be treated as void by extending the Missouri statutes into the State of New York without a violation of the Fourteenth Amendment and without impairing the obligation of a contract, the court said (p. 418):

"It is not an open question in this State, that all subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract, and are not to be treated as independent agreements. This being so, they are inefficacious to alter, change or modify the rights and obligations as they existed under the original contract of insurance. (*Burridge* v. *Ins. Co., supra; Smith* v. *Ins. Co., supra.*)"

Before approaching the constitutional questions relied upon in the light of these rulings we must dispose of a motion to dismiss. It rests upon the ground that as the court below sustained its ruling by reference to a line of state decisions, a leading one of which had been affirmed by this court (*New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389) prior to the decision below, therefore as the basis for jurisdiction had been demonstrated to be unfounded by a decision of this court announced prior to the time the writ of error was prosecuted, there was no substantial ground upon which to base the suing out of the writ and it

must be dismissed. But the contention rests upon a plain misconception as to what was involved and decided in the *Cravens Case*, since that case but concerned a contract of insurance made in Missouri as to a citizen of that State and required it only to be determined whether rights under the Constitution of the United States had been denied by the ruling of the state court holding void a forfeiture of a policy which had been declared by the corporation for a failure to pay in Missouri a premium there due when such forfeiture was in direct violation of the prohibition of the state law. The difference therefore between that case and this is that which in the nature of things must obtain between questions concerning the operation and effect of a state law within its borders and upon the conduct of persons confessedly within its jurisdiction, and its right to extend its authority beyond its borders so as to control contracts made between citizens of other States and virtually in fact to disregard the law of such other States by which the acts done were admittedly valid.

Coming to the merits, to narrow the subject to be decided as much as possible, we pass the consideration of the ruling below holding that under the proof the contract was a Missouri contract and therefore for the sake of argument only concede that there was power in the State to treat the contract made for the purposes stated as a Missouri contract and to subject it as to matters and things which were legitimately within the state authority to the rule of the state law. And this concession brings us to consider the second general inquiry which is the power of the State of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as in such other States to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri and although the contract was sanctioned by the law of the State where made. That is to say, the right of a State where a contract

concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the State in the future concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made. In other words, concretely speaking we must consider the validity of the loan agreement, that is, how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri. Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.[1]

[1] *Huntington* v. *Attrill*, 146 U. S. 657; *Tilt* v. *Kelsey*, 207 U. S. 43; *Fauntleroy* v. *Lum*, 210 U. S. 230; *American Express Co.* v. *Mullins*, 212 U. S. 311; *Converse* v. *Hamilton*, 224 U. S. 243. And see *Bedford* v. *Eastern Building Ass'n*, 181 U. S. 227.

It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer* v. *Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power.[1]

And an analysis of the opinion of the court below makes it clear that its ruling was rested not upon any doubt concerning the obvious operation of the Constitution which we have pointed out, but because it was deemed that the peculiar facts and circumstances of this case took it out of the general rule and caused it to be therefore a law unto itself. We say this because while it is true the court based its conclusion upon a line of cases previously decided in that State, as all the cases thus relied upon involved only policies of insurance issued in Missouri to citizens of Missouri and were solely concerned with the effect of acts done in Missouri which it was asserted were forbidden by the statutes of that State existing at the time when the acts were done, it could not have been that the cases were deemed to be controlling upon the principle of *stare decisis*, but they must have been held to be controlling because of the persuasive force of the reasoning upon which they had been decided. Indeed, this is not left to inference, since the court below in its opinion summarized the reasoning in the previous cases as shown by the passage which we have quoted and made it the ground work of its ruling in this case, that reasoning being as follows: Insurance companies chartered by Missouri took their existence from

[1] *Pennoyer* v. *Neff*, 95 U. S. 714; *Overby* v. *Gordon*, 177 U. S. 214, 222; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8; *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Delaware, L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Buck* v. *Beach*, 206 U. S. 392; *W. U. Tel. Co.* v. *Kansas*, 216 U. S. 1, 38.

the grant of the State and therefore had no power to contract in excess of that which was conferred upon them by the State; hence all acts done by them which were prohibited by the state law were *ultra vires* and void. But, as foreign insurance companies have no right to come into the State and there do business except as the result of a license from the State and as the State exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the State as if they were domestic corporations, it follows that the limitations of the state law resting upon domestic corporations also rest upon foreign companies and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law. But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so as the proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States. It is apparent therefore that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States to exact as a condition of a license granted to a foreign cor-

poration to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing. It would go further than this, since it would require it to be decided not only that the constitutional limitations on state powers could be set aside as the result of a license but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority.

It is true it has been held that in view of the power of a State over insurance, it might, as the condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the State, which otherwise but for the complete power to exclude would be held repugnant to the Constitution. In other words that a company having otherwise no right whatever for any purpose to go in without a license would not be heard after accepting the same to complain of exactions upon which the license was conditioned as unconstitutional because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled or at all events so restricted as to deprive it of all application to this case (see *Harrison* v. *St. L. & San Francisco R. Co.*, 232 U. S. 318, 332, and authorities there cited,) it here can have no possible application since such doctrine at best but recognized the power of a State under the circumstances stated to impose conditions upon the right to do the business embraced by the license and therefore gives no support to the contention here presented which is that a State by a license may acquire the right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution. But the Constitution and its limitations are the safeguards of all the States preventing any and all of them under the guise of license or otherwise from exercising powers not possessed.

As it follows from what we have said that the primary conception upon which the court below assumed this case might be taken out of the general rule and thereby the State of Missouri be endowed with authority which could not be exercised consistently with the Constitution, was erroneous, it results that the necessity for reversal is demonstrated without requiring us to consider other propositions. But before we come to direct the judgment of reversal, we briefly refer to another aspect of the subject, that is, the ruling of the court below as to the subsidiary nature of the loan agreement and its consequent control by the broader principle upon which its conclusion was really based. Of course under the view which we have taken of the case, that is, of the want of power of the State of Missouri because the contract of insurance was made within its jurisdiction to forever thereafter control by its laws all subsequent agreements made in other jurisdictions by persons not citizens of Missouri and lawful where made, that is, to stereotype, as it were, the will of the parties contracting in Missouri as of the date of the contract, it is unnecessary to consider whether the loan agreement was or was not subsidiary, but see on this subject *Leonard* v. *Charter Oak Life Ins. Co.*, 65 Connecticut, 529; *Fireman's Ins. Co.* v. *Dunn*, 22 Ind. App. 332; *S. S. White Dental Mfg. Co.* v. *Delaware Ins. Co.*, 105 Fed. Rep. 642; 2 Wharton Conflict of Laws, § 467g and cases cited; and see note 63 L. R. A. 833.

Reversed.

NEW YORK LIFE INSURANCE COMPANY *v.* HEAD.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 255. Argued March 10, 1914.—Decided June 8, 1914.

Decided on authority of the preceding case.
241 Missouri, 420, reversed.

THE facts are stated in the opinion.

Mr. James H. McIntosh, with whom *Mr. Gardiner Lathrop, Mr. Cyrus Crane, Mr. O. W. Pratt* and *Mr. S. W. Moore* were on the brief, for plaintiff in error.

Mr. Buckner F. Deatherage, with whom *Mr. Goodwin Creason, Mr. James S. Botsford, Mr. W. P. Borland* and *Mr. James A. Reed* were on the brief, for defendant in error.

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

This case is governed by the opinion in No. 254 just decided. The policy sued on was one of the two issued to Richard G. Head in Kansas City, Missouri, in favor of his minor son. It was delivered at Kansas City and the first premium paid there, as in the previous case, and the subsequent premiums were paid in New Mexico. There was borrowed upon the policy by authority of the proper probate court in New Mexico the sum of $2,270.00 under a loan agreement and pledge; there was a default and an adjustment of the policy as in the other case. The case was tried in the court of first instance with the other case, was embraced in the Supreme Court of Missouri by the

same opinion by which the other case was disposed of, and there thus being no distinction between the two cases, for reasons given in the other case, No. 254,

The judgment is reversed.

FLORIDA EAST COAST RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COMMERCE COURT.

No. 383. Argued January 15, 16, 1913.—Decided June 8, 1914.

The rule that a finding of fact made by the Interstate Commerce Commission concerning a matter within the scope of the authority delegated to it is binding and may not be reëxamined in the courts, does not apply where the finding was made without any evidence whatever to support it; the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide.

The record does not disclose any evidence justifying the order of the Commission directing a reduction of rates which had been held to be reasonable by a prior order of the Commission.

In a proceeding against several railroads, testimony as to the condition of traffic on certain railroads does not tend to establish conditions on another road in regard to which no testimony is given and where the record shows essential differences between it and those roads in regard to which the testimony was given.

200 Fed. Rep. 797, reversed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission establishing rates on citrus fruits and vegetables from points of production in Florida to exterior points of consumption, are stated in the opinion.

Mr. Frederick C. Bryan and *Mr. Alex. St. Clair-Abrams* for appellant.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Bullitt* was on the brief, for the United States:

The investigations before the Interstate Commerce Commission into the rates on citrus fruits, vegetables, and pineapples from southern Florida to the north engaged the attention of the Commission for a number of years in several separate proceedings to which the appellant was a party. The Railroad Commissioners of Florida, in pursuance of their statutory duty and authority, instituted the present proceedings against all of the railroads in the State for the purpose of unifying throughout the State the gathering rates. The Interstate Commerce Commission, after bringing before it all the records in the previous investigations, gave notice of further hearings and took a vast amount of additional evidence. In all of those investigations the appellant was represented before the Commission by its present counsel, who was assisted by its officers, traffic officials and other agents, and the voluminous records before the Commission consist principally of matter which they offered.

The appellant has stipulated out of the record all of the evidence taken by the Commission in the previous proceedings. It has further stipulated that the court may refer to the reports of the Commission as correct statements of the issues and facts of those proceedings. The statements attributed to counsel and the Commissioner taking the evidence in December, 1909, that the appellant's rates were not involved in those proceedings are not in the present record. The alleged statements are of no consequence or counsel would not have stipulated them out. The absence from the opinion of the Commerce Court, which reviewed fully all of the evidence and the various proceedings before the Commission, of any reference to the alleged statements is conclusive that they were not seriously pressed at the hearing. It is now

beyond the power of the appellant to shake the presumptions in favor of the validity of the order. *Chi., R. I. & Pac. Ry. Co.* v. *Int. Com. Comm.*, 218 U. S. 88, 110, 111.

The order is also effective against the Atlantic Coast Line and the Seaboard Air Line companies. During the season of 1910, the Atlantic Coast Line handled 2,901,936 boxes of citrus fruits and 1,500,000 miscellaneous crates; total, 4,401,936. The Florida East Coast handled 669,584 boxes of citrus fruits, 600,000 crates pineapples, and 1,890,000 miscellaneous crates; total, 3,159,584. The Seaboard Air Line handled 780,387 boxes of citrus fruits and 1,391,335 miscellaneous crates; total, 2,171,722. In the volume of traffic handled the appellant stands between the Atlantic Coast Line and the Seaboard Air Line. They appeared before the Commission with the appellant, occupied similar positions, had similar interests at stake, and were accorded the same treatment. Those companies forthwith published the reduced rates and have since maintained them without protest. Neither company joined in the petition before the Commerce Court and, while at all times cognizant of the litigation which would inure to their benefit if successful, neither has ever intervened.

The present order of the Interstate Commerce Commission unified the gathering charges on citrus fruits, vegetables and pineapples throughout the entire State of Florida. The rates from the west coast, traversed by the Atlantic Coast Line and the Seaboard Air Line, are not contested. If the court annuls the present order of the Commission and allows the appellant to restore its former rates, a drastic discrimination will result, and the shippers on the east coast will be at an advantage over the shippers on the west coast.

Appellant's railroad consists of two sections: (1) the line and branches from Jacksonville to Homestead, consisting of 506.47 miles, or the main line; (2) the line over

the Keys from Homestead to Key West, consisting of 122 miles, or the Over-Sea Extension; total, 628.47 miles. The capitalization of the entire mileage consists of $10,000,000 of first mortgage bonds, $21,000,000 of second mortgage bonds, and $5,000,000 of stock; total $36,000,000; of this, $15,000,000 applies to the main line and $21,000,000 to the Over-Sea Extension. The entire capital stock is and always has been owned by a single individual and no stockholders' meeting was ever necessary to determine his action. The cost of the Over-Sea Extension was approximately $175,000 per mile, or about $21,000,000. The Keys are undeveloped, vegetation will not grow because of blight resulting from the salt water, and there is little or no population. The act of the legislature of Florida authorizing its construction recites that it is desirable and important to the State to secure a fair proportion of the traffic passing through the Panama Canal. It is conceded that the handling of the cars from the north into southern Florida, the loading of the cars, the handling of the citrus fruits, vegetables and pineapples, and the shipping thereof from southern Florida to the north, were not even among the considerations which resulted in the construction to the south of the Over-Sea Extension.

For the year ending June 30, 1911, the net operating revenue from the main line was $1,272,908.19. According to the showing made by appellant that sum would more than pay a dividend of 8 per cent on the capitalization of $15,000,000 for the main line, and would more than pay a dividend of 4 per cent on the total bonded indebtedness of $31,000,000 for the entire system. The ordinary rate of interest on railroad stocks and bonds is less than 8 per cent, and runs from 4 to 5 and 6 per cent. The reasonableness of the rates paid by the growers and shippers of southern Florida, whose freight is transported northward, should not be tested by a return of 8 per cent, or by any per cent, on the fair value of 122 miles of railroad built

southward over the barren Keys at a cost of $175,000 per mile, and which does not pay operating expenses, for the purpose of securing business from the Panama Canal, not yet opened, or for some other purpose, though confessedly not for the use of those shippers. *Covington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 596; *Int. Com. Comm.* v. *Un. Pac. R. R. Co.,* 222 U. S. 541, 549.

On the subject of confiscation the absence of the Atlantic Coast Line and the Seaboard Air Line companies from the case is again significant. As to them the rates have been published without protest and maintained as just and reasonable rates for similar transportation services. The railroads of those companies were built upon lands open to development where traffic may be secured. If the appellant erred in its judgment in building a railroad at such enormous cost over the barren Keys, into the Atlantic Ocean, the growers of the State of Florida who ship in the opposite direction should not be called upon to pay the bill

Mr. Charles W. Needham for the Interstate Commerce Commission:

The order does not violate the provisions of the Constitution of the United States guaranteeing due process of law and requiring that just compensation be paid for property taken for public use.

Confiscation cannot be predicated on a reduction of total revenue of the carrier caused by an order of the Commission reducing a single rate or rates upon a particular traffic.

The Commission, in the proceeding in which the order was entered, conformed to statutory authority.

In support of their contentions, see *Florida Shippers' Protective Assn.* v. *Atl. Coast Line R. R. Co.,* 14 I. C. C. 476; *S. C.,* 17 I. C. C. 552; *Den* v. *Hoboken Land Co.,* 18 How. 272; *Twining* v. *New Jersey,* 211 U. S. 78; *Reeves*

v. *Ainsworth*, 219 U. S. 296; *United States* v. *Grimaud*, 220 U. S. 506; *Blinn* v. *Nelson*, 222 U. S. 1; *United States* v. *B. & O. S. W. R. R.*, 222 U. S. 8; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270; *Jordan* v. *Massachusetts*, 225 U. S. 167; *Procter & Gamble* v. *United States*, 225 U. S. 282, 297; *Int. Com. Comm.* v. *U. P. R. R. Co.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Arkansas Rate Case*, 187 Fed. Rep. 290; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 397; *Smyth* v. *Ames*, 169 U. S. 466, 541, 544, 547; *St. L. & San F. Ry.* v. *Gill*, 156 U. S. 649, 657, 665; *Minneapolis &c. Ry.* v. *Minnesota*, 186 U. S. 257, 266, 268; *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 594; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Co.*, 204 U. S. 426, 444; *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297, 301; *Int. Com. Comm.* v. *Burnham*, 218 U. S. 88, 111; *Atl. Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1, 24, 25; *Int. Com. Comm.* v. *Chi., R. I. & P. Ry.*, 218 U. S. 88, 102; *Int. Com. Comm.* v. *Chi., B. & Q. R. R.*, 218 U. S. 113; *Ill. Cent. R. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441; *Cincinnati &c. Ry.* v. *Int. Com. Comm.*, 206 U. S. 142, 154; *Int. Com. Comm.* v. *Un. Pac. Ry. Co.*, 222 U. S. 415, 446.

Mr. Frederick M. Hudson for the Railroad Commissioners of Florida:

This case is not controlled by *Smyth* v. *Ames*. It is not a case in which the value of the property is the proper basis of calculation as a test of reasonableness. Petitioner's theory of the case is therefore wholly erroneous.

The cost of the service rendered would have been a sounder basis of calculation in this case, and petitioner has not met that requirement.

Petitioner might have used the average freight receipts as a test, but has not met that requirement.

Even if this case were controlled by *Smyth* v. *Ames*, the petitioner is not within the terms of that rule because

there is no separation or apportionment of interstate and intrastate business.

Even if this case were controlled by *Smyth* v. *Ames* the petitioner is not within the terms of that rule because its theory of the case assumes that the carrier is entitled to a profit on its investment regardless of qualifying circumstances.

Mr. A. A. Boggs filed a brief for the Florida Fruit and Vegetable Shippers' Protective Association and the East Coast Fruit and Vegetable Growers' Association, intervening appellees.

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

The order of the Interstate Commerce Commission concerning which the appellant, hereafter called the East Coast Line, complained before the court below and which that court refused to enjoin was made on a second supplemental petition presented in controversies which had been long pending and twice before decided, such controversies involving many railroads and being concerned with the rates as to pineapples, citrus fruits and vegetables from places of production in Florida to exterior points of distribution or consumption. While the report here under consideration made on the second supplemental petition deals with only a few of the railroads concerned in the previous inquiries and with only a part of the controversies involved in the previous cases, yet the reports in the previous cases and the reasons stated by the Commission for its action in those cases are so connected with its action complained of in this case that it is impossible to understand this controversy without recurring to and stating the previous reports of the Commission in the controversies to which we have referred.

We observe before coming to make that statement that none of the testimony taken before the Commission in the cases prior to this one is in the record, it having been stipulated that the facts stated by the Commission in its reports in such previous cases should be taken as the facts of such controversies. For the purpose of the statement which we shall make the record therefore consists of the reports in such previous cases, of the report in this case and the testimony taken in this case before the Commission and in the court below. The future application of the facts which we shall state will be facilitated by giving a description of the East Coast Line as stated in the several reports of the Commission to which we shall immediately recur.

The East Coast Line is wholly within the State of Florida, the main line extending from Jacksonville south along the Atlantic coast to Miami, a distance of 366 miles, then to Homestead, 28 miles south, and thence across the Florida Keys to Key West. At the time of the final hearing before the Commission on March 2, 1911, the road was not fully constructed and was only completed and being operated to Knight's Key, about 83 miles below Homestead. The total mileage of the road was about 583 miles, including 477 miles of main line from Jacksonville to Knight's Key and about 106 miles of branch line above Miami. The cost of the construction from Homestead on was enormous, amounting to nearly $175,000 per mile, and the total cost of the extension from Homestead to Knight's Key, 83 miles, nearly equalled the entire cost of the balance of the road, 500 miles. On July 3, 1907, a petition was filed by the Florida Fruit & Vegetable Shippers' Protective Association against the Atlantic Coast Line, the Seaboard Air Line and Southern Railway Companies and the East Coast Line complaining of and asking a reduction in interstate rates on pineapples, citrus fruits and vegetables. The East Coast Line was the only one

of the defendant railroads whose traffic was confined to the producing regions in Florida because while the other lines also undoubtedly penetrated to the area of production, their lines were not confined to Florida but were trunk lines carrying not only the product committed to them by producers in Florida, but also the products committed by producers to roads like the East Coast Line which did not extend beyond Florida and had therefore to be transshipped if destined to points beyond the State by other roads. In coming to make its report in the case thus referred to, the Commission thus stated the general situation of the railroad traffic of all the roads in Florida concerning the subjects under discussion (No. 1168, 14 I. C. C. 483):

"The shape and location of the state of Florida is such that these railroads which handle this traffic from the point of production up to the base point necessarily do but a limited business. They extend south considerable distances through a sparsely settled country which neither originates nor consumes a considerable amount of traffic. Some of them reach the seacoast, but none of them connect or can connect with railroads leading beyond, and the amount of through business handled is extremely light. Their traffic is confined almost entirely to bringing out the products which originate upon their lines, and carrying in the supplies which are consumed in the territory served by them. Fruits and vegetables, lumber, naval stores, and in some cases cotton and phosphate rock are the principal commodities carried, and of these, fruits and vegetables produce the most revenue."

In the report by which the Commission disposed of this controversy (No. 1168, 14 I. C. C. 476) it divided the rates to be considered into two classes: (a) gathering charges from production points in Florida to base points of which Jacksonville was the only one on the East Coast Line, and (b) rates from base points to points of final

destination in other States, the sum of the two rates being the joint through rate.

Considering the three products whose traffic charges were under consideration, the Commission said:

(a) Citrus fruits:

"From an examination of the elaborate figures which were introduced upon the trial showing the character of the traffic handled by these Florida roads, the conditions under which it is handled, their earnings, and the cost of operation running through a series of years, it is difficult to see how these railroads can be expected to transport in a suitable way this fruit and vegetable traffic from points of production to these basing points for a less sum than they now receive. It is difficult to see how, even upon the present traffic, those lines can in the immediate future expect to pay any considerable return upon their investment. We feel that these local rates, although they are high in comparison with other local rates, are as low as should be established under all the circumstances." (p. 484.)

(b) Vegetables:

"The same observations which have been made upon the orange rates to base points apply with equal pertinency to those upon vegetables. They are named by the railroad commission of Florida. They are made with the understanding that they are really parts of through rates from the point of production to the market of consumption. They are low in comparison with other rates because it is understood that this industry is an important one to the State of Florida, and that a low cost of transportation is essential to its development.

"While these local rates are essentially part of the through charge and should be dealt with by this Commission as such, it is difficult to see how these Florida railroads can render a proper service upon a lower scale of rates than is now applied. It must be remembered that without the railroad this industry could not exist at all, and that

to its satisfactory carrying on the character of the service is fully as important as the rate. It is better that these fruits and vegetables should reach the market on time, and in good condition, than that a few cents per box should be subtracted from the carrying charge. There was very little complaint as to the service; nor did the shippers who testified manifest any desire that these carriers should be required to accept less than reasonable compensation for that service. Our conclusion upon this branch of the case is that the present rates up to the base points, while high in comparison with similar rates in other localities are as low as they ought to be under the conditions obtaining upon these Florida lines, so that here, as in case of oranges, the real question arises upon the rate from the base point to the northern market." (p. 496.)

(c) Pineapples:

"Pineapples are mainly produced in Florida, upon the line of the Florida East Coast Railway, which extends, as already said, down the east side of Florida. This industry has within recent years developed rapidly. Florida pineapples today sell in all the markets of the United States in competition with foreign pineapples, usually commanding much higher prices than the foreign article. While the period of production in the United States and in Cuba is not exactly the same, still it may fairly be said that the two products do compete.

"It was said that Jansen might be selected as a typical producing point upon the Florida East Coast Railway. This station is 257 miles south of Jacksonville and the rate on pineapples is 24 cents per box of 80 pounds. Rates from other points are relatively about the same as from Jansen; somewhat lower, it will be seen, for the same distance, than from most producing points upon oranges." (p. 502.)

Presumably, deeming that the particular situation on the East Coast Line as to the character of its business, its

location, its cost, etc., etc., required to be specially pointed out in addition to what was said in the passages quoted, the Commission said:

"The Florida East Coast Railway was built as part of a hotel scheme, and its principal business is the carrying of passengers who frequent these Florida winter resorts. Over 50 per cent. of its total receipts are from passenger traffic. Its most important freight business is the transportation of fruits and vegetables, and of these pineapples afford the most considerable amount of revenue. The management of the railroad has paid great attention to the development of this business. In the pineapple region highways are few and transportation by wagon is therefore costly. To relieve this difficulty sidings have been put in the pineapple region at frequent intervals. The traffic representative of this railroad stated that it was possible to load pineapples every half mile upon his line in the pineapple-producing region. When once loaded great attention is paid to sending the fruit to Jacksonville upon a reliable and expeditious schedule.

"Very elaborate tables were introduced showing the cost of constructing this railroad and the financial results of its past operations. These statements and tables have been examined by the Commission, but it does not seem necessary to reproduce them here or to state in detail the grounds of our conclusions. But for this railroad the pineapple industry in Florida would not today exist. The quality of the service rendered that industry by this road is not criticised. The shippers of this fruit ought not to object, nor do they object to paying a fair compensation for the service, and in our opinion the present rates do not exceed such just compensation for the transportation of pineapples from various producing points to Jacksonville, and we so hold." (p. 503.)

And concerning the earnings of the East Coast Line, it was said:

"The total earnings of the Florida East Coast Railway for the same year (ending June 30, 1907) were $5,911 per mile, and its operating expenses $4,502. The greater part of the receipts of this railroad are from its passenger service. The evidence shows that a considerable portion of what little freight revenue it has comes from the transportation of fruits and vegetables. It has given in the past great attention to this service, and has apparently satisfied its patrons in this respect. It makes no through rates, but receives its full local in all cases up to Jacksonville." (p. 484.)

Giving effect to the foregoing, the Commission held that the complaint as to gathering charges was wholly unfounded, and they were maintained. A different conclusion, however, was reached as to charges from the base points to points of distribution or consumption, as to which some reduction was made. It consequently follows that all the other roads who were defendants were subjected to some reduction as to their rates, while the East Coast Line because of its being a purely gathering road was subjected to no reduction whatever.

Within a year after this action by the Commission the same complainant commenced a new proceeding (No. 2566) against two hundred railroads, including among others the East Coast Line, to establish carload rates from base points in Florida to interstate points. At the same time in No. 1168, which as we have seen had been previously passed upon by the Commission and decided in favor of the East Coast Line, a supplemental petition was filed against that road, the sole complaint against the East Coast Line in such petitions being as to its gathering rates on pineapples from points of production to Jacksonville. And it is to be presumed that the complaint as to pineapple-gathering rates was made only against the East Coast Line because as we have seen, as stated by the Commission, that road was almost the exclusive carrier of such

product, and in fact had virtually built up that industry. The controversy while it involved a claim of reduction, in its broad aspect presented only a controversy as to whether there should be put in force carload and less-than-carload instead of any-quantity rates in the performance of its duty of gathering pineapples. On the filing of the new and original as well as of the supplemental petition the Commission directed the rescinding of its previous order concerning the reasonableness of gathering rates, as well as its finding on the subject of rates from base points and directed the matter to be reheard. Without referring to the conclusion of the Commission concerning the controversy as to the many railroads who were before it as to their interstate rates, we come to state the ruling of the Commission as to the East Coast Line (17 I. C. C. 552, 564):

"The evidence produced upon the present hearing suggests no change in what was said so far as that applies to the Florida East Coast Railway. That line operates at the present time 477 miles of main line and 106 miles of branches. It has a first mortgage of $10,000,000, a second mortgage of $20,000,000, and a capital stock of $3,000,000, making in all $33,000,000. This capitalization, with the exception of about $4,000,000, represents an actual cash investment.

"It is urged by the complainant that the portion of the line from Miami south, which has cost some $14,000,000, was not at the present time a paying investment and that the balance of the line from Jacksonville to Miami, which is used by the growers of pineapples, ought not to be taxed with the cost of this construction. Admitting this to be so and laying out of view altogether the $14,000,000 which have been invested in that part of the property, it is still true that during the entire existence of the Florida East Coast Railway, so far as this record shows, that property has never earned in any single year 6 per cent. upon the money invested, with the single exception of the year 1909.

During much of the time its net earnings have been but little above its operating expenses. We certainly cannot hold that these rates should be reduced because for a single twelve months, under what may be termed abnormal conditions, this railway earned about 6 per cent. on the money which has been actually invested in its construction. The years when no return has been received must certainly be given some consideration. Upon no other theory could private capital be induced to invest in the construction of railroads.

"While, however, we adhere to what was said in the previous case, we do think, upon more careful examination, that these rates of the Florida East Coast Railway on pineapples ought to be somewhat revised. They are not consistent with one another, and in our opinion those from the more distant points are too high as compared with rates from nearby points.

"The present rates are in any quantity. About 60 per cent. of these pineapples move from the point of origin in carloads, 40 per cent. in less than carloads. Carload shipments are stripped and loaded by the shipper and are not unloaded at Jacksonville, which probably saves the carrier not far from 2 cents per box. The less-than-carload shipment is loaded by the railway and usually unloaded at the station in South Jacksonville or Jacksonville. In our opinion carload rates should be established which are less than the present any-quantity rates by 3 cents per box.

"The establishment of such carload rates will not of a certainty work a decrease in the net earnings of the carriers. It is a false theory of transportation which seeks to force the shipper to avail himself of a less-than-carload service, which is more expensive to render, for the purpose of increasing the gross revenues of the carrier. The true object should be to perform the service in the most economical manner and to charge for that service reasonable compensation. In the end this makes to the advan-

tage of both the carrier and its patron. The vice-president of the Florida East Coast Railway stated that he had always thought that carload rates should be established and that in his opinion to establish carload rates 3 cents per box less than the present any-quantity rates would not prejudice the net revenues of his company, since he would make up by saving in operating expenses what he lost in gross income."

The order of the Commission which gave effect to these views entered February 8, 1910, changed gathering charges on pineapples and citrus fruits on the East Coast Line from any-quantity to carload and less-than-carload rates and modified the mileage basis. On attention being directed to the fact that the complaint related only to pineapples, while the order applied to that product and to citrus fruits, the order was modified and restricted to the subject complained of, pineapples. The East Coast Line conformed to the order and indeed shortly after doing so also voluntarily put into effect carload and less-than-carload gathering rates on citrus fruits and vegetables, and although the rates thus fixed were somewhat higher than the rates on pineapples which the Commission had established, they were lower than the citrus fruit and vegetable rates which had been expressly sustained by the Commission. Some months after this was done the same complainant who had filed the previous petitions presented in No. 1168 a second supplemental complaint against the East Coast Line, and new petitions against the Seaboard Air Line and Atlantic Coast Line Railways (No. 3808). So far as the East Coast Line was concerned the complaint was against the citrus fruit and vegetable-gathering rates and asked that they be equalized with or made the same as the pineapple rate. The Florida Railroad Commission intervened and asked the same relief. The Commission in effect granted the prayer of this second supplemental complaint, found the rates of the East Coast Line on

citrus fruits and vegetables to be unjust and unreasonable, and directed the putting into operation of a lower stated schedule of gathering rates which was made applicable not only to the East Coast Line but also to the other roads which were parties to the proceeding. And it is this order which the railroad refused to obey and to enjoin the enforcement of which this suit was brought.

Without going into detail it suffices to say that the report of the Commission concerning the action just stated did not purport to question the correctness of its previous findings sustaining the citrus fruit and vegetable rates of the East Coast Line, but was based upon what was deemed to be a change in conditions since the previous decisions. After pointing out that it had previously ordered a change from any-quantity to carload and less-than-carload rates on pineapples from gathering points to the base point on the East Coast Line and on all fruits and vegetables from base points outward, and that on both the Atlantic Coast Line and the Seaboard Air Line any-quantity rates yet remained from gathering points as to all fruits and vegetables, although such was not the case as to the East Coast Line because of the change which it had voluntarily made, it was said (22 I. C. C. 11, 14, 15):

"No material change has taken place since then (that is, since the previous decisions) so far as this record discloses which would lead to a different conclusion if the same subject were before us today. The volume of business transacted has increased, but the expenses of operation have also increased to an extent which offsets the greater amount of business. . . .

* * * * * * * *

"It appeared in the original case that citrus fruits to some extent, and vegetables to a much greater extent, were shipped in small lots to Jacksonville and there reloaded for movement beyond. It was our impression in

establishing carload rates from the base point that this would permit the movement in small lots up to the base point and the consolidation at such point, and that the carload movement would in fact be mainly beyond the base point. Such has not been the result. In order to obtain the carload rate beyond the base point it seems to be necessary for the shipper, in actual practice, to present a full carload at the point of origin, and from this it follows that the movement up to the base point at the present time is entirely different from what it was when we approved these any-quantity rates. At that time the loading was by the carrier; now it is mainly by the shipper. The loading of the cars from the point of origin to the base points is much heavier now than formerly. In 1907 the average loading of citrus fruits and pineapples upon the Atlantic Coast Line up to the base point was 215 boxes. In 1910 this loading had increased to 279 boxes. In case of vegetables the increase is even more marked. The number of cars now required to transport the same amount of this traffic from points of origin to base points would be materially less than in 1908. Otherwise stated, it costs the shipper more to handle his business today and it costs the railroad less."

And upon that changed circumstance an order was awarded directing the change from any-quantity to carload and less-than-carload and fixing a rate which was the same as that previously fixed for pineapples. Of course, as the East Coast Line had voluntarily put in carload and less-than-carload rates, it was only affected by this order to the extent that it lowered the traffic charge as contained in the schedule which had been previously voluntarily established.

It is insisted that the order of the Commission was wrongful and that the court below erred in not restraining its enforcement for the following reasons: (a) because the order complained of was rendered without any evidence

whatever to sustain it; (b) because it confiscated the property of the railway in a two-fold aspect, first, by fixing a rate so unreasonably low as to afford no remuneration to the corporation for the use of its property, and second, because although the Commission in order to justify the rate which it fixed took into account the revenue derived from the extended road, it nevertheless declined to at all consider the value of the extended road and the right to earn a return thereon. We come as briefly as possible to consider these contentions separately.

(a) *That there was no evidence whatever tending to sustain the reduction of the rates on citrus fruits and vegetables as to the East Coast Line which the Commission ordered.*

While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding and may not be reëxamined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide. (*Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91, 92, and cases cited.)

In view of what we have said concerning the state of the record, the solution of the question must depend upon an examination and analysis of two subjects, the one the reports of the Commission in the previous cases, and the other, the testimony which was before it and the report made in this case. As to the first, in view of the statements made by the Commission in its report in the original case (No. 1168, 14 I. C. C. 476) as to the earning power of the road, the nature of its business and the reasonableness of its rates and the express finding that the citrus fruit and vegetable rates were just and reasonable and should not be changed and the further fact that they were not called in question in the second proceeding it

follows that the inquiry narrows itself to the mere consideration of the testimony taken in this proceeding, and the report of the Commission in such proceeding, and the testimony taken before the court below in so far as it is proper to consider it in connection with the particular question under consideration. But coming to make a review of the testimony before the Commission on the issue raised by the second supplemental petition, we fail to find the slightest proof tending to sustain the reduction in rates as to the East Coast Line, which was made.

There are only three subjects referred to in the testimony which can in any view be considered as having any possible tendency to show such a change as would cause the rate which was found by the Commission in the past reasonable and not to justify a change to be unreasonable and therefore require reduction. The three subjects are these: (a) testimony by the chairman of the Florida Railroad Commission that there had been a considerable increase in the volume of traffic in citrus fruits and vegetables since the previous finding; (b) a further statement or admission made by an officer of the East Coast Line in a colloquy which took place at the hearing in this case to the effect that as shippers under carload rates loaded their own cars there was some difference in cost to the advantage of the road over the cost of loading when the any-quantity rates prevailed; (c) testimony with reference to the Atlantic Coast Line and the Seaboard Air Line (but none as to the East Coast Line) to the effect that on those roads it had come to pass that there was a saving in expense and an increase in earning capacity because even under the any-quantity rates carload shipments had greatly increased and cars so shipped were much more heavily loaded and moved from the point of production through the base point to their ultimate destination, when such was not the case at the time the previous order was made. Testimony which as we have seen was expressly

declared by the Commission to be in effect the cause which gave rise to the reduction. But at once it is to be observed that so far as any inference alone from the difference between carload and less-than-carload rates and any-quantity rates is concerned it had no application to the East Coast Line since that road had put in the carload and less-than-carload rates while the other two roads had not. And so far as the consideration of the increased loading is concerned as stated by the Commission, whatever may have been the proof as to the Seaboard Air Line and the Atlantic Coast Line, it is beyond controversy that no such proof can be found in the record as to the East Coast Line except the vague intimation to which we have referred.

Thus by analysis the case comes to this: Did the facts as to the increased loading which the Commission found to exist in the case of the Seaboard Air Line and the Atlantic Coast Line support or tend to support the order as to the East Coast Line in the absence of all testimony in the record concerning the existence of such fact as to the traffic on that road? In other words, the question is, Because there was testimony as to the traffic of those roads, can such testimony be said to tend to establish the same condition on the East Coast Line? Conceding that from an abstract point of view an affirmative answer would have to be given to such question we think such is not the case here for the following reasons: (a) because of the difference in business carried on by the two roads named and the East Coast Line, they being not only gatherers of the local product but trunk line carriers; (b) because of the difference in the situation and traffic of the two trunk lines named and the East Coast Line, as deduced solely from the peculiar environment and movement of business on that road so aptly stated in the passages from the reports of the Commission which we have quoted. Differences which presumably gave rise to

separate statements in the previous reports in considering that road. While we do not say that the conclusion is affirmatively sustained, nevertheless we think the state of the record at least tends to give some support to the suggestion in the argument that the greater magnitude and importance of the consideration of the business and rates of the two trunk line carriers concentrated attention in that direction and therefore caused the inquiry on that subject and the facts concerning the same to eclipse the distinctions between those lines and the East Coast Line—distinctions which if otherwise taken under consideration should have produced a different result.

As it follows from these views that the order in question as to the East Coast Line and its enforcement should have been enjoined by the court below, our duty is to reverse the action of that court and to remand the case to the proper District Court with directions to grant the prayer of the East Coast Line and restrain the enforcement of the order in question and it is so ordered.

Reversed.

VAN DYKE *v.* CORDOVA COPPER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 735. Motion to dismiss submitted May 11, 1914.—Decided June 8, 1914.

Although words may be superfluous, if the statute be construed in accordance with the obvious intent of Congress, the courts should not, simply in order to make them effective, give them a meaning that is repugnant to the statute looked at as a whole, and destructive of its purpose.

Under §§ 32 and 33 of the Arizona Enabling Act of June 20, 1910, the judgment of the state court in a case transferred to it from the

territorial court is not reviewable by this court simply because it was pending in the territorial court at the time of the Enabling Act; such a judgment can only be reviewed by this court where a Federal question exists to give jurisdiction as in the case of judgments from the courts of other States.

Writ of error to review, 14 Arizona, 499, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the courts of a State rendered after statehood in cases transferred from the territorial court, are stated in the opinion.

Mr. William J. Hughes, Mr. John H. Campbell and *Mr. Karl W. Kirchwey,* for defendant in error, in support of the motion.

Mr. Richard E. Sloan and *Mr. James Westervelt,* for plaintiff in error, in opposition to the motion.

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

This action was brought on December 2, 1911, by the Cordova Copper Company in the "District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila" to recover sums of money alleged to have been loaned to Van Dyke, the plaintiff in error, and remaining unpaid. The case was tried in April and May, 1912, after the admission of Arizona as a State, in the "superior court of Gila county, State of Arizona" and resulted in a verdict on May 4 for $15,364.75, upon which judgment was entered on the same day. On May 16, Van Dyke moved for a new trial, which motion was at the instance of the Company stricken from the files. An appeal was taken to the Supreme Court of the State. The court, deciding that the appeal was taken alone from the judgment and that there was no reversible error in the

judgment roll, held that it could not review errors which were alone susceptible of being reviewed upon an appeal from an order refusing a new trial, although treating the motion to strike out as equivalent to such refusal, and the judgment was consequently affirmed. This writ of error was then prosecuted and the case is before us on a motion to dismiss.

Neither in the assignments of error nor in the argument at bar is it asserted that Federal rights were raised or involved in the court below, but the assertion that the case is within our jurisdiction rests solely upon the provisions of §§ 32 and 33 of the Arizona Enabling Act of June 20, 1910, c. 310, 36 Stats., pp. 557, 576, 577. The sections in question, generally speaking, provide for the trial of cases pending at the time of admission to Statehood and for their transfer to the appropriate courts established under the new system, and the particular language upon which the controversy turns is this:

". . . and that from all judgments and decrees or other determinations of any court of the said Territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said State into the Union."

The contention is that as this case was "begun prior to admission" and is one which in consequence of the amount involved might have been brought to this court from a judgment of the Supreme Court of the Territory, therefore it comes within the express terms of the statute and there is jurisdiction. But conceding the premise we think the conclusion is clearly in conflict with the plain language of the provision relied upon. We say this because the right to prosecute writs of error conferred is limited to "judgments and decrees or other determinations of any court of

the said territory," thus obviously excluding the right to review in a case like this where although "begun prior to admission," the case was tried after the conferring of statehood and judgment rendered in a state court. It may indeed be, as suggested in the argument, that to thus construe the provision renders superfluous the phrase "in any cause begun prior to admission," since in the nature of things no judgment could be rendered by a territorial court unless the action had been brought prior to the admission of Arizona as a State. But we may not in order to give effect to those words virtually destroy the meaning of the entire context, that is, give them a significance which would be clearly repugnant to the statute looked at as a whole and destructive of its obvious intent. The statute was enacted for a two-fold purpose, first, to save the right of appeal which had arisen and was in existence in cases decided prior to statehood in the methods contemplated by existing laws, and second, to appropriately distribute and provide for the transfer of untried and pending causes to the new courts which would come into existence under the new system. Passing the question of power to so do, it could not be assumed except as the result of the most unequivocal direction to that end that the statute was intended to create a new and strange method of procedure unknown to our constitutional system of government by which the judgments to be rendered by state courts in cases which the statute contemplated should be transferred to such courts for trial, should be reviewed, not according to the methods provided by the state law for such judgments, but by the Federal courts, although no Federal question of any kind was present to give such courts jurisdiction. That no such anomaly could possibly have been contemplated is shown by the proviso of § 33 of the act making cases in the Supreme Court of the Territory which were pending at the time of Statehood and which were transferred to the highest

court of the State reviewable by this court not as judgments of territorial courts, but on the contrary as judgments of state courts; in other words, making it plain that it was not contemplated that after a case had been transferred to and decided by a state court it would be subject to a review in this court, simply because it was pending in the territorial court at the time of the Enabling Act, as if it were a judgment of a territorial court.

Dismissed for want of jurisdiction.

MULLEN *v.* SIMMONS, SHERIFF OF JOHNSTON COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 263. Submitted May 11, 1914.—Decided June 8, 1914.

The policy of Congress in regard to restrictions upon alienation of allotments has been to protect Indians against their own improvidence, whether shown by acts of commission or omission, contracts or torts.

The prohibition, contained in § 15 of the act of July 1, 1902, as to affecting or encumbering allotments made under the act by deeds, debts or obligations contracted prior to the termination of period of restriction on alienation, applies to a judgment entered against an allottee, whether based on a tort or on a contract.

A tort may be a breach of a mere legal duty or a consequence of negligent conduct, and a confessed judgment based on a prearranged tort might become an easy means of circumventing the policy of the statutes restricting alienation of Indian allotments if alienation could be effected by levy and sale under such a judgment.

33 Oklahoma, 184, reversed.

THE facts, which involve the construction of the provisions of the act of July 1, 1902, affecting alienation of

allottee lands, and the effect of judgments against the allottee, are stated in the opinion.

Mr. S. T. Bledsoe and *Mr. J. R. Cottingham* for plaintiff in error:

The lands involved were not subject to seizure and sale on execution. *Hamilton* v. *Brown*, 31 Oklahoma, 213; *S. C.*, 120 Pac. Rep. 950; *Holden* v. *Garrett*, 23 Kansas, 98; *Koheler* v. *Ball*, 2 Kansas, 160; *Mullen* v. *United States*, 224 U. S. 448.

It was not the purpose of Congress to permit a lien to attach to lands as to which alienation is prohibited, to become effective when the lands are alienable and operate to deprive the allottee of any of the benefit of receiving the lands in allotment. *Choate* v. *Trapp*, 224 U. S. 665; *Goat* v. *United States*, 224 U. S. 458; *Keel* v. *Ingersoll*, 27 Oklahoma, 117; *S. C.*, 111 Pac. Rep. 214; *Krause* v. *Means*, 12 Kansas, 335; *Maynes* v. *Veale*, 20 Kansas, 374; *Farrington* v. *Wilson*, 29 Wisconsin, 383; *Landrum* v. *Graham*, 22 Oklahoma, 458; *S. C.*, 98 Pac. Rep. 432.

Nor was it the purpose in the extension of the Oklahoma statutes over that part of Oklahoma which formerly constituted the Indian Territory to reinstate dormant judgment liens. Chapter 199, 35 Stat. 312; Bledsoe's Indian Land Laws, c. 53.

The effect of a statute purporting to fix a lien upon lands held subject to restrictions on alienation under the laws of the United States undoubtedly presents a Federal question.

If a lien existed by virtue of a judgment, but subject to existing restrictions upon alienation, Congress clearly had authority to extend or enlarge such restrictions as against such character of lien. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

Mr. John E. Dolman and *Mr. L. S. Dolman* for defendants in error:

The Oklahoma courts gave full effect to the words in § 15 of the act of 1902 providing that the lands should not be sold except as therein provided. That entire section refers exclusively to voluntary deeds, debts and contractual obligations, and has no reference whatever to a judgment for damages for a tort. *Brun* v. *Mann*, 151 Fed. Rep. 145.

It is the intention expressed in the statute and that alone to which the courts may lawfully give effect; the act must be held to mean what it clearly expresses. *Wabash* v. *United States*, 178 Fed. Rep. 5, 12; *United States* v. *Ninety-Nine Diamonds*, 139 Fed. Rep. 961; *United States* v. *Alamogordo Co.*, 202 Fed. Rep. 700, 706. *Mullen* v. *United States*, 224 U. S. 448, does not apply.

Under § 15 of the act of 1902, and under the laws of Oklahoma as construed by the highest court of that State in its decision in this case, the judgment of the interpleader became a lien on the allotment when the allottee acquired the same, and this court is bound by the decision of the state court as to the validity and construction of its lien statute under the pleadings in this case. *United States* v. *Morrison*, 4 Pet. 124; *Massingill* v. *Downs*, 7 How. 760; *Taylor* v. *Thomson*, 5 Pet. 358; *Bank* v. *Longworth*, Fed. Cas. No. 923; *United States* v. *Eisenbeis*, 88 Fed. Rep. 4; *Fidelity Ins. Co.* v. *Shenandoah Iron Co.*, 42 Fed. Rep. 372; *Re Grissler*, 136 Fed. Rep. 754; *The Winnebago*, 141 Fed. Rep. 945; *S. C.*, 200 U. S. 616; *Morgan* v. *First National Bank*, 145 Fed. Rep. 466; *Geo. A. Shaw & Co.* v. *Cleveland Ry. Co.*, 173 Fed. Rep. 746; *Livingston* v. *Moore*, 7 Pet. 469; *Galpin* v. *Page*, 18 Wall. 350.

The lien of the interpleader's judgment having legally attached to the allotment, it became a vested right of property of which the interpleader could not be deprived by any subsequent act of Congress, without violating the Fifth Amendment. *Mullen* v. *United States*, 224 U. S. 448, 457.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error brought suit in the District Court in and for the Seventh Judicial District, Johnston County, State of Oklahoma, to restrain defendant in error, who was defendant in the trial court, from selling under execution issued upon a judgment obtained against one F. A. Bonner certain lands, which are described, belonging to plaintiff in error. He was plaintiff in the action, and we will so refer to him. Plaintiff, it is alleged, derived his title from F. A. Bonner by warranty deed dated October 17, 1908, Bonner then having unrestricted right to sell. Bonner is a member and citizen of the Choctaw Tribe of Indians, of one-sixteenth degree of Indian blood, and that the lands described constitute his allotment as a member and citizen of such tribe; that the judgment upon which the execution was issued was rendered and the debt evidenced by it contracted more than five years prior to the issuance of the execution and at a time when the lands were inalienable, and that under the laws of the United States and the treaties between the Chickasaw and Choctaw Nations and the United States the lands were exempt from the operation of the judgment. That defendant threatens to sell the lands and that a sale thereof and the deed which may be executed will cast a cloud upon plaintiff's title. A restraining order was issued. Defendant in his answer alleged that when the restraining order was served upon him he was in possession of the lands under the execution which he set up as a defense. He admitted the other allegations of the plaintiff and alleged that E. F. Ham et al., plaintiffs in the judgment, were necessary parties. He prayed a dissolution of the restraining order and that the suit be dismissed.

Subsequently Millord F. Ham and others filed "their interplea in said cause" and asked to be made defendants.

For answer to plaintiff's petition they alleged the following: They recovered the judgment in controversy against Frank Bonner for the sum of $\$2,966.66^2/_3$ on January 31, 1901, as damages for the killing of the husband of one of the interpleaders and the father of the others, upon which executions were issued but all returned unsatisfied, and finally on September 29, 1908, the interpleaders caused the execution in controversy to be issued and levied upon the lands described in plaintiff's petition. On February 23, 1906, Bonner became the owner of the lands by allotment of the same as an Indian and the judgment thereupon became a lien upon the lands. Subsequently that part of the Indian Territory and the Southern District where the lands are located became a part of what is now Johnston County, and the judgment is still a lien upon the lands and was a lien at the time of the purchase by Mullen who, at the time of the alleged conveyance to him, had full knowledge and notice of the judgment and knew that an execution had been issued and levied upon the lands and that, therefore, he is not an innocent purchaser of them but took them subject to the judgment.

Mullen demurred to the answer of Simmons and to that of the interpleaders upon the grounds (1) that they did not constitute a defense. (2) They failed to show that the execution was a lien upon the lands, failed to show that the lands were seized by the sheriff prior to the deed to plaintiff, and failed to show that a lien attached by virtue of the execution. (3) The lands, having been taken in allotment by Bonner, were not subject under the law to any debt, deed, contract or obligation of any character made prior to the time at which the lands could be alienated by the allottee; that the judgment was recovered against him more than five years before the lands were alienable and that the lands were not subject to it or to the execution issued upon it.

The judgment of the court was that it "doth overrule

plaintiff's general demurrer and his first special demurrer . . . and doth sustain plaintiff's second special demurrer . . . and the interpleaders and the defendants elect to stand upon their answer and interplea herein, refuse to plead further and the court finds for the plaintiff and that he is entitled to the relief prayed for in his petition. . . ." And it was adjudged that the defendant Simmons, as sheriff of Johnston County, and his deputies, and the interpleaders be enjoined and restrained forever from issuing or causing to be issued any execution or other process upon the judgment rendered against Frank Bonner in favor of the interpleaders, and from levying the same upon the lands described.

The Supreme Court of the State reversed the judgment, deciding "that the lien of interpleader's judgment attached to the allotment as soon as it came into being; that plaintiff took the land subject thereto, and that the same should be enforced and said land sold to satisfy the same, and that, too, notwithstanding the provisions of the 15th section of the act of July 1, 1902, which has no material bearing on the question." 33 Oklahoma, 184, 188.

The section referred to is as follows: "Lands allotted to members and freedmen shall not be affected or encumbered 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 as herein provided." c. 1362, 32 Stat. 641, 642.

The Supreme Court of Oklahoma in deciding that this provision did not apply distinguished between the obligations resulting from an Indian's wrongful conduct and the obligations resulting from his contracts, saying, p. 187, "A judgment in damages for tort is not a 'debt contracted'" within the contemplation of § 15. In other words, the court was of the view that the tort retained its identity, though merged in the judgment. However, we need not enter into the controversy of the cases and the

books as to whether a judgment is a contract. Passing such considerations, and regarding the policy of § 15 and its language, we are unable to concur with the Supreme Court of Oklahoma.

This court said, in *Starr* v. *Long Jim*, 227 U. S. 613, 625, that the title to lands allotted to Indians was "retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence." It was held, applying the principle, that a warranty deed made by Long Jim at a time when he did not have the power of alienation "was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel" after he had received a patent for the land.

The principle was applied again in *Franklin* v. *Lynch*, 233 U. S. 269, and its strict character enforced against the deed of a white woman who acquired title in an Indian right. It is true, in these cases the act of the Indian was voluntary or contractual, and, it is contended, a different effect can be ascribed to the wrongs done by an Indian and that in reparation or retribution of them the state law may subject his inalienable lands—inalienable by the National law—to alienation. The consequence of the contention repels its acceptance. Torts are of variable degree. In the present case that counted on reached, perhaps, the degree of a crime, but a tort may be a breach of a mere legal duty, a consequence of negligent conduct. The policy of the law is, as we have said, to protect the Indians against their improvidence, and improvidence may affect all of their acts, those of commission and omission, contracts and torts. And we think § 15 of the act of July 1, 1902, was purposely made broadly protective, broadly preclusive of alienation by any conduct of the Indian, and not only its policy but its language distinguishes it from the statute passed on in *Brun* v. *Mann*, 151 Fed. Rep. 145. Its language is that "lands allotted . . .

shall not be *affected* or encumbered by any deed, debt or *obligation* of any *character contracted* prior to the time at which" the lands may be alienated, "nor shall said lands be sold except" as in the act provided. The prohibition then is that the lands shall not be "affected . . . by any obligation of any character," and, as we have seen, an obligation may arise from a tort as well as from a contract, from a breach of duty or the violation of a right. *Exchange Bank* v. *Ford*, 7 Colorado, 314, 316. If this were not so, a prearranged tort and a judgment confessed would become an easy means of circumventing the policy of the law.

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

MR. JUSTICE DAY dissents.

INTERNATIONAL HARVESTER COMPANY OF AMERICA *v.* STATE OF MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 166. Argued April 29, 1914.—Decided June 8, 1914.

Although the state appellate court may not have referred to the constitutional questions in its opinion, this court cannot regard such silence as a condemnation of the time at, or manner in which, those questions were raised; and, if the record shows that they were raised in that court, this court has jurisdiction.

The Fourteenth Amendment does not preclude the State from adopting a policy against all combinations of competing corporations and enforcing it even against combinations which have been induced by good intentions and from which benefit and not injury may have resulted.

The power of classification which may be exerted in the legislation of

States has a very broad range; and a classification is not invalid under the equal protection provision of the Fourteenth Amendment because of simple inequality.

A state statute prohibiting combination is not unconstitutional as denying equal protection of the law because it embraces vendors of commodities and not vendors of labor and services. There is a reasonable basis for such a classification; and so *held* as to the Missouri anti-trust Laws of 1899 and 1909.

Questions of policy are for the legislature and not for this court to determine.

As classification must be accommodated to the problems of legislation; it may depend upon degree of evil so long as it is not unreasonable or arbitrary.

237 Missouri, 369, affirmed.

THE facts, which involve the constitutionality of the Missouri Anti-trust Acts of 1899 and 1909, are stated in the opinion.

Mr. Edgar A. Bancroft and *Mr. W. M. Williams*, with whom *Mr. Selden P. Spencer* and *Mr. Victor A. Remy* were on the brief, for plaintiff in error:

A Federal question was raised and was decided by the Missouri Supreme Court adversely to plaintiff in error.

The Missouri anti-trust statute is unconstitutional because it exempts from its operation and penalties all "combinations of persons engaged in labor pursuits" and is limited "to persons and corporations dealing in commodities."

Combinations of laborers, skilled or unskilled, no less than combinations of manufacturers and merchants, may restrain trade.

Anti-trust laws aiming to protect the freedom of trade and resting on the police power must include all persons who are capable of restraining trade.

Although certain state decisions support the exemption of labor and services, they are based on inconsistent and fallacious grounds.

Anti-trust laws must be co-extensive with the evils to be prevented and remedied.

The Missouri anti-trust statute is unconstitutional, because, while it prohibits arrangements and combinations designed or tending to lessen competition in the manufacture or sale of commodities, or to increase market prices, it does not prohibit arrangements or combinations between purchasers of commodities designed or tending to lessen competition or to decrease market prices.

A combination of buyers may restrain trade to the same extent and with the same or greater injury as a combination of sellers.

The Missouri anti-trust statute, as construed and applied by the state Supreme Court in its judgment herein, is unconstitutional because it unreasonably and arbitrarily violates and restrains plaintiff in error's right and freedom of contract beyond the police power of the State, thus depriving it of property without due process of law.

In support of these contentions, see *Adams* v. *Brenan*, 177 Illinois, 194; *Bailey* v. *Master Plumbers*, 103 Tennessee, 99; *Chaplin* v. *Brown*, 83 Iowa, 156, 157; *Cleland* v. *Anderson*, 66 Nebraska, 252, 260; *Columbia Water Power Co.* v. *Columbia St. Ry. Co.*, 172 U. S. 475, 487; *Commonwealth* v. *Int. Harvester Co.*, 131 Kentucky, 551; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 556; *Cote* v. *Murphy*, 159 Pa. St. 420; *Dier's Case* (Year Book, 2 Hen. V, fol. 5, pl. 26); *Downing* v. *Lewis*, 56 Nebraska, 386, 389; *Hunt* v. *Riverside Coöperative Club*, 140 Michigan, 538; *Ipswich Tailors' Case* (11 Coke's Rep. 53a); *Loewe* v. *Lawlor*, 208 U. S. 274, 301; *Meyer* v. *Richmond*, 172 U. S. 82, 91; *M., K. & T. R. Co.* v. *Elliott*, 184 U. S. 530; *More* v. *Bennett*, 140 Illinois, 69, 77; *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816, 825; *Owen County Society* v. *Brumback*, 128 Kentucky, 137; *People* v. *Butler St. Foundry Co.*, 201 Illinois, 236, 257; *Rohlf* v. *Kasemeier*, 140 Iowa, 182, 190; *Slaughter House Cases*, 16 Wall. 127;

Smiley v. *Kansas*, 196 U. S. 447, 454; *St. L., I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S. 265, 276; *State* v. *Associated Press*, 159 Missouri, 410, 456; *State* v. *Croyle*, 7 Okla. Cr. 50; *State* v. *Duluth Board of Trade*, 107 Minnesota, 506, 546; *State* v. *Int. Harvester Co.*, 237 Missouri, 369; *State* v. *Standard Oil Co.*, 218 Missouri, 1, 370; *Swift & Co.* v. *United States*, 196 U. S. 375, 395; *United States* v. *Workingmen's Council*, 54 Fed. Rep. 994.

Mr. John T. Barker, Attorney General of the State of Missouri, with whom *Mr. W. T. Rutherford*, *Mr. W. M. Fitch*, *Mr. Thomas J. Higgs* and *Mr. Paul P. Prosser* were on the brief, for defendant in error:

There is no Federal question in this case and the judgment of the Missouri Supreme Court should be affirmed. *Astor* v. *Merritt*, 111 U. S. 401; *Powell* v. *Supervisor*, 150 U. S. 113; *Sayward* v. *Denny*, 158 U. S. 941; *Lone Wolf* v. *Hitchcock*, 187 U. S. 299; *Lohmeyer* v. *Company*, 214 Missouri, p. 688; *Brown* v. *Railroad*, 175 Missouri, p. 189; *Ross* v. *Company*, 241 Missouri, 299.

The Missouri anti-trust statutes are constitutional and have been so held many times. *Standard Oil Co.* v. *Missouri*, 224 U. S. 270; *Missouri* v. *Standard Oil Co.*, 218 Missouri, p. 368; *Missouri* v. *Tobacco Co.*, 177 Missouri, 37; *Missouri* v. *Insurance Co.*, 251 Missouri, 278; *Railroad* v. *Mackey*, 127 U. S. 209; *Barbier* v. *Connelly*, 113 U. S. 31; *Railroad Co.* v. *Ellis*, 165 U. S. 150; *United States* v. *Association*, 171 U. S. 505; *Missouri* v. *Int. Harvester Co.*, 237 Missouri, 369.

Mr. Justice McKenna delivered the opinion of the court.

Information in the nature of *quo warranto* brought in the Supreme Court of the State to exclude plaintiff in error from the corporate rights, privileges and franchises exer-

cised or enjoyed by it under the laws of the State, that they be forfeited, and all or such portion of its property as the court may deem proper be confiscated or in lieu thereof a fine be imposed upon it in "punishment of the perversion, usurpation, abuse and misuse of franchises."

The ground of the action is the alleged violation of the statutes of the State passed respectively in 1899 and 1909 and entitled "Pools, Trusts and Conspiracies" and "Pools, Trusts and Conspiracies and Discriminations."

The facts alleged in the information are these: Plaintiff in error is a Wisconsin corporation engaged in the manufacture and sale of agricultural implements, binders, mowers, etc., and was licensed on the fifth of April, 1892, to do business in Missouri under the name of the Milwaukee Harvester Company, and on September 18, 1902, became licensed to do and engaged in such business in the State. In that year the International Harvester Company of New Jersey was organized with a capital stock of $120,000,000 for the purpose of effecting a combination of plaintiff in error and certain other companies to restrain competition in the manufacture and sale of such agricultural implements in Missouri, and the New Jersey company has maintained plaintiff in error as its sole selling agent in Missouri. Before the combination the companies combined were competitors of one another and of other corporations, individuals and partnerships engaged in the same business in the State and that thereby the people of the State, and particularly the retail dealers and farmers of the State, received the benefit of competition in the purchase and sale of farm implements. The combination was designed and made with a view to lessen, and it tended to lessen, free competition in such implements, and thereby the said corporations entered into and became members of a pool, trust, combination and agreement. In furtherance thereof and for the purpose of giving the International Harvester Company of New Jersey a

monopoly of the business of manufacturing and selling agricultural implements in the State, and for the purpose of preventing competition in the sale thereof, plaintiff in error has compelled the retail dealers in each county of the State who desire to handle and sell or act as agent for it to refrain from selling implements manufactured or sold by competing companies or persons. By reason thereof competition in such implements has been restrained, prices controlled, the quantity of such implements has been fixed and limited, and plaintiff in error has been able to secure, and for several years enjoy, from 85% to 90% of the business, all to the great damage and loss of the people of the State, and by reason of its participation in the pool, trust and combination and by reason of the acts and things done by it plaintiff in error has been guilty of an illegal, wilful and malicious perversion and abuse of its franchises, privileges and licenses granted to it by the State.

The answer of plaintiff in error denied that it had become a party to any combination or that in its transactions there was any purpose to restrain or lessen competition, or that trade had been or was restrained.

The case was referred to a special commissioner to take the evidence and report his conclusions. He found, as alleged in the information, that the International Harvester Company of New Jersey was a combination of the properties and businesses of formerly competing harvester companies, and plaintiff in error being one of such companies and, thereafter by selling the New Jersey company's products in Missouri, had violated the Missouri statutes against pools, trusts and conspiracies.

In exceptions to the report of the special commissioner plaintiff in error urged that the statute of Missouri violated the equality clause and due process clause of the Fourteenth Amendment to the Constitution of the United States, "(1) Because said statute arbitrarily discrim-

inates between persons making or selling products and commodities and persons selling labor and service of all kinds: In that each section of said statute applies only to articles of merchandise and not to labor or services and the like, the prices of which are equally and similarly determined by competition, and may be equally and similarly the subject of combination and conspiracy to the detriment of the public. (2) Because said statute arbitrarily discriminates between the *makers and sellers* of products and commodities and the *purchasers* thereof: It prohibits manufacturers and sellers from making contracts or arrangements intended or tending to increase the market price of the articles they make or sell, but does not prohibit purchasers from combining to fix or reduce the market price of the commodities or articles to be purchased by them. (3) Because said statute, as construed by the Commissioner, unreasonably and arbitrarily interferes with plaintiff in error's right to make proper and reasonable business contracts, and deprives it of property rights in respect thereto."

These exceptions were urged and argued in the Supreme Court upon the filing of the commissioner's report. Judgment was entered upon the report, in which it was adjudged that by reason of the violation of the statutes of the State as charged in the information, plaintiff in error had forfeited the license theretofore granted to it to do business in the State, and it was adjudged that the license be forfeited and canceled and the company ousted from its rights and franchises granted by the State to do business in the State, and a fine of $50,000 was imposed upon it. It was, however, provided that upon payment of the fine on or before the first of January, 1912, and immediately ceasing all connection with the International Harvester Company of New Jersey and the corporations and copartnerships with which it had combined, and not continuing and maintaining the unlawful agreement and com-

bination with them to lessen and destroy competition in the sale of the enumerated farm implements and giving satisfactory evidence thereof to the court, the judgment of ouster should be suspended. The company was given until March 1, 1912, "to file its proof of willingness" to comply with the judgment. It was also adjudged that upon a subsequent violation of the statute "the suspension of the writ of ouster shall be removed" by the court "and absolute ouster be enforced," and to that end the court retained "its full and complete jurisdiction over the cause." 237 Missouri, 369.

A motion is made to dismiss on the ground that plaintiff in error in its answer simply denied that it had violated the anti-trust laws of the State, and, it is contended, that by not alleging in its answer that those laws violated the Constitution of the United States it waived such defense. It is further contended that because the Federal right was not asserted in the answer the Supreme Court of the State could not have considered and did not consider or decide it. Decisions of the Supreme Court of Missouri are cited to sustain the contentions. The decisions declare the proposition that constitutional questions must be raised at the first opportunity or, as it is expressed in one of the cases (*Brown* v. *Railway Co.*, 175 Missouri, 185, 188), "the protection of the Constitution must be timely and properly invoked in the trial court."

In *Milling Company* v. *Blake*, 242 Missouri, 23, 31, it is said: "The rule of this court is that so grave a question [constitutional question] must be lodged at the first opportunity, or it will be deemed to have been waived. If it can be appropriately and naturally raised in the pleadings, and thereby be a question lodged in the record proper, such is the time and place to raise it," and that it is too late to raise the question after judgment in a motion for new trial. In *Hertzler* v. *Railway Co.*, 218 Missouri, 562, 564, it was held: "The motion for a new trial was not

the first door open for the question to enter, and in our later decisions we have ruled that a question of such gravity must be raised as soon as orderly procedure will allow. This, in order that the trial court may be treated fairly and the question get into the case under correct safeguards and earmarked as of substance and not mere color."

It is manifest, we think, that the court only intended to express the condition of appellate review to be that in the trial court constitutional questions should not be reserved until the case had gone to judgment on other issues, and then used to secure a new trial. The principle of the rulings is satisfied in the case at bar. It is, as we have seen, an original proceeding in the Supreme Court and upon the report of the commissioner which brought the case to the court for decision of the issues and questions involved in it the Federal questions were made "under correct safeguards and earmarked as of substance and not mere color." It is true the court has not referred to them in its opinion, but we cannot regard its silence as a condemnation of the time or manner at or in which they were raised. The motion to dismiss is, therefore, denied.

The assignments of error necessarily involve a consideration of the statutes. The relevant provisions are contained in § 10301 of the Revised Statutes of the State of 1909, and § 8966 of the Revised Statutes of 1899.

Section 10301 provides, "that all arrangements, contracts, agreements, combinations or understandings made, or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture or sale" in the State "of any product, commodity or article, or thing bought and sold," and all such arrangements, etc., "which are designed or made with a view to increase, or which tend to increase the market price of any product, commodity or article or thing, of any class or kind whatsoever

bought and sold," are declared to be against public policy, unlawful and void, and those offending "shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished" as provided.

Section 8966 provides that arrangements, etc., such as described in § 10301, having like purpose, and all such arrangements, etc., "whereby, or under the terms of which, it is proposed, stipulated, provided, agreed or understood that any person, association of persons or corporations doing business in" the State, "shall deal in, sell or offer for sale" in the State "any particular or specified article, product or commodity, and shall not during the continuance or existence of any such arrangement, . . . deal in, sell or offer for sale," in the State, "any competing article, product or commodity," are declared to be against public policy, unlawful and void; and any person offending "shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties" provided.

By § 10304 of the Revised Statutes of 1909 it is provided that domestic offending corporations shall forfeit their charters and all or any part of their property as shall be adjudged by a court of competent jurisdiction, or be fined in lieu of the forfeiture of charters or of property.

Foreign offending corporations shall forfeit their right to do business in the State, with forfeiture also of property or, in lieu thereof, the payment of a fine.

In *State* v. *Standard Oil Co.*, 218 Missouri, 1, 370, 372, the Supreme Court held that the anti-trust statutes of the State "are limited in their scope and operations to persons and corporations dealing in commodities, and do not include combinations of persons engaged in labor pursuits." And, justifying the statutes against a charge of illegal discrimination, the court further said that "it must be borne in mind that the differentiation between labor and property is so great that they do not belong to the same

general classification of rights, or things, and have never been so recognized by the common law, or by legislative enactments."

Accepting the construction put upon the statute, but contesting its legality as thus construed, plaintiff in error makes three contentions, (1) The statutes as so construed unreasonably and arbitrarily limit the right of contract; (2) discriminate between the vendors of commodities and the vendors of labor and services, and (3) between vendors and purchasers of commodities.

(1). The specification under this head is that the Supreme Court found, it is contended, benefit—not injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion the answer is immediate. It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it. And such is explicitly the purpose and policy of the Missouri statutes; and they have been sustained by the Supreme Court. There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing such policy. To so decide would be stepping backwards. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

It is true that the Supreme Court did not find a definite abuse of its powers by plaintiff in error, but it did find that there was an offending against the statute, a union of able competitors and a cessation of their competition, and the court said, p. 395: "Some of the smaller concerns that were competitors in the market have ceased their struggle for existence and retired from the field." This is one

of the results which the statute was intended to prevent, the unequal struggle of individual effort against the power of combination. The preventing of the engrossment of trade is as definitely the object of the law as is price regulation of commodities, its prohibition being against combinations "made with a view to lessen, or which tend to lessen, lawful trade or full and free competition in the importation, transportation, manufacture or sale of any commodity, or article or thing bought or sold." See *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, Id. 106; *United States* v. *Patten*, 226 U. S. 525.

(2) and (3). These contentions may be considered together, both involving a charge of discrimination—the one because the law does not embrace vendors of labor, the other because it does not cover purchasers of commodities as well as vendors of them. Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the State. And we shall presently see that power has very broad range. A classification is not invalid because of simple inequality. We said in *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, 106, by Mr. Justice Brewer, "The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." Therefore, it may be there is restraint of competition in a combination of laborers and in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the State was for the legislature of the State to determine.

In *Carroll* v. *Greenwich Ins. Co., supra,* a statute of Iowa was considered which made it unlawful for two or more fire insurance companies doing business in the State, or their officers or agents, to make or enter into combinations or agreements in relation to the rates to be charged for insurance, and certain other matters. The provision was held invalid by the Circuit Court of the United States for the District of Iowa on the ground of depriving of liberty of contract secured by the Fourteenth Amendment and of the equal protection of the laws. This court reversed the decision, saying, after stating that there was a general statute of Iowa which prohibited combinations to fix the price of any article of merchandise or commodity or to limit the quantity of the same produced or sold in the State, "Therefore the act in question does little if anything more than apply and work out the policy of the general law in a particular case." Again, "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms." And, "If the legislature of the State of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what the legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mutual Life Insurance Company* v. *Mettler,* 185 U. S. 308." (199 U. S. p. 411.) Other cases were also cited in illustration.

Carroll v. *Greenwich Ins. Co., supra,* is especially apposite. It contains the elements of the case at bar and a decision upon them. It will be observed that the statute, which it was said declared the general policy of Iowa, was a prohibition against a combination of producers and sellers. There was the same distinction, therefore, be-

tween vendors and purchasers of commodities as in the Missouri statute and the same omission of prohibition of combinations of vendors of labor and services as in the Missouri law. The distinction and omission were continued when the policy of the State was extended to insurance companies. The law was not condemned because it went no farther—because it did not prohibit the combination of all trades, businesses and persons. We held that the omission was not for judicial cognizance, and that a court could not say that fire insurance might not present so conspicuous an example of what the legislature might think an evil "as to justify special treatment."

We might leave the discussion with that and the other cases. They decide that we are helped little in determining the legality of a legislative classification by making broad generalizations, and it is for a broad generalization that plaintiff in error contends—indeed, a generalization which includes all the activities and occupations of life, and there is an enumeration of wage earners in emphasis of the discrimination in which manufacturers and sellers are singled out from all others. The contention is deceptive, and yet it is earnestly urged in various ways which it would extend this opinion too much to detail. "In dealing with restraints of trade," it is said, "the proper basis of classification is obviously neither in commodities nor services, nor in persons, but in *restraints*." A law, to be valid, therefore, is the inflexible deduction, cannot distinguish between "*restraints*," but must apply to all restraints, whatever their degree or effect or purpose, and that because the Missouri statute has not this universal operation it offends against the equality required by the Fourteenth Amendment. This court has decided many times that a legislative classification does not have to possess such comprehensive extent. Classification must be accommodated to the problems of legislation, and we decided in *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S.

251, that it may depend upon degrees of evil without being arbitrary or unreasonable. We repeated the ruling in *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338, in *Engel* v. *O'Malley*, 219 U. S. 128, in *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, and again in *German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389, 418. In the latter case a distinction was sustained against a charge of discrimination between stock fire insurance companies and farmers' mutual insurance companies insuring farm property. If this power of classification did not exist, to what straits legislation would be brought. We may illustrate by the examples furnished by plaintiff in error. In the enumeration of those who, it is contended, by combination are able to restrain trade are included, among others, "persons engaged in domestic service" and "nurses," and because these are not embraced in the law, plaintiff in error, it is contended, although a combination of companies uniting the power of $120,000,000 and able thereby to engross 85% or 90% of the trade in agricultural implements, is nevertheless beyond the competency of the legislature to prohibit. As great as the contrast is, a greater one may be made. Under the principle applied a combination of all the great industrial enterprises (and why not railroads as well?) could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses, whose humble functions preclude effective combination. Such contrasts and the considerations they suggest must be pushed aside by government, and a rigid and universal classification applied, is the contention of plaintiff in error; and to this the contention must come. Admit exceptions, and you admit the power of the legislature to select them. But it may be said the comparison of extremes is forensic, and, it may be, fallacious; that there may be powerful labor combinations as well as powerful industrial combinations, and weak ones of both, and that the law to be valid cannot distin-

guish between strong and weak offenders. This may be granted (*Engel* v. *O'Malley, supra*), but the comparisons are not without value in estimating the contentions of plaintiff in error. The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the "basis of community." We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts "unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Mo., Kan. & Tex. Ry. Co.* v. *May*, 194 U. S. 267, 269; *Williams* v. *Arkansas*, 217 U. S. 79, 90; *Watson* v. *Maryland*, 218 U. S. 173, 179.

The instances of these cases are instructive. In the first there was a difference made between land owners as to liability for permitting certain noxious grasses to go to seed on the lands. In the second, the statute passed on made a difference between businesses in the solicitation of patronage on railroad trains and at depots. In the third a difference based on the evidence of qualification of physicians was declared valid.

In *Western Union Telegraph Co.* v. *Milling Co.*, 218 U. S. 406, a distinction was made between common carriers in the power to limit liability for negligence. In *Engel* v. *O'Malley, supra*, a distinction between bankers was sustained; and in *Provident Savings Institution* v. *Malone*, 221 U. S. 660, deposits in savings banks were distinguished from deposits in other banks in the application of the statute of limitations.

Other cases might be cited whose instances illustrate the same principle and in which this court has refused to accept the higher generalizations urged as necessary to the fulfilment of the constitutional guaranty of the equal pro-

tection of the law, and in which we, in effect, held that it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances. Such power, of course, cannot be arbitrarily exercised. The distinction made must have reasonable basis. *Magoun* v. *Illinois Trust &c. Bank*, 170 U. S. 283; *Clark* v. *Kansas City*, 176 U. S. 114; *Gundling* v. *Chicago*, 177 U. S. 183; *Petit* v. *Minnesota*, 177 U. S. 164; *Williams* v. *Fears*, 179 U. S. 270; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Griffith* v. *Connecticut*, 218 U. S. 563; *Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453, 466; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79; *Fifth Avenue Coach Co.* v. *New York*, 221 U. S. 467; *Murphy* v. *California*, 225 U. S. 623; *Rosenthal* v. *New York*, 226 U. S. 260, 269, 270; *Mo., Kan. & Tex. Ry.* v. *Cade*, 233 U. S. 642.

And so in the case at bar. Whether the Missouri statute should have set its condemnation on restraints generally, prohibiting combined action for any purpose and to everybody, or confined it as the statute does to manufacturers and vendors of articles and permitting it to purchasers of such articles; prohibiting it to sellers of commodities and permitting it to sellers of services, was a matter of legislative judgment and we cannot say that the distinctions made are palpably arbitrary, which we have seen is the condition of judicial review. It is to be remembered that the question presented is of the power of the legislature, not the policy of the exercise of the power. To be able to find fault, therefore, with such policy is not to establish the invalidity of the law based upon it.

It is said that the statute as construed by the Supreme Court of the State comes within our ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, but we do not think so. If it did we should, of course, apply that ruling here.

Judgment affirmed.

INTERNATIONAL HARVESTER COMPANY OF AMERICA *v.* COMMONWEALTH OF KENTUCKY.

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

Nos. 276, 291, 292. Argued April 23, 24, 1914.—Decided June 8, 1914.

An anti-trust criminal law may not necessarily be unconstitutional merely because it throws upon men the risk of rightly estimating what is an undue restraint of trade, but to compel a man to guess what the fair market value of commodities manufactured or sold by him would be under other than existing conditions is beyond constitutional limits.

The anti-trust provision of the constitution of 1891 and of the acts of 1900 and 1906 of Kentucky, as construed by the highest court of that State, are unconstitutional under the Fourteenth Amendment as offering no standard of conduct that it is possible to know in advance and comply with.

147 Kentucky, 564; Id. 795; 148 Kentucky, 572, reversed.

THE facts, which involve the constitutionality of anti-trust provisions of the constitution and laws of Kentucky, are stated in the opinion.

Mr. Alexander Pope Humphrey and *Mr. Edgar A. Bancroft*, with whom *Mr. Victor A. Remy* was on the brief, for plaintiff in error:

The construction placed on the anti-trust statutes by the instructions of the lower court violated the Fourteenth Amendment.

The anti-trust statutes as construed are void for indefiniteness. See act of May 20, 1890, §§ 3915 and 3917, Ky. Stat.; § 198, Kentucky Const.; Ky. Stat., p. 145;

acts of March 21, 1906, p. 429 (Ky. Stat., § 3941a), and March 13, 1908, p. 38 (Ky. Stat., § 3941a).

The Kentucky anti-trust law, as construed and enforced, denies equal protection of the law contrary to the Fourteenth Amendment.

The instructions of the lower court placed a construction on the Kentucky anti-trust law which conflicts with the Fourteenth Amendment. They, in effect, require superior articles to be sold at the same prices as inferior ones.

The Kentucky anti-trust statutes as construed by the Court of Appeals are so indefinite that they are void as criminal laws.

The Kentucky anti-trust statutes as construed and enforced deny equal protection of the law.

The history of the laws and the decisions show the above is true.

The fact that Kentucky is an agricultural State and the "Night Riding" movement tend to show the purpose of the acts.

The construction given the conflicting statutes gave only an apparent equality to manufacturers and merchants as compared to farmers.

As a matter of fact, the laws as construed and enforced, deny manufacturers and dealers equal protection.

The law itself must save the rights of parties, and they cannot be left to the discretion of the courts.

In support of these contentions, see *Am. Tobacco Co.* v. *Commonwealth*, 115 S. W. Rep. 754; *Collins* v. *Commonwealth*, 141 Kentucky, 565; *Commonwealth* v. *Bavarian Brewing Co.*, 112 Kentucky, 925, 928; *Commonwealth* v. *Grinstead*, 108 Kentucky, 59, 67, 76; *Commonwealth* v. *Hodges*, 137 Kentucky, 233; *Commonwealth* v. *Int. Harvester Co.*, 131 Kentucky, 551; *Commonwealth* v. *Int. Harvester Co.*, 131 Kentucky, 768; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Equitable Society* v. *Common-*

wealth, 113 Kentucky, 126; *Ex parte Virginia*, 100 U. S. 339, 346; *Henderson* v. *Mayor*, 92 U. S. 259, 268; *Int. Harvester Co.* v. *Commonwealth*, 124 Kentucky, 543; 137 Kentucky, 668; 144 Kentucky, 403, 410; 147 Kentucky, 564; 147 Kentucky, 795; 148 Kentucky, 572; *L., H. & St. L. Ry. Co.* v. *Roberts*, 144 Kentucky, 820, 824; *Louisville Ry. Co.* v. *Stock Yards Co.*, 212 U. S. 133, 143; *Malone* v. *Commonwealth*, 141 Kentucky, 570; *Nash* v. *United States*, 229 U. S. 373, 377; *O'Bannion* v. *Commonwealth*, 113 S. W. Rep. 907; *Owen County Society* v. *Brumback*, 128 Kentucky, 137; *Robinson* v. *Van Houser*, 196 Fed. Rep. 620; *Steers* v. *United States*, 192 Fed. Rep. 1, 3, 6; *United States* v. *Brewer*, 139 U. S. 278, 288; *United States* v. *Sharp*, Peters' C. C. R. 118; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373.

Mr. James Garnett, Attorney General of the Commonwealth of Kentucky, and *Mr. Charles Carroll*, with whom *Mr. Frank E. Daugherty*, *Mr. J. Robert Layman* and *Mr. J. R. Mallory* were on the brief, for defendant in error:

This court cannot review the evidence. *Dower* v. *Richard*, 151 U. S. 663, 664.

Weight must be given to construction of statutes and constitution, in state courts of last resort, by this court. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 130; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 73.

As to the construction of constitution and acts by Kentucky's highest court, see *Commonwealth* v. *Int. Harvester Co.*, 131 Kentucky, 551; *Commonwealth* v. *Hodges*, 137 Kentucky, 233.

The standard adopted for determining whether or not there has been a violation of the Kentucky anti-trust law is fixed and certain. *Int. Harvester Co.* v. *Commonwealth*, 131 Kentucky, 576; 137 Kentucky, 677; 144 Kentucky, 410; 147 Kentucky, 564.

If the policy adopted by the Kentucky courts is reason-

able, this court will not review it. *Otis* v. *Parker*, 187 U. S. 47; *C., B. & Q. R. R.* v. *McGuire*, 219 U. S. 547; *McLean* v. *Arkansas*, 211 U. S. 539; *Hunter* v. *Pittsburg*, 207 U. S. 176. See Report of Committee of Senate of Kentucky, Feb. 21, 1910; § 198, Const. Kentucky.

The question as to instruction to jury was not raised in the Kentucky courts, and hence cannot avail here. *Dewey* v. *Des Moines*, 173 U. S. 199; *Bollin* v. *Nebraska*, 176 U. S. 90.

The Kentucky anti-trust statutes, as construed by the Court of Appeals, are not so indefinite as to render them void as criminal laws; nor do such statutes, as construed and enforced, deny the equal protection of the law. *Ex parte Virginia*, 100 U. S. 339, and *Yick Wo* v. *Hopkins*, 118 U. S. 356; *L. & N. R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 133 have no application to this case.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was prosecuted, convicted and fined in three different counties for having entered into an agreement with other named companies for the purpose of controlling the price of harvesters, &c. manufactured by them and of enhancing it above their real value; and for having so fixed and enhanced the price, and for having sold their harvesters, &c. at a price in excess of their real value, in pursuance of the agreement alleged. The judgments were affirmed by the Court of Appeals. 147 Kentucky, 564. *Id.* 795. 148 Kentucky, 572. The plaintiff in error saved its rights under the Fourteenth Amendment and brought the cases here.

The law of Kentucky in its present form is the result of the construction of several statutes somewhat far apart in time and of seemingly contradictory import. It was argued that construction could not take the place of express language in a statute and *Louisville & Nashville*

R. R. Co. v. *Central Stock Yards Co.*, 212 U. S. 132, 144, was cited for the proposition. But the case gives no sanction to it. The point there was that a defect in a law could not be cured by precautions in a judgment, not that what seemed a defect could not be cured by the construction given to the words by the court having final authority to declare their intent. We follow the Kentucky Court of Appeals in taking what they derive from the legislation of the State as if it were embodied in a single act.

The history in brief is this: By an act of May 20, 1890, agreements for the purpose of fixing or limiting the amount or quantity of any article of merchandise to be produced or manufactured, mined, bought or sold; as also combinations by corporations with others to put the business of the combination under control with intent to limit, fix or change the price of articles of commerce or in any way to diminish the output of such articles, were made punishable by fine, imprisonment, or both. Carroll's Kentucky Statutes, §§ 3915, 3916, 3917. In 1891 a new constitution was adopted by the State, by § 198 of which it was made the duty of the General Assembly "from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts . . . from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." (This was held not to repeal the earlier statute. *Commonwealth* v. *International Harvester Co.*, 131 Kentucky, 551, 566.) But Kentucky grows tobacco and the farmers were dissatisfied with the prices that they were able to get, being oppressed as they alleged by a combination of buyers. So, on March 21, 1906, a statute was enacted that made it lawful for any number of persons to combine the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of obtaining a higher price than they could get by selling them separately. Session Laws, 1906, c. 117, p. 429. And later, by an act of

March 13, 1908 (Session Laws, 1908, c. 8, p. 38), not only was the legality of these last mentioned combinations reaffirmed, but they were protected by injunction, and the sale by or purchase from the owner contrary to his agreement was punished by a fine.

When the Court of Appeals came to deal with the act of 1890, the constitution of 1891, and the act of 1906, it reached the conclusion, which now may be regarded as the established construction of the three taken together, that by interaction and to avoid questions of constitutionality, they were to be taken to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. *Owen County Burley Tobacco Society* v. *Brumback*, 128 Kentucky, 137, 151. *Commonwealth* v. *International Harvester Co. of America*, 131 Kentucky, 551, 568, 571–573. *International Harvester Co. of America* v. *Commonwealth*, 137 Kentucky, 668. The result seems to be that combinations of tobacco growers are held to do no more than restore an equilibrium that has been disturbed by a combination of buyers, *Owen County Burley Tobacco Society* v. *Brumback*, 128 Kentucky, 137, 152; *Collins* v. *Commonwealth*, 141 Kentucky, 564, whereas if prices rise after a combination of manufacturers it very nearly is presumed that the advance is above the real value and that there is a crime. *International Harvester Co. of America* v. *Commonwealth*, 144 Kentucky, 403, 410, 411.

The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases the real value is declared to be 'its market value under fair competition, and under normal market conditions.' 147 Kentucky, 566. *Commonwealth* v. *International Harvester Co. of America*, 131 Kentucky, 551, 576. *International Harvester Co. of America* v. *Commonwealth*, 137

Kentucky, 668, 677, 678. We have to consider whether in application this is more than an illusory form of words, when nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from ten to fifteen per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from 20 to 25 per cent. and labor 27½ per cent. Whatever doubt there may be about the exact figures we hardly suppose the fact of a rise to be denied. But in order to reach what is called the real value, a price from which all effects of the combination are to be eliminated, the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.

This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased

efficiency in the machines but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand.

We regard this decision as consistent with *Nash* v. *United States*, 229 U. S. 373, 377, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially deter-

minate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.

Judgments reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

KEOKEE CONSOLIDATED COKE COMPANY *v.* TAYLOR.

SAME *v.* KELLY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Nos. 372, 373. Submitted May 7, 1914.—Decided June 8, 1914.

This court does not go behind the construction given to a state statute by the state courts.

A state statute aimed at an evil and hitting it presumably where experience shows it to be most felt is not unconstitutional under the equal protection provision of the Fourteenth Amendment because there might be other instances to which it might be equally well applied.

It is for the legislature to determine to what classes a police statute shall apply; and unless there is a clear case of discrimination the courts will not interfere.

Section 3 of Chapter 391, Virginia Laws of 1888, reënacting the act of 1887 aimed at the evil of payment of labor in orders redeemable only at the employers' shops and forbidding certain classes of employers of labor to issue any order for payment thereto unless purporting

to be redeemable for its face value in lawful money of the United States, is not an unconstitutional denial of equal protection of the law because it does not apply to other classes of employers who also own shops and pay with orders redeemable in merchandise.

THE facts, which involve the constitutionality of a statute of Virginia providing for method of payment of employés of certain industries, are stated in the opinion.

Mr. J. F. Bullitt and *Mr. R. T. Irvine* for plaintiff in error:

The Virginia act is repugnant to the Fourteenth Amendment of the Constitution of the United States, nor is it a valid exercise of police power.

The act is not constitutional; it does not embrace all of a class.

The act is class legislation even though it should be held to be a police regulation.

If an act is repugnant to the Constitution, it is not saved by the police power doctrine. The usual statement of the doctrine is too broad.

The burden is on plaintiffs to show that the act is within the police power.

The act would injure rather than benefit employés as well as employers.

In support of these contentions, see Virginia Code (Pollard), § 3657-d, cl. 1, 2, 3; *Avent-Beattyville Coal Co.* v. *Commonwealth*, 28 L. R. A. 273; *Braceville Coal Co.* v. *People*, 147 Illinois, 66; *Frorer* v. *People*, 141 Illinois, 171; *Lockner* v. *New York*, 198 U. S. 45; *Millett* v. *People*, 117 Illinois, 294; *Peal Coal Co.* v. *State*, 36 W. Va. 802; *State* v. *Goodwell*, 10 S. E. Rep. 285; *State* v. *Loomis*, 115 Missouri, 307; *State* v. *Missouri Tie Co.*, 181 Missouri, 536; Cooley's Const. Lim. (7th Ed.) 561; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *State* v. *Froehlich*, 115 Wisconsin, 32; *S. C.*, 91 N. W. 115; *People* v. *Jackson Road Co.*,

9 Michigan, 285, 307. *Dayton Coal & Iron Co.* v. *Barton*, 183 U. S. 13, distinguished.

Mr. J. C. Noel and *Mr. C. T. Duncan* for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

These are actions of assumpsit brought by the defendants in error upon orders signed by employés of the plaintiff in error and addressed to it, directing it to pay to bearer 'in merchandise only from your store,' to the value specified. These orders were upon scrip issued by the plaintiff in error as an advance of monthly wages in payment for labor performed, and the only controversy between the parties arises from the refusal of the plaintiff in error to pay the indicated amounts in money. The facts were agreed, the Circuit Court gave judgment for the plaintiff and a writ of error was refused by the Supreme Court of Appeals. The ground of the judgment was an act of February 13, 1888, c. 118, amending and reënacting an act of 1887, c. 391, § 3, forbidding any person, firm, or corporation, engaged in mining coal or ore, or manufacturing iron or steel or any other kind of manufacturing to issue for the payment of labor any order unless the same purported to be redeemable for its face value in lawful money of the United States. The plaintiff in error saved its rights under the Fourteenth Amendment and when the Court of Appeals refused to hear the cases brought them here. The writ of error was allowed on September 25, 1912. *Norfolk & Suburban Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269.

Of course we do not go behind the construction given to the state law by the state courts. The objections that are urged here are that the statute interferes with freedom of contract, and, more especially, that it is class legislation

of a kind supposed to be inconsistent with the Fourteenth Amendment; a West Virginia decision upon a similar statute being cited to that effect. *State* v. *Goodwill,* 33 W. Va. 179. The former of these objections, however, is disposed of by *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, and *Dayton Coal & Iron Co.* v. *Barton,* 183 U. S. 23.

It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81. *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144. The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need.

Judgments affirmed.

UNITED STATES *v.* BUFFALO PITTS COMPANY.

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

No. 369. Submitted May 5, 1914.—Decided June 8, 1914.

In cases brought under the Tucker Act and coming to this court from a District or Circuit Court the findings of fact of the trial court are conclusive, and the question here, unless the record would warrant the conclusion that the ultimate facts are not supported by any evidence whatever, is whether the conclusions of law are warranted by the facts found. *Chase* v. *United States*, 155 U. S. 489.

Where property is left with the officer of the Government who has charge of the work by the owner relying upon the fact that his title is not disputed and upon representations made to him that payment would be recommended for such use, and Congress has given authority to appropriate property necessary for the particular work and to pay therefor, there is an implied contract on the part of the Government to pay for the property and jurisdiction exists under the Tucker Act. *United States* v. *Lynah*, 188 U. S. 445, followed, and *Harley* v. *United States*, 198 U. S. 229, distinguished.

When in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, the United States, under the constitutional obligation of the Fifth Amendment, impliedly promises to pay therefor. *United States* v. *Lynah*, 188 U. S. 445, 464, followed. *Hooe* v. *United States*, 218 U. S. 322, distinguished.

193 Fed. Rep. 905, affirmed.

THE facts, which involve the liability of the Government under the Fifth Amendment for the rental value of property used by it, are stated in the opinion.

Mr. Assistant Attorney General Underwood for the United States:

The plaintiff had no such title to the engine as would enable it to contract for its use.

There was no intention to make a contract for the use of

said engine, nor conduct of the parties from which such contract might be implied.

It was not shown that there was any fund out of which judgment might be legally paid.

The engine having been taken under a claim of right, and not in recognition of a paramount title in plaintiff, no action upon an implied contract will lie. *Gibbons* v. *United States*, 8 Wall. 269, 275; *Harley* v. *United States*, 198 U. S. 229; *Hill* v. *United States*, 149 U. S. 593, 598; *Hooe* v. *United States*, 218 U. S. 322; *Knapp* v. *United States*, 46 Ct. Cls. 601, 643; *Langford* v. *United States*, 101 U. S. 341.

Mr. Edward P. White for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This suit was brought by the Buffalo Pitts Company in the Circuit Court of the United States for the Western District of New York to recover for the value of the use of a certain engine which it was alleged the United States was under an implied contract to pay. The action was begun under the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, and the court of original jurisdiction, as required by the statute, § 7, made findings of fact and conclusions of law under which it held the Government liable and rendered judgment for the plaintiff's claim. On writ of error the Circuit Court of Appeals affirmed that judgment (193 Fed. Rep. 905), and the case is brought here.

The findings of fact show that: The plaintiff is a corporation organized under the laws of New York and having its principal place of business at Buffalo, New York, manufacturing, among other things, traction engines. On May 20, 1905, it sold a traction engine with appurtenances to the Taylor-Moore Construction Company, delivered

at Roswell, New Mexico, and took a chattel mortgage thereon to secure the payment of $1600 of the purchase price. The chattel mortgage conveyed the engine and appurtenances to the plaintiff on condition that if the mortgagor should fail to pay the sum of $1600 according to certain notes or should attempt to dispose of or injure the property or remove the same from the County of Chaves, New Mexico, or if the mortgagor should not take proper care of the property, or if the mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable and it should be lawful for the mortgagee to take the property and remove the same and hold or sell it and all equity of redemption at public auction with notice as provided by law. The mortgage was duly recorded May 22, 1905, and no part of the money thereby secured has ever been paid to the mortgagee which has ever since been the owner and holder of the mortgage. The engine was put to work by the Construction Company upon the so-called Hondo Project, being part of the Reclamation Service undertaken by the Department of the Interior of the United States, which work was being prosecuted under a contract between the United States and the Construction Company, the engine being located at or near Roswell, New Mexico.

The Construction Company having made default in the performance of its contract, on or about June 7, 1905, work was suspended thereunder and the Construction Company then assigned all its interest in the contract to the United States, which, pursuant to the contract, took possession of all material, supplies and equipment belonging to the Construction Company, including the engine and appurtenances. On June 16, 1905, at Roswell, New Mexico, the plaintiff by its agents made a demand upon the defendant through Wendell M. Reed, District Engineer of the Reclamation Service under the Department of the Interior,

for the possession of the engine and appurtenances, which the defendant then and there refused, and thereafter it retained and used the property in the work under the contract until June 21, 1906. Reed was during, and before and after, such period, the local representative of the Government in charge of the work under the contract at and near Roswell, and as such took possession of the engine and appurtenances for the United States. Thereafter the defendant by the Director of the United States Geological Survey to whom the Secretary of the Interior referred the matter, and by the Chief Engineer and Assistant Chief Engineer of the Reclamation Service under the direction of the Department, ratified and adopted the acts of Reed in respect to the possession of the engine and appurtenances. The mortgagor has never made any claim to the property since the suspension and assignment of the contract to the defendant.

Plaintiff, on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of the chattel mortgage and that the plaintiff claimed the property under the title thereby vested in it and claimed the right of possession because of the default by the mortgagor in the conditions thereof, and the defendant at all times well knew of the existence and filing of the chattel mortgage and did not at any time dispute the validity thereof. On September 30, 1905, the defendant represented to the plaintiff that it was using and would continue to use the engine and appurtenances in its work and that any legal proceedings to recover the possession thereof would be resisted by the defendant, and further represented to the plaintiff that if such property was left in the defendant's possession its attorney would recommend payment therefor. The plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and consented

to defendant's retaining possession of the property in expectation of receiving due compensation therefor.

The question in this case is, Did these facts warrant the deduction that the Government was liable upon an implied contract to pay for the use of the engine? In cases brought under this act coming up from a District or Circuit Court of the United States the findings of fact of the trial court are conclusive, and the question is whether the conclusions of law were warranted by the facts found (*Chase* v. *United States*, 155 U. S. 489, 500). Exceptions to the rule may exist if the record enables the court to conclude that the ultimate facts found are not supported by any evidence whatever (*Collier* v. *United States*, 173 U. S. 79).

We think the Circuit Court and the Circuit Court of Appeals were right in concluding that under the facts found the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed and upon the representations made to it, and consented to the defendant's retaining possession of the property in expectation of receiving compensation for it; as to the Government it is found that it was well known to it that the chattel mortgage existed and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and if left in its possession payment would be recommended for such use.

True it is that under the Tucker Act there is no jurisdiction in the Court of Claims or District Courts of the United States to recover for acts merely tortious, the statute providing that there shall be no recovery except in cases not sounding in tort. It was said in a case cited for the Government, *Harley* v. *United States*, 198 U. S. 229, that there must be some meeting of the minds of the parties upon the fact that compensation will be made. In

that case it was found that there was no demand based upon a convention between the parties or coming together of minds, for while the plaintiff, an employé of the Government in the Bureau of Printing and Engraving, supposed and understood he would be entitled to compensation for certain improvements made in printing presses which were used for many years by the Bureau, the findings also set forth in express terms that it was supposed and understood by the officers of the Government that the claimant would neither expect nor demand remuneration, and this fact, said this court, distinguished it from *McKeever* v. *United States*, 14 Ct. Cl. 396, affirmed by this court; also from *United States* v. *Lynah*, 188 U. S. 445, and the other cases cited by appellant.

In the present case, as we have said, there is nothing to show that the Government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the Government had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee. *Kitchen* v. *Schuster*, 14 New Mex. 164.

Furthermore, the Government was authorized by § 7 of the act of June 17, 1902, c. 1093, 32 Stat. 388, under which this improvement was being made to acquire any property necessary for the purpose and if need be to appropriate it. It may be said, as contended, that under the contract with the Construction Company the Government had a right to take possession of this engine which was in possession of the Company as mortgagor and by virtue of the terms of the agreement complete the work, but it could not in this

manner extinguish the rights of the mortgagee, nor did it undertake to do so. Under such circumstances we think the former decisions of this court, recognizing the general principles of justice which give rise to implied obligations, and enforcing the right of compensation when private property is taken for a public use, require the Government to make compensation for the use of this engine, and that the facts bring this case within *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, and *United States* v. *Lynah, supra.* In the latter case, where it was sought to recover damages for the alleged taking of the plaintiff's property in the construction of a dam which had the effect to overflow lands belonging to him and destroy their value, after an extended review of the previous cases in this court, it was said (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real

property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

(P. 465) " . . . Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

In *Hooe* v. *United States*, 218 U. S. 322, the attempt to make the Government liable for rent was in the face of a statute of the United States which provided that no contract should be made for rent until an appropriation for that purpose had been made by Congress. In the present case the Government had the right to contract for this work under statutory authority and to acquire property necessary to that end. Under the contract it might take possession of the Construction Company's property, and, it may be conceded, finish the contract with such property, but it had no right to use the property of others without compensation, and in this case it did not assume to do so. The mortgagee had a distinct right in the property which had accrued to it before the property was entered upon, and was authorized to take and hold the same as against the attempted transfer of the mortgagor. While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this court and arises because of the constitutional obligation embodied in the Fifth Amendment to the Constitution of the United

States, guaranteeing the owner of property against its appropriation for a governmental use without compensation.

We find no error in the judgment of the Circuit Court of Appeals, and it is

Affirmed.

UNITED STATES *v.* UNITED ENGINEERING AND CONTRACTING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 381. Submitted May 8, 1914.—Decided June 8, 1914.

While reasonable contracts for liquidated damages for delay are not to be regarded as penalties and may be enforced between the parties, *Sun Printing Ass'n* v. *Moore*, 183 U. S. 642, one party must not prevent the other party from completing the work in time, and if such is the case, even if the subsequent delay is the fault of the latter, the original contract cannot be insisted upon and the liquidated damages are waived.

Where the original contract for government work provided for liquidated damages for delay beyond a specified date but supplemental contracts contained no fixed rule for the time of completion, the Government is limited in its recovery to the actual damages sustained by reason of the delay for which the contractor was responsible.

It is the English rule, as well as the rule in some of the States, that where both parties are responsible for delays beyond the fixed date, the obligation for liquidated damages is annulled; and, unless there was a provision substituting a new date, the recovery for subsequent delay is limited to the actual loss sustained.

Where the Government has by its own fault prevented performance of the contract and thereby waived the stipulation as to liquidated damages, it cannot insist upon it as a rule of damages because it may be impracticable to prove actual damages.

47 Ct. Cl. 489, affirmed.

THE facts, which involve the construction of a contract for Government work and the rights and obligations of

the Government and the contractor thereunder, are stated in the opinion.

Mr. Assistant Attorney General Thompson and *Mr. P. M. Ashford* for the United States.

Mr. Frederic D. McKenney, Mr. John S. Flannery and *Mr. William Hitz* for appellee.

Mr. Justice Day delivered the opinion of the court.

Suit was brought in the Court of Claims by the United Engineering and Contracting Company to recover of the United States upon a contract, dated the fifteenth of September 1900, for the construction within seven calendar months from the date of the contract, namely by April 15, 1901, of a pumping plant for Dry Dock No. 3 at the New York Navy Yard, the work to be done in accordance with certain plans and specifications annexed to and forming a part of the contract. The claimant recovered a judgment (47 Ct. Cl. 489), and the United States brings this appeal.

The principal question in the case involves the correctness of that part of the judgment of the Court of Claims which permitted the claimant to recover $6,000, which the Government had deducted as liquidated damages for 240 days' delay in the completion of the work, at the rate of $25 per day. To understand this question the terms of the contract and certain facts found by the Court of Claims, upon which the case is to be considered here, must be had in view.

The claimant commenced the construction of the work in accordance with the contract, and after a portion thereof had been done the Navy Department concluded to connect Dry Dock No. 2 with Dry Dock No. 3 and to build a single pumping plant for both docks. To that end on July 21,

1901, a supplemental contract was entered into with the United States, whereby the claimant agreed, for an additional sum, to furnish all the material and labor necessary to carry out the changes in and additions to the plant originally contracted for and to complete the work on or before October 15, 1901, to which date the original contract was extended.

While the work was progressing under the original and supplemental contracts, a controversy arose between the claimant and the civil engineer in charge as to the proper method of designing and constructing the floor of the pump well and as to the correct interpretation of the requirements of the specifications concerning other matters, which resulted in considerable delay and the cessation of work without the fault of the claimant. On January 13, 1903, the chief of the Bureau of Yards and Docks appointed a board to consider changes in the bottom of the pump well and the compensation to be paid therefor, of which the claimant was advised by letter and it was informed that it would be expected to immediately resume work under its contract and push the same to completion with utmost dispatch, otherwise the Bureau would annul the contract and take over the entire work. The claimant thereupon promised to push the work to completion as rapidly as possible, with which promise the Bureau appears to have been satisfied.

On February 15, 1903, after the date fixed for the completion of the work under the original and supplemental contracts, a second supplemental contract was entered into, whereby the claimant agreed to construct three hatches in the roof of the pump well for additional compensation. Nothing was said in this contract as to the time of completion or as to delays under prior contracts.

The board of officers appointed to consider the design of the floor of the pump well and other matters in controversy reported February 16, 1903, that there were, as

conceded by the Bureau, errors in the design of the pump well floor; that the work done and materials furnished by the claimant complied with the specifications, and that it was not chargeable with improper work or procedure, and the board estimated the increased compensation for the new work and made certain allowances to the claimant. On March 7, 1903, a third supplemental contract was entered into, which embodied the changes found necessary in the original plan for the construction of the floor of the pump well and the increased compensation to claimant therefor. Nothing was said in this contract as to the date of the completion of the work theretofore contracted for, nor as to prior delays.

The claimant proceeded under the contracts with reasonable dispatch and without delay on its part until May 1, 1903, when the work was ready for the installation of the machinery. Up to this date the claimant was delayed by the Government in making changes and alterations in the work and in the use of the docks for docking vessels while the work was going forward. No delays were chargeable to the claimant up to October 15, 1901, the time fixed for the completion of the work, nor thereafter to May 1, 1903. During this period, due to the delays of the Government, the claimant incurred additional expenses for superintendence and maintenance. During the period from May 1, 1903, to April 21, 1904, the work was delayed by the claimant's subcontractors in not getting the pump castings in place, for which the Government was not responsible. The claimant was also delayed for a few days during said period by the Government while using the docks for docking vessels.

At the request of the Bureau a civil engineer made a review of the matter of delays and in February, 1905, reported that, notwithstanding the increased work required by the supplemental agreements and the restrictions placed upon the work, the claimant was up to time

on its contracts to May 1, 1903, but that subsequent to that date and up to April 21, 1904, it had taken seven calendar months more time than was necessary. After the plant was completed a board was appointed to pass upon it, which recommended certain deductions from the contract price for failure to strictly comply with the specifications. On March 24, 1905, the civil engineer in charge transmitted to the claimant a supplemental agreement covering the deductions, which agreement contained a reservation that nothing therein and no action taken under it should affect the rights of either party in the matter of delay and the completion of the work or otherwise except as specifically stated, which supplemental agreement claimant refused to execute. In February, 1906, long after the plant had been accepted, the Bureau held the claimant responsible for 240 days' delay, and deducted as liquidated damages for the delay the sum of $25 per day, or $6,000, from the balance due under the contract, which the claimant accepted under protest, and it subsequently filed with the Bureau a written protest against the deductions for delays and disallowances. The work was completed and accepted finally by the Government on April 5, 1905.

Notwithstanding the delays of the Government, the Court of Claims found that the claimant with reasonable diligence could have completed the plant for tests during the period by about September 21, 1903, and found that if it was chargeable for the delay according to the liquidated damage clause of paragraph 12 of the specifications of $25 per day, the deduction would be $750 less than the Government had deducted. But it found that, if the claimant was only liable for actual damages, and it did so determine, since there was no evidence as to such damages, the claimant was entitled to recover the entire amount deducted.

In the original contract the specifications provided,

paragraph 12, for liquidated damages for delay, as follows:

"12. Damages for delay.—In case the work is not completed within the time specified in the contract, or the time allowed by the Chief of the Bureau of Yards and Docks under paragraph 11 of this specification, it is distinctly understood and agreed that deductions at the rate of $25 per day shall be made from the contract price for each and every calendar day after and exclusive of the date within which completion was required up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon as the measure of damage to the United States by reason of delay in the completion of the work; and the contractor shall agree and consent that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract."

Under the provisions of this paragraph, if there had been nothing subsequently changing the rights of the parties, and the delay had resulted from the failure of the claimant to complete the work within the time specified, the deduction at the rate of $25 per day might have been made by the United States as liquidated damages. This was the sum estimated and agreed upon between the parties as the damages which might be regarded as sustained by the Government in event of the breach of the claimant's obligation to complete the work within the stipulated time. Such contracts for liquidated damages when reasonable in their character are not to be regarded as penalties and may be enforced between the parties. See *Sun Printing & Publishing Ass'n* v. *Moore*, 183 U. S. 642, in which the matter is fully discussed.

The precise question here is whether, when the work was delayed solely because of the Government's fault beyond the time fixed for its completion and afterwards the work was completed without any definite time being fixed in

which it was to be done, the claimant can be charged for the subsequent delays for which he was at fault by the rule of the original contract stipulating liquidated damages, or was that stipulation waived by the conduct of the Government and was it obligatory upon it in order to recover for the subsequent delays to show the actual damages sustained? We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date, to do this would permit it to recover damages for delay caused by its own conduct.

It may be that damages were sustained by the failure to carry out the subsequent agreement. But the Government, as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the Government required no stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered.

This conclusion is in accord with the rule of the English cases. In *Dodd* v. *Churton*, L. R., 1 Q. B. 1897, 562, 568, Chitty, L. J., said:

"The law on the subject is well settled. The case of *Holme* v. *Guppy*, (3 M. & W. 387), and the subsequent cases in which that decision has been followed are merely examples of the well known principle stated in Comyns' Digest, Condition L (6), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles, J., in *Russell* v. *Bandeira*, (13 C. B. (N. S.) 149.). This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time."

The same rule was followed with approval by the New York Court of Appeals in a well considered case, *Mosler Safe Co.* v. *Maiden Lane S. D. Co.*, 199 N. Y. 479, in which it was held that, even where both parties are responsible for the delays beyond the fixed time, the obligation for liquidated damages is annulled, and in the absence of a provision substituting another date it cannot be revived, and the recovery for subsequent delays must be for actual loss proved to have been sustained.

This principle is applicable here, the conduct of the Government's agents had caused the delays up to May 1, 1903, and the subsequent delays though chargeable to the claimant would only give rise to a claim for damages measured by the actual loss sustained. *Mosler Safe Co.* v. *Maiden Lane S. D. Co.*, *supra*. We think the application of this rule is not changed by the difficulty suggested that it might be impracticable to prove actual damages. This fact, if such it be, would not permit the Government

by its own fault to prevent the performance of the contract and to do that which amounts to a waiver of the stipulation and then insist upon it as a rule of damages. We think the Court of Claims was right upon this principal branch of the case.

There are certain minor assignments of error to the conclusions and judgment of the Court of Claims. The Government was held responsible for the extra cost of enclosing certain machinery in casing necessitated by its building a plank walk across the top of the pipe in the pumping plant to protect its workmen from high speed gearing. The Court of Claims found that this expense was made necessary by the Government and allowed for it. We find no error in this. Also, as to the assignment of error to the judgment of the Court of Claims under Finding XI, awarding damages for repairs made necessary by the breakage of certain pipes caused by sudden increase in the pressure in the salt and fresh water systems in the Navy Yard, the Court of Claims found that these breaks were caused by the Government without notice to the claimant and without its fault. We find no error in the judgment of the Court of Claims awarding damages under this finding.

It follows that the judgment of the Court of Claims is

Affirmed.

UNITED STATES *v.* FIRST NATIONAL BANK OF DETROIT, MINNESOTA.

UNITED STATES *v.* NICHOLS-CHISHOLM LUMBER COMPANY.

UNITED STATES *v.* NICHOLS-CHISHOLM LUMBER COMPANY.

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

Nos. 873, 874, 875. Argued April 7, 1914.—Decided June 8, 1914.

The natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant.

The rule that words in treaties with, and statutes affecting, Indians, must be interpreted as the Indians understood them is not applicable where the statute is not in the nature of a contract and does not require the consent of the Indians to make it effectual.

The after facts have but little weight in determining the meaning of legislation and cannot overcome the meaning of plain words used in a statute; nor can the courts be influenced in administering a law by the fact that its true interpretation may result in harsh consequences.

The responsibility for the justice and wisdom of legislation rests with Congress and it is the province of the courts to enforce, not to make, the laws.

The policy of the Government in enacting legislation is often an uncertain thing as to which opinions may vary and it affords an unstable ground of statutory construction.

Congress has on several occasions put full blood Indians in one class and all others in another class.

If a given construction was intended by Congress, which it would have been easy to have expressed in apt terms, other terms actually used will not be given a forced interpretation to reach that result.

While the early administration of a statute showing the departmental

construction thereof does not have the same weight which a long observed departmental construction has, it is entitled to consideration as showing the construction placed upon the statute by competent men charged with its enforcement.

Courts may not supply words in a statute which Congress has omitted; nor can such course be induced by any consideration of public policy or the desire to promote justice in dealing with dependent people.

The Clapp Amendments of June 21, 1906, 34 Stat. 325, 353, and March 1, 1907, *Id.* 1015, 1034, removing restrictions imposed by the act of February 8, 1887, upon alienation of Chippewa allotments as to mixed bloods apply to mixed bloods of all degrees and not only to those of half or more than half white blood. Such was not the congressional intent as expressed in the statute and this court cannot interpret the statute except according to the import of its plain terms.

208 Fed. Rep. 988, affirmed.

THESE suits were brought by the United States in the Circuit Court of the United States for the District of Minnesota against the appellees to set aside certain conveyances under and through which the appellees claimed title to lands, particularly described, in the White Earth Indian Reservation in Minnesota. The decree of the District Court (which had succeeded the Circuit Court) in the first two cases in favor of the Government was reversed by the Circuit Court of Appeals for the Eighth Circuit, while the decree dismissing the bill in the last case was affirmed (208 Fed. Rep. 988).

By the treaty of March 19, 1867, 16 Stat. 719, creating the White Earth Indian Reservation, the Chippewas of the Mississippi ceded all their land in Minnesota, except certain described tracts, to the United States and the Government set apart the White Earth Reservation for their use, and provision was made for the certification to each Indian of not to exceed 160 acres of the land of such reservation in lots of forty acres each, upon the cultivation of ten acres, provided, that the land should be exempt from taxation and sale for debt and should not be alienated

except with the approval of the Secretary of the Interior and then only to a Chippewa Indian. The act of February 8, 1887, c. 119, 24 Stat. 388, provided for the allotment of land in the Indian reservations in severalty to the Indians and that (§ 5) upon the approval of the allotments patents should issue therefor in the name of the allottees, which should be of the legal effect and declare that the United States held the land for twenty-five years, in trust for the sole use and benefit of the Indian to whom the allotment was made, or, in case of his death, of his heirs, according to the laws of the State or Territory where the land was located, and that at the expiration of that time the United States would convey the same to the Indian or his heirs in fee, discharged of the trust and free of all charge or incumbrance whatsoever, provided that the President of the United States might in his discretion extend the period, and provided that any conveyance or contract touching the lands before the expiration of the trust period should be null and void. The Nelson Act of January 14, 1889, c. 24, 25 Stat. 642, provided for the relinquishment to the United States of that part of the reservation remaining after the allotment, subject to the act of February 8, 1887, *supra*, in severalty, to the Chippewa Indians in Minnesota, the act to become operative only upon the assent of a certain number of Indians being obtained. By the act of February 28, 1891, c. 383, 26 Stat. 794, the allotments were limited to eighty acres to each Indian, but by the Steenerson Act of April 28, 1904, c. 1786, 33 Stat. 539, the maximum allotments of the White Earth Reservation were made 160 acres. The acts of June 21, 1906, c. 3504, 34 Stat. 325, 353, and March 1, 1907, c. 2285, 34 Stat. 1015, 1034, in what is known as the Clapp Amendment, removed the restrictions upon alienation as respects mixed blood Indians, but left the matter, so far as full bloods were concerned, to the Secretary of the Interior.

The Government relied, in the first case, upon its title

to a certain parcel of land as a part of the public domain set apart as the White Earth Reservation, and the fact that, although under the various acts of Congress above mentioned authority was given to segregate certain parcels of land from others in the reservation and to allot them to members of the Band, and O-bah-baum, an Indian woman of that tribe, had been given a trust patent, as provided for by the act of February 8, 1887, *supra*, and had given a mortgage to the defendant in that case upon such land, she had no right or authority so to do. It prayed that the mortgage be annulled, as being a cloud upon the Government's title.

The allegations of the complaints in the second and third cases are the same, except that the allottee in the former is named Bay-bah-mah-ge-wabe and in the latter Equay-zaince, and in both cases that there are outstanding warranty deeds and mortgages, that there were intermediate parties not made parties of record, and that an accounting was asked for timber already cut and an injunction from cutting standing timber.

The defendant in the first case, besides denying that the reservation was a part of the public domain and alleging that the property was that of the Indians and that after selection the allottee acquired a fee simple title, notwithstanding the acts of Congress, particularly set up the fact that O-bah-baum is a mixed blood Chippewa Indian, and one of the class referred to in the Clapp Amendment, and therefore emancipated from the pretended supervision of the Government and able to transfer her property as a citizen of the United States. The defendant also alleged that under the facts, the Indians having made affidavit that they were mixed bloods and the good faith of the defendant, the Government should be required to place the defendant *in statu quo* before the relief asked could be granted. The Lumber Company, defendant in the second case, and the defendants in the third case, filed

answers of similar purport, with the additional averment that under the facts stated the matter relating to the timber was immaterial, but if the court found against defendant's title they would account for the timber cut by them.

By stipulation or introduction in evidence the following facts were made to appear:

The three Indians here involved are adult Chippewa Indians, residing upon the White Earth Reservation. O-bah-baum has some white blood, derived from a remote ancestor, but not to exceed one-thirty-second; Bay-bah-mah-ge-wabe has one-sixteenth of white blood, and Equay-zaince has one-eighth of white blood.

A question having arisen with reference to the construction of the term "mixed blood" as used in the treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians of Lake Superior and the Mississippi, the Commissioner of Indian Affairs in a letter to the Indian Agent at Detroit, Michigan, said that "the term 'mixed-bloods' has been construed to mean all who are identified as having a mixture of Indian and white blood. The particular proportion of each blood is, therefore, immaterial, where the provision is so broad as that stated in the treaty."

The Indian Agent at the White Earth Reservation after the passage of the Clapp Amendment came to Washington to consult the Commissioner of Indian Affairs, and was referred by him to the Land Division, and, after discussing the situation with a man represented to be in charge of such matters, it was agreed that the act did not require a showing of any definite quantum of foreign blood to constitute a mixed blood, and to his knowledge this was the construction generally adopted by those who dealt with the Indians on the White Earth Reservation. The Chief of the Land Division at the time of the passage of the Clapp Amendment testified that to his knowledge no ques-

tion was raised as to the quantum of foreign blood. In a communication dated October 6, 1910, to the Commissioner of Indian Affairs the Special Assistant to the Attorney General and the Special Indian Agent at Detroit, Minnesota, expressed the belief that the attorneys for the Government were going to contend that the term mixed blood should be interpreted to embrace only those of half or less of Indian blood, and cited a certain act of the United States (of February 6, 1909, c. 80, 35 Stat. 600) in which the term Indian was defined to include the aboriginal races inhabiting Alaska when annexed to the United States and their descendants of the whole or half blood, which act concerned the sale of liquor or firearms to an Indian or half breed. They also cited certain treaties with the Chippewas wherein it was shown that half breeds are persons of less than half blood and not regarded as Indians or members of the Chippewa nation: Article 3 of the treaty of July 29, 1837, 7 Stat. 536; article 4 of the treaty of October 4, 1842, 7 Stat. 591; article 4 of the treaty of August 2, 1847, 9 Stat. 904; article 6 of the treaty of February 22, 1855, 10 Stat. 1165; and article 4 of the treaty of March 19, 1867, 16 Stat. 719, from which it was summarized that in these treaties persons classed as half breeds or mixed bloods or less than half blood were not recognized by the Government or the Chippewas as Indians entitled to the rights and privileges of Chippewa Indians unless by special provisions of treaties, as heretofore shown. The Second Assistant Commissioner in his reply of November 19, 1910, stated that the Office was inclined to give the expressions "full bloods" and "mixed bloods" their ordinary meaning which would be more reasonable than to hold that the term full bloods included those of admitted pure blood and others above the half blood. It was also said in his letter, however, that a conference would be had with the Department of Justice, and further advice given. The Commissioner of Indian Affairs

said that he had never given an official construction to the term mixed blood.

It was stipulated that in administering the Bureau of Indian Affairs under the Clapp Amendment and especially in issuing patents thereunder, the Department had not required any statement as to the quantum of foreign blood, but had issued patents upon the showing that the applicant was a mixed blood. Several instances were shown by the records of allotments having been made to allottees on the White Earth Reservation having but one-sixteenth or one-thirty-second of Indian blood, while other instances were shown where allotment had been denied because applicant was of "doubtful blood."

A white man who had resided for a long time among the Chippewa Indians stated that in the early period the terms mixed blood and half breed were synonymous, applying to one of mixed white and Indian blood, irrespective of the percentage, and that later the term mixed blood was more commonly used, while the term half breed was applied to one having nearly equal parts of white and Indian blood. The general impression of business men in and about the White Earth Reservation was that any Indian who had white blood in his veins was a mixed blood.

Several very elderly Indians testified, however, that the Indians regarded the term mixed blood as applying to those having practically half white and half Indian blood.

The District Court, after stating that the question was one of first impression, said that Congress intended competency to be the test and came to the conclusion that an Indian having an admixture of one-eighth white blood might come within the term, but that beyond that the white blood would not affect the capacity of the Indian to manage his own affairs, and therefore dismissed the bill in the third case and entered a decree in favor of the complainants in the other two cases. The Circuit Court of Appeals reached the conclusion that every Chippewa

Indian having an identifiable mixture of other than Indian blood, however small, is a mixed blood Indian and all others are full blood Indians within the meaning of the Clapp Amendment, and accordingly reversed the decree of the District Court in the first two cases and affirmed the decree in the third case.

The Solicitor General, with whom *Mr. C. C. Daniels* and *Mr. W. A. Norton*, Special Assistant to the Attorney General, were on the brief, for the United States:

The history of the legislation involved shows the disastrous effects resulting from its improper application.

The term "mixed blood" is to be applied only to those Indians who possess a quantum of white blood amounting to one-half or more.

The act should be so construed as to subserve the well-defined and well-established policy of Congress. *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Durousseau* v. *United States*, 6 Cranch, 307; *Lionberger* v. *Rouse*, 9 Wall. 468, 475; *United States* v. *Freeman*, 3 How. 556; *United States* v. *Lacher*, 134 U. S. 624.

It has been the settled policy of Congress in dealing with the Indians to make competency alone the test for removing these restrictions. *Smith* v. *Stevens*, 10 Wall. 321, 326.

Congress having declared in plain and unmistakable language that lands allotted to these Indians would be held in trust for them for a period of twenty-five years, and the assent of the Indians to a cession of their reservation having been given in reliance upon that promise, no subsequent act of Congress should be construed to revoke this promise unless couched in language so plain and certain as to leave room for no other interpretation. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

Assuming the competency of the white man and the incompetency of the Indians, it is but reasonable in mak-

ing a classification based on blood to include in the competent class all who have more than one-half white blood and in the incompetent class all who have more than one-half Indian blood. *Holy Trinity Church* v. *United States*, 143 U. S. 457.

The act is to be interpreted according to the understanding of its terms among the Indians themselves.

Indian treaties and statutes modifying treaty rights will be construed as they are understood by the Indians and not necessarily in accordance with the technical terms employed by white men in framing them. *Jones* v. *Meehan*, 175 U. S. 1; *Starr* v. *Long Jim*, 227 U. S. 613.

Provision for mixed bloods was made in treaties with the Chippewas by their request, and the identification of such mixed bloods was left to them.

That the Indians understood the words "mixed blood" in the sense for which the Government contends is clearly shown by uncontradicted testimony.

The meaning for which the Government contends is not foreclosed either by departmental construction or judicial decisions.

See also *Deweese* v. *Smith*, 106 Fed. Rep. 438; *Jeffries* v. *Ankeny*, 11 Ohio, 372; *Lane* v. *Baker*, 12 Ohio, 237; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Merritt* v. *Cameron*, 137 U. S. 542; *Nor. Pac. Ry. Co.* v. *United States*, 227 U. S. 355; *Thacker* v. *Hawk*, 11 Ohio, 376; *United States* v. *Kagama*, 118 U. S. 375.

Mr. Ransom J. Powell, with whom *Mr. George T. Simpson* and *Mr. Ernest C. Carman* were on the brief, for appellees:

The Clapp act was obviously designed to create an arbitrary classification.

The language is clear and explicit, and the term "mixed blood" had acquired a definite and well-understood meaning.

See 2 Kappler, Indian Laws and Treaties, pp. 147, 148, 173, 175, 207, 211, 218, 223, 269, 298, 301, 307, 338, 452, 464, 474, 492, 493, 499, 543, 568, 573, 649, 689, 692, 766, 774, 779, 798, 802, 841, 855, 862, 864, 881, 959, 975; Debates in Congress, 40 Cong. Record, pp. 1260 *et seq.*, 5738, 5739, 5784, 6041, 6044, 6046; vol. 41, p. 2337.

For definitions and use of "mixed blood" in decided cases, see Standard Dictionary; Century Dictionary; 14 Encyc. Britannica, 467; Hodge's Hand Book of American Indians, 1907, pp. 365, 850, and 913; 5 Words and Phrases, 4546; 27 Cyc. 811; *Hamilton* v. *Railway Co.*, 21 Mo. App. 152; *Daniel* v. *Guy*, 19 Arkansas, 121; *Thurman* v. *State*, 18 Alabama, 276; *Johnson* v. *Norwich*, 29 Connecticut, 407; *Van Camp* v. *Board of Education*, 9 Oh. St. 407; *Gentry* v. *McMannis*, 3 Dana (Ky.), 382; *Scott* v. *Raub*, 88 Virginia, 721, 727; *Jones* v. *Commonwealth*, 80 Virginia, 538; North Carolina Statutes, § 5, c. 71; § 81, c. 31, act of 1836; *State* v. *Dempsey*, 31 N. Car. 384; *State* v. *Chavers*, 50 N. Car. 11; *Hopkins* v. *Bowers*, 111 N. Car. 175; *State* v. *Davis*, 2 Bailey (S. Car.), 558; *Thacker* v. *Hawk*, 11 Ohio, 77.

The tendency at that time was toward the removal of restrictions by arbitrary act of Congress. Ann. Rep. Indian Comm. 1905, p. 3.

For the act of May 27, 1908, 35 Stat. 312, its history and the debate thereon, see 42 Cong. Record, pp. 5074–5078, 5425.

The interpretation of the term "mixed blood" necessitates the interpretation of the term "full blood." Congress made two classes, not three.

In seeking the intent of the legislature the first consideration is the natural, ordinary, and generally understood meaning of the terms used. *United States* v. *Fisher*, 2 Cr. 358; *Lake County* v. *Rollins*, 130 U. S. 662; *Sloan* v. *United States*, 118 Fed. Rep. 285; *United States* v. *Temple*, 105 U. S. 97; *Maillard* v. *Lawrence*, 16 How. 250; *United States* v. *Pacific Ry. Co.*, 91 U. S. 72; *Parsons* v. *Hunter*,

2 Sumn. (U. S.) 422; *Levy* v. *McCartee*, 6 Pet. 102, 110; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *The Cherokee Tobacco*, 11 Wall. 616; *Edison &c. Co.* v. *U. S. Elect. Co.*, 35 Fed. Rep. 138.

A dispute over the meaning of a statute does not of itself show an ambiguity in the act. *Nor. Pac. Ry. Co.* v. *Sanders*, 47 Fed. Rep. 610; *Shreve* v. *Cheesman*, 69 Fed. Rep. 789; *Webber* v. *St. Paul City Ry. Co.*, 97 Fed. Rep. 140; *Swartz* v. *Siegel*, 117 Fed. Rep. 13.

Subsequent experience is no guide to interpretation. *United States* v. *Un. Pac. Ry. Co.*, 91 U. S. 72; *Platt* v. *Un. Pacific Ry. Co.*, 99 U. S. 48.

Where Congress has by apt terms created a class or drawn distinctions between classes of persons or objects it is not competent for the courts, under the guise of interpretation, to extend or limit the operation of the statute. *United States* v. *Colorado Co.*, 157 Fed. Rep. 321; *Brun* v. *Mann*, 151 Fed. Rep. 145; *United States* v. *Temple*, 105 U. S. 97; *Minor* v. *Bank*, 1 Pet. 44; *Folsom* v. *United States*, 160 U. S. 121; *United States* v. *Choctaw Nation*, 179 U. S. 494; *Pirie* v. *Chicago*, 182 U. S. 438, 451; *The Paulina*, 7 Cr. 52, 61; *Barintz* v. *Casey*, 7 Cr. 456, 468; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *Maxwell* v. *Moore*, 22 How. 185, 191; *Tiger* v. *Western Inv. Co.*, 221 U. S. 286; *Thurman* v. *State*, 18 Alabama, 276.

The court is not at liberty to amend the statute or read words into it to make it conform to what the court may believe to be the spirit of the act or to escape injustice of the law. *Maxwell* v. *Moore*, 22 How. 185; *United States* v. *Goldenberg*, 168 U. S. 95; *Hobbs* v. *McLean*, 117 U. S. 567; *In re Conway and Gibbons*, 17 Wisconsin, 526; 17 Op. Att'y Gen. 65; *St. Louis Co.* v. *Taylor*, 210 U. S. 281; *Hadden* v. *Barney*, 5 Wall. 107; *Gardner* v. *Collins*, 2 Pet. 92.

The practical construction by the Departments of the Government and the dealings of the citizens with the subject in reliance upon that construction is entitled to con-

sideration in cases of doubt. *United States* v. *Un. Pac. Ry. Co.*, 37 Fed. Rep. 551; *S. C.*, 148 U. S. 562; *Le Marchal* v. *Tegarden*, 175 Fed. Rep. 682; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Malonny* v. *Mahar*, 1 Michigan, 26; *Westbrook* v. *Miller*, 56 Michigan, 148; *United States* v. *Alabama Ry. Co.*, 142 U. S. 615; *Kelly* v. *Multnomah County*, 18 Oregon, 356; *Schell* v. *Fauche*, 138 U. S. 562; *United States* v. *Moore*, 95 U. S. 760, 763; *Johnson* v. *Ballow*, 28 Michigan, 378; *Kirkman* v. *McClaughry*, 160 Fed. Rep. 436; *United States* v. *Bank of North Carolina*, 6 Pet. 29; 2 Op. Att'y Gen. 558; *In re State Lands*, 18 Colorado, 359; *Hill* v. *United States*, 120 U. S. 169, 182; *Blaxham* v. *Light Co.*, 36 Florida, 519; *Harrison* v. *Commonwealth*, 83 Kentucky, 162; *State* v. *Holliday*, 42 L. R. A. 826; *Iowa* v. *Carr*, 191 Fed. Rep. 257; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Chandler-Dunbar Co.*, 152 Fed. Rep. 25; *United States* v. *Walker*, 139 Fed. Rep. 409; *Railway Co.* v. *First Division &c.*, 26 Minnesota, 31; *Menard* v. *Massey*, 8 How. 292; *Magee* v. *Hallett*, 22 Alabama, 699, 718.

Congress was familiar with apt terms to create a classification based upon a given quantum of Indian and other than Indian blood. If it had intended to make the classification urged by the Government, it could easily have said so. Indian treaties (previously cited); act of May 27, 1908, 35 Stat. 312; *Pennock* v. *Commissioners*, 103 U. S. 44; *Smith* v. *Bonifer*, 154 Fed. Rep. 883; *Farrington* v. *Tennessee*, 95 U. S. 679, 689; *Bank* v. *Mathews*, 98 U. S. 621, 627; *United States* v. *Koch*, 40 Fed. Rep. 250; *In re Drake*, 114 Fed. Rep. 229; *Moore* v. *U. S. Trans. Co.*, 24 How. 1, 32; *Shaw* v. *Railroad Co.*, 101 U. S. 557; *Harrington* v. *Herrick*, 64 Fed. Rep. 469; *Austin* v. *United States*, 155 U. S. 417; *In re Downing*, 54 Fed. Rep. 470, 474; 21 Op. Atty. Gen. 418; *Louisville Trust Co.* v. *Cincinnati*, 73 Fed. Rep. 726; *Parker* v. *United States*, 22 Ct. Cl. 104; *Grace* v. *Collector of Customs*, 79 Fed. Rep. 319; *Strode* v. *Stafford Justices*, 1 Brock. (U. S.) 162; *Ryan* v. *Carter*, 93

U. S. 83; *Tompkins* v. *Little Rock*, 125 U. S. 127; *United States* v. *Ryder*, 110 U. S. 739; *Leavenworth* v. *United States*, 92 U. S. 744; *Butz* v. *Muscatine*, 8 Wall. 580; *James* v. *Milwaukee*, 16 Wall. 161; *United States* v. *Anderson*, 9 Wall. 66; *Lawrence* v. *Allen*, 7 How. 796; *Nor. Pac. Ry. Co.* v. *Dudley*, 85 Fed. Rep. 86; *In re Baker*, 96 Fed. Rep. 957; *In re Bauman*, 96 Fed. Rep. 948; *Steele* v. *Buell*, 104 Fed. Rep. 970; *United States* v. *Slazengerm*, 113 Fed. Rep. 525; *Ex parte Byers*, 32 Fed. Rep. 409; *Ulman* v. *Meyer*, 10 Fed. Rep. 243; *Hall's Case*, 17 Ct. Cl. 46; *The Cherokee Tobacco*, 11 Wall. 616; *Gardner* v. *Collins*, 2 Pet. 87.

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

Before the transfers here complained of and while the lands were held in trust, subject to the provisions of the act of February 8, 1887, *supra*, the Clapp Amendment was passed, having the purpose of removing the restrictions upon alienation in certain cases. This act provides, (34 Stat., p. 1034):

"That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, heretofore [amended March 1, 1907, the word 'heretofore' being substituted for the word 'now'] or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

It is at once apparent from reading this act that it deals with two classes, adult mixed blood Indians, concerning whom all restrictions as to sale, incumbrance or taxation are removed, and full blood Indians, whose right to be free from restrictions shall rest with the Secretary of the Interior, who may remove the same upon being satisfied that such full blood Indians are competent to handle their own affairs.

This case turns upon the construction of the words "mixed blood Indians." It is the contention of the Government that mixed blood means those of half white or more than half white blood, while the appellees insist, and this was the view adopted by the Circuit Court of Appeals, that the term mixed blood includes all who have an identifiable mixture of white blood. If the Government's contention be correct, it follows that for the purposes of this suit all of less than half white blood must be regarded as full blood Indians, all others as mixed bloods. Upon the appellees' contention the line is drawn between full bloods as one class and all having an identifiable admixture of white blood as the other.

If we apply the general rule of statutory construction that words are to be given their usual and ordinary meaning, it would seem clear that the appellees' construction is right, for a full blood is obviously one of pure blood, thoroughbred, having no admixture of foreign blood. That this natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant, is an elementary rule of construction frequently recognized and followed in this court. *United States* v. *Fisher*, 2 Cranch, 358, 399; *Lake County* v. *Rollins*, 130 U. S. 662, 670; *Dewey* v. *United States*, 178 U. S. 510, 521. Interpreted according to the plain import of the words the persons intended to be reached by the clause are divided into two and only two well-defined classes, full blood Indians and mixed

bloods. There is no suggestion of a third class, having more than half of white blood or any other proportion than is indicated in the term mixed blood, as contrasted with full blood. If the Government's contention is correct, the Indians of full blood must necessarily include half bloods, and mixed bloods must mean all having less than half white blood and none others. Such construction is an obvious wresting of terms of plain import from their usual and well-understood signification.

But the Government insists that to effect the legislative purpose the words must be interpreted as the Indians understood them, and cases from this court (*Jones* v. *Meehan*, 175 U. S. 1; *Starr* v. *Long Jim*, 227 U. S. 613) are cited to the effect that Indian treaties and acts to which the Indians must give consent before they become operative must be interpreted so as to conform to the understanding of the Indians as to the meaning of the terms used. The justice and propriety of this method of interpretation is obvious and essential to the protection of an unlettered race, dealing with those of better education and skill, themselves framing contracts which the Indians are induced to sign. But the legislation here in question is not in the nature of contract and contains no provision that makes it effectual only upon consent of the Indians whose rights and privileges are to be affected. Evidently this legislation contemplated in some measure the rights of others who might deal with the Indians, and obviously was intended to enlarge the right to acquire as well as to part with lands held in trust for the Indians.

The Government refers, in support of its contention, to reports of Congressional committees, showing after effects of this legislation, which was followed, as the reports tend to show, by improvident sales and incumbrances of Indian lands and wasteful extravagance in the disposition of the proceeds of sales, resulting in suffering to the former proprietors of the lands sold and mortgaged. But

these after facts can have little weight in determining the meaning of the legislation and certainly cannot overcome the meaning of plain words used in legislative enactments. If the effect of the legislation has been disastrous to the Indians, that fact will not justify the courts in departing from the terms of the act as written. If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws. *St. Louis, Iron Mt. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 294; *Texas Cement Co.* v. *McCord*, 233 U. S. 157, 163.

The Government further insists that its interpretation of the act is consistent with its policy to make competency the test of the right to alienate, and that the legislation in question proceeds upon the theory that those of half or more white blood are more likely to be able to take care of themselves in making contracts and disposing of their lands than those of lesser admixture of such blood. But the policy of the Government in passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may, as is the fact in this case, afford an unstable ground of statutory interpretation. *Hadden* v. *The Collector*, 5 Wall. 107, 111. And again Congress has in other legislation not hesitated to place full blood Indians in one class and all others in another. *Tiger* v. *Western Investment Co.*, 221 U. S. 286. In that case this court had occasion to deal with certain sections of the act of April 26, 1906, c. 1876, 34 Stat. 137, providing that no full blood Indian of certain tribes should have power to alienate or incumber allotted lands for a period of twenty-five years, unless restrictions were removed by act of Congress. By section 22 of the act all adult heirs of deceased Indians were given the right to convey their lands, but for the last sentence of the section which kept full

blood Indians to their right to convey under the supervision of the Secretary of the Interior. Therefore all adult heirs of any deceased Indian other than a full blood might convey, but the full blood only with the approval of the Secretary of the Interior. In this important provision the restrictions were removed as to all classes of Indians other than full bloods. In other words, there as here, the Indians were divided into two classes, full bloods in one class and all others in the second class.

Furthermore, the appellees' construction accords with the departmental construction, as shown by the facts stipulated. Such was the construction given by the Indian Commissioner to the treaty of September 30, 1854, *supra*, wherein provision was made for mixed blood Indians among the Chippewas, and the Indian agent at Detroit, Michigan, was instructed by the Indian Commissioner that the term mixed blood had been construed to mean all who are identified as having a mixture of Indian and white blood. Such was the interpretation of the Department of Interior, in the first place at least, in administering the matter under the Clapp Amendment. It is true that the Government representatives at Detroit, Minnesota, were of the opposite opinion, for the reasons we have stated above, and that the Second Assistant Commissioner in his reply, while reaching the conclusion we have, stated that he would confer with the Department of Justice.

While departmental construction of the Clapp Amendment does not have the weight which such constructions sometimes have in long continued observance, nevertheless it is entitled to consideration,—the early administration of that amendment showing the interpretation placed upon it by competent men having to do with its enforcement. The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the

act the words necessary to make that intention clear, that is, we deem this a case for the application of the often expressed consideration, aiding interpretation, that if a given construction was intended it would have been easy for the legislative body to have expressed it in apt terms. *Farrington* v. *Tennessee*, 95 U. S. 679, 689; *Bank* v. *Matthews*, 98 U. S. 621, 627; *Tompkins* v. *Little Rock & Ft. S. R. Co.*, 125 U. S. 109, 127; *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 410.

Congress was very familiar with the situation, the subject having been before it in many debates and discussions concerning Indian affairs. This was a reservation inhabited by Indians of full blood and others of all degrees of mixed blood, some with a preponderance of white blood, others with less and many with very little. If Congress, having competency in mind and that alone, had intended to emancipate from the prevailing restriction on alienation only those who were half white or more, by a few simple words it could have effected that purpose. We cannot believe that such was the congressional intent, and we are clearly of opinion that the courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people.

We reach the conclusion that the Circuit Court of Appeals rightly construed this statute, and its decrees are

Affirmed.

LAZARUS, MICHEL & LAZARUS *v.* PRENTICE, RECEIVER OF MUSICA.

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

No. 1012. Motion to dismiss or affirm submitted May 4, 1914.—Decided June 8, 1914.

Under clause 20 of § 2 of the Bankruptcy Act as added by the amendment of June 25, 1910, the bankruptcy courts have ancillary jurisdiction over persons and property within their respective territorial limits in aid of a trustee or receiver appointed in any court of bankruptcy.

Property of the bankrupt when seized by an ancillary receiver or trustee is held by virtue of the terms of the Bankruptcy Act to be turned over to the court of original jurisdiction and no right can be acquired in it by assignment subsequent to the petition which can defeat this purpose.

Under subd. d of § 60 of the Bankruptcy Act, attorney's fees for services in contemplation of bankruptcy are specifically provided for and are subject to revision in the court of original jurisdiction and not elsewhere. *In re Wood and Henderson*, 210 U. S. 246.

The seizure of property of the bankrupt by an ancillary receiver is a summary proceeding and not a plenary suit and the decision of the bankruptcy court in the jurisdiction of seizure that an intervenor claiming by virtue of an assignment of the bankrupts made after the petition and in payment of attorney's fees must assert the claims in the court of original jurisdiction is an administrative order, and the order of the Circuit Court of Appeals affirming the same is not reviewable in this court.

A motion to dismiss an appeal from the Circuit Court of Appeals will not be denied as premature because the record has not been printed if the record of proceedings in the District Court is here and this court is sufficiently advised as to the situation of the case to dispose of it without doing injustice to the parties. *National Bank* v. *Insurance Co.*, 100 U. S. 43.

Appeal from 211 Fed. Rep. 326, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from the Circuit Court of Appeals in cer-

tain classes of bankruptcy matters, are stated in the opinion.

Mr. H. Generes Dufour and *Mr. Edwin T. Rice* for appellees in support of the motion.

Mr. Henry L. Lazarus, Mr. David Sessler, Mr. Girault Farrar, Mr. Herman Michel, and *Mr. Eldon S. Lazarus* for appellants, in opposition to the motion:

This court has jurisdiction of the cause of the appellants. See in support of this proposition: *Houghton* v. *Burden,* 228 U. S. 161; *Greey* v. *Dockendorff,* 231 U. S. 513; *Knapp* v. *Milwaukee Trust Co.,* 216 U. S. 545; *Hewitt* v. *Berlin Machine Works,* 194 U. S. 296; Bankruptcy Act, § 24a; acts of Congress, March 3, 1891, 26 Stat. 828, c. 517, § 6; Judicial Code, 1912, §§ 128, 241.

No printed record having been submitted to appellants or to the court, the motion to dismiss or affirm should be denied or be postponed until the regular hearing of this cause. *Power* v. *Baker,* 112 U. S. 710; *Crane Iron Co.* v. *Hoagland,* 108 U. S. 5; *National Bank* v. *Ins. Co.,* 100 U. S. 43; *Waterville* v. *Van Slyke,* 115 U. S. 290.

A motion to affirm coupled with a motion to dismiss will not be entertained unless there is color of ground in the motion to dismiss. *Chanute City* v. *Trader,* 132 U. S. 213, and cases cited therein.

The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy, and hence the motion to dismiss should be denied or deferred to the hearing on the merits. *Lynch* v. *De Bernal,* 131 U. S. (Appendix) XCIV.

The questions raised by this appeal are serious and not frivolous.

MR. JUSTICE DAY delivered the opinion of the court.

This is a motion to dismiss the appeal of Lazarus, Michel & Lazarus, interveners in a certain bankruptcy proceeding in the District Court of the United States for the Eastern District of Louisiana, where the intervening petition was dismissed (205 Fed. Rep. 413), which order was affirmed on appeal to the Circuit Court of Appeals for the Fifth Circuit (211 Fed. Rep. 326). The interveners now attempt to bring the case to this court by appeal on the ground that the judgment of the Circuit Court of Appeals was not final in the proceeding.

The facts are not materially in dispute, and, as found by both the District Court and the Circuit Court of Appeals, appear to be: Antonio Musica and Philip Musica were partners in trade under the firm name of A. Musica & Son, importers of hair in the City of New York. They had become largely indebted and on the nineteenth of March, 1913, a petition in involuntary bankruptcy was filed in the District Court of the United States for the Southern District of New York against the firm and the individual members thereof, and a receiver was appointed of the bankrupt estate, the partnership and its members being subsequently adjudicated bankrupts. On the same day the petition was filed the bankrupts and Arthur Musica were arrested as fugitives from justice in the City of New Orleans, and Lucy Grace Musica was held as a material witness. Upon search there was found upon their persons, variously distributed among them and concealed in divers ways, about $75,000 in money, and notes, mortgages and insurance policies amounting in value to some $50,000 more. Without going into detail, upon the admissions of the parties it became perfectly apparent that the property in question belonged to the bankrupt estate. The District Court for the Eastern District of Louisiana, upon petition, confirmed the receiver

as temporary receiver of that court and directed that all the property be turned over to him to be transmitted to the trustee or trustees in bankruptcy of A. Musica & Son elected and qualified in the District Court for the Southern District of New York, to be disposed of under and subject to the orders of that court.

While the Musicas took the case to the Circuit Court of Appeals, no appeal has been sued out by them to this court, and the only questions here concern the intervention of Lazarus, Michel & Lazarus, who, on April 28, 1913, filed an intervening petition in the District Court for the Eastern District of Louisiana, claiming $15,000 as attorney fees for services rendered the Musicas in the proceedings against them in the courts of Louisiana to protect their property rights and possession and for services to be rendered in representing them in proceedings in New York, if their services were there required. The decree of the District Court which was affirmed in the Circuit Court of Appeals, dismissed the petition in intervention of Lazarus, Michel & Lazarus, reserving their right to assert whatever claim they may have in the bankruptcy court of original and primary jurisdiction.

The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts wherever situated into *custodia legis*, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. *Mueller* v. *Nugent*, 184 U. S. 1; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300. Under clause 3 of § 2 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, the receiver in the original case would have had the right, acting under authority of the court, to take possession in a summary

proceeding of the bankrupts' property, found as was this, in possession of those admittedly holding it for the bankrupts, and to hold the property until the qualification of the trustee or until the bankruptcy petition should be dismissed, if that should happen. *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, *supra*. Prior to the amendment of June 25, 1910, c. 412, 36 Stat. 838, this court had held that in cases where the bankruptcy court of original jurisdiction could itself make a summary order for the delivery of property to the trustee or receiver the court of ancillary jurisdiction could do so (*Babbitt* v. *Dutcher*, 216 U. S. 102), and by clause 20, added to § 2 by the amendment of June 25, 1910, the bankruptcy courts were specifically given ancillary jurisdiction over persons or property within their respective territorial limits in aid of a trustee or receiver appointed in any court of bankruptcy. Under this amendment there can be no question that the District Court in Louisiana had authority to appoint a receiver and to take summary proceedings for the restoration of the bankrupts' estate which was in the custody of people having no right to it, in order that the same might be turned over to the bankruptcy court having jurisdiction for administration. Under the circumstances here shown, there can be no question that this authority was properly exercised in this case.

The property when seized was by virtue of the terms of the Bankruptcy Act held for and to be turned over to the court of original jurisdiction, and no right could be acquired in it by assignment subsequent to the filing of the petition which would defeat this purpose. Such assignment was a mere nullity, properly disregarded by the bankruptcy court, and notwithstanding which it could direct the delivery of the bankrupts' property to the receiver by summary order. *Babbitt* v. *Dutcher*, *supra*. There is no contention that Lazarus, Michel & Lazarus had any lien upon this property at the time of the appre-

hension of the parties and the seizure of the property. Whatever rights they had are asserted to arise by virtue of the assignments made April 1, 1913, and after the filing of the original petition in bankruptcy.

For an attorney fee for services to be rendered in contemplation of bankruptcy the act makes specific provision in subdivision *d* of § 60, and the amount thus attempted to be used in contemplation of bankruptcy proceedings is subject to revision in the court of original jurisdiction and not elsewhere. See *In re Wood and Henderson*, 210 U. S. 246.

The contention of the appellants and the proposition upon which they rely to sustain jurisdiction in this court is that by their intervention in the proceeding in the United States District Court in Louisiana they initiated a controversy in the bankruptcy proceeding, which is appealable to this court from the Circuit Court of Appeals, as are ordinary cases in equity where original jurisdiction does not rest on diverse citizenship entirely (Judicial Code, § 128). To maintain that proposition *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *Houghton, Receiver*, v. *Burden*, 228 U. S. 161, and cases of that character are cited. In those cases it was held that controversies arising in bankruptcy, in the nature of plenary suits, concerning property claimed by others than the bankrupt do not come under the special provisions of the Bankruptcy Act governing petitions for review and appeals, but take the course of ordinary cases in equity and are not final in the Circuit Court of Appeals where other cases of a similar character would not be.

The Bankruptcy Act provides for review under § 24b of administrative orders and decrees in the course of bankruptcy proceedings which are not made specially appealable under § 25a. And controversies arising in bankruptcy proceedings, of the character of which we

have spoken, under § 24a, are appealable like other equity cases. See *Matter of Loving*, 224 U. S. 183. In this case merely ancillary jurisdiction in a summary proceeding in bankruptcy was invoked in the seizure of this property in the hands of those holding it for the bankrupts, and its character could not be changed or enlarged by the attempted intervention of Lazarus, Michel & Lazarus under alleged assignments of the property made after the filing of the petition in the original bankruptcy proceeding. We think the District Court was right in holding, and the Circuit Court of Appeals right in affirming its decision, that whatever claim Lazarus, Michel & Lazarus had under the circumstances here shown must be asserted in the court of original jurisdiction. The attempted intervention in the ancillary proceeding did not give jurisdiction over a controversy in bankruptcy appealable under the Judicial Code to the Court of Appeals and thence to this court. This conclusion must result in the dismissal of the attempted appeal here.

It is contended, however, that this motion is premature, because the record in this case has not been printed. It is true that ordinarily such motions made before the record is printed must be accompanied by a statement of facts upon which they rest or by printed copies of so much of the record as will enable the court to understand the case. Under the present practice it is permissible to file the record printed in the court below, and we have a printed transcript of the proceedings in the District Court. In this printed record matters which the briefs do not dispute are shown, and we think we are sufficiently advised as to the situation of the case to dispose of it now without doing injustice to the parties. *National Bank* v. *Insurance Co.*, 100 U. S. 43.

We reach the conclusion that this appeal

Must be dismissed.

STONE, SAND AND GRAVEL COMPANY *v.* UNITED STATES.

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

No. 302. Argued April 23, 1914.—Decided June 8, 1914.

Where the contract contains a provision for a method of annulment and liquidated damages in case of a breach by failure to commence work and the Government avails of that provision it is only entitled to the liquidated damages and cannot recover damages for difference in cost on reletting the contract under a provision for failure to complete or abandonment after commencing the work. *United States* v. *O'Brien*, 220 U. S. 321, distinguished.

The benefit and burden of a provision in a Government contract giving a right to annul in consequence of a breach by failure to commence work must hang together and the Government cannot avail of the former without accepting the latter.

195 Fed. Rep. 68, reversed.

THE facts, which involve the liability of a contractor and its surety under a contract with the Government for excavation work, are stated in the opinion.

Mr. William Marshall Bullitt, with whom *Mr. Henry C. Willcox* and *Mr. T. M. Miller* were on the brief, for plaintiffs in error:

The contract as construed in *United States* v. *O'Brien*, 220 U. S. 321, means: Clause A: If the contractor (1) fails to begin work on the day specified or (2) fails (in the judgment of the Government engineer) to prosecute the work faithfully, then the United States may annul the contract, i. e., refuse to perform it further; in which event the United States may keep all money or retained percentages in its hands, but shall have no further damages.

Clause B: On the other hand, if the contractor fails to

complete work by the time agreed on, whether such failure be due to (1) a repudiation or refusal amounting to an anticipatory breach or (2) abandonment after doing some work or (3) mere failure to complete though still working at the expiration of the contract period, then in either such event, the United States may recover the excess cost of completing the work. *Farrelly* v. *United States*, 159 Fed. Rep. 671; *United States* v. *O'Brien*, 163 Fed. Rep. 1022; *S. C.*, 220 U. S. 321.

When the United States annulled the contract and retained the $6,206.69 money or reserved percentage due the contractor (which clause A authorized it to retain), then *ipso facto* the United States exercised the sole, exclusive and entire right it had under the contract; and it cannot hold the contractor liable for the excess cost of completing the work, which it had, by annulment, prohibited the contractor from further trying to perform.

Clause A calls for liquidated damages. *United States* v. *O'Brien*, 220 U. S. 321; *Sun Printing Ass'n* v. *Moore*, 183 U. S. 642, 669; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

As clause A fixed the forfeiture of retained pay as the penalty to a contractor upon an annulment under the conditions specified in clause A, the United States cannot claim an inherent right to further damages under clause A. *United States* v. *O'Brien*, 220 U. S. 321, 327.

Clause B (which is the only clause in the contract permitting the United States to recover the excess cost of completion) never came into operation against the contractor; and hence no recovery can be had under its provisions. The petition does not declare upon a breach of clause B. There is no "failure to complete" when the contractor is stopped from further work by an annulment of his contract. Cases *supra*.

There were two independent grounds why there could be no recovery in the *O'Brien Case*, both of which exist here.

See also *Quinn* v. *United States*, 99 U. S. 30; *Sparhawk* v. *United States*, 134 Fed. Rep. 720; *United States* v. *McMullen*, 222 U. S. 460; *Graham* v. *United States*, 231 U. S. 474; *United States* v. *Maloney*, 4 App. D. C. 505.

The American Surety Company was released by reason of the 50 days' extension of time, which the United States granted to the contractor without the knowledge or consent of the surety; which extension was not made pursuant to any reserved power in the contract.

The time of beginning was material and was of the essence of the contract.

The extension of time for beginning was permissible only for freshets, ice, etc. *United States* v. *Gleason*, 175 U. S. 588, 604.

The extension was not granted on account of freshets, ice, etc.

The contractor gave a valuable consideration for the extension; it was not a mere forbearance by the Government.

The surety never consented in advance to the extension except on account of freshets, ice, etc.

The surety was released by the extension. *Reese* v. *United States*, 9 Wall. 13; *Earnshaw* v. *Boyer*, 60 Fed. Rep. 528; *United States* v. *Freel*, 186 U. S. 309. *United States* v. *McMullen*, 222 U. S. 460, and *Graham* v. *United States*, 231 U. S. 474, distinguished.

Even if defendants are liable for all the damages suffered by the Government, the excess cost of completing the work under the Atlantic Gulf and Pacific Co. contract, is not the proper measure of damages, owing to vital differences between the original contract and the relet contract.

Excess cost of completion is the proper measure of damages, but it must be for doing substantially the same work, under substantially the same conditions as the original

contract called for. *United States* v. *McMullen*, 222 U. S. 460, 467; *Graham* v. *United States*, 231 U. S. 474, 481; *United States* v. *Weisburger*, 206 Fed. Rep. 641, 645; *United States* v. *U. S. F. & G. Co.*, 194 Fed. Rep. 611, 615, 617; *Am. Bonding Co.* v. *United States*, 167 Fed. Rep. 910, 915, 922; *Chesapeake Transit Co.* v. *Walker*, 158 Fed. Rep. 850, 856, 858; *United States* v. *Walsh*, 115 Fed. Rep. 697; *City of Goldsboro* v. *Moffat*, 49 Fed. Rep. 213, 216.

The relet contract contained five new and more onerous conditions, which increased the cost of the work, and hence destroyed the value of the excess cost as a true measure of damages.

Clause A was changed to impose the excess cost of completion as a penalty for being slow; indemnity was required against patents; definite time limit imposed; cost of superintendence was imposed; the United States retained the right of rejection, and compelled the contractor to guarantee work as a whole.

The Solicitor General, with whom *Mr. Francis H. McAdoo*, Special Assistant to the Attorney General, was on the brief, for the United States:

The Government's right of action on the breach was not lost by annulling the contract. *United States* v. *McMullen*, 222 U. S. 460; *United States* v. *O'Brien*, 220 U. S. 321.

The measure of recovery for the breach was the excess cost of completing the work and was not limited by Clause A to liquidated damages. *United States* v. *Maloney*, 4 App. D. C. 505.

The Government had a right to repudiate the contract on common-law principles, and is entitled to recover actual damages for the breach. *Bollman* v. *Burt*, 61 Maryland, 415; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255; *Johnson* v. *Allen*, 78 Alabama, 387; *Norrington* v. *Wright*, 115 U. S. 188; *Pope* v. *Porter*, 102 N. Y. 366.

The defendant surety company was not discharged by the extension of time.

The surety consented in advance to the extension which was granted to the contractor.. *Graham* v. *United States*, 231 U. S. 474; *United States* v. *McMullen, supra.*

Even if the surety did not so consent, it was not discharged by the extension, since it suffered no damage thereby. *Atlantic Trust & Deposit Co.* v. *Town of Laurinburg*, 163 Fed. Rep. 690; *Baglin* v. *Title Guaranty & Surety Co.*, 166 Fed. Rep. 356; *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416 (and other cases cited in brief).

The contract with the Atlantic, Gulf & Pacific Company was competent evidence to show the excess cost of completing the work. *Baer* v. *Sleicher*, 153 Fed. Rep. 129; *Graham* v. *United States, supra*, 481; *New York* v. *Second Ave. R. R. Co.*, 102 N. Y. 572; *United States* v. *McMullen, supra*, 471.

Mr. Justice Lurton delivered the opinion of the court.

This was an action by the United States against the Stone, Sand and Gravel Company, a corporation, hereinafter styled the contractor, and its surety, the American Surety Company of New York, to recover the excess cost of completion of a certain contract for excavating 7,500,000 cubic yards of earth within certain designated localities in the work of improving the harbor of Vicksburg, Mississippi. For this work the United States agreed to pay 8.49 cents per cubic yard as the work progressed and the contractor agreed to begin active work on or before December 5, 1899, with sufficient force and plant for an output of not less than 260,000 cubic yards per month, to be increased on or before June 5, 1900 to a plant adequate for an output of 330,000 cubic yards per month. Subsequently, upon application of the contractor, the time for beginning was extended to January 24, 1900. While by

January 24 the contractor had made large expenditures in preparing to commence work it had not on that day assembled the necessary force or plant. For this reason the Chief of Engineers on the following day confirmed a prior, anticipatory, recommendation of the engineer in charge that the contract should be annulled. An application for an extension of time was denied by the Secretary of War and on March 7, 1900 formal notice was given to the contractor, as required by the contract, that it had failed to prosecute the work of excavation, etc., "in accordance with specifications and requirements . . . and the said contract is hereby annulled." The work was relet at price of 12.4 cents per cubic yard, making an excess cost of $228,201.91, and an action was brought and judgment had against the contractor for that sum, minus a credit of $6,206.69, on account of certain voluntary work of an experimental character, which sum had been retained by the United States. There was also judgment against the Surety Company for $75,000, the full penalty of the bond.

The only breach of contract alleged was the failure to begin active operations on the day stipulated with a plant and force adequate to produce the monthly output required. The breach is confessed, but the error insisted upon here is that the contract, for such a breach, limits the measure of recovery to liquidated damages, namely, a forfeiture of all money or retained percentages due or to become due under the contract, and that the court below erred in allowing as damages the excess cost of the work under the reletting.

The clauses of the contract which give rise to this contention occur in the standard form of contract used by the War Department, known as form 19, and are the same clauses construed by this court in *United States* v. *O'Brien*, 220 U. S. 321. The clauses involved for purposes of reference may be described as clauses A and B. In clause A

it is expressly provided that if the contractor "fail to commence with the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect . . . and upon the giving of such notice, all money or reserve percentage due or to become due . . . by reason of this contract shall be and become forfeited to the United States. . . ." The engineer in charge is thereupon authorized, if an immediate performance of the work, "be, in his opinion, required by the public exigency, to proceed to provide for the same . . .", as prescribed in § 3709, Revised Statutes.

Following clause A are three other clauses dealing with changes in the work, cost of extra work and liabilities for labor and material furnished. Then comes clause B, which reads as follows:

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

That there was no abandonment of the contract by the plaintiffs in error is too plain to need discussion. Large expenditures were made to get ready, and further exten-

sions of time were sought both before and after notice of annulment. The explanation of the failure to get ready lies in the obvious fact that the contract was larger than the financial capacity of the contractor, and the United States was plainly within its contract right in putting it off the job and in reletting the work.

What is the measure of recovery against the contractor where the Government "annuls" the contract for failure to commence the work upon a stipulated day? The right to "annul," that is, to prohibit the contractor from going on under the contract, is plainly conferred in two distinct cases by clause A,—first, when the contractor fails to begin upon the day stipulated, and, second, when, having commenced the work, the contractor fails, "in the judgment of the engineer in charge to prosecute the work faithfully and diligently." In either case the same section specifically declares that upon the giving of the notice of annulment, "all money or reserve percentage due or to become due to the contractor . . . shall be and become forfeited to the United States."

It is therefore obvious that if the right to annul this contract depends upon clause A, the measure of damages recoverable in this action is limited by that clause to the forfeiture of all moneys or retained percentages due or to become due under the contract. *United States* v. *O'Brien*, *supra*. This is plainly conceded in the brief of the Solicitor General.

To escape confession of error in the judgment below, in so far as the United States was permitted to recover the excess cost of reletting the job, it has been argued that the right to annul the contract did not arise out of clause A, but was "a right inherent" in this and every other contract when time is of the essence, and that when there was, as in this case, a breach of an express agreement to begin the work upon a certain day, the right to annul was complete; and upon annulment the right to

recover all actual damages followed. Of course, this so-called "inherent right" to annul a contract with the consequent right to recover all actual damages as for a complete breach, are rights supposed to arise not out of any express agreement but out of the common law. But the assumption that aside from clause A an agreement to begin such a work on a particular day would be such a vital term of the contract as to justify the other party in an immediate annulment if the work was not so begun is seriously challenged. The vital character of time to the contract would depend upon its nature and particular circumstances. These might be such that time would not be of the essence of the contract at all. Any resort to the contract here involved as making time the essence of the agreement must include clause A, which expressly determines the consequences. Such an appeal to the contract would naturally result detrimentally to the argument here made, since the contract while making time vital provides also for the consequence of a breach in that respect. The benefit and the burden of clause A must hang together.

But we need not deal with the consequences as if clause A had been omitted. The right might have been inherent or not so vital as to justify the rigor of annulment. Both parties elected to deal with the matter by express stipulation and that should be and is the end of it. In such a situation there would be no justice in straining the contract for a construction which would limit its application to cases where the right of annulment would not exist without it. This contract was prepared in advance of the bidding by the United States. The bidder was required to dig with strict reference to its terms. One term was that the work should begin with a plant and force of definite capacity on or before a particular day. Another was that if this term was not complied with the United States might annul the contract and that as a consequence

of such annulment all money earned under it should be forfeited. This forfeiture is not made dependent upon the existence of any actual damage. Thus damages were by stipulation liquidated. That such damages may be in this instance inadequate may be true, but the fact affords no ground for frittering away the agreement by fanciful distinctions which never entered the head of either party to it.

The plain purpose was to obtain for the United States the right to take the contract from a bidder who should break his agreement at its threshold and let the work to another, possibly for a better price. At any rate the right to annul for a breach in respect of the time of beginning was a valuable right, and for it the Government stipulated and liquidated the damages in the event of its exercise. The contractor would not only lose his contract, but also would forfeit everything due him. The agreement settled the right and all the consequences of its exercise.

There is nothing in the case of *United States* v. *O'Brien*, *supra*, which would justify the limitation that the United States would now have us place upon this plain provision of the contract. The contract in that case was a dredging contract. The work was to begin on a day named and be completed on another. The contract was according to form 19 and included the two clauses, A and B, above set out. The work was begun on time. The first member of clause A was therefore eliminated from any consideration. The dredging did not progress to the satisfaction of the engineer in charge who elected to stop the contractor from going on, when, confessedly, time enough remained to complete the work within contract time. The United States, under these circumstances, sought to recover the excess cost of completing the work, but this court held that such excess cost could only be recovered under clause B for a failure to complete according to the terms of the agreement. There had been no breach of the agreement,

as time remained to finish the work had the contractor not been prohibited from going on because the engineer in charge was not satisfied with the progress of the job. But the right to annul for the latter reason was a right conferred by clause A, with the damages limited as therein provided. The United States was precluded from the rule of damages prescribed by clause B, and being forced to justify under clause A was held bound by the limitation of that clause.

The right to annul is expressly conferred by clause A for a failure to begin on the stipulated day. The United States resorted to that clause for its authority and pursued the procedure therein pointed out. It is plainly bound by the limitation of damages therein prescribed.

For the error in not so confining the recovery, the judgment is reversed and a new trial awarded.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* STATE OF GEORGIA.

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

No. 24. Argued April 17, 1913.—Decided June 8, 1914.

The existence of difference of opinion as to which is the best form of necessary safety device does not preclude the exercise of legislative discretion; and so far as the question is simply one of expediency the legislature is competent to decide it.

The criticism that a police statute requires a carrier to comply with conditions beyond its control and, therefore, deprives it of its property without due process of law, is not open in this court if the state court has construed the statute as not so requiring the carrier.

The state court having held that the term "railroad company" as used

in a state police statute is inclusive of natural persons operating a railroad and that the statute is not unconstitutional as denying equal protection of the law to railroad corporations because it does not include natural persons, this court concurs in that view.

A state police statute requiring railroad companies to use a specified safety device is not unconstitutional as denying equal protection of the laws because it does not affect receivers operating railroads; in view of the temporary and special character of a receiver's management, the classification is reasonable and proper.

In the absence of legislation by Congress, the States may exercise their powers to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce.

In regulating interstate trains as to matters in regard to which Congress has not acted, a State may not make arbitrary requirements as to safety devices; but its requirements are not invalid as interfering with interstate commerce because another State, in the exercise of the same power, has imposed, or may impose, a different requirement.

Congress may, whenever it pleases, make the rule and establish the standard to be observed on interstate highways.

None of the safety appliance statutes enacted by Congress relate to or regulate locomotive headlights.

The intent of Congress to supersede the exercise of the police power of the States in respect to a subject on which it has not acted cannot be inferred merely from the fact that such subject has been investigated under its authority.

The statute of Georgia of 1908, Civil Code, §§ 2697, 2698, requiring railroad companies to use locomotive headlights of specified form and power, is not unconstitutional either as a denial of equal protection of the law, as deprivation of property without due process of law, or as an interference with interstate commerce.

135 Georgia, 545, affirmed.

THE facts, which involve the constitutionality of the Locomotive Headlight Law of Georgia, are stated in the opinion.

Mr. Henry L. Stone, with whom *Mr. Alfred P. Thom*, *Mr. Alexander Hamilton* and *Mr. Robert C. Alston* were on the brief, for plaintiff in error:

The act known as the Georgia Headlight Law is viola-

tive of the due process clause of the Fourteenth Amendment. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Baxendale* v. *Railway Co.*, 5 C. R. (N. S.) 336; *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Bonnett* v. *Vallier*, 17 L. R. A. (N. S.) 492; *Bracewell Coal Co.* v. *People*, 147 Illinois, 66; *C. H. & D. R. Co.* v. *Bowling Green*, 41 L. R. A. (Ohio) 422; *Cleveland, C., C. & St. L. Ry. Co.* v. *Connersville*, 37 L. R. A. (Ind.) 175; *Cleveland* v. *Clements Bros. Co.*, 59 L. R. A. (Ohio) 775; *Dobbins* v. *Los Angeles*, 195 U. S. 223; Elliott on Railroads, 2d ed., § 668; *Id.*, Vol. 2, Note, p. 24; *Harbison* v. *Knoxville Iron Co.*, 103 Tennessee, 421; *Health Department* v. *Trinity Church*, 145 N. Y. 32, 41; *Houston & Tex. Cent. R. R. Co.* v. *Mayes*, 201 U. S. 321, 329; *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59; *Int. Com. Comm.* v. *Balt. & Ohio R. R. Co.*, 43 Fed. Rep. 52; *Int. Com. Comm.* v. *Chicago G. West. Ry.*, 209 U. S. 108; *Lawton* v. *Steele*, 152 U. S. 133; *McLean* v. *Arkansas*, 211 U. S. 547; *Mo. Pac. R. Co.* v. *Humes*, 115 U. S. 512; *Nat. Phonograph Co.* v. *Sehlegel*, 128 Fed. Rep. 733; *Ritchie* v. *People*, 154 Illinois, 98, 29 L. R. A. 79; *Shelbyville* v. *C., C., C. & St. L. Ry. Co.*, 146 Indiana, 66; *United States* v. *Palmer*, 128 U. S. 262, 271; *Welch* v. *Swasey*, 214 U. S. 105; *Wisconsin* v. *Kreutzberg*, 58 L. R. A. 748, 751.

The act violates the equal protection clause of the Fourteenth Amendment. *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Gulf Col. & S. Fe R'y Co.* v. *Ellis*, 165 U. S. 150; *Harding* v. *People*, 43 N. E. Rep. 624; *Henderson* v. *New York*, 92 U. S. 259; *Lochner* v. *New York*, 198 U. S. 45; *Los Angeles* v. *Hollywood Cemetery*, 57 Pac. Rep. 153; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The act is unenforcible and void under the commerce clause of the Federal Constitution and because Congress by its legislation has preëmpted and occupied the field of regulation of the same subject-matter.

The act interferes with and places a burden upon interstate commerce. *Adams Exp. Co.* v. *Kentucky*, 214 U. S. 218, 223; *Atl. Coast Line* v. *Wharton*, 207 U. S. 328, 334; *Bowman* v. *C. & N. W. R. Co.*, 125 U. S. 465; *Cooley* v. *Board of Wardens*, 12 How. 299; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209; *Hall* v. *DeCuir*, 95 U. S. 485; *Henderson* v. *New York*, 92 U. S. 259; *Un. Pac. Ry.* v. *Chic., R. I. & Pac. Ry.*, 163 U. S. 564; Rev. Stat., § 5258; *Welton* v. *Missouri*, 91 U. S. 275; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

Congress by its legislation has preëmpted and occupied the field of regulation of the same subject-matter, to the exclusion of state legislation. See acts of March 2, 1893, known as the Safety Appliance Act, 27 Stat. 531; March 2, 1903, amending Safety Appliance Act, 32 Stat. 943; May 27, 1908, authorizing investigations for safety of railway operation, 35 Stat. 324, c. 200; April 14, 1910, supplemental of the Safety Appliance Act, 36 Stat. 298, c. 160; May 6, 1910, reports of accidents, 36 Stat. 350, c. 208; May 30, 1908, as to ash pans, 35 Stat. 476; February 17, 1911, see also the statutes relating to boilers and appurtenances, and to the hours of service. See also the Employers' Liability Act, and the act of March 4, 1911, as to investigations, 36 Stat. c. 285, § 1, p. 1397, and the Act to Regulate Commerce, § 1; *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; Block Signal Board's Final Report to Int. Com. Comm., June 29, 1912, pp. 14–15; *Chic., B. & Q. R'y* v. *Miller*, 226 U. S. 513; *Chic., St. P., M. & O. Ry.* v. *Latta*, 226 U. S. 519; *Chic., R. I. & Pac. R'y* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Chic., R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453, 466; *Employers' Liability Cases*, 223 U. S. 1, 55; Interstate Commerce Commission's Rules, promulgated March 13, 1911; Twenty-fourth Ann. Rep. to Congress, December 21, 1910, pp. 44–47, and pp. 173–189; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *Mich. Cent. R. Co.* v. *Vreeland*, 227 U. S.

59; *N. Y., N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 632; *N. Y. C. & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248; *Nor. Pac. R'y* v. *Washington*, 222 U. S. 370; *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Southern R'y Co.* v. *Reid*, 222 U. S. 424; *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444; *B. & O. R. Co.* v. *Indiana Railroad Commission*, 196 Fed. Rep. 690, 699.

The brief contains a summary of the Headlight Laws in sixteen States.

Mr. Thomas S. Felder, Attorney General of the State of Georgia, for defendant in error:

Statutes of States of the character of the one under consideration, being designed for the protection of the property and lives of the people, are not unconstitutional because they may in a manner affect interstate commerce, nor do they violate the due process clause of the Fourteenth Amendment to the Constitution because an expense may be incurred in obeying their regulations. *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 622; *Hennington* v. *Georgia*, 163 U. S. 299; *Smith* v. *Alabama*, 124 U. S. 465; *N. Y. & N. E. R. R. Co.* v. *Briston*, 151 U. S. 567; *Chicago, R. I. & P. R. R.* v. *Arkansas*, 219 U. S. 453; *Savage* v. *Jones*, 225 U. S. 501; *Southern Ry. Co.* v. *King*, 217 U. S. 524; *Chic., B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561; *Reid* v. *Colorado*, 187 U. S. 137; *Asbell* v. *Kansas*, 209 U. S. 251; *Chic., M. & St. P. R. Co.* v. *Solan*, 169 U. S. 133; *Mo. Pacific Ry.* v. *Humes*, 115 U. S. 512; *N. C. & St. L.* v. *Alabama*, 128 U. S. 96.

The act does not violate the equal protection clause of the Constitution because it excepts from its operations tram, mill, and lumber roads. This would seem to be a wise and reasonable classification. *Chic., R. I. & Pac. R. Co.* v. *Kansas*, 219 U. S. 453; *New York, N. H. & H. R. Co.* v. *New York, supra; People* v. *New York &c.*, 56 Hun,

409; *Missouri &c. R. Co.* v. *State,* 121 S. W. Rep. 930 (Ark.); *Chicago &c. R. Co.* v. *Railroad Com'rs,* 90 N. E. Rep. 1011.

The contention that the act exempts from its operations railroads operated by receivers is not tenable. The act does not by its terms exempt receivers of railroads. A court would order its officer to comply with the terms of the statute and equip the locomotives with the headlights required.

The statute does not interfere with the right of the railroad company to contract. *New York & New England R. Co.* v. *Bristol,* 151 U. S. 556, 567; McGehee on Due Process of Law, 345.

It is not a taking of property without due process of law, in contemplation of this provision of the Constitution, because the railroad, in order to comply with the statute, would have to discard the headlights used by it, which it considers are good headlights, and to replace the same with the headlights required under the act. All property is held subject to the police regulations of the State. *Chi., B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561; *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628; *Bacon* v. *B. & M. R. Co.,* 76 Atl. Rep. 128 (Vt.); *Munn* v. *Illinois,* 94 U. S. 113; *Missouri Pac. R. Co.* v. *Humes,* 115 U. S. 512.

The legislature may prescribe in detail the kind of light which should be used, and may also designate the size of the reflector as well as the number of watts that should be used. The intensity of an electric light is measured by the watt, and the reflector increases the breadth and intensity of the light, as was well known to the legislature. *Chesapeake &c.* v. *Manning,* 186 U. S. 238; Freund on Police Power, § 34; *Atchison &c. R. R. Co.* v. *Matthews,* 174 U. S. 96, 102.

This statute is in the interest of the public and its wisdom cannot be questioned by the courts. The public

policy of the Government is to be found in its statutes and when the law-making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such cases is what the statute enacts. *Logan* v. *Postal Tel. Co.*, 157 Fed. Rep. 570, 587; *United States* v. *Freight Association*, 166 U. S. 340; *Chi., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 569.

The subject has not been acted upon in any way by Congress or by the Interstate Commerce Commission, directly or indirectly. The act does not in any way conflict with any act of Congress or any rule or regulation of the Interstate Commerce Commission, and in the absence of such conflict the Federal courts will not declare the act invalid as interfering with interstate commerce. *Savage* v. *Jones*, 225 U. S. 501, 533; *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612, 623; *Reid* v. *Colorado*, 187 U. S. 137, 148.

Mr. Justice Hughes delivered the opinion of the court.

The Atlantic Coast Line Railroad Company, the plaintiff in error, was convicted of violating a statute of the State of Georgia known as the 'headlight law.' Pub. Laws (Ga.), 1908, pp. 50, 51; Civil Code, §§ 2697, 2698. In defense it was insisted that the act contravened the commerce clause and the Fourteenth Amendment of the Constitution of the United States. On appeal from the judgment of conviction the Court of Appeals of the State of Georgia certified the questions thus raised, together with others involving the application of the state constitution, to the Supreme Court of the State. Answering these questions, that court sustained the validity of the statute (135 Georgia, 545), whereupon final judgment was entered and this writ of error was sued out.

The material portions of the statute are as follows:

"Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, That all railroad companies are hereby required to equip and maintain each and every locomotive used by such company to run on its main line after dark with a good and sufficient headlight which shall consume not less than three hundred watts at the arc, and with a reflector not less than twenty-three inches in diameter, and to keep the same in good condition. The word main line as used herein means all portions of the railway line not used solely as yards, spurs and sidetracks.

"Section 2. Be it further enacted, That any railroad company violating this Act in any respect shall be liable to indictment as for a misdemeanor in any county in which the locomotive not so equipped and maintained may run, and on conviction shall be punished by fine as prescribed in Section 1039 of the Code of 1895. . . .

"Section 4. Provided this Act shall not apply to tram roads, mill roads and roads engaged principally in lumber or logging transportation in connection with mills."

The contention is made that this act deprives the company of its liberty of contract, and of its property, without due process of law. It compels the disuse of a material part of the company's present equipment and the substitution of a new appliance. The use of locomotive headlights, however, is directly related to safety in operation. It cannot be denied that the protective power of government, subject to which the carrier conducts its business and manages its property, extends as well to the regulation of this part of the carrier's equipment as to apparatus for heating cars or to automatic couplers. The legislature may require an adequate headlight, and whether the carrier's practise is properly conducive to safety, or a new method affording greater protection should be substituted, is a matter for the legislative judgment. But it is insisted that the legislature has gone beyond the

limits of its authority in making the specific requirements contained in the act as to the character and power of the light and the dimensions of the reflector. This argument ignores the established principle that if its action is not arbitrary—is reasonably related to a proper purpose—the legislature may select the means which it deems to be appropriate to the end to be achieved. It is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. Particularization has had many familiar illustrations in cases where there has been a conviction of the need of it, as, for example, in building regulations and in provisions for safeguarding persons in the use of dangerous machinery. So far as governmental power is concerned, we know of no ground for an exception in the case of a locomotive headlight.

It cannot be said that the legislature acted arbitrarily in prescribing electric light, in preference to others, or that, having made this selection, it was not entitled to impose minimum requirements to be observed in the use of the light. Witnesses for the plaintiff in error, including its general superintendent of motive power and other employés holding important positions and conversant with the exigencies of operation, presented their objections to the use of the electric headlight. Locomotive engineers who for many years had driven locomotives with such a light testified for the State, expressing a decided opinion in favor of the use of electric headlights in the interest of safe operation and submitting their views in answer to the objections that had been urged. Assuming that there is room for differences of opinion, this fact does not preclude the exercise of the legislative discretion. So far as the question was one simply of expediency—as to the best method to provide the desired security—it was within the competency of the legislature to decide it. *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 571; *C., B. & Q.*

Ry Co. v. *Drainage Com'rs,* 200 U. S. 561, 583, 584; *McLean* v. *Arkansas,* 211 U. S. 539, 547, 548; *C., B. & Q. R. R. Co.* v. *McGuire,* 219 U. S. 549, 568, 569, and cases there cited.

As to the objection that the statute makes no provision for conditions beyond the carrier's control, it is sufficient to say that in the light of the construction placed upon the act by the Supreme Court of the State, we are not at liberty to regard it as open to this criticism (135 Georgia, pp. 561, 562); certainly, no such case is here presented. We conclude that there is no valid objection to the statute upon the ground that it deprives the carrier of liberty or property without due process of law.

The further contention is that the statute offends in denying to the plaintiff in error the equal protection of the laws. Specifically, the complaint is that the act does not apply to receivers operating railroads, and that it expressly excepts tram roads, mill roads and roads engaged principally in lumber or logging transportation in connection with mills. As to the first, it cannot be said that the act does exclude receivers from its requirements. The state court has ruled that the words 'railroad company' in the statute include natural persons as well as corporations. It declined to decide that receivers were not included; but, conceding, without deciding, that they were not, it was held that the statute would not for that reason violate the equal protection clause in view of the temporary and special character of receivers' management. 135 Georgia, pp. 555, 556. We concur in this view. As to the exceptions made by the statute of tram roads, mill roads, etc., it is impossible to say that the differences with respect to operation and traffic conditions did not present a reasonable basis for classification. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78, 81; *Barrett* v. *Indiana,* 229 U. S. 26, 30; *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 418.

Finally, it is urged that the statute constitutes an unwarrantable interference with interstate commerce. The locomotive, with respect to which the accusation was made, was at the time being regularly used in the hauling of interstate freight trains over the company's main line of railroad and was equipped with an oil headlight. The statute, as the Supreme Court of the State said, was not directed against interstate commerce, but it was held that it incidentally applied to locomotives used in hauling interstate trains while these were moving on the main line in the State of Georgia. This being so, the act is said to be repugnant to the exclusive power of Congress. It is argued that if Georgia may prescribe an electric headlight, other States through which the road runs may require headlights of a different sort; that, for example, some may demand the use of acetylene and that others may require oil; and that, if state requirements conflict, it will be necessary to carry additional apparatus and to make various adjustments at state lines which would delay and inconvenience interstate traffic.

The argument is substantially the same as that which was strongly presented to the court in *New York, New Haven & Hartford R. R. Co.* v. *New York*, 165 U. S. 628, where the plaintiff in error was held subject to penalty for the violation of a New York statute which in substance made it unlawful for any steam railroad doing business in that State to heat its passenger cars, on any other than mixed trains, by any stove or furnace kept inside of the car or suspended therefrom. The railroad company was a Connecticut corporation having but a few miles of road within the State of New York and operating through trains from New York through Connecticut to Massachusetts. As this court said in its opinion, the argument was made that 'a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid

transportation impossible; that to stop an express train on its trip from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode as required by the laws of that Commonwealth, would be a hardship on travel that could not be endured.' But the court ruled that these 'possible inconveniences' could not affect 'the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered is appropriate and effective.' 165 U. S. 632, 633.

In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that pending Federal action the use of such agencies, which unless carefully guarded was fraught with danger to the community, should go unregulated and that the States should be without authority to secure needed local protection. The requirements of a State, of course, must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another State in the exercise of a similar power may not impose the same regulation. We may repeat what was said in *Smith* v. *Alabama*, 124 U. S. 465, 481, 482: "It is to be remembered that railroads are not natural highways of trade and commerce. . . . The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments

and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. . . . The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution." See also, *Nashville &c. Rwy. Co.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y., N. H. & H. R. R. Co.* v. *New York, supra; Lake Shore & M. S. Rwy. Co.* v. *Ohio*, 173 U. S. 285; *Missouri Pacific Rwy. Co.* v. *Larabee Mills*, 211 U. S. 612; *Missouri Pacific Rwy. Co.* v. *Kansas*, 216 U. S. 262; *Chicago, R. I. & Pac. Rwy. Co.* v. *Arkansas*, 219 U. S. 453; *Minnesota Rate Cases*, 230 U. S. 352, 402, 410.

If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries —there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway.

It is suggested that Congress has acted in the present instance. Reference is made to the act of March 2, 1893, c. 196, 27 Stat. 531, relating to power driving-wheel brakes for locomotives, grabirons, automatic couplers and height of drawbars; to the act of March 2, 1903, c. 976, 32 Stat. 943, amending the act of 1893; to the act of May 27, 1908, c. 200, 35 Stat. 317, 324, 325, authorizing the Interstate Commerce Commission to keep informed regarding compliance with the Safety Appliance Act and to investigate and report on the need of any appliances or systems intended to promote the safety of railway operations; to the act of May 30, 1908, c. 225, 35 Stat. 476, relating to locomotive ash pans; to the act of April 14, 1910, c. 160, 36 Stat. 298, relating to sill steps, hand brakes, ladders, running boards and hand holds and providing that the Interstate Commerce Commission should after hearing designate the number, dimensions, location and manner of application of these appliances and of those required by the act of 1893; to the detailed regulations prescribed by the Commission, on March 13, 1911, pursuant to this authority; to the act of May 6, 1910, c. 208, 36 Stat. 350, requiring the Commission to investigate accidents and make report as to their causes with such recommendations as they may deem proper; and to the act of February 17, 1911, c. 103, 36 Stat. 913, relating to locomotive boilers.

But it is manifest that none of these acts provides regulations for locomotive headlights. Attention is also called to the investigations conducted by what is known as the 'block-signal and train control board' (organized by the Commission) and the reports of that board with respect to sundry devices and appliances, including headlights. It does not appear, however, either that Congress has acted or that the Commission under the authority of Congress has established any regulation so far as headlights are concerned. As to these, the situation has not been altered by any exertion of Federal power and the

case stands as it has always stood without regulation unless it be supplied by local authority. The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken. *Missouri Pacific* v. *Larabee Mills*, *supra*; *Savage* v. *Jones*, 225 U. S. 501, 533.

The judgment is affirmed.

Affirmed.

THE LOS ANGELES SWITCHING CASE.[1]

APPEAL FROM THE COMMERCE COURT.

No. 98. Argued January 14, 15, 1914.—Decided June 8, 1914.

An order of the Interstate Commerce Commission requiring railway companies to desist from exacting charges for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within the switching limits of a terminal city when such carload freight is moving in interstate commerce incidentally to a system line haul is not open to the objection that it rests upon a construction of the Act to Regulate Commerce which would forbid a carrier from separating its terminal and haulage charges on the same shipment.

Quære, and not involved in this decision, whether the rate which the Act to Regulate Commerce requires to be published is a complete rate including not only the charge for hauling but also the charge for the use of terminals at both ends of the line.

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[1] Docket title of this case is Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, appellants, *v.* Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company.

The delivery and receipt of goods on an industrial spur-track within the switching limits in a city is not necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to and from that city when that rate embraces a receiving and delivery service for which the spur-track service is a substitute.

Industrial spur-tracks established within the carrier's switching limits, within which the team tracks are also located, may constitute an essential part of the carrier's terminal system; and whether or not delivery on the spur-track is an additional service on which to base a charge or merely a substituted service, which is substantially a like service to that included in the line-haul rate and not received, is a question of fact for the Interstate Commerce Commission to determine.

Findings of the Interstate Commerce Commission as to the character and use of industrial spur-tracks within the switching limits of a city are conclusions of fact and not subject to review.

Although the Interstate Commerce Commission may not have found that a switching charge if legal was unreasonable in amount or that the shippers had objected thereto, as the service must be performed according to the law of the land, the shippers are not estopped from bringing the matter before the Commission to the end that the carrier's charges should not be unjustly discriminatory.

It is permissible for a railway company to establish a terminal district; and it is for the Commission to determine according to the actual conditions of operation, whether an extra charge for spur-track delivery within that district, regardless of the variations in distance, is either unreasonable or discriminatory.

This court cannot substitute its judgment for that of the Interstate Commerce Commission upon matters of fact within the province of the Commission.

The order of the Interstate Commerce Commission that the carriers desist from making a switching charge for carload freight moving in interstate commerce to industrial spur-tracks within the switching limits of Los Angeles, California, *sustained.*

Pursuant to the act of October 22, 1913, c. 32, judgments of the Commerce Court reversed by this court are remanded to the District Court of the United States for the district where the case would have been brought had the Commerce Court not been established.

188 Fed. Rep. 229, reversed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission in regard to switching

charges within the yard limits of Los Angeles, California, are stated in the opinion.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States, Intervenor:

The action of the Commerce Court in refusing to sustain the motions of the United States to dismiss the bills, and in holding, on the face of the bills alone, that the court had the power to decide, notwithstanding the findings of the Commission based on the evidence, that the service of making deliveries on the spur tracks was different from the service of making deliveries on the team tracks, with a consequent difference in the cost, was so flagrantly erroneous as to require a reversal of the judgments and the dismissal of the bills.

The question as to what are and what are not terminal facilities is manifestly a question of fact to be determined according to the circumstances of each particular case. The findings made by the Commission, after a careful review of all of the attending facts and circumstances, that the spur tracks in question are a part of the carriers terminal facilities, to the same extent as the stations, team tracks, and freight sheds, are conclusive upon the courts.

The findings of the Commission are not only in accord with the facts before it, but they are also in accord with the express provisions of the Act to Regulate Commerce, as well as with certain well considered judicial decisions,—all of which the Commerce Court ignored. See § 7 of the act approved June 18, 1910, 36 Stat. 539, 544, 545, which reënacted, in its original form, § 1 of the act of June 29, 1906, 34 Stat. 584; *Vincent* v. *Chicago & Alton R. R. Co.*, 49 Illinois, 33, 41; *Chicago & North West. Ry. Co.* v. *The People*, 56 Illinois, 365, 382; *Coe & Milsom* v. *Louis. & Nash. R. R. Co.*, 3 Fed. Rep. 775, 778; *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 135.

The case at bar is not that of a carrier making delivery "to a point off its line" by means of a terminal company, for which it is entitled to make an extra charge, as in *Int. Com. Comm.* v. *Stickney*, 215 U. S. 98.

The present controversy is limited to the single question of the right of the appellees to make an extra charge for deliveries made on spurs which constitute a part of their terminals, tracks, facilities, and equipment. The carriers established, and for many years maintained, the practice of making deliveries on the spurs as a part of their terminals and facilities. The shippers have, at all times, acquiesced in that practice. On complaint duly filed, and after a full hearing, the Commission dealt with the practice in all of its aspects. Its order, in pursuance of its investigation, is a mere regulation. The terminal facilities of carriers, with these spurs as a part, have time and again been the subject of consideration by Congress. Against the judgment of the carriers, the shippers, the Commission, the Congress, and the courts, the Commerce Court, with its holding, stands alone.

It is manifest, from its report, that the Commission considered all of the facts and circumstances. No claim to the contrary is made. The Commission also considered the difference between the American and English systems of dealing with terminal services and charges. The findings of the Commission are also supported by facts of such common observation as to be within the scope of judicial knowledge. Without the use of the spurs as terminal facilities, all of the enormous carload tonnage into or out of Greater New York must be handled on a common team track, or in a common depot. The same situation would obtain at Chicago, Pittsburgh, and all other large terminals. The livestock, ore, coal, oil, lumber, grain, and all other carload freight, would be unloaded on a common team track, or in a common depot, and crudely handled by the consignees through the streets of the cities. That

the Commerce Court substituted its judgment, on these facts and circumstances, for that of the Commission, is beyond question. A comparison of the language used by the Commission with that of the court conclusively demonstrates it.

The Commerce Court reviewed the element of the so-called water competition, and substituted its judgment that the industrial track service is not the same as the team track or depot service, for the contrary judgment of the Commission. In doing so, the Commerce Court assumed an authority which this court, for the past ten years, has persistently condemned in every decision relating to the respective functions of the Commission and the courts.

The Commission found that these spurs and sidetracks were a part of the terminal facilities; that deliveries thereon were the same, in cost and character, as the deliveries on the public team tracks; that the line haul rates for all other shippers embraced, without additional charge, deliveries on the terminals; and that out of 10,000 cities in the United States where terminal services are performed, only in the cities of San Francisco, Los Angeles, and San Diego, was this spur track charge imposed. Having made these findings, the conclusion of the Commission that the extra charge was unlawful followed as a matter of course.

No justification is given for the extra charge of $2.50 for spur track delivery. The appellees are practically the only carriers who may compete for the freight, and it is easy for them to agree. When competition is inimical to their interests, they do not compete. When asked by the Commission why this charge was made at these points, the traffic manager of one of the roads replied, "Because we can get it." Another railroad official who appeared before the Commission explained the non-existence of such a charge at all other points on his line, as well as throughout

the country at large, by saying that the absence of such a charge was "a tribute to competition."

The Commerce Court held that "the ultimate conclusion of the Commission is a mixed question of law and fact which certainly ought not to be conclusive upon this court." But this court has held that even on a mixed question of law and fact the findings of the Commission are conclusive. *Ill. Cent. R. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441, 455, 459.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Fred H. Wood and *Mr. Gardiner Lathrop*, with whom *Mr. Robert Dunlap*, *Mr. T. J. Norton*, *Mr. C. W. Durbrow*, *Mr. W. F. Herrin* and *Mr. J. P. Blair* were on the brief, for appellees.

There was no abuse of power in issuing injunction *pendente lite*.

The switching charge is not embraced in regular rate. It covers a special service rendered under special contract and separate charge therefor is legal.

There is no dispute as to meaning of tariffs.

The charge is imposed for special service not rendered to public in general and properly stated separately and in addition to freight rate.

The charge is separately stated in pursuance of § 6 of the Interstate Commerce Law.

There are other instances in which a separate charge has been imposed in addition to usual rate.

It is not obligatory upon a railway company to construct industrial spurs and deliver and receive freight thereon. Any obligation is wholly contractual and a separate charge for such service is proper.

The Government's cases are not in point.

The charge is not violative of § 2 of the act concerning unjust discriminations.

The charge was not found to be violative of § 3 of the act concerning undue preferences.

It is error to consider the supposed practice of railway companies, in general, making free deliveries at private industries, as they would not disclose the legal duties of carriers complained against under the Interstate Commerce Law, and the Commission was confined to ascertaining and determining whether these particular railway companies in making the charge complained of were doing or omitting to do something in contravention of some provision of that law.

It conclusively appears from the form of the order and the face of the Commission's report that the order is not based upon any finding of discrimination under either the second or third sections, but upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment.

The Commission's construction of the law is erroneous.

By the plain intendment of the language used, carriers performing a road service between termini may separately state the charges for carriage between places named in the tariffs and their own terminal services performed at the places between which such transportation is conducted.

The Commission's construction is contrary to the purposes and scope of the statute as shown by its legislative history.

The Commission's construction is contrary to the construction of the English act at the time of the passage of the Act to Regulate Commerce.

In the construction of this statute no assumed custom of embracing within a single charge compensation for these two services can weigh against the plain reading of the statute and the contemporaneous construction of similar provisions in the English law.

In so far as the order is predicated upon any assumption that the cost of team track delivery and industry track

delivery is the same, it is based upon an assumption warranted by no finding of the Commission, contrary to the undisputed evidence before the Commission, and contrary to the specific allegation of the petition, admitted by the motions of appellants, that the cost of industry track delivery is greater than the cost of team track delivery.

Waiving the form of the order, the tariffs of the carriers in imposing a terminal charge for industry track delivery when made in connection with a line haul by the carrier making such delivery, while making no terminal charge for team track delivery incident to a line haul, violated no provision of the Act to Regulate Commerce.

The two services in question are not like services performed under similar circumstances and conditions; and the resultant difference in charges results in no undue preference, but is justified both by the dissimilar circumstances and conditions under which rendered, and by the added value of the service in connection with industry track delivery, for which it is just to make an additional charge.

In support of these contentions, see *Central Stock Yards Co.* v. *Louis. & Nash. R. R.*, 192 U. S. 568; *Chalk* v. *Charlotte &c. R. Co.*, 85 N. Car. 371; *Evershed* v. *London &c. R. Co.*, 2 Q. B. D. 254; *Fenner* v. *Buffalo &c. R. Co.*, 44 N. Y. 505; *Francis* v. *Dubuque &c. R. Co.*, 25 Iowa, 60; *Hall* v. *London & Brighton Ry. Co.*, 15 Q. B. D. 505; *Imperial Wheel Co.* v. *St. L., I. M. & S. Ry.*, 20 I. C. C. 56; *Import Rate Case*, 162 U. S. 197, 219; *In re Investigation of Coal Rates*, 22 I. C. C. 604; *Int. Com. Comm.* v. *Balt. & Ohio R. R. Co.*, 225 U. S. 326; *Int. Com. Comm.* v. *Balt. & Ohio R. R. Co.*, 145 U. S. 284; *Int. Com. Comm.* v. *Chicago G. West. Ry. Co.*, 209 U. S. 108; *Int. Com. Comm.* v. *Louis. & Nash. R. R. Co.*, 227 U. S. 88, 100; *Int. Com. Comm.* v. *Stickney*, 215 U. S. 98; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Minnesota Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *New Orleans &c. R. Co.* v. *Tyson*, 46 Mis-

sissippi, 729; *Party Rate Case*, 145 U. S. 284; *Ralston Townsite Co.* v. *M. P. Ry.*, 22 I. C. C. 354; *South &c. Ala. R. Co.* v. *Wood*, 66 Alabama, 167; *State* v. *Republican Valley R. Co.*, 17 Nebraska, 647; *Tex. & Pac. R. R. Co.* v. *Int. Com. Comm.*, 162 U. S. 197, 219; *Witbeck* v. *Holland*, 45 N. Y. 13; *Winters Paint Co.* v. *C., M. & St. P. Ry.*, 16 I. C. C. 587; *Union Pacific R. R. Co.* v. *United States*, 117 U. S. 355; *United States* v. *Balt. & Ohio R. R. Co.*, 231 U. S. 274.

Mr. Justice Hughes delivered the opinion of the court.

The Atchison, Topeka and Santa Fe Railway Company, the Southern Pacific Company and the San Pedro, Los Angeles and Salt Lake Railroad Company, brought this suit against the Interstate Commerce Commission in the Circuit Court of the United States for the District of Kansas, first division, to restrain the enforcement of an order of the Commission made in April, 1910. The order required these companies to desist 'from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits' in Los Angeles, California, when such carload freight 'is moving in interstate commerce incidentally to a system-line haul.' It also prohibited the exaction of any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight in such cases.[1]

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[1] The order is as follows:

"This case being at issue on complaint and answer 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 findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering

After answer had been filed by the Commission, the suit was transferred to the Commerce Court, and the United States, the Associated Jobbers of Los Angeles and the Pacific Coast Jobbers' and Manufacturers' Association, intervened. The United States thereupon moved to dismiss the bill for want of equity and the petitioners asked for a preliminary injunction. The Commerce Court, denying the Government's motion, suspended the Commission's order until the further order of the court (188 Fed. Rep. 229, 929); and this appeal is prosecuted.

The complaint of the petitioners in substance is that they have established in the city of Los Angeles their public terminals, including what are known as team tracks and freight sheds, for the accommodation of the public in receiving and delivering carload freight; that these facilities are entirely adequate for the purpose, and are

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and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul."

sufficient to handle all the carload freight shipped or delivered in the city, including that now received or delivered upon the industrial spur tracks in question; that the spur-track service has been established simply for the convenience of the shippers thus served; that it is a service essentially distinct from the line haul, and additional thereto, being of great benefit in the saving of cartage charges to the favored shippers for whose use the spur tracks were constructed; that the industries or plants located upon the spurs are distant from the main tracks, in the case of the Atchison Company from 1-5 mile to $3\frac{1}{2}$ miles, in that of the Southern Pacific Company from 200 feet to 7 miles, and in that of the San Pedro Company from 1-5 mile to 4 miles, and that the special switching service involves a much greater expense than if the carload freight were received or delivered on the team tracks or at the freight sheds of the carriers respectively; that the charge of $2.50 per car for this service is entirely reasonable and one which the carriers are entitled to make in addition to the line-haul rate; and that as such it has been duly specified in their published tariffs. It is also averred that, while in the contracts governing the construction and maintenance of the spur tracks no specific sum was prescribed for the service of receiving and delivering carload freight thereon, the charge above mentioned had been generally established; that at the time of the making of these contracts the shippers understood and willingly consented that, if the railway company performed this special service, there should be additional compensation and that such charge has generally been maintained and collected. The adequacy of the public terminal facilities for carload freight in Los Angeles (consisting of the team tracks and freight sheds of the carriers respectively), the facts set forth with respect to the construction of the spur tracks, their location, the acquiescence in the switching charge and its maintenance, were established before the Com-

mission, it is alleged, by undisputed evidence. It is further stated that on account of water and other competition, the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that the companies do not receive the amount to which they are justly entitled and that they ought not to be required to perform the service in question without reasonable reward. The Commission's order was assailed as beyond its authority, involving a discrimination in favor of the owners of plants located upon the spur tracks and a deprivation of the property of the carriers without due process of law.

The report of the Commission (18 I. C. C. 310) was made a part of the bill. It appears that the proceeding before the Commission was instituted by the Associated Jobbers of Los Angeles and was directed against two distinct practices, involving the spur-track switching charges incident to a system-line haul and to a foreign-line haul respectively. The propriety of such a charge when the line haul was by a foreign carrier was sustained, and the prohibitory order was confined to cases where the charge was made in connection with a system-line haul. The pertinent facts as found by the Commission are substantially as follows:

Each of the carriers has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over the freight rate named in the tariffs, while at industry spurs an additional

charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood. These spurs have been constructed under substantially uniform contracts.[1] None of the industries at Los Angeles fur-

[1] The standard form of the Southern Pacific Company provides as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Company may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

The Sante Fe contract contains this provision:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second

nishes its own motive power, and interline switching is done from the interchange track to the industry by the locomotives of the delivering line, the carrier performing the switching service.

The Commission found that these spur tracks were portions of the terminal facilities of the carriers with whose lines they connected, being distinguished from mere plant facilities such as were under consideration in *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558, and in the cases of the *General Electric Company* and *Solvay Process Company*, 14 I. C. C. 237, 246. Each of the spurs here considered, said the Commission, is in a real sense a railroad terminal at which the carrier receives and delivers freight. It further appears from the report that the charge for spur-track delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city; that it was first imposed by the Southern Pacific and as the other lines came in they adopted the policy of the line already there; that as to certain commodities the charge was not imposed until quite recently and at all times until the Hepburn Act went into effect there was great variation in charge as between individual shippers. It is added that there are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points; only in Los Angeles, San Franciso and San Diego is there such a charge for spur-track delivery, though in many of these places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal

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party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

rates, the Southern Pacific, Northern Pacific and Great Northern lines, impose no such charge, and to the east where defendants' lines have their termini in cities competing with Los Angeles, this charge is also unknown.

The Commission thus described the character of the service in question: "Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.

"Again it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered—some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. Before the cars are placed the consignees are given notice of the tracks to which they are to be sent, so that there is no confusion, and the switch

engines which place the cars on one track also serve to haul the 'loads' in and 'empties' out at the other tracks. After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.

"An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done." 18 I. C. C. pp. 317, 318.

1. It is urged that the Commission's order rests upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment, and that this is a fundamental misconception of the law.

We do not think that the order is open to this objection. It is true that the Commission directed attention to the distinction between the American and English methods of stating rates, pointing out that the English practise of fixing separate schedules for 'conveyance' and 'station terminal' rates had not obtained in this country so far as the records of the Commission show. The opinion was expressed that the provisions of the Act to Regulate Commerce were enacted with reference to the American method of rate-making and that the rate which the statute requires to be published is 'a complete rate,' including 'not only the charge for hauling but the charge for the use of

the terminals at both ends of the line.' 18 I. C. C. pp. 315, 316. We need not stop to consider whether this is a correct interpretation of the act, for the question of a segregation of haulage and terminal charges (meaning, by the latter, charges for the use of ordinary terminal stations in receiving and delivering goods) was not before the Commission and its propriety was not necessarily involved in the decision. No such segregation had been attempted by the carriers here. On the contrary, it was undisputed that the line haul carload rate comprehended receipt and delivery on team tracks or at freight sheds.

The Commission conceded the right of the carrier to charge for any terminal service that was accessorial. But it was held that an additional charge was not justified if additional service was not in fact rendered.

2. Nor do we understand that the Commission ruled that the receipt and delivery of goods at plants located upon spurs or side-tracks could not, in any circumstances, be regarded as a distinct service for which separate compensation might be demanded. Cases of an interior movement of plant traffic to and from various parts of the establishment, and of deliveries through a system of interior switching tracks constructed as plant facilities, were expressly distinguished by the Commission (18 I. C. C. pp. 313, 314); and it is apparent that the ruling of the Commission would not apply in any case where by reason of the location and extent of the spur tracks and the character of the movement the facts were essentially different from those upon which the decision was based. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105.)

3. On the other hand, it cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to

or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute. It is said that carriers are bound to carry only to or from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which also various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system. It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question 'as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in.' It was added that while this general statement covered perhaps ten thousand cities and towns in the United States, the carriers before the Commission could name only three exceptions, to wit, the cities of Los Angeles, San Francisco and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

Such a question is manifestly one upon which it is the province of the Commission to pass.

4. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles—that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds—as conclusions of fact. Assuming that they were based upon evidence, they are not open to review. *Balti-*

more & Ohio R. R. Co. v. *Pitcairn Coal Co.*, 215 U. S. 481, 495; *Interstate Commerce Commission* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 251; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547, 548; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Atchison, Topeka & Santa Fe Rwy. Co.* v. *United States*, 232 U. S. 199, 221.

In this view, we find no ground for holding the order of the Commission to be invalid. It is not denied that the complaining shippers and these carriers were heard before the Commission and that evidence disclosing the terminal situation in Los Angeles, and the nature and use of the various tracks within the switching limits, was presented; and it cannot be doubted that the case demanded an appreciation of a variety of details, or minor facts, in order that the ultimate questions of fact could be determined. It is said that it was established by undisputed evidence that the team tracks and freight sheds provided by the carriers were fully adequate for all carload freight. Putting aside the denial by the Commission of this allegation, it is evident that the question was not simply as to such adequacy, but as to the actual use of the various tracks, the services thereon relatively considered, and whether there was really an extra service in the circumstances shown. Again, it is said that the Commission did not find the switching charge in itself, that is, taken separately, to be unreasonable, but the inquiry was whether in view of the conditions of the distribution of the carload freight through a large area there was in fact such a similarity of movement as to negative the basis for a separate charge. It is further urged that while the contracts for the construction of these spurs did not fix the charge, it was proved by undisputed evidence that at the time these contracts were made the shippers consented to a special charge, if freight were received and delivered thereon, and that the charge in question had been generally

maintained. The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. (See *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482; *Phila., Balt. & Wash. R. R. Co.* v. *Schubert*, 224 U. S. 603, 613, 614.) If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, they were in no way estopped from bringing the matter before the body created by law to deal with such questions and from securing its order directing the carriers to stop the objectionable practise.

But it is contended that the finding of the Commission is opposed to the admitted physical facts, and reference is made to the transportation to and from industrial plants located from 1-5 of a mile to 7 miles from the main track of the carrier. We find no such fundamental unsoundness in the Commission's conclusions. It appeared, as already stated, that the carrier had designated certain territory as within its switching or yard limits in Los Angeles extending for 6 or 7 miles and 'including numerous tracks, main lines, branch lines, industry tracks, team tracks, freight-shed tracks and various structures.' It does not appear how many industries were within a short distance or to how many the statement as to the greatest distance above-mentioned applied. The carrier did not fix a charge according to the comparative service in the case of these various industrial plants. It made the same switching charge whether the distance was 200 feet or 7 miles, that is, it dealt with the situation upon an average basis making the same charge for all this switching in a given area which constituted its terminal district. It was the service within these switching limits, that the Commission was considering. Manifestly it was permissible to establish such a district, and taking the team-track and freight-shed service in that area, and the average spur-track service, the Commission reached the conclusion set forth. It is said

that the finding of the Commission as to the comparative cost of the service was not affirmative, but was merely a negative statement to the effect that the Commission was unable to find that the cost of spur-track delivery was more expensive to the carrier. While this form of expression was used at one place in the Commission's report, at another the service in question was described as one which involved 'no greater expense than would team-track delivery' and we cannot but regard this as the Commission's finding upon the evidence. It is then insisted that the contrary of this finding is self-evident, but the facts with respect to the movement of freight in a great terminal district are by no means so simple that the deliberate judgment of the Commission can be regarded as contradicting the obvious.

The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the court. We cannot regard the Act to Regulate Commerce as justifying an increased or extra charge for a substantially similar service and upon the case made it cannot be said that the Commission has overstepped its authority in forbidding the charge in question as one which was unjustly discriminatory.

In our opinion the Commerce Court erred in denying the Government's motion to dismiss and in granting the petitioners' motion for injunction. The order of the Commerce Court is therefore reversed and the cause is remanded to the District Court of the United States for the Southern District of California, southern division, with instructions to dismiss the bill. Act of October 22, 1913, c. 32; Stat. 1913, p. 221.

It is so ordered.

INTERSTATE COMMERCE COMMISSION *v.* SOUTHERN PACIFIC COMPANY.

APPEAL FROM THE COMMERCE COURT.

No. 98. Argued January 14, 15, 1914.—Decided June 8, 1914.

Los Angeles Switching Case, ante, p. 294, followed and applied to similar switching charges made by railway companies in the City of San Francisco.
188 Fed. Rep. 241, reversed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission relative to switching charges within the yard limits of San Francisco, California, are stated in the opinion.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.[1]

Mr. P. J. Farrell for the Interstate Commerce Commission.[1]

Mr. Fred H. Wood and *Mr. Gardiner Lathrop*, with whom *Mr. Robert Dunlap, Mr. T. J. Norton, Mr. C. W. Durbrow, Mr. W. F. Herrin* and *Mr. J. P. Blair* were on the brief, for appellees.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

The Pacific Coast Jobbers' and Manufacturers' Association complained before the Interstate Commerce Commission of a switching charge of $2.50 per car maintained by the respondents for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within the carriers' switching limits in San Fran-

[1] For abstracts of arguments in this case see abstracts in preceding case which was argued simultaneously herewith.

cisco. The Commission, finding the facts to be similar to those found in the case of the complaint of the Associated Jobbers of Los Angeles with respect to switching charges in the latter city (18 I. C. C. 310), entered a similar order prohibiting the carriers from continuing the charge. This suit was thereupon brought in the Circuit Court of the United States for the District of Kansas, first division, against the Interstate Commerce Commission to restrain the enforcement of the order. Upon its transfer to the Commerce Court, the United States intervened and moved to dismiss the proceeding. This motion was denied and upon the application of the petitioners an injunction was granted.

The questions presented on the appeal from this order are the same as those which have been considered in the opinion of the court in No. 98, *Los Angeles Switching Case, ante*, p. 294, decided this day, and for the reasons there set forth the order of the Commerce Court is reversed and the cause is remanded to the District Court of the United States for the Northern District of California with instructions to dismiss the bill.

It is so ordered.

PORT RICHMOND AND BERGEN POINT FERRY COMPANY *v.* BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 225. Argued March 4, 1914.—Decided June 8, 1914.

At common law the right to maintain a public ferry lies in franchise.

In England such a ferry could not be set up without the King's license, and, in this country, the right has been made the subject of legislative grant.

Transportation of persons and property from one State to another by ferry is interstate commerce and subject to regulation by Congress, and it is beyond the competency of the States to impose direct burdens thereon; Congress not having acted on the subject, however, the States may exercise a measure of regulatory power not inconsistent with the Federal authority and not actually burdening, or interfering with, interstate commerce.

A State has the power to establish boundary ferries, not a part of a continuous interstate carrier system, and regulate the rates to be charged from its shores, subject to the paramount authority of Congress over interstate commerce; and, even though there might be a difference in the rate of ferriage from one side of the stream as compared with the rate charged from the other side.

Questions in respect to ferries such as the one involved in this case, generally imply transportation for a short distance, generally between two specified points, unrelated to other transportation, thus presenting situations essentially local and requiring regulation according to local conditions.

The absence of Federal action in such a case does not presuppose that the public interest is unprotected from extortion.

A State being able to exercise the power to regulate ferries, it follows that it may not derogate from the similar authority of another State; its regulating power therefrom extends only to transactions within its own territory and to ferriage from its own shores.

Rates of ferriage fixed by one State from its own shore on a boundary ferry do not preclude the other State from fixing other rates if reasonable with respect to the ferry maintained on its side.

Where the state court has not construed an ordinance fixing rates

of ferriage on a boundary ferry as requiring the issuing of round trip tickets, and this court does not so construe it, the ordinance may be valid as limiting the amount which may be charged if such trip tickets are issued; and so *held* in this case. *Quære* as to whether a State may require round trip tickets to be issued on a boundary ferry.

82 N. J. Law, 536, affirmed.

THE facts, which involve the power of a State, or a municipality acting under its authority, to establish rates of transportation on ferries plying between one of its ports and a port of another State, are stated in the opinion.

Mr. Frank Bergen for plaintiff in error:

A State cannot prescribe rates to be charged by a person or corporation operating an interstate ferry not in connection with a railroad, because a ferry across an interstate stream is an instrument of interstate commerce; the transportation of passengers, vehicles, horses and cattle from one State to another, is interstate commerce; prescribing rates for such transportation is a direct regulation of interstate commerce; and the power to regulate directly commerce among the States can be exercised only by authority of Congress. *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Covington Elevated R. R. Co.* v. *Kentucky*, 154 U. S. 224.

A ferry operated in connection with a railroad and carrying passengers who arrive at the ferry by rail, and also passengers who arrive at the ferry otherwise, is not subject to regulation as to its rates by authority of a State. *N. Y. Central Case*, 74 N. J. Law, 367; 76 N. J. Law, 664; 80 N. J. Law, 305; and see *International Transit Co.* v. *Sault Ste. Marie*, 194 Fed. Rep. 522; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 620; *Gloucester Ferry Case*, 114 U. S. 196.

States have indeed exercised control in some instances over commerce by means of interstate ferries and bridges

since the Federal Constitution was adopted, and there are expressions in a few opinions of this court that have been supposed to recognize the authority of the States to do so (see *Fanning* v. *Gregoire*, 16 How. 524; *Conway* v. *Taylor*, 1 Bl. 603; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365), but there is no decision of this court to that effect. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, does not support this, although sometimes cited to that effect, and see *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204; *N. Y. Cent. R. R. Co.* v. *Hudson County*, 227 U. S. 248; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557.

Nearly every important instrument of interstate commerce was created by authority of the States; but that fact does not justify or support the conclusion that commerce carried on by those instruments may be directly regulated by the States. *Covington Bridge Co.* v. *Kentucky*, *supra*, at p. 219; *New York* v. *New Jersey Nav. Co.*, 106 N. Y. 28.

The States may make and enforce regulations that indirectly and in minor particulars affect interstate commerce until Congress takes action, after that, as to all matters covered by congressional action, state regulations must give way. *Gloucester Ferry Case*, *supra*, at p. 214; *Covington Bridge Co.* v. *Kentucky*, *supra*; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Minnesota Rate Cases*, 230 U. S. 352, 398–412.

For cases in New Jersey in which the authority of the State to prescribe rates to be charged by owners of interstate ferries has been considered, see *State* v. *Freeholders of Hudson*, 23 N. J. Law, 206, aff'd, 24 N. J. Law, 718; *New York Central Case*, 74 N. J. Law, 367; 76 N. J. Law, 664, 679; 227 U. S. 248.

The history of the commerce clause of the Constitution confirms the opinion that it was intended to transfer the power to regulate directly foreign commerce and commerce

among the States of all kinds and by every means, from the States to the National Government. See letters by Madison to Cabell (1829), and to Davis (1832); Letters and Writings of Madison, vol. iv, pp. 14 and 247; Curtis' Const. Hist. U. S., vol. 1, p. 231, note; Elliot's Debates, vol. 1, p. 115, ed. 1876; Webster's Works, vol. vi, p. 9, 8th ed. 1854; 9 Wheat. at p. 226, and 12 Wheat. at p. 445.

If the power to regulate foreign commerce was transferred to Congress by the Constitution, it cannot be denied that power to regulate interstate commerce was also transferred at the same time. Story's Constitution, § 1065; *Crutcher* v. *Kentucky*, 141 U. S. 47, 57; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1. Rev. Stat., § 2792, evidently relates to ferries between points in Canada and Mexico and the United States, but § 4426 applies to all ferryboats, and see § 4400; *Hall* v. *De Cuir*, 95 U. S. 485, 488.

Mr. James J. Murphy for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

The plaintiff in error, Port Richmond and Bergen Point Ferry Company, was incorporated in 1848 (c. 306) by special act of the legislature of New York for the purpose of maintaining a ferry across the Kill von Kull from Port Richmond, Staten Island, New York, to Bergen Point, Hudson County, New Jersey.[1] This act prescribed rates of ferriage as did also the amendatory acts of 1857 (c. 692) and 1868 (c. 778).

The ferry is not operated in connection with any railroad.

In July, 1905, the Board of Chosen Freeholders of the County of Hudson, New Jersey, passed two resolutions

[1] See also Laws of New York, 1857, chap. 692; 1860, chap. 266; 1864, chap. 290; 1868, chap. 778; 1873, chap. 300; 1881, chap. 652.

fixing the rates to be taken at the ferry of this company within the County of Hudson for the transportation of foot passengers for single trips to the New York terminal, and for round trips to that terminal and return, respectively. This action was taken under the authority of an act of the legislature of New Jersey passed in 1799, providing as follows: "That the board of chosen freeholders shall be, and they hereby are empowered and directed to fix the rates to be taken at the several ferries within their respective counties, and the same, from time to time, to revise, alter, amend, or make anew at their discretion." Comp. Stat. (N. J.) p. 2308. On certiorari, the Supreme Court of the State of New Jersey sustained the validity of these resolutions against the objection that they were repugnant to the commerce clause of the Federal Constitution (80 N. J. Law, 614) and its judgment was affirmed by the Court of Errors and Appeals. 82 N. J. Law, 536. This writ of error is prosecuted.

The plaintiff in error contends that the action of the board is void for the reason that the transportation is interstate and the fixing of rates therefor is a direct regulation of interstate commerce.

At common law, the right to maintain a public ferry lies in franchise; in England such a ferry could not be set up without the King's license, and, in this country, the right has been made the subject of legislative grant. *Blissett* v. *Hart*, Willes, 508; *Fay, Petitioner*, 15 Pick. 243, 249, 253; *Mayor &c. of New York* v. *Starin*, 106 N. Y. 1, 10, 11; 3 Kent's Com. 458; 2 Washburn, Real Prop., 4th ed., 292. The States have been accustomed to grant such franchises not only for ferries wholly intrastate but also for those to be operated from their shores to other States. Cooley, Const. Lim. 740. They have fixed the rates for such ferriage; and this has been done both directly by the legislature and also through designated courts and local boards acting under legislative sanction. The prac-

tice has had continuous illustration in a great variety of instances from the foundation of the Government to the present day.[1]

The Court of Errors and Appeals of New Jersey in the case of *Chosen Freeholders of Hudson County* v. *The State* (1853), 4 Zab. 718, sustained the authority of the board to prescribe ferry rates between New Jersey and New York. Speaking through Elmer, J., the court thus described conditions existing at the time of the passage of the above-mentioned act of 1799 and its purpose: "When the act was passed, long before the invention of steamboats, ferries were generally the property of one or two individuals, established for the public convenience and private gain, by the owners of the shore, sometimes by virtue of a grant or law, and sometimes without any public authority. The owner or keeper resided on the one bank or the other of the river over which the ferry passed, and kept his boats and other apparatus where he resided. The ferry was commonly known and designated by the name of the place from which it started, and where such owner resided, as Paulus Hook ferry; or from the name of the

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[1] A few of these instances may be cited:

New York.—Across Lake Champlain: Laws of 1803, chap. 37; 1810, chap. 61; 1812, chap. 60. (These are referred to in the argument of counsel in *Gibbons* v. *Ogden*, 9 Wheat. 1, 97; see 3 C. R. & G. Webster ed. Laws of New York, p. 321; 6 Websters & Skinner ed., p. 16; *id.*, p. 394.) See also Laws of 1831, chap. 105; 1847, chap. 288; 1886, chap. 674; 1901, chap. 442; 1907, chap. 392. Between New York and New Jersey: Laws of 1850, chap. 314; 1870, chap. 731.

Vermont.—Across Lake Champlain: Laws of 1799, p. 63; 1801, p. 72; 1820, chap. 115; 1890, chap. 116; 1896, chap. 298.

New Hampshire.—Across Connecticut River: Laws of 1863, chap. 2822; 1867, chap. 86.

Missouri.—Mississippi River: Laws of 1855, p. 516; 1870, p. 231. Des Moines River: Laws of 1855, p. 517. Missouri River: Laws of 1855, p. 229; 1863-64, p. 312.

Nebraska.—Compiled Statutes of 1907, § 3549.

owner or keeper, as Dunk's ferry, Corriel's ferry, etc. In many cases, where the river was not too wide, a bell or horn, or some other signal was established on the side of the river opposite to that where the owner lived, so that persons coming there who desired to pass over, could make known their wishes. Probably but few, if any of the keepers, had a boat constantly running, or started at any particular hour. In some cases, there were ferry owners on both sides of the river; but the ferry or ferries on each side were considered and spoken of as distinct ferries, and had distinct owners or keepers. This was the case with most, if not all, the ferries between Philadelphia and what is now called Camden; and the ferries on each side were regulated and governed by the laws of the State in which such owner or keeper resided. Sail and row-boats, and flats or scows, were the vessels in use, as is manifest from the act itself. . . .—The act meant to authorize, and did authorize the boards of freeholders in the several counties, to regulate the fares to be taken at the ferry situate within that county; that is, at the ferry establishment of the owner or keeper. . . . Even if it might happen, upon this construction, that one board might establish one set of rates at one side, and another board another set on the other side, or that each State might have different regulations, where the ferry was over one of the rivers forming the boundary between this and another State, I do not see that there would be any important conflict of authority. Each power regulated what was done within its own jurisdiction, and left to others to regulate what was done in theirs. Existing ferries between this State and New York, and this State and Pennsylvania are now, in numerous instances, regulated by the laws of this State, without the occurrence of any difficulty. . . .—Without deeming it necessary to go over and specially refer to the different acts . . . it is sufficient to say, that they show a course of legisla-

tion, commencing in 1714, and continued till near the passage of the act of 1799, by which the ferries over the waters dividing this State from the adjoining States, were regulated by the laws of New Jersey, in those cases where ferry establishments were within this State. . . . To effect this object" (i. e. of the act) "the word ferries must be interpreted to mean, what in those laws it had obviously included, ferries the owners or keepers of which resided in this State, or which had one of their termini where fares were demanded, in this State, and not merely ferries in the technical meaning, of an entire passage across a river or other water. . . . If set up without public authority, it" (the ferry) "was liable at any time to be stopped, or in the discretion of the legislature to be regulated. . . . It is sufficient to authorize these rates, that it is a public ferry, and that there is no law prescribing rates for it, inconsistent with the exercise of the power by the board of chosen freeholders." *Supra*, pp. 721–724, 726. This decision was followed by the state court in the present case.[1]

In view of the extended consideration which the decisions of this court bearing upon the questions involved have received in recent opinions (*St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454; *N. Y. C. & H. R. R. R. Co.* v. *Board of Chosen Freeholders*, 227 U. S. 248), it is not necessary to review them at length. The authority of the State to grant franchises for ferries to be operated from its shores across boundary waters was distinctly recognized in *Fanning* v. *Gregoire*, 16 How. 524; *Conway* v. *Taylor's Executor*, 1 Black, 603; and *Wiggins Ferry Co.*

[1] As to the views of other state courts upon this subject, see *People* v. *Babcock*, 11 Wend. 586; *Newport* v. *Taylor*, 16 B. Mon. 699; *Marshall* v. *Grimes*, 41 Mississippi, 27; *Carroll* v. *Campbell*, 108 Missouri, 550; *Memphis* v. *Overton*, 3 Yerg. 387, 390; *Burlington Ferry Co.* v. *Davis*, 48 Iowa, 133; *Tugwell* v. *Eagle Pass Ferry Co.*, 74 Texas, 480; *State* v. *Faudre*, 54 W. Va. 122; *Chilvers* v. *People*, 11 Michigan, 43.

v. *East St. Louis*, 107 U. S. 365. While in *Fanning* v. *Gregoire*, *supra*, the plaintiff's license for a ferry across the Mississippi river from Dubuque, Iowa, was held under the terms of the grant not to be exclusive as against the subsequent licensee, the court said that the commercial power of Congress did not 'interfere with the police power of the States in granting ferry licenses.' In *Conway* v. *Taylor's Executor*, *supra*, the court upheld a judgment which restrained the appellants (the owners of a ferry from Cincinnati, Ohio, to Newport, Kentucky) from conducting the ferry from the Kentucky shore to Ohio in violation of the rights of the appellees under their Kentucky franchise. Referring to the latter, the court said (p. 631): "The franchise is confined to the transit from the shore of the State. The same rights which she claims for herself she concedes to others. . . . It was shown in the argument at bar that similar laws exist in most, if not all, the States bordering upon those streams. They exist in other States of the Union bounded by navigable waters." With respect to 'ordinary commercial navigation' the authority of the appellants to transport persons and property from the Kentucky shore was undoubted. The owners of the Kentucky franchise, it was said, had no right to exclude or restrain those who were prosecuting 'the business of commerce in good faith, without the regularity or purposes of ferry trips'; but, as the appellants' boat was run 'openly and avowedly as a ferry-boat,' as 'that was her business,' the injunction was sustained. After referring to the commerce clause, the opinion concluded, (p. 634): "Undoubtedly, the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. . . .—There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised

the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power.—That the authority lies within the scope of that 'immense mass' of undelegated powers which 'are reserved to the States respectively,' we think too clear to admit of doubt." These cases were cited with approval in *Wiggins Ferry Co.* v. *East St. Louis*, *supra*. There, the ferry company was an Illinois corporation and held a franchise granted by the legislature of that State for the operation of a ferry from East St. Louis, Illinois, to St. Louis, Missouri. The payment of a license tax imposed upon the company in Illinois, for the privilege of conducting the ferry, was resisted under the commerce clause, but the contention was overruled, the court holding that "the levying of a tax upon vessels or other water-craft or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution." (*Id.* p. 373.)

It is manifest, however, that the transportation of persons and property from one State to another is none the less interstate commerce because conducted by ferry; and it is not open to question that ferries maintained for that purpose are subject to the regulating power of Congress. It necessarily follows that whatever may properly be regarded as a direct burden upon interstate commerce, as conducted by ferries operating between States, it is beyond the competency of the States to impose. This was definitely decided in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. The Commonwealth of Pennsylvania had imposed a tax upon the ferry company, based upon the estimated value of its capital stock, upon the ground that it was doing business within the State. The company was incorporated in New Jersey and maintained a ferry from Gloucester in that State to Philadelphia. Save for the wharf that it leased at the latter place, its

property, including its boats, had its *situs* in New Jersey; and its entire business consisted in ferrying. The tax upon the 'receiving and landing of passengers and freight at the wharf in Philadelphia,' which was a necessary incident to the transportation across the Delaware river, was a tax upon that transportation; and in this view the tax was held to be void as one laid upon interstate commerce. "The only interference of the State with the landing and receiving of passengers and freight, which is permissible," said the court, "is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations." (*Id.* p. 206.) It was said that the statement of Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, had relation to ferries entirely within the State. "Ferries," continued the court, (p. 216), "between one of the States and a foreign country cannot be deemed, . . . beyond the control of Congress under the commercial power . . . neither are ferries over waters separating States." And it was pointed out that Congress had passed various laws respecting international and interstate ferries, the validity of which was not open to question [Rev. Stat., §§ 2792, 4233 (Rule 7), 4370, 4426].

But, in view of the nature of the subject and the diversified regulation which was necessary, it was recognized that the States were entitled to exercise a measure of regulatory power not inconsistent with the Federal authority. The court said: "It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage

such inter-State ferries than the General Government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption." (*Id.* p. 217.)

In *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, the question related to the power of the State of Kentucky to regulate tolls upon an interstate bridge built pursuant to the concurrent action of Kentucky and Ohio. The power was denied under the commerce clause. Reviewing the authorities, the opinion was expressed that the principle involved was identical with that applied in *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, with respect to interstate railroad rates, and that (at least in the absence of mutual action) it was impossible for either State to fix a tariff of charges. It was said that it did not follow that because a State might 'authorize a ferry or bridge from its own territory to that of another State' it might 'regulate the charges upon such bridge or ferry.' It was pointed out, however, that the State of Kentucky, by the statute in question attempted 'to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky,' a right which practically nullified

'the corresponding right of Ohio to fix tolls from her own State.' (*Id.* p. 220.) And this was an adequate basis for the judgment. Four of the justices of the court, concurring in the judgment, announced their view that 'the several States have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce.' (*Id.* p. 223.)

In *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, where a Kentucky corporation conducting a ferry across the Ohio river between Kentucky and Indiana, held ferry franchises from both States, it was decided that the franchise from Indiana could not be taxed by Kentucky. The court said that the franchises were distinct; that each was 'property entitled to the protection of the law'; and that the Indiana franchise must be regarded as an incorporeal hereditament having its situs in that State and hence as beyond the jurisdiction of Kentucky. The case of *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454, involved the right of a county in Illinois to recover statutory penalties for carrying on, without a ferry license, the transportation of cars across the Mississippi river between points in Illinois and Missouri. Conceding, *arguendo*, that the police power of a State extends 'to the establishment, regulation and licensing of ferries on a navigable stream, being the boundary between two States,' it was held that the business of transporting railroad cars was not a ferry business in the proper sense; and that the requirements of the ordinance in question made it a direct burden upon interstate commerce. The ordinance was therefore held to be invalid. In *New York Central R. R. Co.* v. *Board of Chosen Freeholders*, 227 U. S. 248, the question concerned the authority of the New Jersey board to fix rates for a ferry between Weehawken, New Jersey, and New York City.

It appeared that the ferry was operated in connection with a railroad and it was concluded that the action of Congress with respect thereto (Act to Regulate Commerce, February 4, 1887, § 1, c. 104, 24 Stat. 379) had the effect of freeing the subject from state control.

Coming then to the question now presented—whether a State may fix reasonable rates for ferriage from its shore to the shore of another State,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation. *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Ex parte McNeil*, 13 Wall. 236, 240; *Welton* v. *Missouri*, 91 U. S. 275, 280; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania*, *supra*, p. 204; *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 465, 481, 485; *Gulf, Colorado & Sante Fe Ry. Co.* v. *Hefley*, 158 U. S. 98, 103, 104; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 378; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 436; *Minnesota Rate Cases*, 230 U. S. 352, 399, 400. It is this principle that is applied in holding that a State may not impose direct burdens upon interstate commerce, for this is to say that the States may not directly regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed by valid Federal rule. (*Gloucester Ferry Co.* v. *Pennsylvania*, *supra*.) It was this principle which governed the decision in *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, as to interstate railroad rates. Considering the conditions of interstate railroad trans-

portation, which might extend not only from one State to another but through a series of States, or across the Continent, and the consequences which would ensue if each State should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that 'this species of regulation' was one 'which must be, if established at all, of a general and national character' and could not be 'safely and wisely remitted to local rules.' (*Id.* p. 577.)

But, in the case of ferries, we have a subject of a different character. We dismiss from consideration those ferries which are operated in connection with railroads, and cases, if any, where the ferriage is part of a longer and continuous transportation. Ferries, such as are involved in the present case are simply means of transit from shore to shore. These have always been regarded as instruments of local convenience which, for the proper protection of the public, are subject to local regulation; and where the ferry is conducted over a boundary stream, each jurisdiction with respect to the ferriage from its shore has exercised this protective power. There are a multitude of such ferries throughout the country and, apart from certain rules as to navigation, they have not engaged the attention of Congress. We also put on one side the question of prohibitory or discriminatory requirements, or burdensome exactions imposed by the State, which may be said to interfere with the guaranteed freedom of interstate intercourse or with constitutional rights of property. The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage

regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question, we can entertain no doubt. It is true that in the case of a given ferry between two States there might be a difference in the charge for ferriage from one side as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a *ferry* which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local requiring regulation according to local conditions. It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly or to establish for that purpose a Federal agency. The matter is illuminated by the consideration of this alternative for the point of the contention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the States are obvious and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will of course control.

If the State may exercise this power, it necessarily

follows that it may not, in its exercise, derogate from the similar authority of another State. The state power can extend only to the transactions within its own territory and the ferriage from its own shore. It follows that the fact that rates were fixed by New York did not preclude New Jersey from establishing reasonable rates with respect to the ferry establishment maintained on its side.

With respect to the rates for round trips, we do not construe the ordinance as requiring the company to issue round-trip tickets at its office in New Jersey. We may not look into the testimony and it does not appear that such a construction has been placed upon the ordinance by the state court. Viewed as a limitation upon rates charged for such round-trip tickets, when sold by the company in New Jersey, we think that the ordinance is valid being one relating to the transactions of the company in New Jersey and the charges there enforced. Whether it would be competent for the State, through the local board, to require the company to issue round-trip tickets, is a question not presented by the record, and we express no opinion upon it.

The judgment is affirmed.

Affirmed.

CITY OF SAULT STE. MARIE *v.* INTERNATIONAL TRANSIT COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 323. Argued March 20, 1914.—Decided June 8, 1914.

A State may not make commercial intercourse with another State or a foreign country a matter of local privilege and require that it cannot be carried on without its consent, and to exact a license fee as the price of that consent.

Transportation between States and foreign countries is within the protection of the constitutional grant to Congress, and this includes transportation by ferry. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

One otherwise enjoying full capacity for the purpose of carrying on interstate or foreign commerce cannot be compelled to take out a local license for the mere privilege of carrying it on.

An ordinance enacted by the city of Sault Ste. Marie under state authority, requiring a license fee for the operation of ferries to the Canadian shore opposite, *held* unconstitutional, as applied to the owners of a ferryboat plying from the Canadian shore, as a burden on interstate commerce.

Quære, whether such an ordinance is void as violative of Article I of the Treaty of 1909 with Great Britain.

194 Fed. Rep. 522, reversed.

THE facts, which involve the right of the State, or a municipality acting under its authority, to establish ordinances regulating maintenance of ferries between its ports and one of a foreign government and the construction of the treaty of 1909 with Great Britain, are stated in the opinion.

Mr. John W. Shine, with whom *Mr. F. T. McDonald* was on the brief, for appellants:

The ordinance is not invalid as in violation of the commerce clause of the Constitution.

A ferry is in respect to the landing and not on the water. The point of departure is the seat, the base, the home of the ferry. *Conway* v. *Taylor*, 1 Bl. 603; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 394; *Memphis* v. *Overton*, 3 Yerg. (Tenn.) 387, 390; *State* v. *Faudre*, 54 W. Va. 122; *Powers* v. *Athens*, 99 N. Y. 592.

Ferries are local in their nature and the regulation of ferries is a matter of local concern. *Chilvers* v. *People*, 11 Michigan, 51; *St. Clair County* v. *Interstate Sand Co.*, 192 U. S. 454.

In all local matters state statutes are valid until superseded by act of Congress. *Cooley* v. *Port Wardens*, 12

How. 310; *Mobile* v. *Kimball*, 102 U. S. 691, 702; *Atlantic &c. Co.* v. *Philadelphia*, 190 U. S. 160; *Bowman* v. *Railroad Co.*, 125 U. S. 465, 507; *Leisy* v. *Hardin*, 135 U. S. 100; *Stoughtenburgh* v. *Hennick*, 129 U. S. 141; *Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Robbins* v. *Taxing District*, 120 U. S. 489; *Wabash Railway* v. *Illinois*, 118 U. S. 557; *Morgan* v. *Louisiana*, 118 U. S. 455; *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 210; Willoughby's Fed. Const., § 309.

The privilege of keeping a ferry over boundary streams with the right to take tolls for passengers and property is grantable by the State. *Gloucester Ferry Case*, 114 U. S. 196, 217; *State* v. *Faudre*, 54 W. Va. 122; *Ferry Co.* v. *Russell*, 52 W. Va. 356; *Cross* v. *Hopkins*, 6 W. Va. 323; *Carroll* v. *Campbell*, 108 Missouri, 550; *State* v. *Sickmann*, 65 Mo. App. 499; *Tugwell* v. *Eagle Pass Ferry Co.*, 74 Texas, 480; *Parsons* v. *Hunt*, 98 Texas, 420; *Nixon* v. *Reid*, 8 So. Dak. 507; *Hatten* v. *Turnman* 123 Kentucky, 844.

The right to establish and regulate ferries over boundary streams is among the powers reserved to the State. *Gibbons* v. *Ogden*, 9 Wheat. 1; *In re Young*, Fed. Cas. No. 18,150; *Memphis* v. *Overton*, 11 Tennessee (3 Yerg.), 387; *People* v. *Babcock*, 11 Wend. 587; *Jones* v. *Fanning*, 1 Morris, 348; *Mills* v. *St. Clair Co.*, 7 Illinois, 197, 225, aff'd 8 How. 569; *Phillips* v. *Bloomington*, 1 G. Greene, 498; *Fanning* v. *Gregoire*, 16 How. 524; *Chosen Freeholders* v. *State*, 24 N. J. Law, 718; *Newport* v. *Taylor*, 16 B. Mon. 699; *Chispella* v. *Brown*, 14 La. Ann. 185; *Minturn* v. *LaRue*, 23 How. 435; *Conway* v. *Taylor*, 1 Black, 603; *Chilvers* v. *People*, 11 Michigan, 43; *Marshall* v. *Grimes*, 41 Mississippi, 27; *Burlington* v. *Davis*, 48 Iowa, 133; *St. Louis* v. *Waterloo Ferry Co.*, 14 Mo. App. 216; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Tugwell* v. *Eagle Pass Ferry*, 9 S. W. Rep. 120; *S. C.*, 13 S. W. Rep. 654; *Madison* v. *Abbott*, 118 Indiana, 337; *Carroll* v. *Camp-*

bell, 108 Missouri, 550; *State* v. *Sickmann*, 65 Mo. App. 499; *Nixon* v. *Reid*, 67 N. W. Rep. 57; *Sisterville Ferry Co.* v. *Russell*, 52 W. Va. 356; *State* v. *Faudre*, 54 W. Va. 122; *N. Y. C. & H. R. R. Co.* v. *Freeholders, N. J.*, 74 Atl. Rep. 954; *Port Richmond Ferry Co.* v. *Freeholders, N. J.*, 77 Atl. Rep. 1046.

The right of the State to establish and regulate ferries over boundary streams between States and foreign countries has been sustained. *People* v. *Babcock*, 11 Wend. 587; *Chilvers* v. *People*, 11 Michigan, 43; *Tugwell* v. *Eagle Pass Ferry Co.*, 9 S. W. Rep. 120, *S. C.*, 13 S. W. Rep. 654.

This court has repeatedly held that the power over ferries on boundary streams was reserved to the States. *Gibbons* v. *Ogden*, 9 Wh. 1; *In re Young*, Fed. Cas. No. 18,150; *Mills* v. *St. Clair County*, 8 How. 569; *Fanning* v. *Gregoire*, 16 How. 524; *Minturn* v. *LaRue*, 23 How. 435; *Conway* v. *Taylor*, 1 Black, 603; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365.

Ferries are in aid of commerce and not an interference with commerce. *Gibbons* v. *Ogden*, 9 Wh. 1, 235; *Fanning* v. *Gregoire*, 16 How. 524; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365.

Where a doubt arises as to the restriction of the commerce clause, it is to be decided in favor of the State. *Bank* v. *Tennessee*, 104 U. S. 495; *Railroad Co.* v. *Comrs.*, 103 U. S. 1; *Wilson* v. *Gains*, 103 U. S. 417; *Railroad Co.* v. *Hamblen Co.*, 102 U. S. 273; *Railroad Co.* v. *Gains*, 97 U. S. 697; *Ferry Co.* v. *East St. Louis*, 102 Illinois, 570. See *Ferry Co.* v. *East St. Louis*, 107 U. S. 365.

The acts of Congress relative to the licensing and enrollment of vessels do not interfere with the regulation of ferries by the States. *Conway* v. *Taylor*, 1 Bl. 603; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *The Nassau*, 182 Fed. Rep. 696; affirmed in part, 110 C. C. A. 184.

The fact that some articles of freight are also carried on the ferryboat does not change or affect the rule applied

to ferries. *St. Clair County* v. *Interstate Sand Co.*, 192 U. S. 458; § 2972, Rev. Stat.

A license fee imposed as a condition of granting a ferry license is not a tax on commerce within the meaning of the commerce clause of the Constitution. *Wiggins Ferry Co.* v. *East St. Louis*, 102 Illinois, 560, *S. C.*, 107 U. S. 365; *Chilvers* v. *People*, 11 Michigan, 43; *Ash* v. *People*, 11 Michigan, 347; *Kitson* v. *Ann Arbor*, 26 Michigan, 324; McQuillin, Mun. Ord. Co., § 409.

The power of the State to license and regulate ferries includes the power to fix rates for the ferriage of persons and property. *Fanning* v. *Gregoire*, 16 How. 524; *Chosen Freeholders* v. *State*, 24 N. J. Law, 718; *State* v. *Sickmann*, 65 Mo. App. 499.

The fact that defendant in error is a foreign corporation does not affect the right of the State to regulate ferries. *Port Richmond Ferry Co.* v. *Board of Chosen Freeholders*, 77 Atl. Rep. 1046.

The ordinance of the city of Sault Ste. Marie regulating ferries on St. Mary's river does not violate the treaty between Great Britain and the United States.

The ordinance does not interfere with the provisions of the treaty that "navigable boundary waters shall forever continue free and open for the purpose of commerce to inhabitants and to ships, vessels and boats of both countries equally." *Fanning* v. *Gregoire*, 16 How. 524; *Conway* v. *Taylor*, 1 Bl. 603; *Escanaba Trans. Co.* v. *Chicago*, 107 U. S. 678.

Mr. Henry E. Bodman, with whom *Mr. Alexis C. Angell*, *Mr. Herbert E. Boynton* and *Mr. James Turner* were on the brief, for appellee.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought by the International Transit Company, a Canadian corporation, to restrain the enforce-

ment of an ordinance adopted, in the year 1911, by the city of Sault Ste. Marie, Michigan. The ordinance related to the maintaining of ferries from that city across the St. Mary's river to the opposite shore in the Province of Ontario; and the complainant contended that, as applied to it, the ordinance was a violation of the commerce clause of the Federal Constitution and of article I of the treaty of January 11, 1909, 36 Stat. 2448, 2449, between the United States and Great Britain. The District Court granted the relief as prayed (194 Fed. Rep. 522); and this appeal is brought.

The Transit Company holds a license from the Dominion Government to operate a ferry between Sault Ste. Marie, Ontario, and Sault Ste. Marie, Michigan. It owns, and uses in this business, two steam ferryboats of British registry; it leases a private wharf in the City of Sault Ste. Marie, Michigan, and there maintains an office where fares are received. The Canadian license prescribes the frequency of the service and fixes the maximum fares to be charged; it also provides that the licensee shall not 'infringe any of the laws or by-laws or of the regulations' of the United States or of the State of Michigan or 'of the town of Sault Ste. Marie, U. S. A.' in reference to ferriage, 'which may be applicable to the said ferry or such portion thereof as may be within the jurisdiction of any of them.'

The City of Sault Ste. Marie, Michigan, was authorized by its charter to 'establish, license and regulate ferries to and from the city,' and to prescribe rates. The charter also provided: "The council may regulate and license ferries from the city or any place or landing therein to the opposite shore . . . and may require the payment of such reasonable sum for such license as the council shall deem proper; and may impose such reasonable terms and restrictions in relation to the keeping and management of such ferries, and the time, manner and rates of carriage and transportation of persons and property as may be

proper; and provide for the revocation of any such license, and for the punishment, by proper fines and penalties, of the violation of any ordinance prohibiting unlicensed ferries and regulating those established and licensed." Under this authority, the city adopted the ordinance in question. Section one is as follows:

"No person, persons, or company shall operate a ferryboat, or engage in the business of carrying or transporting persons or property thereon from the City of Sault Ste. Marie, Michigan, and across the St. Mary's River to the opposite shore, without first obtaining a license therefor from the Mayor and by otherwise complying with the provisions of this ordinance."

The Mayor was empowered to grant a license upon the payment of fifty dollars annually for each ferryboat engaged in such transportation, and it was further provided that, before any license should be issued, the person or company desiring the same should make application setting forth a schedule of the rates proposed to be charged within the prescribed territory. Additional provisions fixed the period and frequency of service and the rates to be charged from the licensee's dock within the city to the opposite shore. The Mayor was authorized to revoke the license if he was satisfied that any of the provisions of the ordinance were violated. After the passage of this ordinance, one Pocock, operating a ferryboat belonging to the Transit Company without a license having been obtained therefor, was arrested and fined. Alleging the purpose of the city to enforce the ordinance, and its invalidity, the Transit Company then brought this suit.

It will be observed that the question is not simply as to the power of the State to prevent extortion and to fix reasonable ferry rates from the Michigan shore; it is not as to the validity of a mere police regulation governing the manner of conducting the business in order to secure safety and the public convenience. (See *Port Richmond &c.*

Ferry Co. v. *Board of Chosen Freeholders*, *ante*, p. 317, decided this day.) The ordinance goes beyond this. The ordinance requires a municipal license; and the fundamental question is whether in the circumstances shown the State, or the city acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the State, or the city, may make its consent necessary, it may withhold it. The appellee, having its domicile in Canada, is engaged in commerce between Canada and the United States. At the wharf which it leases for the purpose on the American shore, it receives and lands persons and property. Has the State of Michigan the right to make this commercial intercourse a matter of local privilege, to demand that it shall not be carried on without its permission, and to exact as the price of its consent—if it chooses to give it—the payment of a license fee?

This question must be answered in the negative. It is urged, on behalf of the city, that the State either directly or through its municipalities may establish and license ferries—may grant ferry franchises (*Fanning* v. *Gregoire*, 16 How. 524; *Conway* v. *Taylor's Executor*, 1 Black, 603; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365). But, since the decision in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, it has been clear that, whatever authority the State may have for this purpose, it does not go so far as to enable the State to interdict one in the position of the appellee from conducting the commerce in which it is engaged, or justify the State in imposing exactions upon that commerce in the view that business of this character may be carried on only by virtue of its consent express or implied. In that case the ferry company was a New Jersey corporation, receiving and landing its passengers and property at its wharf in Philadelphia in substantially the same manner as the appellee transacts its business at its wharf in Sault Ste. Marie, Michigan. The court held that it was

not within the power of the State to prevent the ferry company from so doing; that this was an essential part of the interstate transportation which the State could not forbid, or burden by a privilege tax. See *Philadelphia & S. Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 343. Referring to foreign commerce, the court said in *Crutcher* v. *Kentucky*, 141 U. S. 47, 57: "Would any one pretend that a state legislature could prohibit a foreign corporation,—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation." Ferry transportation is placed upon the same footing in this respect by the holding in the *Gloucester Case* (*supra*, pp. 203, 205), the point of the decision being that the transportation was within the protection of the constitutional grant to Congress. "It matters not," said the court, "that the transportation is made in ferry-boats, which pass between the States every hour of the day."

The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 496; *Leloup* v. *Mobile*, 127 U. S. 640, 645; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148; *McCall* v. *California*, 136 U. S. 104, 109; *Norfolk &c. R. R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Crutcher* v. *Kentucky*, *supra*, p. 58; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 21; *Pullman Co.* v. *Kansas*, 216 U. S. 56;

International Text Book Co. v. *Pigg*, 217 U. S. 91, 109; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 260; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Minnesota Rate Cases*, 230 U. S. 352, 400; *Adams Express Co.* v. *New York*, 232 U. S. 14, 31, 32.

Assuming that, by reason of the local considerations pertinent to the operation of ferries, there exists in the absence of Federal action a local protective power to prevent extortion in the rates charged for ferriage from the shore of the State, and to prescribe reasonable regulations necessary to secure good order and convenience, we think that the action of the city in the present case in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the State could exercise either directly or by delegation. In this view, it is unnecessary to consider the question raised with respect to the treaty with Great Britain.

The decree restraining the enforcement of the ordinance in question as against the appellee is affirmed.

Affirmed.

HOUSTON, EAST AND WEST TEXAS RAILWAY COMPANY *v.* UNITED STATES.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

APPEALS FROM THE COMMERCE COURT.

Nos. 567, 568. Argued October 28, 29, 1913.—Decided June 8, 1914.

The object of the commerce clause was to prevent interstate trade from being destroyed or impeded by the rivalries of local governments; and it is the essence of the complete and paramount power confided

to Congress to regulate interstate commerce that wherever it exists it dominates.

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule; otherwise the Nation would not be supreme within the National field.

While Congress does not possess authority to regulate the internal commerce of a State, as such, it does possess power to foster and protect interstate commerce, although in taking necessary measures so to do it may be necessary to control intrastate transactions of interstate carriers.

The use by the State of an instrument of interstate commerce in a discriminatory manner so as to inflict injury on any part of that commerce is a ground for Federal intervention; nor can a State authorize a carrier to do that which Congress may forbid and has forbidden.

In removing injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates Congress is not bound to reduce the latter to the level of the former.

Congress having the power to control intrastate charges of an interstate carrier to the extent necessary to prevent injurious discrimination against interstate commerce may provide for its execution through the aid of a subordinate body.

By § 3 of the Act to Regulate Commerce, 24 Stat. 379, 380, Congress has delegated to the Interstate Commerce Commission power to prevent all discriminations against interstate commerce by interstate carriers, subject to the Act, which it is within the power of Congress to condemn.

Where the Interstate Commerce Commission has found after due investigation that unjust discrimination against localities exists under substantially similar conditions of transportation the Commission has power to correct it; and this notwithstanding the limitations contained in the proviso to § 1 of the Act to Regulate Commerce.

The earlier action of the Interstate Commerce Commission was not of such controlling character as to preclude the Commission from giving effect to the Act to Regulate Commerce, and in this case having, after examination of the question of its authority, decided to make a remedial order to prevent unjust discrimination and the Commerce Court having sustained that authority of the Commission, this court should not reverse unless, as is not the case, the law has been misapplied.

No local rule can nullify the lawful exercise of Federal authority; and after the Interstate Commerce Commission has made an order within its jurisdiction there is no compulsion on the carrier to comply with any inconsistent local requirement.

Although there is gravity in any question presented when state and Federal views conflict, it has been recognized from the beginning that this Nation could not prosper if interstate and foreign trade were governed by many masters; and where the freedom of such commerce is involved the judgment of Congress and the agencies it lawfully establishes must control.

An order made by the Interstate Commerce Commission that in order to correct discrimination found to exist against specified localities interstate carriers should desist from charging higher rates for transportation between certain specified interstate points than between certain specified intrastate points, *held* to be within the power delegated by Congress to the Commission; also *held*, that so far as the carriers' *inter*state rates conformed to what was found to be reasonable by the Commission, they were entitled to maintain them, and that they were free to comply with the order by so adjusting their *intra*state rates, to which the order related, as to remove the forbidden discrimination.

205 Fed. Rep. 380, affirmed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission relating to rates between Shreveport, Louisiana, and points within the State of Texas, and the effect of orders of the Railroad Commission of the State of Texas in regard to rates wholly within that State, are stated in the opinion.

Mr. Hiram M. Garwood, with whom *Mr. Maxwell Evarts*, *Mr. James G. Wilson*, *Mr. George Thompson*, *Mr. W. L. Hall* and *Mr. Thomas J. Freeman* were on the brief, for appellants.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Ruffin G. Pleasant, Attorney General of the State of Louisiana, and *Mr. Luther M. Walter,* with whom *Mr. W. M. Barrow, Mr. M. W. Borders* and *Mr. John S. Burchmore* were on the brief, for the Railroad Commission of Louisiana, Intervenor.

MR. JUSTICE HUGHES delivered the opinion of the court.

These suits were brought in the Commerce Court by the Houston, East & West Texas Railway Company, and the Houston & Shreveport Railroad Company, and by the Texas & Pacific Railway Company, respectively, to set aside an order of the Interstate Commerce Commission, dated March 11, 1912, upon the ground that it exceeded the Commission's authority. Other railroad companies [1] intervened in support of the petitions, and the Interstate Commerce Commission and the Railroad Commission of Louisiana intervened in opposition. The petitions were dismissed. 205 Fed. Rep. 380.

The order of the Interstate Commerce Commission was made in a proceeding initiated in March, 1911, by the Railroad Commission of Louisiana. The complaint was that the appellants, and other interstate carriers, maintained unreasonable rates from Shreveport, Louisiana, to various points in Texas, and, further, that these carriers in the adjustment of rates over their respective lines unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas. The carriers filed answers; numerous pleas of intervention by shippers and commercial bodies were allowed; testimony was taken and arguments were heard.

The gravamen of the complaint, said the Interstate

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[1] The Missouri, Kansas & Texas Railway Company of Texas, the St. Louis Southwestern Railway Company, and the St. Louis Southwestern Railway Company of Texas.

Commerce Commission, was that the carriers made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they extended into Texas from Shreveport. The situation may be briefly described: Shreveport, Louisiana, is about 40 miles from the Texas state line, and 231 miles from Houston, Texas, on the line of the Houston, East & West Texas and Houston & Shreveport Companies (which are affiliated in interest); it is 189 miles from Dallas, Texas, on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport. The first class rate from Houston to Lufkin, Texas, 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, was 69 cents. The rate on wagons from Dallas to Marshall, Texas, 147.7 miles was 36.8 cents, and from Shreveport to Marshall, 42 miles, 56 cents. The rate on furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents, and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of differences in rates are merely illustrative; they serve to indicate the character of the rate adjustment.

The Interstate Commerce Commission found that the interstate class rates out of Shreveport to named Texas points were unreasonable, and it established maximum class rates for this traffic. These rates, we understand, were substantially the same as the class rates fixed by the

Railroad Commission of Texas, and charged by the carriers, for transportation for similar distances in that State. The Interstate Commerce Commission also found that the carriers maintained "higher rates from Shreveport to points in Texas" than were in force "from cities in Texas to such points under substantially similar conditions and circumstances," and that thereby "an unlawful and undue preference and advantage" was given to the Texas cities and a "discrimination" that was "undue and unlawful" was effected against Shreveport. In order to correct this discrimination, the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable. 23 I. C. C. 31, 46–48.

The order in question is set forth in the margin.[1] The

[1] "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 findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That defendants The Texas & Pacific Railway Company, The Houston, East & West Texas Railway Company, and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting their present class rates for the transportation of traffic from Shreveport, La., to the points in Texas hereinafter mentioned on their respective lines, as the Commission in said report finds such rates to be unjust and unreasonable.

"It is further ordered, That defendant The Texas & Pacific Railway Company be, and it is hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, and apply to

report states that under this order it will be the duty of the companies "to duly and justly equalize the terms and conditions" upon which they will extend "transportation to traffic of a similar character moving into Texas from

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the transportation of traffic from Shreveport, La., to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are found by the Commission in its report to be reasonable, to wit: (rates inserted).

"It is further ordered, That defendants The Houston, East & West Texas Railway Company and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of traffic from Shreveport, La., to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are found by the Commission in its report to be reasonable, to wit: (rates inserted).

"It is further ordered, That defendant The Texas & Pacific Railway Company be, and it is hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, La., to Dallas, Tex., and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Dallas, Tex., toward said Shreveport for an equal distance, as said relation of rates has been found by the Commission in said report to be reasonable.

"It is further ordered, That defendants The Houston, East & West Texas Railway Company and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, La., to Houston, Tex., and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Houston, Tex., toward said Shreveport for an equal distance, as said relation of rates has been found by the Commission in said report to be reasonable.

"And it is further ordered, That said defendants be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, substantially similar practices respecting the concentration of interstate cotton at Shreveport, La., to

Shreveport with that moving wholly within Texas," but that, in effecting such equalization, the class scale rates as prescribed shall not be exceeded.

In their petition in the Commerce Court, the appellants assailed the order in its entirety, but subsequently they withdrew their opposition to the fixing of maximum class rates and these rates were put in force by the carriers in May, 1912.

The attack was continued upon that portion of the order which prohibited the charge of higher rates for carrying articles from Shreveport into Texas than those charged for eastward traffic from Dallas and Houston, respectively, for equal distances. There are, it appears, commodity rates fixed by the Railroad Commission of Texas for intrastate hauls, which are substantially less than the class, or standard, rates prescribed by that Commission; and thus the commodity rates charged by the carriers from Dallas and Houston eastward to Texas points are less than the rates which they demand for the transportation of the same articles for like distances from Shreveport into Texas. The present controversy relates to these commodity rates.

The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission's power. Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these in-

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those which are contemporaneously observed by said defendants respecting the concentration of cotton within the state of Texas, provided the practices adopted shall be justifiable under the act to regulate commerce and applicable fairly under like conditions elsewhere on the lines of such defendants."

trastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. But it is urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the Commerce Court was that the order relieved the appellants from further obligation to observe the intrastate rates and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate

commercial intercourse from local control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 224; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697; *Smith* v. *Alabama*, 124 U. S. 45, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile* v. *Kimball*, *supra*); 'to foster, protect, control and restrain' (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to pre-

scribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases, supra*, pp. 48, 51; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases, supra*, p. 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473.

In *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission, supra*, the argument against the validity of the Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415) involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employés so that those who were engaged in interstate commerce should be confined to that commerce exclusively. Employés dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations. Again, in *Southern Railway Co.* v. *United States, supra*, the question was presented whether the amendment to the Safety Appliance Act (March 2, 1903, c. 976, 32 Stat. 943) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety

of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense by applying the requirements of the act to both classes of vehicles. So, in the *Second Employers' Liability Cases, supra,* it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one employé through the negligence of another, where all were engaged in interstate commerce, that power did not embrace instances where the negligent employé was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence when operating injuriously upon an employé engaged in interstate commerce had the same effect with respect to that commerce as if the negligent employé were also engaged therein. The decision in *Employers' Liability Cases,* 207 U. S. 463, is not opposed, for the statute there in question (June 11, 1906, c. 3073, 34 Stat. 232) sought to regulate the liability of interstate carriers for injuries to any employé even though his employment had no connection whatever with interstate commerce. (See *Illinois Central R. R. Co.* v. *Behrens, supra.*)

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of

interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

It is also to be noted—as the Government has well said in its argument in support of the Commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. This question was presented with respect to the long and short haul provision of the Kentucky constitution, adopted in 1891, which the court had before it in *Louisville & Nashville R. R. Co.* v. *Eubank*, 184 U. S. 27. The state court had construed this provision as embracing a long haul, from a place outside to one within the State, and a shorter haul on the same line and in the same direction between points within the State. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce

because 'it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law.' See 230 U. S. pp. 428, 429. It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.

Second. The remaining question is with regard to the scope of the power which Congress has granted to the Commission.

Section three of the Act to Regulate Commerce provides (February 4, 1887, c. 104, 24 Stat. 379, 380):

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to

any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it: "The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations. . . ." (Senate Report No. 46, 49th Cong., 1st Sess., p. 215).

The opposing argument rests upon the proviso in the first section of the act which in its original form was as follows: "*Provided, however,* that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Ter-

ritory as aforesaid." When the act was amended so as to confer upon the Commission the authority to prescribe maximum interstate rates, this proviso was reënacted; and when the act was extended to include telegraph, telephone and cable companies engaged in interstate business, an additional clause was inserted so as to exclude intrastate messages. See acts of June 29, 1906, c. 3591, 34 Stat. 584; June 18, 1910, c. 309, 36 Stat. 539, 545.

Congress thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier and subject to the authority of the States or of the agencies created by the States. This was the question recently decided by this court in the *Minnesota Rate Cases, supra.* There, the State of Minnesota had established reasonable rates for intrastate transportation throughout the State and it was contended that, by reason of the passage of the Act to Regulate Commerce, the State could no longer exercise the state-wide authority for this purpose which it had formerly enjoyed; and the court was asked to hold that an entire scheme of intrastate rates, otherwise validly established, was null and void because of its effect upon interstate rates. There had been no finding by the Interstate Commerce Commission of any unjust discrimination. The present question, however, was reserved, the court saying (230 U. S. p. 419): "It is urged, however, that the words of the proviso" (referring to the proviso above-mentioned) "are susceptible of a construction which would permit the provisions of section three of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discriminations

between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts."

Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one State.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination,

there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation. It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission was of such a controlling character as to preclude it from giving effect to the law. The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority and decided that it had the power to make this remedial order. The Commerce Court sustained the authority of the Commission and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate.

The further objection is made that the prohibition of section three is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier and does not relate to acts which are the result of conditions wholly beyond its control. *East Tennessee &c. Rwy. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18. The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities which are assumed to be binding upon the carriers. The contention is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rules could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement. We are not unmindful of the gravity of the

question that is presented when state and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.

In conclusion: Reading the order in the light of the report of the Commission, it does not appear that the Commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service. So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination. But this result they are required to accomplish.

The decree of the Commerce Court is affirmed in each case.

Affirmed.

MR. JUSTICE LURTON and MR. JUSTICE PITNEY dissent.

CITIZENS BANKING COMPANY *v.* RAVENNA NATIONAL BANK.

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

No. 288. Argued March 16, 1914.—Decided June 8, 1914.

The failure by an insolvent judgment debtor and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such a levy, is not a final disposition of the property affected by the levy under the provisions of § 3a (3) of the Bankruptcy Act of 1898.

An insolvent debtor does not commit an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898 merely by inaction for the period of four months after levy of an execution upon his real estate.

All of the three elements specified in § 3a (3) of the Bankruptcy Act of 1898 must be present in order to constitute an act of bankruptcy within the meaning of that provision.

Questions certified, 202 Fed. Rep. 892, answered in the negative.

THE facts, which involve the construction of § 3a of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. G. Ray Craig, with whom *Mr. Edward H. Rhoades, Jr.*, and *Mr. John D. Rhoades* were on the brief, for Citizens Banking Company:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate to vacate or discharge such levy is not a "final disposition of the property" affected by such levy, within the provisions of § 3a (3) of the Bankruptcy Act.

An insolvent debtor does not commit an act of bankruptcy merely by inaction for a period of four months after the levy of an execution upon his real estate.

In support of these contentions, see *Re Baker-Ricketson Co.*, 97 Fed. Rep. 489; *Bogen* v. *Protter*, 129 Fed. Rep. 533; *Re Brightman*, 4 Fed. Cas. 136; *Colcord* v. *Fletcher*, 50 Maine, 398; *Re Empire Bedstead Co.*, 98 Fed. Rep. 981; *French* v. *Spencer*, 21 How. 228; *Re Heller*, 9 Fed. Rep. 373; *Jenney* v. *Walker*, 80 Oh. St. 100; *Metcalf* v. *Barker*, 187 U. S. 165; *Re National Hotel Co.*, 138 Fed. Rep. 947; *Poor* v. *Considine*, 6 Wall. 458; *Re Rome Planing Mill*, 96 Fed. Rep. 813; *Ex parte Russell*, 13 Wall. 664; *Re Seaboard Casting Co.*, 124 Fed. Rep. 75; *Thornley* v. *United States*, 113 U. S. 310; *Re Truitt*, 203 Fed. Rep. 550; *Re Vastebinder*, 126 Fed. Rep. 417; *Re Vetterman*, 135 Fed. Rep. 443; *Wilson* v. *City Bank*, 17 Wall. 473; *Wilson* v. *Nelson*,

183 U. S. 191; *Re Windt*, 177 Fed. Rep. 584; *Yturbide* v. *United States*, 22 How. 290.

Mr. A. T. Brewer for Ravenna National Bank:

The failure by an insolvent judgment debtor for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a "final disposition of the property," affected by the levy, under the provisions of § 3a (3) of the Bankruptcy Act of 1898, making the debtor subject to involuntary adjudication as a bankrupt under said § 3a (3), and it is not essential that the debtor shall do anything at all.

It is assumed that the judgment debtor, being insolvent, the levy constitutes a lien and works a preference. *Wilson* v. *Nelson*, 183 U. S. 191; *Bogen* v. *Protter*, 129 Fed. Rep. 533; *Folger* v. *Putnam*, 194 Fed. Rep. 793; *In re Tupper*, 163 Fed. Rep. 766.

The judgment levied on the property of Curtis on April 9, 1908, created a lien thereon in favor of the Citizens Bank of Norwalk, the judgment creditor, the judgment debtor being then insolvent.

This lien existed for a period one day less than four months, to-wit, until August 10, 1908, when the petition in involuntary bankruptcy was filed by the Ravenna National Bank, being so filed within four months, as August 9th was Sunday, these facts constituting a "final disposition" of said property by the bankrupt to the extent of the judgment.

To establish the bankruptcy through the foregoing facts it was not necessary for Cora M. Curtis to do anything. Her act of bankruptcy was therefore complete in all respects when the involuntary petition was filed and the adjudication by the district judge was fully authorized.

She permitted the judgment.

She was then insolvent.

The judgment worked a preference.

She did nothing to vacate it.

Except in bankruptcy the judgment was unassailable.

The involuntary petition alone prevented the consummation of the preference and the defeat of the main purpose of the Bankruptcy Law in securing an equal distribution among all creditors of the property of insolvent persons.

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

Upon a petition filed in the District Court for the Northern District of Ohio by one of her creditors, Cora M. Curtis was adjudged a bankrupt. In addition to matters not requiring notice, the petition charged that within four months next preceding its filing the respondent committed an act of bankruptcy, in that (a), while insolvent, she suffered and permitted the Citizens Banking Company to recover a judgment against her for $1,598.78 and costs, in the Common Pleas Court of Erie County, Ohio, and to have an execution issued under the judgment and levied on real estate belonging to her, whereby the company obtained a preference over her other creditors, and (b) at the time of the filing of the petition, which was one day less than four months after the levy of the execution, she had not vacated or discharged the levy and resulting preference.

The company appeared in the bankruptcy proceeding and challenged the petition on the ground that it disclosed no act of bankruptcy, but the court, deeming that such an act was charged, overruled the objection, and, there being no denial of the facts stated in the petition, adjudged the respondent a bankrupt. The company appealed to the Circuit Court of Appeals, and that court, having briefly reviewed the opposing views touching the point in controversy (202 Fed. Rep. 892), certified the case here, with a request that instruction be given on the following questions:

"(1) Whether the failure by an insolvent judgment

debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a 'final disposition of the property' affected by such levy, under the provisions of section 3a (3) of the Bankruptcy Act of 1898.

"(2) Whether an insolvent debtor commits an act of bankruptcy rendering him subject to involuntary adjudication as a bankrupt, under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate."

It will be observed that no reference is made to an accomplished or impending disposal of the property in virtue of the levy, although the mode of disposal prescribed by the local law is by advertisement and sale. 2 Bates' Ann. Ohio Statutes, §§ 5381, 5393.

The answers to the questions propounded turn upon the true construction of § 3a (3) of the Bankruptcy Act, which declares:

"Acts of bankruptcy by a person shall consist of his having . . . (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." Chapter 541, 30 Stat. 544, 546.

Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor, the second is suffering or permitting a creditor to obtain a preference through legal proceedings, that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class, and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days

before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor.

The questions propounded assume the existence of the first two elements and are intended to elicit instruction respecting the proper interpretation of the clause describing the third, namely, "and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." It is to this point that counsel have addressed their arguments.

Without any doubt this clause shows that the debtor is to have until five days before an approaching or impending event within which to vacate or discharge the lien out of which the preference arises. What, then, is the event which he is required to anticipate? The statute answers, "a sale or final disposition of any property affected by such preference." As these words are part of a provision dealing with liens obtained through legal proceedings, and as the enforcement of such a lien usually consists in selling some or all of the property affected and applying the proceeds to the creditor's demand, it seems quite plain that it is to such a sale that the clause refers. And as there are instances in which the property affected does not require to be sold, as when it is money seized upon execution or attachment or reached by garnishment,[1] it seems equally

[1] See *Turner* v. *Fendall*, 1 Cranch, 117, 133; *Sheldon* v. *Root*, 16 Pick. 567; *Crane* v. *Freese*, 16 N. J. L. 305; *Green* v. *Palmer*, 15 California, 411, 418; 2 Bates' Ann. Ohio Statutes, §§ 5374, 5383, 5469, 5470, 5483, 5531, 5548, 5555.

plain that the words "or final disposition" are intended to include the act whereby the debtor's title is passed to another when a sale is not required. No doubt, the terms "sale or final disposition," explained as they are by the context, are comprehensive of every act of disposal, whether by sale or otherwise, which operates as an enforcement of the lien or preference.

But we do not perceive anything in the clause which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. On the contrary, the natural and plain import of the language employed is that it will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is the only point of time that is mentioned, and the implication is that it is intended to be controlling.

To enforce a different conclusion counsel for the petitioning creditor virtually contends that the clause has the same meaning as if it read "and having failed to vacate or discharge the preference at least five days before a sale or final disposition of any of the property affected, or at most not later than five days before the expiration of four months after the lien was obtained." But we think such a meaning cannot be ascribed to it without rewriting it, and that we cannot do. The contention puts into it an alternative which is not there, either in terms or by fair implication, and to which Congress has not given assent. Indeed, it appears that in the early stages of its enactment the bankruptcy bill contained a provision giving the same effect to a failure to discharge the lien within a prescribed period after it attached as to a failure to discharge it within a designated number of days before an intended sale, and that during the final consideration of the bill that provision was eliminated and the one now before us was adopted. This, of course, lends strength to the implication otherwise arising that the clause names the sole test of

when the lien must be vacated or discharged to avoid an act of bankruptcy.

The contention to the contrary is sought to be sustained by a reference to §§ 3b, 67c and 67f. But we perceive nothing in those sections to disturb the plain meaning of § 3a (3). It defines a particular act of bankruptcy and purports to be complete in itself, as do other subsections defining other acts of bankruptcy. Section 3b deals with the time for filing petitions in bankruptcy and limits it to four months after the act of bankruptcy is committed. It says nothing about what constitutes an act of bankruptcy, but treats that as elsewhere adequately defined. Sections 67c and 67f deal with the retrospective effect of adjudications in bankruptcy, the former declaring that certain liens obtained in suits begun within four months before the filing of the petition shall be dissolved by the adjudication, and the latter that certain levies, judgments, attachments and other liens obtained through legal proceedings within the same period shall become null and void upon the adjudication. Both assume that the adjudication will be grounded upon a sufficient act of bankruptcy as elsewhere defined, and give to every adjudication the same effect upon the liens described whether it be grounded upon one act of bankruptcy or another. And what is more in point, there is no conflict between § 3a (3) and the sections indicated. All can be given full effect according to their natural import without any semblance of interference between § 3a (3) and the others.

But it is said that unless § 3a (3) be held to require the extinguishment of the lien before the expiration of four months from the time it was obtained the result will be that in some instances the lien will not be dissolved or rendered null through the operation of §§ 67c and 67f, because occasionally the full four months will intervene before an act of bankruptcy is committed and therefore before a petition can be filed. Conceding that this is so,

it proves nothing more than what is true of all liens obtained through legal proceedings more than four months prior to the filing of the petition. And while it may be true, as is suggested, that if the debtor is not restricted to less than four months within which to extinguish the lien there will be instances in which general creditors will be affected disadvantageously, it must be reflected that there also will be instances in which an honest and struggling debtor will be able to extinguish the lien the requisite number of days before a sale or final disposition of any of the property affected and thereby to avoid bankruptcy, without injury to any of his creditors. But with this we are not concerned. The advantages and disadvantages have been balanced by Congress, and its will has been expressed in terms which are plain and therefore controlling.

Lastly it is said that the term "final disposition" is not used in the sense hereinbefore indicated, but as denoting the status which a lien acquires through the lapse of four months before the filing of a petition in bankruptcy. This is practically a reiteration of the contention already noticed, but probably is intended to present it from a different angle. It overlooks, as we think, the influence which rightly must be given to the context, and also the manifest inaptness of the term to express the thought suggested. When one speaks of a sale or *final* disposition of property he means by final disposition an act having substantially the effect of a sale—a transfer of ownership and control from one to another—and especially is this true when he is referring to a sale or final disposition in the enforcement of a lien. We regard it as entirely clear that the term is so used in this instance, and that it signifies an affirmative act of disposal, not a mere lapse of time which leaves the lien intact and still requiring enforcement. To illustrate, let us take the instance of a provisional attachment of real property, which the creditor is not entitled to enforce unless he sustains the demand which is the sub-

ject of the principal suit; and let us suppose that the debtor defends against the demand, and that the suit is pending and undetermined four months after the levy. Of course, an adjudication in bankruptcy upon a petition filed thereafter would not disturb the attachment. But could it be said that the property attached was finally disposed of at the end of the four months? An affirmative answer seems quite inadmissible.

We conclude that both of the questions propounded by the Circuit Court of Appeals should be resolved in the negative.

As shown by the reported cases, some diversity of opinion has arisen in other Federal courts in disposing of similar questions (*In re Rome Planing Mill*, 96 Fed. Rep. 812, 815; *In re Vastbinder*, 126 Fed. Rep. 417, 420; *In re Tupper*, 163 Fed. Rep. 766, 770; *In re Windt*, 177 Fed. Rep. 584, 586; *In re Crafts-Riordon Shoe Co.*, 185 Fed. Rep. 931, 934; *Folger* v. *Putnam*, 194 Fed. Rep. 793, 797; *In re Truitt*, 203 Fed. Rep. 550, 554), and so we deem it well to observe that the conclusion here stated has been reached only after full consideration of those cases.

Questions answered "No."

LOUISVILLE & NASHVILLE RAILROAD CO. *v.* WESTERN UNION TELEGRAPH CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 337. Argued March 20, 1914.—Decided June 8, 1914.

On a direct appeal under § 238, Judicial Code, from a judgment of the District Court dismissing the bill for want of jurisdiction on the ground that neither of the parties was a resident of that district and that the suit was one that could only be brought in a district in which

one of the parties resided, this court is only concerned with the jurisdiction of the District Court as a Federal court; whether appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238.

When the matter in controversy is of the requisite value and diverse citizenship exists, the question is simply whether the case is cognizable in the particular District Court in which the case is brought.

Section 57, Judicial Code, makes suits to remove any encumbrance, lien or cloud upon title to real or personal property cognizable by the District Court of the district in which the property is situated regardless of residence of the parties and process for service of the non-resident defendants by notification outside of the district or by publication.

The provision in § 57, Judicial Code, respecting suits to remove clouds from title embraces a suit to remove a cloud cast upon the title by a deed or instrument which is void upon its face when such suit is founded upon a remedial statute of the State, as well as when resting upon established usages and practice of equity.

As construed by the highest court of Mississippi, § 975, Rev. Code of 1871 of that State entitles the rightful owner of real property in that State to maintain a suit to dispel a cloud cast upon the title thereto by an invalid deed, even though, under applicable principles of equity, it be void on its face.

In Mississippi, as declared by its highest court, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose, and if other elements of Federal jurisdiction are present the case is one to remove cloud upon title and, under § 57, Judicial Code, the case is cognizable in the District Court of the district in which the property is situated although neither of the parties reside therein.

THE facts, which involve the jurisdiction of the District Courts of the United States under § 57, Judicial Code, are stated in the opinion.

Mr. Gregory L. Smith, with whom *Mr. Henry L. Stone* was on the brief, for appellant.

Mr. Rush Taggart, with whom *Mr. J. B. Harris* and *Mr. George H. Fearons* were on the brief, for appellee.

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

By a bill in equity exhibited in the District Court the appellant seeks the annulment of three judgments of special courts of eminent domain in Harrison, Jackson and Hancock Counties, Mississippi, purporting to condemn portions of its right of way in those counties for the use of the appellee. According to the allegations of the bill, when given the effect that must be given to them for present purposes, the case is this: The appellant has a fee simple title to the land constituting the right of way and is in possession, and the appellee is asserting a right to subject portions of the right of way to its use under the three judgments, recently obtained. The appellant insists, for various reasons fully set forth, that the judgments were procured and rendered in such disregard of applicable local laws as to be clearly invalid, and that they operate to becloud its title. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, the right of way is within the district in which the bill was filed, and the appellant and appellee are, respectively, Kentucky and New York corporations. The prayer of the bill is, that the judgments be held null and void and the appellee enjoined from exercising or asserting any right under them. Appearing specially for the purpose, the appellee objected to the District Court's jurisdiction, upon the ground that neither of the parties was a resident of that district and that the suit was not one that could be brought in a district other than that of the residence of one of them without the appellee's consent. The court sustained the objection, dismissed the bill, and allowed this direct appeal under § 238 of the Judicial Code.

We are only concerned with the jurisdiction of the District Court as a Federal court, that is, with its power to entertain the suit under the laws of the United States.

Fore River Shipbuilding Co. v. *Hagg*, 219 U. S. 175; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Chase* v. *Wetzlar*, 225 U. S. 79, 83. Whether upon the showing in the bill the appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238 and is not before us. *Smith* v. *McKay*, 161 U. S. 355; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.*, 205 U. S. 46, 58; *Darnell* v. *Illinois Central Railroad Co.*, 225 U. S. 243.

As the matter in controversy is of the requisite value and the parties are citizens of different States, the suit manifestly is within the general class over which the District Courts are given jurisdiction by the Judicial Code, § 24, cl. 1; so the question for decision is, whether the suit is cognizable in the particular District Court in which it was brought.

In distributing the jurisdiction conferred in general terms upon the District Courts, the code declares, in § 51, that, "except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." If this section be applicable to suits which are local in their nature, as well as to such as are transitory (as to which see *Casey* v. *Adams*, 102 U. S. 66; *Greeley* v. *Lowe*, 155 U. S. 58; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105; *Kentucky Coal Lands Co.* v. *Mineral Development Co.*, 191 Fed. Rep. 899, 915), it is clear that the District Court in which the suit was brought cannot entertain it, unless one of the six succeeding sections provides otherwise, or the appellee waives its personal privilege of being sued only in the district of its or the appellant's residence. *In re Moore*, 209 U. S. 490;

Western Loan Co. v. *Butte & Boston Mining Co.*, 210 U. S. 368.

The appellant relies upon § 57, one of the six succeeding sections, as adequately sustaining the jurisdiction. This section reads as follows:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal prop-

erty against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

It will be perceived that this section not only plainly contemplates that a suit "to remove any incumbrance, lien or cloud upon the title to real or personal property" shall be cognizable in the District Court of the district wherein the property is located, but expressly provides for notifying the defendant by personal service outside the district, and, if that be impracticable, by publication. The section has been several times considered by this court, and, unless there be merit in an objection yet to be noticed, the decisions leave no doubt of its applicability to the present suit, even though both parties reside outside the district. *Greeley* v. *Lowe*, 155 U. S. 58; *Dick* v. *Foraker, Id.* 404; *Jellenik* v. *Huron Copper Co.*, 177 U. S. 1; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.*, 205 U. S. 46; *Chase* v. *Wetzlar*, 225 U. S. 79.

The appellee, after asserting that each of the judgments is void upon its face if the attack upon it in the bill is well taken, calls attention to the general rule that a bill in equity does not lie to cancel, as a cloud upon title, a conveyance or instrument that is void upon its face, and then insists that § 57 must be regarded as adopted in the light of that rule and as not intended to displace it or to embrace a suit brought in opposition to it. The difficulty

with this contention is that it seeks to make the usages of courts of equity the sole test of what constitutes a cloud upon title, so as to bring a suit to remove it within the operation of § 57, and disregards the bearing which the state law rightly has upon the question. As long ago as 1839 this court had occasion, in *Clark* v. *Smith*, 13 Pet. 195, to consider whether a Federal court sitting in the State of Kentucky could entertain a suit to remove a cloud from the title to real property in that State where the right to such relief depended upon a remedial statute of the State; and in the opinion, which fully sustained the jurisdiction, the court pointed out that the nature of the right was such that it could only be enforced in a court of equity, and then said (p. 203): "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature. . . . The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the Federal courts." The principle of that decision has been reaffirmed and applied in many cases, one being *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405. It was a suit in the Circuit Court for the District of Indiana to remove a cloud from title in virtue of a statute of that State, and the objection was interposed that the deed sought to be

canceled was void upon its face and therefore afforded no basis for such a suit in a Federal court. But this court pronounced the objection untenable, saying (p. 410): "While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the court sits to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove." Citing *Clark* v. *Smith, supra.* See also *Cowley* v. *Northern Pacific Railroad Co.*, 159 U. S. 569, 582. There are many state statutes of this type, and our decisions show that their enforcement in the Federal courts is subject to but three restrictions: 1. The case must be within the general class over which those courts are given jurisdiction. 2. A suit in equity does not lie in those courts where there is a plain, adequate and complete remedy at law. 3. In those courts there can be no commingling of legal and equitable remedies, or substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is defeated. Judicial Code, §§ 24 (cl. 1) and 267; *Whitehead* v. *Shattuck*, 138 U. S. 146, 152, 156; *Greeley* v. *Lowe*, 155 U. S. 58, 75; *Wehrman* v. *Conklin, Id.* 314, 323; *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 9.

We conclude that the provision in § 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several States, as well as when resting upon established usages and practice in equity.

The State of Mississippi has such a statute. Code of 1906, § 550. Although originally more restricted (Hutchinson's Code, p. 773; Rev. Code 1857, p. 541, art. 8), it has read as follows since 1871 (Rev. Code 1871, § 975):

"When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not."

While we have not been referred to any decision of the Supreme Court of the State passing directly upon the question, whether a conveyance or other evidence of title void upon its face is within the purview of this statute, the decisions of that court brought to our attention show that it has treated the statute as embracing conveyances described as "void"—whether the invalidity was shown upon the face of the instrument being left uncertain—*Ezelle* v. *Parker*, 41 Mississippi, 520; *Wofford* v. *Bailey*, 57 Mississippi, 239; *Drysdale* v. *Biloxi Canning Co.*, 67 Mississippi, 534; *Preston* v. *Banks*, 71 Mississippi, 601; *Wildberger* v. *Puckett*, 78 Mississippi, 650; and also that it regards the statute as very comprehensive and materially enlarging existing equitable remedies. In *Huntington* v. *Allen*, 44 Mississippi, 654, 662, it was said: "The statute in reference to the removal of clouds from title, enlarges the principle upon which courts of equity were accustomed to administer relief. It is very broad, allowing the real owner in all cases, to apply for the cancellation of a deed or other evidence of title, which casts a cloud or suspicion on his title. . . . The terms used in the statute, expressive of the scope of the jurisdiction, viz., 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which creates them is apparent rather than 'real;' is 'semblance' rather than substance; obscures rather than

destroys or defeats." In *Cook* v. *Friley*, 61 Mississippi, 1, 4, it was further said: "The statute . . . not only authorizes the real owner to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the court." And in *Peoples Bank* v. *West*, 67 Mississippi, 729, 740, the court concluded its opinion with the statement: "We know of no line by which the jurisdiction of the court is limited other than that prescribed by the law which confers it. When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant, and should be canceled."

In view of these decisions, we think the statute must be regarded as entitling the rightful owner of real property in the State to maintain a suit to dispel a cloud cast upon his title by an invalid deed or other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face.

The judgments sought to be canceled as clouds upon the appellant's title were rendered by special courts of eminent domain, each composed of a justice of the peace and a jury. According to the statute controlling such proceedings (Miss. Code, 1906, c. 43) the special court is not

permitted to quash or dismiss the proceeding for want of jurisdiction or for any other reason, or to inquire whether the applicant has a right to condemn or whether the contemplated use is public, but "must proceed with the condemnation" (§§ 1862, 1865, 1866); and, while an appeal lies to the Circuit Court, a supersedeas is not permitted, and upon the appeal the Circuit Court is restricted, like the special court, to an ascertainment of the compensation to be paid to the owner (§ 1871). A form of judgment is prescribed, which contains blanks for a description of the property and a recital of the compensation awarded, and then declares: "Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application" (§ 1867). An affirmative provision to the same effect also appears in the statute (§ 1868). Considering these statutory provisions and § 17 of the state constitution which declares that the question whether the condemnation is for a public use shall be a judicial question, the Supreme Court of the State holds that "the only question which can be raised in the eminent domain court, and the only jurisdiction confided to it, is the jurisdiction to ascertain the amount of damage sustained by the party whose lands are sought to be taken;" that "a new issue, involving a new question and new pleadings, cannot be raised in the appellate tribunal, that is to say, in the circuit court;" that the owner "may litigate the right to take his property at any time before acceptance of the compensation, or before the waiver of his right to have the question of the use judicially determined;" that "neither the constitution nor the laws of the State provide any particular tribunal in which this question shall be determined, nor is it a matter of any particular concern in what court the question shall be settled, provided it be determined in that forum which is capable of deciding it," and that the

appropriate mode of litigating the question is by a suit in equity challenging the right of the condemnor to enter under the judgment of the court of eminent domain. *Vinegar Bend Lumber Co.* v. *Oak Grove & Georgetown Railroad Co.*, 89 Mississippi, 84, 107, 108, 110, 112. Thus it will be perceived that under the law of the State, as declared by its court of last resort, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose. This being so, and the elements of Federal jurisdiction being present, the litigation may, of course, be had in a Federal court. One of the grounds upon which the judgments are challenged in the present bill is that the condemnation is not for a public purpose. If this ground be well taken, as to which we intimate no opinion, the judgments apparently confer upon the appellee a right in the appellant's right of way to which the appellee is not entitled.

We conclude that the suit is one to remove a cloud from title within the meaning of § 57 of the Judicial Code, and is cognizable in the court below, although neither of the parties resides in that district.

Decree reversed.

GILSON *v.* UNITED STATES.

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

No. 207. Submitted May 6, 1914.—Decided June 8, 1914.

The settled rule of this court that the concurring findings of two courts below will not be disturbed, unless shown to be clearly erroneous, applies where the evidence is taken before an examiner. *Texas & Pacific Railway Co.* v. *Louisiana Railroad Commission*, 232 U. S. 338.

Quære, as to what is the effect on a commuted homestead entry under § 2301, Rev. Stat., of an agreement for alienation made after entry and before commutation; and see *Bailey* v. *Sanders*, 228 U. S. 603. 185 Fed. Rep. 484, affirmed.

THE facts, which involve the validity of a patent of the United States for a tract of land issued under a homestead entry, are stated in the opinion.

Mr. Wade H. Ellis, Mr. Ira P. Englehart, Mr. Allen S. Davis and *Mr. George B. Holden* for appellant:

The evidence having all been taken before a special master, the rule that appellate courts will give great weight to findings of trial courts on questions of fact does not apply.

After Landis had made his homestead filing, he had a right to make an agreement to sell the land and then commute his entry and purchase the land. He did not make final proof under the homestead statute, but purchased the land under § 2301 of Revised Statutes. *Adams* v. *Church*, 193 U. S. 510; *Williamson* v. *United States*, 207 U. S. 425.

The evidence is insufficient to justify the conclusion that there was any agreement between Landis and Gilson before Landis filed on the land that Landis was to sell the land to Gilson. Even though Landis was guilty of fraud, there is insufficient evidence that Gilson was a party thereto to authorize cancellation of patent after title thereto has vested in him.

Mr. Assistant Attorney General Knaebel and *Mr. S. W. Williams* for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an equity action brought by the United States against appellant to cancel a patent issued to one Daniel

Landis for a tract of one hundred and twenty acres of land in Yakima County, in the State of Washington, afterwards conveyed by Landis to appellant. Landis made a homestead entry in November, 1899, under § 2289 of the Revised Statutes as amended by act of March 3, 1891, c. 561, 26 Stat. 1095, 1098; in November, 1902, he commuted the entry and purchased the land under § 2301 as amended by the same act; and in July, 1903, he received a patent. Upon the day on which he made the commutation entry he gave a mortgage upon the land to appellant, and from that date ceased to live upon it, and as soon as the patent was issued he made the conveyance to appellant. The grounds of the action were: that Landis did not enter the land in good faith, but for the purpose and with the intent of acquiring title to it for appellant and at his instigation; that the residence and improvements were not sufficient; that the affidavit upon which Landis' original application was allowed was false and fraudulent, in that he did not make the application in good faith for the purpose of actual settlement and cultivation, but made it for the benefit of appellant, with whom the entryman was then acting in collusion for the purpose of giving to appellant the benefit of the entry; that the proof of settlement and cultivation offered in support of the commutation entry was false and fraudulent, in that the entryman had not made settlement in November, 1899, or at any other time, had not built a house, except a partially completed shanty, had not resided on the land, and had not broken thirteen acres and cultivated three acres as alleged in his final proofs; and that the statement made in his affidavit that he had not alienated any part of the land was also false, in that he had alienated or agreed to alienate it to appellant.

The trial court found that Landis made the homestead entry at appellant's instigation and for his benefit; that the evidence on which the register and receiver allowed

the commutation entry included sworn statements by Landis and two witnesses to the effect that the claimant had lived continuously on the land and made improvements, including a corral and chicken house, and that he had cultivated three acres for three seasons; that this was a false statement, there having been no plowing or cultivation except during the third year; that the land was dry sage-brush land, not productive without irrigation; that Landis made only a pretence of settlement and a show of improving the land, in order to satisfy the scruples of the witnesses upon whom he depended to make final proof; and further, that appellant was cognizant of every detail of the transaction from its inception to the issuance of patent, and, indeed, directed the proceedings at every step, and therefore could not claim to be a *bona fide* purchaser.

The Circuit Court of Appeals concurred in this view of the facts, and therefore sustained the conclusion reached by the trial court that the patent should be canceled, without finding it necessary to consider the question of law, suggested by appellant, that inasmuch as final proof was not made under § 2291 but under § 2301 of the Revised Statutes, the fact that the claimant had made an agreement before commutation to convey the land to another would not affect the validity of the title obtained from the United States, because § 2301 prescribes as requisite to commutation, proof only that the entryman has made settlement, cultivation, and residence for fourteen months, and does not require him to make oath that he has not alienated any portion of the land. The decree was affirmed (185 Fed. Rep. 484), and the present appeal was taken.

Upon the question of fact as to the fraudulent nature of the proof upon which the commutation entry was allowed, we have the concurring findings of two courts, which, according to the settled rule, will not be disturbed by this court unless clearly shown to be erroneous. *Stuart*

v. *Hayden*, 169 U. S. 1, 14; *Towson* v. *Moore*, 173 U. S. 17, 24; *Dun* v. *Lumbermen's Credit Assoc.*, 209 U. S. 20, 23; *Washington Securities Co.* v. *United States*, *ante*, p. 76.

In behalf of appellant it is urged that this rule does not apply where the evidence is taken before an examiner, as was done in this case. The rule, however, is subject to no such exception; indeed, prior to the adoption of the new Equity Rules (226 U. S., Appendix, Rule 46), the evidence in equity actions was usually taken before a master or examiner. And in *Texas & Pacific Ry.* v. *Louisiana Railroad Commission*, 232 U. S. 338, where the findings of the special master who heard the testimony were set aside by the Circuit Court, and the conclusions of that court were concurred in by the Circuit Court of Appeals, we deemed the case a proper one for applying the general rule.

In the present case, not only does the argument submitted in behalf of appellant fail to show clear ground for disturbing the concurring findings of the two courts, but it raises no reasonable doubt of their correctness.

This renders it unnecessary to deal with the question raised as to the effect of an agreement for alienation made after entry and before commutation. However, it is settled adversely to the contention of appellant by our recent decision in *Bailey* v. *Sanders*, 228 U. S. 603, 608.

Decree affirmed.

GRANNIS *v.* ORDEAN.

GRANNIS *v.* WHITESIDE.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 325, 326. Argued April 27, 28, 1914.—Decided June 8, 1914.

Where the trial court did not infringe any Federal right of plaintiff in error, but the decision of the appellate court ran counter to the alleged Federal right which was raised on petition for reargument and specifically passed on and overruled in refusing the reargument, this court has jurisdiction under § 237, Judicial Code, to review the judgment.

In determining what is due process of law within the meaning of the Fourteenth Amendment, there is a distinction between actions *in personam* and actions *in rem;* in the former judgments without personal service within the State are devoid of validity either within or without the State but in the latter the judgment although based on service by publication may be valid so far as it affects property within the State. *Pennoyer* v. *Neff*, 95 U. S. 714.

Where a State has jurisdiction over the *res* the judgment of the court to which that jurisdiction is confided, in order to be binding with respect to the interest of a non-resident not served with process within the State, must be based upon constructive service by mailing, publication or otherwise in accordance with the law of the State.

This court must exercise an independent judgment as to whether the process sanctioned by the court of last resort of the State constituted due process of law; it is not bound by, nor can it merely accept, the decision of the state court on that question.

While the fundamental requisite of due process of law is the opportunity to be heard, that does not impose an unattainable standard of accuracy; and a defendant served with process either personally, or by publication and mailing, in which his name is misspelled cannot safely ignore it on account of the misnomer.

The general rule in cases of constructive service of process by publication tends to strictness, but even in names due process of law does not require ideal accuracy.

In constructive service of process by publication and mailing where

there has been a misnomer, neither the test of *idem sonans* nor that of substantial similarity in appearance in print is the true one; but whether the summons as published and mailed complies with the law of the State so as to give sufficient constructive notice to the party mis-named.

In this case, *held*, that a summons in an action of foreclosure served by publication and mailing and otherwise in strict compliance with the state statute, did not deprive a defendant of his property without due process of law because his name was misspelled Albert Guilfuss assignee in the various papers instead of correctly, Albert B. Geilfuss assignee.

118 Minnesota, 117, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of a judgment based on service by publication in which the name of the defendant was misspelled, are stated in the opinion.

Mr. Henry J. Grannis and *Mr. Frederic D. McKenney* for plaintiff in error.

Mr. Alfred Jaques, with whom *Mr. Theodore T. Hudson* and *Mr. John G. Williams* were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

These two cases were heard as one, upon the record in No. 325; it being stipulated that since the cases are identical in their facts, and in the questions raised, except that they pertain to different portions of the land respecting which the controversy arises, the decision in No. 326 shall abide the result in No. 325. We shall, therefore, discuss the record in the latter case, without further mention of No. 326.

On the eighth day of November, 1895, and for some time prior thereto, one John McKinley was the owner of an undivided fifth part of certain lands in the County of St. Louis, in the State of Minnesota. Prior to that

time one Albert B. Geilfuss, Assignee, recovered a judgment for the sum of $2,854.02 against McKinley in the District Court of that County, which was duly entered in the judgment book and appeared in the judgment roll in the name of Albert B. Geilfuss, Assignee, and on the fifth day of January, 1894, was docketed by the clerk of the court as in favor of Albert Geilfuss, Assignee, as judgment creditor and against John McKinley as judgment debtor, and being so docketed became a lien upon McKinley's interest in said lands, and on November 8, 1895, was a lien thereon. Under a sale afterwards made upon an execution issued on this judgment, plaintiff in error claims title to the undivided one-fifth of said lands formerly owned by McKinley, by virtue of certain proceedings and conveyances hereafter mentioned. Albert B. Geilfuss, Assignee, recovered another judgment against McKinley for the sum of $2,125.60, which was duly entered and docketed on January 10, 1894, and became a lien upon the interest of McKinley in the same lands, but plaintiff in error claims no rights thereunder.

On November 8, 1895, one George A. Elder, the owner of an undivided fifth interest in said lands, commenced a partition suit in the District Court of St. Louis County against Mesaba Land Company, John McKinley, and the other owners of the fee, and also against certain other parties having judgment or other liens. The suit was brought under the provisions of Chapter 74, Gen. Stat. Minnesota, and its sole purpose was to partition the lands, or, in case a partition could not be had, then to have them sold and the proceeds of the sale distributed among the parties entitled.

At the time of the partition action, Albert B. Geilfuss, Assignee, resided at Milwaukee, Wisconsin. His correct name, "Albert B. Geilfuss, Assignee," or "Albert Geilfuss, Assignee," did not appear among the names of the defendants in the action, or in the summons or other files

or records therein. "Albert Guilfuss, Assignee" was named as a defendant, and it was alleged in the complaint, and found and determined in the findings and judgment, that he was the owner of the judgment for $2,854.02 against McKinley. "Albert B. Guilfuss" was also named as a defendant, and it was alleged in the complaint and found and determined in the findings and judgment that he was the owner of the judgment for $2,125.60 against McKinley. There was no personal service of the summons in the partition action upon Geilfuss, however named, either as individual or as assignee, and no appearance in his behalf. There was a return by the sheriff of St. Louis County upon the summons to the effect that the defendants "Albert Guilfuss, Assignee," and "Albert B. Guilfuss" could not be found in the county, and an affidavit of one of the attorneys of plaintiff was filed, stating that he believed that the defendants "Albert Guilfuss, Assignee," and "Albert B. Guilfuss" were not residents of the State of Minnesota, and could not be found therein, and that after the commencement of the action affiant had deposited copies of the summons in the post-office with postage prepaid, directed to each of these defendants at their respective places of residence, to wit, one to Albert Guilfuss, Assignee, Milwaukee, Wisconsin, and one to Albert B. Guilfuss, Milwaukee, Wisconsin, and stating that the subject of said partition action was certain real property situated in the County of St. Louis and State of Minnesota, and that each of said defendants had and claimed a lien and interest in said real estate, and that the relief demanded in said action consisted in excluding the defendants and each of them from any interest or lien therein. There was also service of the summons by publication upon the defendants named therein as "Albert Guilfuss, Assignee," and "Albert B. Guilfuss," the summons being published in a legal newspaper in Duluth, which is in St. Louis County, Minnesota. It is admitted

that (saving the effect of the misnomer), the statutory provisions respecting the service of summons upon non-residents by mailing and publication were complied with. These are contained in Minnesota Statutes 1894, §§ 5204 and 5205 (respecting civil actions), and in §§ 5771 and 5773 (respecting actions for partition of real property).[1]

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[1] CHAPTER 66.

CIVIL ACTIONS.

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Section 5204. Service by publication, when allowed.

When the defendant cannot be found within the State, of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the State, or cannot be found therein, and that he has deposited a copy of the summons in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney in either of the following cases:

* * * * * * * *

Fifth. When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein. . . .

Section 5205. Publication, how made.

The publication shall be made in a newspaper printed and published in the county where the action is brought, (and if there is no such newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county, then in a newspaper printed and published at the capital of the state,) once in each week for six consecutive weeks; and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid.

* * * * * * * *

All of the defendants in the action were properly served with summons, except as mentioned, and in due course a judgment was entered on May 5, 1899, adjudging and decreeing the ownership of the lands, and that they could not be divided and partitioned, and ordering that they be sold by a referee to the highest bidder and the proceeds distributed among the defendants according to their respective rights under the law. The sale was made accordingly and confirmed by the court, and thereafter the present defendants in error, by mesne conveyances, acquired such interest in the lands as had been acquired by the purchaser under the referee's sale.

Subsequently the Geilfuss judgment against McKinley, docketed January 5, 1894, for the sum of $2,854.02, was assigned to one Timlin and by him to one Buell, and whatever interest in the land, if any, remained in McKinley after the partition sale was sold under execution and purchased by Buell, and subsequently acquired through mesne conveyances by the present plaintiff in error.

This action (No. 325) was brought by defendants in error to determine the adverse claims in the lands. The trial resulted in a judgment to the effect that the plaintiffs

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CHAPTER 74.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

* * * * * * * *

Section 5771. Summons, to whom addressed.

The summons shall be addressed by name to all the owners and lienholders who are known, and generally to all persons unknown, having or claiming an interest in the property.

* * * * * * * *

Section 5773. Rules as to civil actions applicable.

Such action shall be governed by the rules and provisions applicable to civil actions, including the right of appeal, except that, when service of the summons is made by publication, it shall be accompanied by a brief description of the property sought to be divided, and except as herein otherwise expressly provided.

were the owners of an undivided four-fifths interest, and that the present plaintiff in error was the owner of the undivided fifth interest which had been the property of McKinley. Upon appeal, the Supreme Court reversed the judgment so far as it adjudged plaintiff in error to be the owner of McKinley's interest. 118 Minnesota, 117. By the present writ of error we are called upon to determine whether the Supreme Court of Minnesota, by its judgment giving effect to the decree in the partition suit notwithstanding the misnomer of Albert B. Geilfuss, Assignee, in the proceedings and summons, has deprived plaintiff in error of his property without due process of law, contrary to the Fourteenth Amendment.

The trial court held that no jurisdiction was acquired in the partition suit over the judgment lien of Albert B. Geilfuss, Assignee, and the Supreme Court declared that if this were correct the lien of his judgment upon the McKinley interest was not affected by the decree in that action, and that the subsequent sale of that interest under execution on the judgment gave a good title to the purchaser, under whom defendant (now plaintiff in error) claims; while on the other hand, if the court acquired jurisdiction over that judgment lien, the McKinley interest in the lands passed to the purchaser at the partition sale, and afterwards became the property of plaintiffs (now defendants in error). This was upon the assumption that the court had jurisdiction to decree a sale in the partition action, a question of state law arising out of facts not here pertinent, and to which an affirmative answer was given in the same opinion.

The precise question now presented, therefore, is whether, under the circumstances, a service by the publication and mailing of a summons in the partition suit, naming as party and addressee "Albert Guilfuss, Assignee," and "Albert B. Guilfuss," constituted due process of law conferring jurisdiction to render a judgment binding

upon Albert B. Geilfuss, Assignee, with respect to his lien upon or interest in the land, he not having appeared.

There is a motion to dismiss, upon the ground that the Federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the State, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the Supreme Court upholding the notice that first ran counter to the alleged Federal right. In a petition for reargument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the Fourteenth Amendment. The Supreme Court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed, declared that its decision was to be interpreted as holding against the contention, and therefore refused a reargument. This is sufficient to confer jurisdiction upon this court. *Mallett* v. *North Carolina*, 181 U. S. 589, 592; *Leigh* v. *Green*, 193 U. S. 79, 85; *McKay* v. *Kalyton*, 204 U. S. 458, 463; *Sullivan* v. *Texas*, 207 U. S. 416, 422; *Kentucky Union Co.* v. *Commonwealth of Kentucky*, 219 U. S. 140, 158.

We therefore proceed to the merits.

In determining what is due process of law within the meaning of the Fourteenth Amendment, a distinction is to be observed between actions *in personam* and actions *in rem*, or *quasi in rem*. In *Pennoyer* v. *Neff*, 95 U. S. 714, 733, it was held that by force of the Amendment a judgment rendered by a state court in an action *in personam* against a non-resident served by publication of summons, but upon whom no personal service of process within the

State was made, and who did not appear to the action, was devoid of any validity either within or without the territory of the State in which the judgment was rendered; it being, however, conceded that a different rule obtains where, in connection with initial process against a person, property in the State is brought under the control of the court and subjected to its disposition, or where the judgment is sought as a means to reach such property or affect some interest in it; in other words, where the action is in the nature of a proceding *in rem*. As was said by the court (speaking by Mr. Justice Field, p. 734): "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

But it is also settled that where a State has jurisdiction over a *res*—as of course it has over the partition of lands lying within its borders—the judgment of the court to which that jurisdiction is confided, in order to be binding with respect to the interest of a non-resident who is not served with process within the State, must be based upon constructive notice given by publication, mailing, or otherwise, substantially in the manner prescribed by the law of the State. *Cheely* v. *Clayton*, 110 U. S. 701, 705; *Guaranty Trust Co.* v. *Green Cove Railroad*, 139 U. S. 137, 148; *Windsor* v. *McVeigh*, 93 U. S. 274, 283; *Hassall* v. *Wilcox*, 130 U. S. 493, 504; *Thompson* v. *Thompson*, 226 U. S. 551, 562.

In the case before us, there is no disputed question as to what steps were taken in order to give notice to Geilfuss of the partition suit. The Supreme Court of the State, in accepting what was done as being a sufficient compliance with the provisions of the statute, in effect construed the statute as permitting such notice to be given as was in fact given.

But, the question whether the process thus sanctioned by the court of last resort of the State constitutes due process of law within the meaning of the Fourteenth Amendment being properly presented to this court for decision, we must exercise an independent judgment upon it. *Scott* v. *McNeal*, 154 U. S. 34, 45; *Ballard* v. *Hunter*, 204 U. S. 241, 260; *Jacob* v. *Roberts*, 223 U. S. 261.

The fundamental requisite of due process of law is the opportunity to be heard. *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436. And it is to this end, of course, that summons or equivalent notice is employed. But the inherent authority of the States over the titles to lands within their respective borders carries with it, of necessity, the jurisdiction to determine rights and interests claimed therein by persons resident beyond the territorial limits of the State, and upon whom the ordinary judicial process cannot be served. The logical result is that a State, through its courts, may proceed to judgment respecting the ownership of lands within its limits, upon constructive notice to the parties concerned who reside beyond the reach of process. That this constitutes "due process" within the meaning of the Fourteenth Amendment was recognized in *Pennoyer* v. *Neff*, *supra*, and is no longer open to question. *Huling* v. *Kaw Valley Railway*, 130 U. S. 559, 563; *Arndt* v. *Griggs*, 134 U. S. 316, 320 *et seq.*; *Lynch* v. *Murphy*, 161 U. S. 247, 251; *Roller* v. *Holly*, 176 U. S. 398, 403. It is not disputed that the statutory scheme of publication and mailing, as established in

Minnesota, for giving notice to non-resident defendants in actions *quasi in rem*, is in its general application sufficient to comply with the Fourteenth Amendment. But the statute provides that "the summons shall be addressed by name to all the owners and lien holders who are known"; and the contention is that the mistake of name in the present instance was fatal.

The "due process of law" clause, however, does not impose an unattainable standard of accuracy. If a defendant within the jurisdiction is served personally with process in which his name is misspelled, he cannot safely ignore it on account of the misnomer. The rule, established by an abundant weight of authority, is, that if a person is sued by a wrong name, and he fails to appear and plead the misnomer in abatement, the judgment binds him. *Lafayette Ins. Co.* v. *French*, 18 How. 404, 409; *Crawford* v. *Satchwell*, 2 Strange, 1218; *Oakley* v. *Giles*, 3 East, 167; *Smith* v. *Patten*, 6 Taunt. 115; *S. C.*, 1 Marsh. 474; *Smith* v. *Bowker*, 1 Massachusetts, 76, 79; *Root* v. *Fellowes*, 6 Cush. 29; *First Nat'l Bank* v. *Jaggers*, 31 Maryland, 38, 47; *S. C.*, 100 Am. Dec. 53, 54; *McGaughey* v. *Woods*, 106 Indiana, 380; *Vogel* v. *Brown Township*, 112 Indiana, 299; *S. C.*, 2 Am. St. Rep. 187; *Lindsey* v. *Delano*, 78 Iowa, 350, 354; *Hoffield* v. *Board of Education*, 33 Kansas, 644, 648.

Of course, in a published notice or summons, intended to reach absent or non-resident defendants, where the name is a principal means of identifying the person concerned, somewhat different considerations obtain. The general rule, in cases of constructive service of process by publication, tends to strictness. *Galpin* v. *Page*, 18 Wall. 350, 369, 373; *Priest* v. *Las Vegas*, 232 U. S. 604. But, even in names, "due process of law" does not require ideal accuracy. In the spelling and pronunciation of proper names there are no generally accepted standards; and the well-established doctrine of *idem sonans*—generally ap-

plied, as it is, to constructive notice of suits—is a recognition of this.

The trial court was of the opinion that the question turned upon whether "Guilfuss" and "Geilfuss" were *idem sonans*, and held that since "Geilfuss" is evidently a German name the first syllable must be pronounced with the long sound of "i," while the first syllable of "Guilfuss" would necessarily be pronounced with the short sound of "i." The court therefore concluded that the names were not *idem sonans*, and that the difference was fatal. The Supreme Court agreed that "Geilfuss" and "Guilfuss" were not *idem sonans*, but held that this was not the proper test; that where a summons is served by publication, the true test is not whether the names sound the same to the ear when pronounced, but whether they look substantially the same in print (following *Lane* v. *Innes*, 43 Minnesota, 137, 143; *D'Autremont* v. *Anderson Iron Co.*, 104 Minnesota, 165); and assuming that the name of the judgment creditor of McKinley was Albert B. Geilfuss, Assignee, the court said: "The question then is, placing the names 'Albert Guilfuss, Assignee,' and 'Albert B. Geilfuss, Assignee,' in juxtaposition, was there so material a change as to be misleading?" This was answered in the negative.

Were we to theorize, we might say that while each of these tests is helpful, neither is altogether acceptable if perfect accuracy were the aim; not the test of *idem sonans*, because it does not appear that all persons would necessarily pronounce Geilfuss with the long "i," or Guilfuss with the short "i"; and not the test of the appearance of the names as printed and placed in juxtaposition, because in fact, as the name appeared in the summons published and mailed, it was "Guilfuss" alone, without any name in juxtaposition to serve as a standard for comparison. And we think both tests are inadequate if applied without regard to what was contained in the summons besides the mere name and addition—"Albert Guilfuss, As-

signee." The record, as it happens, contains no copy of the summons; but from findings and admissions that are in the record, we know that it was in due form, and therefore that it contained such notice of the commencement of the action and of its purpose, and such warning to appear and answer, as would constitute due process of law if served upon a defendant within the jurisdiction (Minnesota Stats., 1894, §§ 5194, 5195); and that it contained, *inter alia*, a brief description of the property sought to be divided (Minnesota Stats., 1894, § 5773, marginal note, *supra*). The underlying question is a practical one—whether, notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute and sufficient constructive notice to the party concerned. In determining this, we need not confine ourselves to the test of *idem sonans*, nor to the appearance of the name in print, but may employ both of these, with such additional tests as may be available in view of what is disclosed by the record. One such additional test, we think, is whether, when two letters reached the postoffice at Milwaukee, one addressed "Albert Guilfuss, Assignee," the other addressed "Albert B. Guilfuss," they or either of them would, in reasonable probability, be delivered to Albert B. Geilfuss, then a resident of that city. Another is, whether, assuming that the summons as so mailed, or as published in Duluth, and containing the misspelled names or either of them, had come to the eye of the veritable Albert B. Geilfuss, or of any person knowing him by that name and sufficiently interested in him to acquaint him with its contents if apprised that it was intended for him, the summons, as a whole, would probably have conveyed notice that Albert B. Geilfuss was the person intended to be summoned. Both of these questions are, we think, to be answered in the affirmative. In view of the well-known skill of postal officials and employés

in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that the letters would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee. And it seems to us that any person knowing him, and knowing the correct spelling of his name, and having reason to acquaint him with the contents of a notice of this character if supposed to be intended for him, would probably realize for whom such notice was intended, notwithstanding the name was spelled "Guilfuss." The general resemblance between the names is striking, however they are to be pronounced. And the designation, "Assignee," was an additional means of identification. That Geilfuss himself, upon receiving the notice, would be sufficiently warned that it affected his interest in the Minnesota lands under his judgments against McKinley, is free from doubt. He would of course observe the misnomer; but, having received the notice which it was the purpose of the law to convey to him, he could not safely ignore it on the ground of the mistake in the name, any more than, if personally served with summons within the State of Minnesota, he could have ignored it on account of a similar misnomer.

We conclude that there was due process of law in the partition suit, and that therefore the present judgment should be affirmed.

Judgments in Nos. 325 and 326 affirmed.

DALE v. PATTISON.

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

No. 330. Argued April 23, 1914.—Decided June 8, 1914.

The legal effect of a transaction involving pledge or hypothecation depends upon the local law; and if the state law permits the pledged property to remain under certain conditions in the possession of the pledgor and those conditions exist, the trustee in bankruptcy of the pledgor takes subject to the rights of the pledgee. *Taney* v. *Penn Bank*, 232 U. S. 174.

There is a well-recognized distinction between a chattel mortgage and a pledge; and a state statute requiring the delivery of the chattel or recording of the instrument does not necessarily apply to a pledge of personal property so situated that it is not within the power of the owner to deliver it to the pledgee.

Where property is from its character or situation not capable of actual delivery, the delivery of a warehouse receipt or other evidence of title is sufficient to transfer the property and right of possession. *Gibson* v. *Stevens*, 8 How. 384.

Notwithstanding §§ 8560 and 8619, General Code of Ohio, the law of that State recognizes the force of long continued commercial usage and the effectiveness of a symbolical delivery of personal property by the transfer of warehouse receipts representing the same.

Where neither statutes nor decisions of the courts are directly to the contrary, the courts may refer to established trade customs as evidence of what has been long understood to be the law. *Gibson* v. *Stevens*, 8 How. 384.

The law of Ohio not being dissimilar from that of Pennsylvania in recognizing the validity of transfers by delivering warehouse receipts representing property under conditions similar to those involved herein, this case is controlled by *Taney* v. *Penn Bank*, 232 U. S. 174.

196 Fed. Rep. 5, affirmed.

DAVID ROHRER, for many years prior to November 5, 1909, owned and operated a distillery in Montgomery County, Ohio. On that day he was adjudicated a bank-

rupt, and the appellants were appointed his trustees. In the following month they filed an application in the bankruptcy proceedings setting forth that in the distillery warehouses of the bankrupt there were stored about 9,800 barrels of Bourbon and rye whiskies, to which there were many conflicting claims; among the claimants being certain named persons to whom it was alleged the bankrupt had pledged or hypothecated certain barrels of the whiskies. One of the parties so named was the respondent, Edward M. Pattison. The application prayed that all of the claimants be notified of the proceedings, be made parties thereto, and be required to set up their respective claims. Pattison filed an answer and intervening petition, claiming that 210 barrels of whiskey (specifying them by numbers), were a part of a lot of 800 barrels that had been pledged or hypothecated to him by Rohrer as security for certain loans; the remainder of the 800 barrels having been sold by Rohrer without the knowledge of Pattison. It was denied that the whiskies were or ever had been in Rohrer's possession, it being alleged that all of them, as soon as manufactured, were placed in the storage warehouse in the possession and control of the Government of the United States, and that certain moneys were loaned by Pattison to Rohrer, to secure payment of which the latter assigned and transferred in writing to the former his entire interest in certain designated barrels of whiskey then on storage in said warehouse, the agreement and transfer being evidenced by documents in the form of warehouse receipts, of which the following is a sample:

"No. 750.

"Stored in Warehouse.

"56 bbls. in No. 2.

"94 bbls. in No. 1.

"The David Rohrer Distillery, Montgomery County.

"Fire Copper Bourbon and Pure Rye.

"Brand and Distillery Established in 1847.

"GERMANTOWN, O., *Feb.* 23, 1906.

"Received in my Distillery Bonded Warehouse No. 11, First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this warehouse receipt and the written order of the holder thereof, and on payment of the United States Government tax and all other taxes and storage at the rate of five cents per barrel per month from storage free,

"One hundred and fifty barrels D. Rohrer pure Bourbon whiskey, entered into bond as follows: 56 bbls. Rye; 94 bbls. Bourbon.

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
107853					
———				Feb. 10, 12, 13.	Y
108002	7,600.49	102	7,405.70	14, & 15/06	44953
					———
					45102

"56 Rye.

"94 Bourbon.

"Gauged by F. P. Thompson, U. S. Gauger.

"Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

"It is expressly provided that in the payment of excess under this guarantee the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefor, and the carrying charges thereon added thereto, together with the Internal Revenue tax thereon at the rate of tax imposed by the Internal Revenue law upon distilled spirits at the date of the withdrawal.

"The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same become due.

"This warehouse receipt is given in conformity with the warehouse laws of the State of Ohio and the laws of the United States in force at this date.

"DAVID ROHRER, *Proprietor.*"

By an amendment to his intervening petition, Pattison set forth:

"That for more than forty years last past and ever since the enactment by the Congress of the United States of the laws relating to the storing by distillers of whiskey in distillery bonded warehouses, it has been and still continues to be the usual and customary course of doing business by distillers of whiskey to sell, pledge and transfer whiskey deposited by them in their distillery bonded warehouses by the making, issuing and delivering by them of their warehouse receipts to the vendee or pledgee of the barrels of whiskey sold or pledged (describing and identifying in said warehouse receipts the barrels of whiskey sold or pledged, by their serial numbers, the date of their manufacture, the warehouse stamps thereon and the number of the bonded warehouse in which situated) and agreeing in said warehouse receipts to hold said barrels of whiskey sold or pledged for the account and subject to the order of the vendee or pledgee thereof, and in and by the sale and pledge as aforesaid of barrels of whiskey in their distillery bonded warehouses to obtain money and advances of money to enable them to carry on business as distillers, and during all of said time it has been and continues to be among distillers and bankers, brokers, dealers in whiskey and all persons having transactions with distillers an established custom and a commercial usage generally known and acted upon to regard and consider said warehouse receipts as giving constructive possession of the barrels of whiskey mentioned therein and as conveying

either an absolute title or a special interest, according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferable by indorsement either absolutely or as collateral security, and as investing the holder of the warehouse receipts with the title, property in or possession of the barrels of whiskey mentioned in said warehouse receipts according to the rights of the original parties to the transaction and as constituting the owner of the distillery bonded warehouse issuing and delivering such warehouse receipts, as the bailee for the vendee or pledgee of the barrels of whiskey in said warehouse receipts mentioned; and this practice and method of doing business has obtained for more than forty years, and become an important part of the commercial system of the country, so that it is well understood and according to the usual course of business that the use and purpose of a warehouse receipt is to enable the owner of said distillery bonded warehouse to sell, pledge and transfer the title or the possession of the barrels of whiskey in his bonded warehouse for the purpose of raising money or securing advances thereon either by sale or pledge."

The trustees filed a general demurrer, which was sustained by the referee, and the order sustaining it was affirmed by the District Court (186 Fed. Rep. 997). The Circuit Court of Appeals reversed the District Court, and remanded the case for further proceedings (196 Fed. Rep. 5). Thereupon the District Court, in obedience to the mandate, overruled the demurrer and rendered final judgment in favor of Pattison, which was affirmed by the Court of Appeals; and an appeal to this court was then allowed.

Mr. Lee Warren James for appellants.

Mr. W. H. Mackoy, with whom *Mr. M. L. Buchwalter* was on the brief, for appellee.

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

The transactions in question, as between Rohrer, the bankrupt, and Pattison, the appellee, are not distinguishable from those that were under consideration in *Taney* v. *Penn Bank*, 232 U. S. 174. In that case the Distilling Company deposited as security for the loan made by the Bank certain gauger's certificates, in addition to warehouse receipts issued by itself. But the sole significance of the gauger's certificates was that they constituted evidence that the whiskies had been deposited in the storehouse in barrels marked and numbered as required by the act of Congress. Since it is admitted in the present case that the whiskies in question were in fact on storage, as mentioned in the warehouse receipts delivered by Rohrer to Pattison, and that the barrels were stamped, marked, and numbered as therein stated, the fact that no gauger's certificate was delivered to Pattison is of no present consequence.

The legal effect of such a transaction depends upon the local law. In *Taney* v. *Penn Bank*, upon finding that, by the law of Pennsylvania, the ordinary rule as to the effect of the retention of physical possession by the vendor of personal property, which he is capable of delivering to the vendee, is not applied by the courts of that State to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale is made, we held that, considering the situation of the property and the usages of the business, the transaction between the distiller and the bank was valid, and gave to the latter a lien upon the whiskey superior to that of the trustee in bankruptcy.

The question here presented is whether the local law of

Ohio so far differs from that of Pennsylvania that a different result should be reached. In behalf of appellants it is insisted that there is in Ohio a settled legislative policy with reference to the change of possession necessary for the creation of liens on personal property. Section 8560 of the General Code is cited (formerly § 4150, Rev. Stat.). It reads as follows:

"SEC. 8560. A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section."

It is insisted that this clearly and unmistakably establishes the doctrine that any transaction designed to give a security in personal property, if not accompanied by an actual change of possession, must be placed in the form of a chattel mortgage and filed for record, in order to be good as against creditors. It seems to us, however, that we should not fail to consider the well-recognized distinction between a chattel mortgage and a pledge. A mortgage of chattels imports a present conveyance of the legal title, subject to defeasance upon performance of an express condition subsequent, contained either in the same or in a separate instrument. It may or may not be accompanied by a delivery of possession. On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage.

There is no question that in Ohio, as elsewhere, a chattel mortgage, as well as a pledge, is valid between the parties, although not recorded. And, without the statute, it would

be good as against creditors, purchasers and mortgagees in good faith. The primary purpose of the act is to protect persons of these classes, who might otherwise sustain losses by relying upon the possession and apparent ownership of the chattels by the mortgagor. In the case of an ordinary pledge, there is no need of recording, since the pledgor at once parts with possession.

But what shall be said, when the transaction relates to personal property which is so situated that it is not within the power of the owner to deliver it to mortgagee or pledgee, and of which he has no such visible possession and apparent ownership as would probably be relied upon by creditors, purchasers, and mortgagees? Does § 8560, G. C., which declares that mortgages in such case shall be invalid against the designated third parties unless recorded, necessarily apply to transactions in the nature of a pledge, which are not mentioned in terms? The effect would be to greatly hamper, sometimes to prevent, transactions in the nature of a pledge, where only constructive possession of the property could be transferred. We cannot give to the section cited so extensive a meaning, in the absence of a decision by the state court adopting that construction. None such is referred to.

It is contended that a different rule exists in Ohio as to the delivery of possession in the case of pledges from that which obtains in the case of sales. Section 8619, G. C. (Rev. Stat., § 4197) is cited:

"SEC. 8619. When goods and chattels remain for five years in the possession of a person, or those claiming under him, to whom a pretended loan thereof has been made, they shall be the property of such person, unless a reservation of a right to them is made to the lender in writing, and the instrument recorded within six months after the loan is made, in the recorder's office of the county where one or both of the parties reside, or unless such instrument is filed as provided by law with respect to chattel mort-

gages. But if a loan of goods and chattels is made to an art museum association within this State, such reservation of a right to them may be so made and recorded at any time within five years from the date of the loan."

But in the Code, this section is made a part of Chapter 4, entitled "Statute of Frauds and Perjuries." It partakes also of the nature of a statute of limitations. We are unable to see anything in it to establish the asserted distinction between sales and pledges, and we are unable to find that any such force has been given to it by the courts of Ohio.

The cases to which particular reference is made are *Gibson* v. *Chillicothe Bank*, 11 Oh. St. 311; *Thorne* v. *Bank*, 37 Oh. St. 254; and *Hunt* v. *Bode, Assignee*, 66 Oh. St. 255. All are decisions by the Supreme Court of the State. In the *Gibson Case*, in an action of trespass for levying upon and detaining certain property by virtue of an execution against their bailees, plaintiffs, in order to prove their property and right of possession, gave in evidence certain warehouse receipts, reading in substance as follows: "Received, Chillicothe, November 13, 1852, of Messrs. Gibson, Stockwell & Co., and for their account, the following property, in good order, which we agree to hold irrevocably subject to their order, they having a lien thereon for the full cost of the same." (p. 312.) It was held that the legal effect of such a receipt was to pass the general property and right of possession to the holder, and that this effect was not impaired by the recital that the holder had a lien upon the property. The court, in its opinion, recognized that receipts of this kind, from long and general use in commerce and trade, had come to have a well-understood import among business men, which (as the court said) ought not to be confounded or perhaps even qualified by a strict construction of the literal and grammatical meaning of the words employed. And the court proceeded to say, (p. 317): "The receipts in this case are in

some particulars variant from each other; and yet we have no doubt they would all be recognized by commercial men, as of like import and equal validity as warehouse receipts. And if so, they as absolutely transfer the general property of the goods and chattels therein expressed, as would a bill of sale. They are a kind of instrument extensively used by commercial men, as the most convenient mode of transfer and constructive delivery of property, and facilitating the ready realization of the price of products by the producer remote from market. Public policy, as well as respect to good faith, requires that those like other instruments of commerce, should be so regarded in courts, as not to unjustly impair confidence in them elsewhere. And this view of the legal effect of such instruments, we think fully sustained by the authorities cited by counsel; and especially by the case of *Gibson* v. *Stevens*, 8 How. Rep. 384." It was therefore held that in spite of the recital that *Gibson, Stockwell & Company* had a "lien thereon for the full cost of the same," the warehouse receipts tended to prove that the plaintiffs had a general ownership in the property, and that the trial court erred in ruling otherwise. The citation of *Gibson* v. *Stevens* is significant, because in that case this court, in an opinion by Mr. Chief Justice Taney, recognized that where personal property is from its character or situation not capable of actual delivery, the delivery of a warehouse receipt or other evidence of title is sufficient to transfer the property and right of possession to another; and also because this decision was based in large part upon the usages of trade and commerce.

In *Thorne* v. *Bank, ubi supra*, it was held that an instrument in the form of a warehouse receipt, executed by a debtor to his creditor, upon property owned by the debtor, who was not a warehouseman, and made for the sole purpose of securing the creditor, was void as against other creditors where the property remained in the possession of the debtor. The court cited and relied upon Rev.

Stat., § 4150, above quoted, and in effect held that the attempt by the warehouse receipts to establish a lien upon the personal property was in conflict with the policy of that section, and therefore invalid as to a creditor. *Gibson* v. *Chillicothe Bank* was distinguished upon the ground that in that case the warehouse receipts were offered to show ownership, and not a mere agreement for securing an indebtedness. It will, however, be observed that in the *Thorne Case* the property in question was in the possession of the borrowers, and there was nothing in its character or situation to prevent an actual delivery of it to the lender.

In *Hunt* v. *Bode, Assignee, ubi supra,* which is the most recent case upon the subject to which our attention has been called, one Stothfang had delivered to a bank certain warehouse receipts for whiskey as collateral for a loan of money made to him by the bank, and thereafter undertook to make a second transfer or pledge to another party, subject to the claim of the Bank. A copy of this instrument was served upon the Bank, and it was notified to retain possession of the warehouse receipts pledged with it as collateral security for its claim against the pledgor, and after it was duly paid, the balance of the receipts were to be turned over to the second pledgee. The transaction was sustained, the court remarking, (p. 268): "Delivery of the property pledged is generally essential to a valid pledge, and it is equally true that to make a valid sale or transfer of any species or article of personal property, a delivery of the property sold or transferred is necessary. . . . But it does not follow that actual or physical delivery should always accompany the sale or transfer, and this is also true as to the pledging of choses in action or other kinds of personal property. The delivery in some cases may be symbolical, such as the handing over the writing which constitutes the title to the property, just as was done in this case, to secure the Atlas National Bank

for the money it had loaned to Stothfang. He delivered to the bank, not the one hundred and sixty-five barrels of whiskey, but the warehouse receipts for the same, which were its muniment of title and control of the property they represented. And when the pledgor desired to secure the payment of the note held against him by Dieckmann, he executed and delivered to him the transfer of all interest in the receipts which would remain, after the bank's claim should be satisfied. This transfer was not strictly a pledge, but an assignment and transfer of the stated interest in the warehouse receipts; but if it is desired that we call it a pledge, as has been done by counsel, we still observe, that constructive possession in the second pledgee would be sufficient, if the intent to deliver such possession is clearly apparent. It is the application of the familiar rule, that the transfer is complete and delivery made, when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferree as the nature of the property and its situation will permit. In this case Stothfang owned a valuable equity in the warehouse receipts held by the bank, as their sale afterwards made manifest, and it was such interest in them that could be made the subject of sale and transfer, and even pledge, and certainly Stothfang gave to Dieckmann possession of all interest in and title to the receipts which would remain after the debt due the bank was satisfied. This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law."

We are unable to find in these decisions a recognition of the distinctions insisted upon by counsel for appellants. On the contrary, the Supreme Court of Ohio clearly recognizes the effectiveness of a symbolical delivery.

It is evident, also, that that court recognizes the force of a long continued commercial usage. And this lends peculiar significance to the conceded existence for more

than forty years of the custom and commercial usage set up by appellee in the amendment to his intervening petition, quoted in the prefatory statement. It is no answer to say that a trade custom or usage should not prevail against clear and unequivocal rules of law. This is a *petitio principii*. The question under consideration is whether certain portions of the written law are to be given by construction an effect different from that expressed in their language, on the ground that by authoritative decisions of the Supreme Court of the State the asserted policy has been found to be implied in them. Since it seems to us that neither the statutes nor the decisions go to the extent that is claimed for them by appellants, we may refer to the established custom as evidence of what has long been understood as the law; for, as this court held in *Gibson* v. *Stevens*, and as the Supreme Court of Ohio held in *Gibson* v. *Chillicothe Bank*, such usages are to be judicially recognized as a part of the law.

It results that by the local law the transactions in question, as between Rohrer and Pattison, had the effect of transferring to the latter the legal title and right to possession for the purposes of the agreement between them; and we think it is a matter of indifference whether the transaction be called a pledge, or an equitable pledge, or an equitable lien. The substance of the matter is for present purposes the same.

This being so, the superiority of Pattison's right over that of the trustee in bankruptcy is established by the decision of this court in *Taney* v. *Penn Bank*, 232 U. S. 174.

Decree affirmed.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS *v.* HARRIS.

ERROR TO THE JUSTICE COURT, PRECINCT NO. 6, HOPKINS COUNTY, TEXAS.

No. 604. Submitted February 24, 1914.—Decided June 8, 1914.

Missouri, Kansas & Texas Ry. v. *Cade*, 233 U. S. 642, followed to effect that the Texas Statute of 1909 allowing an attorney fee in certain cases for claims of less than a specified amount is not unconstitutional under the due process or equal protection provisions of the Fourteenth Amendment.

A state police regulation designed to promote the payment of small but well founded claims and to discourage litigation in respect thereto, and which only incidentally includes claims arising out of interstate commerce, does not constitute a direct burden on interstate commerce, and is not, in the absence of legislation by Congress on the subject, repugnant to the commerce clause or otherwise in conflict with Federal authority. *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122.

When Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject are superseded.

The mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not, in the absence of specific action by Congress or the Commission, interfere with the police power of the States as to matters otherwise within their respective jurisdictions and not directly burdening interstate commerce even though such commerce may be incidentally affected. *Southern Ry. Co.* v. *Reid*, 222 U. S. 424.

While the Carmack Amendment supersedes state legislation on the subject of the carrier's liability for loss of interstate shipments, it does not interfere with a state statute incidentally affecting the remedy for enforcing that liability, such as a moderate attorney fee in case of recoverable contested claims for damages. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, distinguished.

The Texas Statute of 1909 allowing a reasonable attorney's fee as a

part of the costs in suits on contested but proper claims of less than $200 is not unconstitutional as applied to claims for loss on interstate shipments nor is it inconsistent with any of the provisions of the Act to Regulate Commerce.

THE facts, which involve the constitutionality of a statute of the State of Texas allowing an attorney's fee in certain actions based on claims for small amounts against railway companies, 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 of the legislature in question is void because in conflict with that provision of § 1 of the Fourteenth Amendment to the Constitution of the United States which guarantees the equal protection of the laws.

The act violates that provision of § 1 of the Fourteenth Amendment which prohibits the taking of property without due process of law.

The act is in part a regulation of, a burden upon, and an interference with, interstate commerce, contrary to subdivision 3, § 8, Article I of the Constitution of the United States, and is in conflict with the Act to Regulate Commerce approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, 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.

The provisions of the act of the legislature in question relating to overcharges and loss and damage claims, as to interstate shipments, are void.

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; *Atl. Coast Line* v. *Mazursky*, 216 U. S. 122; *Atl. 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 of Georgia R. R. Co.* v. *Murphey*, 196 U. S. 194; *Chi., M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165; *C., R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *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 Mutual Life Assn.* v. *Mettler*, 185 U. S. 308; *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. *Moore*, 83 S. W. Rep. 362; *Hale* v. *Henkel*, 201 U. S. 76; *H. & T. C. R. R. Co.* v. *Mayes*, 201 U. S. 321; *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; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *M., K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Mo. Pac. Ry. Co.* v. *Larabee Mills*, 211 U. S. 612; *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. & S. Ry. Co.* v. *Wynne*, 224 U. S. 354; *St. L. & S. F. Ry. Co.* v. *Mathews*, 165 U. S. 1; *Seaboard Air Line* v. *Seegars*, 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 Ry. Co.* v. *Greene*, 216 U. S. 400; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444; *West. Un. Tel. Co.* v. *Milling Co.*, 218 U. S. 406; *Yazoo & Miss. R. R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1; *Yazoo & Miss. 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 defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

In this case the plaintiff below (now defendant in error) recovered a judgment for three dollars and fifty cents damages for loss of certain freight that was shipped from St. Louis, Missouri, consigned to plaintiff at Como, Texas, and delivered by the initial carrier to defendant for transportation to destination; the loss having occurred on defendant's line in Texas. The judgment includes an attorney's fee of ten dollars, allowed by virtue of the local statute approved March 13, 1909, Laws p. 93, Texas Rev. Civ. Stat. 1911, Arts. 2178 and 2179, which was under consideration in *Missouri, Kansas & Texas Ry.* v. *Cade*, decided May 11, 1914, 233 U. S. 642, and is set forth *verbatim* in a marginal note to the opinion in that case. The controversy turns upon the allowance of the attorney's fee, the same Federal questions having been raised in the state court and in this court that were raised in the *Cade Case*. So far as the Fourteenth Amendment is concerned, our opinion in that case renders further discussion unnecessary. But since the claim of the present plaintiff was based upon freight lost in interstate commerce, we must now pass upon the question whether the allowance of an attorney's fees in such a case, pursuant to the Texas statute, is repugnant to the Commerce Clause of the Federal Constitution or the Act to Regulate Commerce and amendments thereof.

By way of preface, we should repeat that the state court of last resort has construed the act as relating only to the collection of claims not exceeding $200 in amount; that by its terms 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"; and

that, in the *Cade Case*, we have held it to be a police regulation designed to promote the prompt payment of small but well founded claims, and to discourage unnecessary litigation in respect to them; and have held it, in its general application, to be not repugnant to either the "equal protection" or the "due process" clauses of the Fourteenth Amendment.

Such being the character of the statute, and it having a broad sweep which only incidentally includes claims arising out of interstate commerce, it follows that it cannot be held to constitute a direct burden upon such commerce and hence repugnant to the commerce clause of the Constitution, or otherwise in conflict with the Federal authority, in the absence of legislation by Congress covering the subject. To this extent, the case is controlled by the decision in *Atlantic Coast Line R. R.* v. *Mazursky*, 216 U. S. 122, where it was held that a South Carolina statute which required common carriers doing business in the State to settle claims for loss or damage to property while in the possession of the carrier within forty days, in case of shipments wholly within the State, and within ninety days, in case of shipments from without the State, and that failure to adjust and pay a claim within the prescribed period should subject the carrier to a penalty of fifty dollars in case the full amount claimed was recovered, as the statute was applied to a claim for loss or damage to interstate freight while in the possession of the carrier within the State, was not an unwarrantable interference with interstate commerce, in the absence of legislation by Congress, but was rather a regulation in aid of the performance by the carrier of its legal duty. The decision was rested upon the authority and reasoning of *Sherlock* v. *Alling*, 93 U. S. 99, 104; *Smith* v. *Alabama*, 124 U. S. 465, 476; *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 96; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 660; *Chicago, Mil. & St. P. Ry.* v. *Solan*, 169 U. S. 133, 137; *Pennsyl-*

vania R. R. Co. v. *Hughes*, 191 U. S. 477, 491; *Missouri Pacific Ry.* v. *Larabee Mills*, 211 U. S. 612, 623. And see *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S. 406, 416; *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; *Minnesota Rate Cases*, 230 U. S. 352, 402, 408, 410.

But the "Act to Regulate Commerce" (Act of February 4, 1887, c. 104, 24 Stat. 379), is now invoked, together with its amendments, and especially that part of the Hepburn Act of June 29, 1906, known as the Carmack Amendment (c. 3591, 34 Stat. 584, 595); and it remains to be considered whether the Texas statute, as applied to claims for loss or damage to interstate freight while in the possession of the carrier in the State of Texas, is repugnant to this Federal legislation. It is of course settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject are superseded. *Northern Pacific Ry.* v. *Washington*, 222 U. S. 370, 378; *Erie Railroad Co.* v. *New York*, decided May 25, 1914, 233 U. S. 671. But it is equally well settled that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the States to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with. *Missouri Pacific Ry.* v. *Larabee Mills*, 211 U. S. 612, 623; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 437.

In the *Larabee Mills Case* it was held that the railroad company, by engaging in the business of a common carrier, had become subject to certain duties imposed upon it by general law, including the obligation to treat all shippers alike; that the enforcement of this duty and the regulation of matters pertaining to it were within the authority

of the State, although interstate commerce was thereby indirectly affected; and that until specific action by Congress or the Commission, the control of the State over such incidental matters remained undisturbed. Hence, a decision by the Supreme Court of Kansas, awarding a mandamus to require the company to restore the service of transferring cars between the lines of another railroad and the Larabee Mills and Elevator, in aid of interstate and intrastate shipments alike, was affirmed. This case arose after the enactment of the Hepburn Act.

On the other hand, it was held in the *Reid Case* that since Congress had taken control of the subject of the making of rates and charges, and by § 2 of the Hepburn Act had forbidden the carrier to engage or participate in transportation unless the rates, fares, and charges had been filed and published in accordance with the provisions of the act, a state law requiring railroad companies to receive freight for transportation whenever tendered at a regular station and to forward the same over the route selected by the person offering the shipment, under a penalty of fifty dollars a day besides all damages incurred, was in necessary conflict, since it required the carrier to do the very things forbidden by the Federal law.

So in *Chicago, R. I. &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, it was held that since by the Hepburn Act, Congress had legislated concerning deliveries of cars in interstate commerce by carriers subject to the act, specifically requiring the carrier to provide and furnish "transportation" (cars being embraced within the definition of the term) upon reasonable request, the authority of the State of Minnesota to legislate upon the subject of the delivery of cars when called for to be used in interstate traffic was superseded. And see *Yazoo & Mississippi R. R.* v. *Greenwood Grocery Co.*, 227 U. S. 1.

These cases recognize the established rule that a state law enacted under any of the reserved powers—especially

if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In *Reid* v. *Colorado*, 187 U. S. 137, 148, the court, speaking by Mr. Justice Harlan, said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'In the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot* v. *Davenport*, 22 How. 227, 243." In *Savage* v. *Jones*, 225 U. S. 501, 533, the court said: "When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power [citing cases]. But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." [Citing many cases.]

With respect to the specific effect of the Carmack

Amendment (set forth in the margin [1]), it has been held, in a series of recent cases (*Adams Express Co.* v. *Croninger*, 226 U. S. 491; *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; *Missouri, Kans. & Tex. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Chicago, R. I. & Pac. Ry. Co.* v. *Cramer*, 232 U. S. 490; *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97), that the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto, have been superseded.

But the Texas statute now under consideration does not in anywise either enlarge or limit the responsibility of the carrier for the loss of property entrusted to it in transportation, and only incidentally affects the remedy for enforcing that responsibility. As pointed out in the *Cade*

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[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.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

Case, supra, it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney, applicable in cases where the carrier unreasonably delays payment of a just demand and thereby renders a suit necessary. In fact and effect, it merely authorizes a moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep, among which are incidentally included claims for freight lost or damaged in interstate commerce.

It is true that in *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 186, 208 (a case arising since the Hepburn Act), it was held that § 8 of the act of February 4, 1887, does not authorize the allowance of a counsel or attorney's fee in an action for loss of property entrusted to the carrier for purposes of transportation. But that is far from holding that it is not permissible for a State, as a part of its local procedure, to permit the allowance of a reasonable attorney's fee, under proper restrictions. In claims of this character, based upon the ordinary liability of the common carrier, although regulated by the Commerce Act, the state courts have full jurisdiction, and some differences respecting the allowance of costs and the amount of the costs are inevitable, as being peculiar to the *forum.* And we think that where a State, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, establishes by a general statute otherwise unexceptionable the policy of allowing recovery of a moderate attorney's fee as a part of the costs, in cases where, after specific claim made and a reasonable time given for investigation of it, payment is refused, and the claimant succeeds in establishing by suit his right to the full amount demanded, the application of such statute to actions for goods lost in interstate commerce is not inconsistent with the provisions of the Commerce Act and its amendments. The local

statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the State may enforce it in such a case as the present.

Judgment affirmed.

JOHNSON *v.* GEARLDS.

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

No. 802. Argued May 1, 1914.—Decided June 8, 1914.

Where complainant's entire case rests on the construction of treaties with Indians in regard to reservations and on the claim that certain of such treaties have been repealed by the subsequent admission of the Territory within which the reservations are situated, this court has jurisdiction of a direct appeal from the District Court under § 238, Judicial Code.

The provision in Article VII of the treaty with the Minnesota Chippewa Indians of 1855, that the laws of Congress prohibiting the manufacture and introduction of liquor in Indian country shall be in force within the entire boundaries of the country ceded by that treaty to the United States until otherwise provided by Congress, relates to the outer boundaries and includes all the reservations that lie within.

It is within the constitutional power of Congress to prohibit the manufacture, introduction or sale of intoxicants upon Indian lands, including not only land reserved for their special occupancy, but also lands outside of the reservations to which they may naturally resort; and this prohibition may extend even with respect to lands lying within the bounds of States.

Article VII of the Chippewa treaty of 1855 was not repealed directly or by implication by the subsequent act of Congress admitting Minnesota into the Union, nor was that article repealed by the effect of the subsequent treaties with the same bands of Chippewas of 1865 and 1867; but the intent of treaties of 1855, 1865 and 1867, as construed

together, was that the acts of Congress relating to the introduction and sale of liquor in Indian country should continue in force within the entire boundaries of the country in question until otherwise provided by Congress.

Article VII of the Chippewa Treaty of 1855 has not been superseded by any of the provisions of the Nelson Act of 1889, or the cessions made by the Indians to the United States pursuant thereto; nor has that article been superseded by reason of any change in the character of the Territory affected by the treaty and the status of the Indians therein.

The abrogation of an article in an Indian treaty prohibiting the sale of liquor within territory specified therein until Congress otherwise provides is, in the absence of any considerable number of Indians remaining in that territory, a question primarily for Congress and not for the courts.

The fact that there has been a recent communication and recommendation from the President to Congress on a particular subject and Congress has not acted thereon is evidence that the problem is not so entirely obvious of solution that the courts can declare it to be beyond the range of legislative discretion.

Article VII of the Chippewa Treaty of 1855 having provided for the prohibition against sale of liquor within the entire territory ceded by that treaty until Congress should otherwise provide, *held* that notwithstanding the subsequent admission of Minnesota to the Union, and the later treaties with the Chippewas of 1865 and 1867 and the changed condition of the country and the status of the Indians, Congress not having otherwise provided, the prohibition is still in force throughout that entire territory including the City of Bemidji in which there are but few Indians and in the vicinity of which there is a large area of territory unrestricted by the prohibitions of Article VII.

183 Fed. Rep. 611, reversed.

THIS is a direct appeal from a final decree of the District Court, rendered April 20, 1912, granting to appellees (who were complainants below, and will be so designated), a permanent injunction against appellants (defendants below), in accordance with the prayer of the amended bill of complaint. It appears that complainants are severally residents and citizens of the City of Bemidji, Beltrami County, Minnesota, and at the time of the filing of the

bill were, and for a considerable time had been, engaged in business there as saloon-keepers, selling at retail spirituous, vinous and malt liquors at their respective places of business in that city, each of them having paid to the Federal and state governments respectively, the necessary tax and license fees, and having a receipt from the Federal Government and a liquor license issued under the authority of the State of Minnesota by the municipal council and officials of the city. The bill alleged that each of the complainants had refrained from selling or disposing of any liquor to Indians, or individuals of Indian blood, and had complied with the Federal and state laws in this and in other respects; that each of them had built up and established a profitable and lucrative trade; and that the jurisdictional amount was involved. It averred that defendants, being citizens of other States, and acting in conjunction as special officers under the Interior Department of the United States Government, were threatening to enforce within the City of Bemidji the provisions of §§ 2139 and 2140 of the Revised Statutes of the United States and amendments thereto, and on December 9, 1910, had ordered complainants and other licensed saloon-keepers in Bemidji to close their saloons and cease sales of liquor, and ship away their stock, threatening that otherwise they would destroy the stocks of liquor in the possession of complainants, on the ground that under Article VII of a treaty made on the twenty-second day of February, 1855, between the United States and certain bands of Chippewa Indians, certain territory mentioned in the treaty, including what is now the City of Bemidji, was subject to the laws of the United States respecting the sale of liquors in the Indian country.

To the bill as orginally filed defendants interposed a demurrer, which was overruled, and a temporary injunction was granted. 183 Fed. Rep. 611. Thereafter, the cause was brought to final hearing upon an amended bill

and a reamended answer, and the court, adhering to its former conclusion, rendered a final decree, as already mentioned.

The pertinent historical facts, as deduced from the averments of the amended pleadings, are as follows: On and prior to February 22, 1855, certain bands of the Chippewa Tribe of Indians, known as the Mississippi bands and the Pillager and Lake Winnibigoshish bands, were in possession of the greater portion of the lands north of parallel 46, within the boundaries of the then Territory of Minnesota. Their country constituted a wilderness, almost wholly uninhabited by civilized people. On the date mentioned, these bands entered into a treaty with the United States, which was approved by the Senate and proclaimed by the President shortly thereafter (10 Stat. 1165). By its first article the Indians ceded and conveyed to the United States "all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries:" [Here follows a particular description, by natural boundaries, of a tract of country said to contain about 21,000 square miles.] By the same Article the Indians further relinquished and conveyed to the United States any and all right, title, and interest, of whatsoever nature, that they then had in and to any other lands in the Territory of Minnesota or elsewhere. This Article mentions no exception or reservation from the lands ceded or granted. By Article II there was "reserved and set apart, a sufficient quantity of land for the permanent homes of the said Indians: the lands so reserved and set apart to be in separate tracts, as follows." The separate tracts were then briefly described or indicated. For the Mississippi bands seven reservations were set apart, which came to be known as the Mille Lac, Rabbit Lake, Gull Lake, Pokagomon Lake, Sandy Lake, and Rice Lake reservations; and besides these, a section of land was

reserved for one of the Indian chiefs. For the Pillager and Lake Winnibigoshish bands, three reservations were set apart, known from their respective locations as the Leech Lake, Lake Winnibigoshish, and Cass Lake reservations.

The seventh Article of the treaty is as follows:

"Article VII. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

By act of February 26, 1857, c. 60, 11 Stat. 166, the inhabitants of a portion of the Territory, including the lands ceded by the Chippewas as above, were authorized to form a state government and come into the Union on an equal footing with the original States. The act contained no condition with reference to the Treaty of 1855 or the rights of the Indians to any lands within the boundaries of the State. A state constitution was formed, by which Indians were given the right to vote under certain circumstances, and persons residing on Indian lands were declared entitled to enjoy the rights and privileges of citizens as though they lived in any other portion of the State, and to be subject to taxation. This constitution having been ratified and adopted by the people, Congress, by act of May 11, 1858, c. 31, 11 Stat. 285, admitted the State "on an equal footing with the original States in all respects whatever." And by § 3 it was enacted that all the laws of the United States, not locally inapplicable, should have the same force and effect within that State as in other States of the Union.

Another treaty was made between the Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewas and the United States under date May 7, 1864, which was ratified and proclaimed in the following year and is known as the Treaty of 1865 (13 Stat. 693). It took the place of a treaty of March 11, 1863 (12 Stat. 1249). By its first section the Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomon Lake, and Rice Lake reservations as described in the Treaty of 1855, were ceded to the United States, with an exception not now pertinent; and in consideration of this cession, the United States agreed to set apart for the future home of the Chippewas of the Mississippi a considerable tract of land (part of the great tract ceded in 1855), embraced within designated boundaries, expressly excepting however the reservations made in the Treaty of 1855 for the Pillager and Lake Winnibigoshish bands, which were included within the boundaries mentioned. The lands thus set apart for the Chippewas of the Mississippi contained all the territory now within the limits of the City of Bemidji and the lands adjacent to it for a distance of several miles in all directions.

By a treaty made between the United States and the Chippewas of the Mississippi dated March 19, 1867, ratified and proclaimed in the same year (16 Stat. 719), these bands ceded to the United States the greater portion (estimated at 2,000,000 acres) of the lands secured to them by the treaty of 1865, and in consideration of this cession, the United States set apart for the use of the same Indians a tract to be located in a square form as nearly as possible, with lines corresponding to the Government surveys, the reservation to include White Earth Lake and Rice Lake, and to contain thirty-six townships. This reservation came to be known as the White Earth Reservation. It lies within the exterior boundaries of the cession of 1855.

The territory ceded to the United States by the treaty

of 1867 contains what is now the City of Bemidji and the country about it for miles in every direction.

By an act of January 14, 1889, known as the Nelson Act, c. 24, 25 Stat. 642, the President was authorized to designate Commissioners to negotiate with all the different bands of Chippewa Indians in Minnesota for the complete cession and relinquishment of their title and interest in all their reservations, except the White Earth and Red Lake Reservations, and in so much of these two reservations as in the judgment of the Commission was not required to make and fill the allotments required by this and existing acts. The act provided that a census should be taken, and that after the cession and relinquishment had been approved, all the Chippewa Indians in the State, except those on the Red Lake Reservation, should be removed to the White Earth Reservation, and lands should then be allotted to the Indians in severalty, in conformity with the act of February 8, 1887, c. 119, 24 Stat. 388, and the surplus lands disposed of by sale, and the proceeds placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, to bear interest payable annually for fifty years, and at the end of that period the fund to be divided and paid to all of said Chippewas, and their issue then living, in cash. By the first section of this act the acceptance and approval of the cession and relinquishment of the lands by the President of the United States was to be deemed full and ample proof of the assent of the Indians, and to operate as a complete extinguishment of the Indian title without further act or ceremony. Commissioners were appointed accordingly, and agreements were entered into between them and the several bands of Chippewas, by which the Indians accepted and ratified the provisions of the act and ceded to the United States all their right, title, and interest in their reservations, excepting portions of

the White Earth and Red Lake Reservations, and these cessions were approved by the President on the fourth day of March, 1890.

Since the making of the Treaty of 1855 the country then ceded to the United States, with the exception of the portions set apart as Indian reservations, has been largely developed, gradually at first, but with great rapidity during recent years, and all the land has become populated by white people and opened up to settlement and organized as political subdivisions of the State, and in the larger portion of the territory industries have been established and commercial interests have grown up, so as to materially change the situation that existed at the time of the making of the treaty. According to the census of 1910, the counties affected by that treaty show a total white population of 382,191. Bemidji is the county seat of Beltrami County, and is a municipal corporation, organized under the laws of the State as a city, containing within its corporate limits about 7,000 inhabitants, and, in connection with adjacent municipalities, constituting a population of about 9,000 people. The city is reached by five lines of railroads, three of which have transcontinental connections. The country surrounding it is highly developed, and there are no Indian habitations within twenty miles in any direction from the city.

The original Red Lake Indian Reservation lay immediately north of the great tract covered by the cession of 1855, and was not subject to the treaty of that year. Pursuant to the Nelson Act of January 14, 1889, a considerable portion of this reservation was relinquished to the United States, and has been opened up to settlement, with the result that there is now a strip of territory about fifteen miles in width, lying a few miles north of Bemidji, which is admittedly exempt from the provisions of any treaty or law relative to the introduction of intoxicating liquors in the Indian country; and in that strip the sale of intoxi-

cating liquors is actually conducted without interference on the part of the Government of the United States.

Mr. Assistant Attorney General Wallace for appellants:

This court has jurisdiction under § 238, Judicial Code, because the construction or validity of Article VII of the Treaty of 1855 is drawn in question; the construction or application of the Constitution is involved; the construction of Treaties of 1865 and 1867 is drawn in question. *United States* v. *Wright*, 229 U. S. 226. "Validity" involves existence of treaty. The Minnesota Enabling Act did not expressly repeal Article VII.

The question of implied repeal depends on the relative potency of state police power and the Federal interstate commerce power.

The court below erred in holding that the state police power was dominant.

Article VII of the treaty was in force in 1910.

It was not repealed by the Minnesota Enabling Act.

Webb Case, 225 U. S. 663, and *Wright Case*, 229 U. S. 226, control this case.

The *Perrin, Dick*, and *Whisky Cases* are like the case at bar, except that Congress acted here before, and there after, Statehood.

If Congress still had power after Statehood, implied repeal by Enabling Act is not possible.

A reservation of power in Enabling Act is not necessary.

Congress could not reserve a power it might not enjoy without reservation.

The State has no police power over Indian commerce.

The *McBratney* and *Draper Cases* are distinguished in the *Donnelly Case*, and *Ward* v. *Race Horse*, 163 U. S. 504, is distinguished.

The *Friedman Case* was overruled by the Circuit Court of Appeals in 180 Fed. Rep. 1006.

Article VII was not repealed by Treaties of 1865 or 1867, and there has been no express repeal.

It was not necessary to repeat prohibition in 1865 or 1867 because Article VII in the 1855 treaty covered and protected the whole area.

The need for protection of Article VII, was as great in 1865 and 1867 as in 1855.

The rule that reconveyance to a grantor cancels existing covenant is not applicable in this case, because there has been no such reconveyance in fact and because that rule does not apply to treaties.

Article VII had not become a purely arbitrary regulation in 1910.

Three classes of Indians are concerned: full-blood White Earth and all Leech Lake allottees holding prior to act of May 9, 1906. These may be citizens but cannot alienate lands.

All of the above are holding allotments only since the act of 1906. These are not citizens and cannot alienate.

Mixed-blood White Earth allottees are citizens of the United States and of the State.

All save class 3 are still in wardship (without regard to other reasons), because the trust period has not expired.

The wardship of mixed blood White Earth allottees depends on whether they are still regarded as a dependent people by the executive and legislative branches of the Government.

The pleadings do not show that this protection is purely arbitrary as applied to tract A.

The open 15-mile strip never was protected by treaty.

There is present need of 10,000 Indians for this protection, and there is inadequacy of state laws to keep the liquor out.

In support of these contentions, see *Altman & Co.* v. *United States*, 224 U. S. 583; *The Cherokee Tobacco*, 11 Wall. 616; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445,

451; *Cornell* v. *Green*, 163 U. S. 75; *Couture* v. *United States*, 207 U. S. 581; *Coyle* v. *Oklahoma*, 221 U. S. 559; *Dick* v. *United States*, 208 U. S. 340; *Donnelly* v. *United States*, 228 U. S. 243; *Draper* v. *United States*, 164 U. S. 240, 247; *Ex parte Webb*, 225 U. S. 663; *Foster* v. *Neilson*, 2 Pet. 314; *Friedman* v. *United States Exp. Co.*, 180 Fed. Rep. 1006; *Georgia Rd. &c. Co.* v. *Walker*, 87 Georgia, 204; *Green* v. *Edwards*, 15 Tex. Civ. App. 382; *Holder* v. *Aultman*, 169 U. S. 81; *Hallowell* v. *United States*, 221 U. S. 312; *Jones* v. *Walker*, 2 Paine, 288; *Loeb* v. *Township*, 179 U. S. 472; *Matter of Heff*, 197 U. S. 488; *Matter of Rickert*, 188 U. S. 432; *McKay* v. *Kalyton*, 204 U. S. 458, 466; *Mosier* v. *United States*, 198 Fed. Rep. 54; *Muse* v. *Arlington Hotel Co.*, 168 U. S. 435; *People's Bank* v. *Gibson*, 161 Fed. Rep. 286, 291; *Perrin* v. *United States*, 232 U. S. 478; *Petit* v. *Walshe*, 194 U. S. 216; *Pollard* v. *Hagan*, 3 How. 212; *Silverman* v. *Loomis*, 104 Illinois, 142; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *United States* v. *Celestine*, 215 U. S. 287; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *McBratney*, 104 U. S. 621; *United States* v. *Pelican*, 232 U. S. 442; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Sutton*, 215 U. S. 291; *United States* v. *Wright*, 229 U. S. 226; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *United States Exp. Co.* v. *Friedman*, 191 Fed. Rep. 673; *Ward* v. *Race Horse*, 163 U. S. 504; *Wilson* v. *Shaw*, 204 U. S. 24, 33.

Mr. Charles P. Spooner, with whom *Mr. Marshall A. Spooner*, *Mr. John C. Spooner*, *Mr. Fred W. Zollman* and *Mr. Joseph P. Cotton*, were on the brief, for appellees:

This court has not jurisdiction of this appeal under § 238, Judicial Code, because the construction or validity of Article VII of the treaty of 1855 is not drawn in question; the construction or application of the Constitution is not involved; the construction of the treaties of 1865 and 1867 is not drawn in question.

Article VII of the treaty of 1855 was repealed by the Minnesota Enabling Act; it was also repealed by the treaties of 1865 and 1867; and it had expired in 1910 because of the act of January 14, 1889, and the change in the character of territory and the status of Indians.

In support of these contentions, see *Bates* v. *Clark*, 95 U. S. 204; *Balt. & Poto. R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445; *Clough* v. *Curtis*, 134 U. S. 361; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Linford* v. *Ellison*, 155 U. S. 503; *Matter of Heff*, 197 U. S. 488; *McLean* v. *Railroad Co.*, 203 U. S. 38; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131; *New Orleans* v. *Water Works Co.*, 142 U. S. 79; *Snow* v. *United States*, 118 U. S. 346; *Swearingen* v. *St. Louis*, 185 U. S. 38; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *United States* v. *Celestine*, 215 U. S. 278, 290; *United States* v. *Dick*, 208 U. S. 340; *United States* v. *Fisher*, 2 Cranch, 358; *United States* v. *Forty Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Lynch*, 137 U. S. 280; *United States* v. *Perrin*, 232 U. S. 478; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Wright*, 229 U. S. 226; *Wiggan* v. *Connolly*, 163 U. S. 56.

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

This direct appeal is taken under § 238, Jud. Code (act of March 3, 1911, c. 231, 36 Stat. 1087, 1157), which allows such an appeal (*inter alia*) "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." Our jurisdiction is invoked upon three grounds: (a) that the construction or validity of Article VII of the Treaty of 1855 is drawn in question; (b) that the construction or application of the Constitution is

involved; (c) that the construction of the Treaties of 1865 and 1867 is drawn in question. There is a motion to dismiss, based upon the ground that none of these contentions is well founded. We think the motion must be denied. The court below, in overruling the demurrer, based its decision upon the ground that the treaty of 1855 was necessarily repealed by the admission of the State of Minnesota into the Union upon an equal footing with the original States. This decision was based upon the bill as originally framed, but the amendments made no change affecting this ground of decision; and it is evident from the record that in granting the final decree the court adhered to the view expressed in overruling the demurrer. It is insisted by appellants, with some force, that this view was based upon grounds that involved the construction or application of the Constitution of the United States; and that for this reason the direct appeal lies. We find it unnecessary to consider the point, since it seems to us that the entire case for complainants rests at bottom upon grounds that involve the construction of the three treaties referred to, especially that of 1855.

The bill, either in its original or its amended form, did not expressly assert as a ground for relief that the treaty of 1855 had been repealed, in whole or in part, by the admission of the State. On the contrary, relief was prayed upon the ground that the second clause of Article VII (that which related to the liquor traffic and was to remain in force until otherwise provided by Congress) applied only to the ceded territory, and not to the reservations set apart within that territory; that by the Treaty of 1865 those reservations were ceded to the United States, and ceased to be Indian country in any sense; and that by the subsequent cession in the Treaty of 1867 the reservation of 1865 in turn was vested in the United States, and therefore ceased to be Indian country; and, finally, that Article VII of the treaty of 1855 had expired at the time of

the acts complained of in the bill (1910) by virtue of the provisions of the act of January 14, 1889, and the cessions made to the United States by the Chippewas of Minnesota pursuant to that act, and because of the changes wrought by time in the character of the territory included in the Treaty of 1855 and the status of the Indians therein. These grounds of relief are reiterated in the amended bill, and the averments of the amended answer are calculated to meet them. And the principal force of the arguments on both sides is addressed to the construction of the several treaties referred to. For this reason, if for no other, the direct appeal is well taken.

Upon the merits, we may well begin with the disputed portion of the Treaty of 1855:

"Article VII. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

The reference to previous laws clearly points to the act of June 30, 1834, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers" (c. 161, 4 Stat. 729), and kindred acts. The act of 1834 was a revision of previous enactments, and contains many provisions for the regulation of trade and intercourse. Its twentieth and twenty-first sections (4 Stat. 732) prohibit the introduction or manufacture of, or traffic in, spirituous liquor or wine within the Indian country. From them, §§ 2139, 2140, and 2141, Rev. Stat., were derived.

By the first section of the act of 1834, the term "Indian

country" was defined, for the purposes of that act, as meaning land to which the Indian title had not been extinguished. At the making of the treaty, therefore, the restriction respecting the liquor traffic was in force within the ceded area, because until then the Indian title had not been extinguished. It was the evident purpose of Article VII to continue the restriction in force in the ceded territory, notwithstanding the extinguishment of the Indian title. Such stipulations were not unusual. A contemporaneous treaty with the Winnebagoes contained a similar one. 10 Stat. 1172, 1174, Article VIII. And it has been uniformly recognized that such stipulations amount in effect to an amendment of the statute, so as to make the restriction effective throughout the ceded territory. *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 196; *Bates* v. *Clark*, 95 U. S. 204, 208.

The fundamental contention that underlies the entire argument for complainants is that the first part of Article VII had for its object that the laws of Congress, present and future, regulating trade and intercourse with the Indian tribes, were to continue and be in force within the reservations created by the treaty; while the latter portion of the Article had for its object to keep in force in the ceded country—which, it is said, excludes the reservations—those portions of the laws that prohibited the introduction, manufacture, use of, and traffic in ardent spirits, etc., in the Indian country until otherwise provided by Congress; the particular insistence being that the latter clause applies merely to the so-called ceded territory, and not to the lands included within the reservations.

With this construction of the treaty we cannot agree. We think it rests upon a misconception of the fair import of the terms employed in Article VII, whether considered alone or together with the context, and fails to give due effect to the reason and spirit of the stipulation.

It seems to us that in the qualifying clause—"within

the entire boundaries of the country herein ceded to the United States";—the words "entire boundaries" are equivalent to "outer boundaries," and therefore include the reservations that lie within. And this agrees with the context; for, if we turn back to see what is "herein ceded," we find, that by the terms of Article I the cession is of all the right, title, and interest of the Indians in the lands owned and claimed by them included within designated boundaries (this being the great tract in question), and then, in a separate clause, a relinquishment and conveyance of all right, title, and interest of the Indians in any other lands in the Territory of Minnesota or elsewhere. There is here no suggestion that the reservations are excepted out of the cession. On the contrary, Article I in terms vests the Indian title in the United States as to all the described lands, including the reservations mentioned in Article II. The latter article reserves a number of comparatively small and isolated tracts "for the permanent homes of the said Indians." Of these, all are within the outer boundaries of the cession excepting the Mille Lac Reservation, which lies outside. Reading the two articles together, it is evident that the framers of the treaty intended that the reservations themselves should become the property of the United States, subject only to a trust for the occupancy of the Indians. This is placed beyond controversy when we observe that by the latter part of Article II it was provided that the President of the United States might cause the reservations or portions thereof to be surveyed; assign a reasonable quantity, not exceeding eighty acres in any case, to each head of a family or single person over twenty-one years of age for his or their separate use; issue patents for the tracts so assigned, which tracts were to be exempt from taxation, levy, sale, or forfeiture, and not to be aliened or leased for a longer period than two years at one time, unless otherwise provided by the legislature of the State with the

assent of Congress; not to be sold or aliened in fee for a period of five years after the date of patent, and not then without the assent of the President; and that prior to the issue of the patents the President might make rules and regulations respecting the disposition of the lands in case of the death of the allottee, etc.

The subdivision of the reservations, allotments to individual Indians, and the ultimate alienation of allotments, being thus in view at the making of the treaty, it is unreasonable to give such a construction to the stipulation contained in the second portion of Article VII as would defeat its object, by removing the restriction from scattered parcels of land whenever it should come to pass that the Indian title therein was extinguished. The restriction would be of little force unless it covered the entire ceded area *en bloc*, so that no change in the situation of the reservations by way of extinguishing the residue of Indian title or otherwise should operate to limit its effect. And so, upon the whole, we deem it manifest that the second clause of Article VII dealt with the entire ceded country, including the reservations, as country proper to be subjected to the laws relating to the introduction, etc., of liquor into the Indian country until otherwise provided by Congress. It was evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, would be at liberty to roam and to hunt throughout the entire country, as before. The purpose was to guard them from all temptation to use intoxicating liquors.

That it is within the constitutional power of Congress to prohibit the manufacture, introduction, or sale of intoxicants upon Indian lands, including not only lands reserved for their special occupany, but also lands outside of the reservations to which they may naturally resort; and that this may be done even with respect to lands lying within the bounds of a State, are propositions so

thoroughly established, and upon grounds so recently discussed, that we need merely cite the cases. *Perrin* v. *United States*, 232 U. S. 478, 483; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 195, 197; *Dick* v. *United States*, 208 U. S. 340.

And we cannot agree with the District Court that Article VII of the treaty of 1855 was repealed by the Minnesota Enabling Act, or by the admission of that State into the Union upon equal terms with the other States. Neither the Enabling Act nor the Act of Admission contains any reference to the treaty, although the latter was so recent that it can hardly have been overlooked. The court seems to have considered that the continued existence of Article VII, so far as it prohibited the introduction, manufacture, and sale of liquors within the ceded country outside of the reservations, was inconsistent with the "equal footing" clause of the Enabling and Admitting Acts. That there is no such inconsistency results very plainly, as we think, from the reasoning and authority of the cases above cited. The court deemed that *United States* v. *Forty-three Gallons of Whiskey*, *supra*, and *Dick* v. *United States*, *supra*, were distinguishable upon the ground that in each of those cases the treaty under consideration was made after the State had been admitted into the Union. But if the making of such a treaty after the admission of the State is not inconsistent with the "equal footing" of that State with the others—as, of course, it is not—it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.

In *Ex parte Webb*, 225 U. S. 663, we had to deal with the effect of the Oklahoma Enabling Act (June 16, 1906, c. 3335, 34 Stat. 267) upon a previous statute (act of March 1, 1895, c. 145, § 8, 28 Stat. 693, 697), which prohibited (*inter alia*), the "carrying into said [Indian] Terri-

tory any of such liquors or drinks," in view of the fact that the Enabling Act itself required that the constitution of the new State should prohibit the manufacture, sale, or otherwise furnishing of intoxicating liquors within that part of the State formerly known as the Indian Territory; and we held that in view of the existing treaties between the United States and the Five Civilized Tribes, and because the Enabling Act and the constitution established thereunder dealt only with the prohibition of the liquor traffic within the bounds of the new State, the act of 1895 remained in force so far as pertained to the carrying of liquor from without the new State into that part of it which was the Indian Territory.

In *United States* v. *Wright*, 229 U. S. 226, we held that the prohibition against the introduction of intoxicating liquors into the Indian country found in § 2139, Rev. Stat., as amended by the acts of July 23, 1892, c. 234, 27 Stat. 260, and January 30, 1897, c. 109, 29 Stat. 506, was not repealed, with respect to intrastate transactions, by the Oklahoma Enabling Act, in spite of the provision respecting internal prohibition contained therein as already mentioned.

Upon the whole, we have no difficulty in concluding that Article VII of the Treaty of February 22, 1855, was not repealed by the admission of Minnesota into the Union.

We come, therefore, to the principal contention of complainants and appellees, which is that the Article was repealed by the effect of the Treaties of 1865 and 1867. The argument in support of this contention may be outlined as follows: that by the earliest of the three treaties the several bands of Indians ceded to the United States the great tract of approximately 21,000 square miles, but excepted from that cession the several reservations created for the Mississippi bands and for the Pillager and Lake Winnibigoshish bands; that when the Treaty of 1865 was

made the Mississippi bands were the owners of their reservations within the exterior limits of the cession of 1855, which reservations were not covered by the second portion of Article VII, but were subject to all of the laws of the United States regulating commerce and intercourse with the Indian tribes, simply because of being Indian country in fact; that by the Treaty of 1865 the Mississippi bands ceded outright to the United States these reservations, and in return the United States ceded to them the tract of territory already mentioned (including Bemidji and the country surrounding it), excepting those portions included within the reservations of the Pillager and Lake Winnibigoshish bands; and that when, in 1867, in return for the White Earth reservation, the Mississippi Chippewas was receded to the United States the greater portion of the tract set apart for them in 1865, they ceded the same title and the same right and power over the lands that the three original tribes would have had; that is to say, they ceded them free and clear of Article VII of the Treaty of 1855.

It will at once be observed that the argument rests at bottom upon the erroneous construction to which we have already called attention, viz., that the second portion of Article VII did not apply to the reservations that were within the exterior limits of the ceded territory. We repeat that, in our opinion, the restriction applied to all the territory that was included within the terms of the cession; as much to those portions set apart for reservations as to the surrounding territory. There was nothing in the Treaty of 1865, therefore, to make the receded reservations unrestricted territory; nor was there anything in the Treaty of 1867 to remove the restriction from the territory then receded. Reading the series of treaties together, it is plain enough, we think, that the contracting parties, in all that was done, were resting upon the plain language of the second part of Article VII, which declared that the laws relat-

ing to the introduction, etc., of liquor in the Indian country should continue in force within the entire boundaries of the country in question until otherwise provided by Congress.

Finally, it is contended that Article VII of the Treaty of 1855 had been superseded at the time of the acts complained of in the bill (1910), by virtue of the provisions of the Nelson Act of January 14, 1889, c. 24, 25 Stat. 642, and the cessions made to the United States by the Indians pursuant to that act, and by reason of the change in the character of the territory included in the Treaty of 1855 and the status of the Indians therein.

As already pointed out, this act provided that Commissioners to be appointed by the President should negotiate with the different bands of Chippewas in the State of Minnesota for the complete cession and relinquishment of their title and interest in all their reservations in the State, except so much of the White Earth and Red Lake reservations as was not required for allotments, and that acceptance and approval of such cession and relinquishment by the President should be deemed full and ample proof of the cession and should operate as a complete extinguishment of the Indian title without other or further act or ceremony.

From the averments of the amended bill and answer it is not easy to gather a precise statement of the present situation of the Indian lands and of the Indians themselves, so far as it affects the question before us. Some reference is made to the situation at the Red Lake reservation; but since it is not clear that the restriction contained in the Treaty of 1855 was intended for the protection of the Indians within that reservation, we prefer to confine our attention to the situation as it existed in 1910 within the boundaries of the great tract that was the subject of the cession of 1855. Within those bounds there would seem to be remaining only fragments of the White Earth

and Leech Lake reservations; both reservations being in process of allotment under the acts of February 8, 1887, c. 119, 24 Stat. 388, and of January 14, 1889, c. 24, 25 Stat. 642, and amendatory acts. Of the lands that have been allotted, a considerable portion are still held in fee by the United States, and are non-alienable by the allottees until the expiration of the trust period. Upon the White Earth reservation, and also at Leech Lake, the Government maintains an Indian Agency and Superintendent, as well as Indian schools. At the White Earth Agency, 5,600 Indians are carried upon the annuity rolls; at Leech Lake, 1,750 Indians. The majority of these reside upon lands embraced within the original reservation, and they are the same Indians, or descendants of the same, that were parties to the treaties of 1855, 1865, and 1867. In consequence of their elevation to the plane of citizenship by the operation of the allottment acts, tribal relations have for most purposes ceased to exist, but are recognized for the purpose of the distribution of annuities under the Nelson Act. And it is admitted that for purposes of business, pleasure, hunting, travel, and other diversions, these Indians traverse parts of the region comprised in the cession of 1855, outside of the reservations, and thus visit the towns, villages, and cities in the territory, including Bemidji. On the other hand it is admitted that their visits to Bemidji are infrequent, and that there are no Indian habitations within a range of twenty miles in any direction from that city. And, as pointed out in the prefatory statement, the diminished Red Lake reservation is admittedly surrounded by a strip of land, approximately fifteen miles in width, which never was subject to the Treaty of 1855, and upon which saloons are maintained in close proximity to that reservation. This strip extends along the northerly boundary of the cession of 1855, which is perhaps ten or twelve miles north of Bemidji.

The argument for treating the restriction of 1855 as no

longer in force rests not upon any denial of the fact that there are some thousands of Indians at the White Earth and Leech Lake agencies, who are still more or less under the guardianship of the Government, and for whose protection the liquor restriction ought to be maintained, but rather upon the fact that these Indians are surrounded by territory in which liquor is lawfully obtainable. In support of this, it is said that the former Mississippi reservations ceded to the United States in 1865 are unrestricted territory; that so much of the Leech Lake and Lake Winnibigoshish reservations as were conveyed to the United States in 1890 are such territory; that every allotment from either of these reservations as to which the trust period has expired is such territory, and that lands sold to white men in the reservations is such territory. It will be observed, again, that each of these contentions rests upon the fundamental error that the reservations mentioned in the Treaty of 1855 are not within the liquor restriction of Article VII.

In view of the interpretation we have placed upon that Article, it seems to us that the contention as to changed conditions must be based not upon the supposed fact that the tract covered by the cession of 1855 "is already dotted with wet territory," but rather upon the question whether the restriction—entered into more than half a century ago, when the country was a wilderness—ought to be treated as still in force, in view of the small number of Indians entitled to protection as compared with the large population of whites who now form the great majority of the inhabitants, and in view of the high state of civilization and development of the territory in question.

In *Perrin* v. *United States*, 232 U. S. 478, 486, we had to deal with a somewhat similar question. That was a review of a conviction for unlawfully selling intoxicating liquors upon ceded lands formerly included in the Yank-

ton Sioux Indian reservation in the State of South Dakota. The reservation was created in 1858, and originally embraced 400,000 acres. A considerable part of it was allotted in severalty to members of the tribe under the act of 1887, the allotments being in small tracts scattered through the reservation. By an agreement ratified and confirmed by Congress August 15, 1894 (c. 290, 28 Stat. 286, 314, 318), the tribe ceded and relinquished to the United States all the unallotted lands, and by Article 17 of the agreement it was stipulated: "No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement." In the ratifying act a penalty was prescribed. The ceded lands were opened to disposition under the homestead and town site laws and passed largely into private ownership, and the place at which the intoxicating liquors were sold was within the defendant's own premises in a town located upon a part of the ceded lands held in private ownership by the inhabitants, none of whom was an Indian. After overruling the contention that the restriction was invalid because the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the State (citing *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, and *Dick* v. *United States*, 208 U. S. 340), the opinion dealt with the further contention that the power of Congress was necessarily limited to what was reasonably essential to the protection of Indians occupying the unceded lands, and that this limitation was transcended by the provision in

question because it embraced territory greatly in excess of what the situation required, and because its operation was not confined to a designated period reasonable in duration, but apparently was intended to be perpetual. As to this the court said (p. 486):

"As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus, a prohibition like that now before us, if covering an entire State when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts."

Although the circumstances of the present case are different, and we are here dealing with a question of obsolescence rather than of original invalidity, the language just quoted indicates the point of view from which the question should be approached. But we must not forget that the question is one, primarily, for the consideration of the law-making body; nor are we in danger of doing so, since by the very terms of the stipulation now under consideration the prohibition of the liquor traffic was to continue "until otherwise provided by Congress." We do not mean to say that if it appeared that no considerable

number of Indians remained wards of the Government within the territory in question, the courts would not be justified in declaring that since the constitutional warrant for the restriction no longer existed the restriction must expire with it. But where the question confessedly turns not upon a total, nor even upon an approximately complete, emancipation of the Indians from the Federal guardianship, but upon their unimportance as compared with the interests of the population at large, we think the question is legislative rather than judicial.

Indeed, it has only recently been under consideration by Congress. On February 17, 1911 (Senate Doc. No. 824, 61st Cong., 3d Sess., Vol. 85), the President, in a special message, called attention to the situation in Minnesota, resulting from the operation of the old Indian treaties under present conditions; and with respect to the area ceded by the Chippewas in 1855, he stated: "The records of the Indian Bureau show that there are within said area, under the jurisdiction of the superintendents of the White Earth and Leech Lake Reservations, 7,196 Indians who can be amply protected by limiting the territory as to which said treaty provisions shall remain in force and effect to the area within and contiguous to said reservations, particularly described as follows: . . . I therefore recommend that Congress modify the article of said treaty quoted above so as to exclude from the operations of its provisions all of the territory ceded by said treaty to the United States, except that immediately above described."

That Congress has not yet acted upon this recommendation is evidence that the problem is not so entirely obvious of solution that it can be judicially declared to be beyond the range of legislative discretion.

Since it must be admitted that complainants have no ground of relief against defendants if the restriction remains in force at Bemidji, as we hold that it does, it follows

that the decree of the District Court should be reversed, and the cause remanded with directions to dismiss the bill.

Decree reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE LURTON dissent upon grounds expressed in the opinion of the District Court, reported in 183 Fed. Rep. 611.

EQUITABLE SURETY COMPANY *v.* UNITED STATES OF AMERICA, TO THE USE OF McMILLAN.

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

No. 861. Argued April 15, 1914.—Decided June 8, 1914.

The obligation given by the surety under the District of Columbia Materialmen's Act of 1899 which is modeled after the General Materialmen's Act of 1894, has a dual aspect, being given not only to secure the Government the faithful performance of all the obligations assumed towards it by the contractor, but also to protect third persons from whom the contractor may obtain materials and labor; these two agreements being as distinct as though contained in separate instruments, the surety cannot claim exemption from liability to persons supplying materials merely on account of changes made by the Government and the contractor without its knowledge and which do not alter the general character of the work. *United States* v. *National Surety Co.*, 92 Fed. Rep. 549, approved.

Under the rule of *strictissimi juris*, the agreement altering the contract must be participated in by the obligee or creditor as well as the principal in order to discharge the surety; in the case of a bond under the Materialmen's Acts of 1894 or 1899, there is no single obligee or creditor to consent thereto and the rule of *strictissimi juris* does not

apply where the alterations agreed upon do not change the general nature of the work.

In this case the alterations of the terms of a contract for building a school house in the District of Columbia altering its location but without affecting its general character, without the knowledge or consent of the surety, did not have the effect of releasing the surety from the obligation of the bond given under the District of Columbia Materialmen's Act of February 28, 1899.

Quære, and not involved in this case, what would be the result of a change not contemplated in the original contract as between the District of Columbia and so great as to amount to abandonment of the contract?

THE Court of Appeals of the District of Columbia certifies that the record in the above entitled cause, now pending in said court upon appeal from the Supreme Court of the District of Columbia, discloses the following:

The declaration of the United States to the use of W. McMillan and Son, filed February 11, 1913, against the Equitable Surety Co. alleges:

That Allen T. Howison, as principal, and the Equitable Surety Co., as surety, on July 24, 1911, executed a bond to the United States in the penal sum of $110,350.00, conditioned for the faithful performance by Howison of a certain contract made by him with the Commissioners of the District of Columbia on that date. A copy of the bond, made an exhibit, shows that the contract was for the erection of a school building fronting on Eleventh Street, N. W., between Harvard and Girard Streets, in the City of Washington. The conditions of the bond are that if Howison shall perform to the satisfaction of the Commissioners the work to be done by him in accordance with the stipulations of the contract, and shall save harmless and indemnify the District of Columbia from any and all claims, delays, suits, charges, damages, judgments, etc., on account of any accidents to persons or property after the commencement of the work and prior to completion and acceptance, and pay the same; and "will promptly make payments to all persons supplying him

with labor and material in the prosecution of the work provided for in said contract," etc., the obligation shall be void; otherwise to remain in force.

That thereafter W. McMillan & Son, at the request of the Butt-Chapple Stone Co., agreed to furnish to said contractor certain stone materials to be used in the prosecution of the work provided for in the contract by the contractor, and did furnish to said contractor materials of the kind and quality specified in his contract to the value of $4,452.84, of which material the contractor used in the building a quantity of the value of $3,952.84 for which he has failed to make payment. And that defendant, though requested so to do, has refused to pay the same. The affidavit of the plaintiff in support of the declaration follows the requirements of Rule 73.

After the general issue, defendant filed a special plea denying liability on said bond because after the execution and delivery of the same, and without the knowledge or consent of defendant, the Commissioners of the District of Columbia and the said Howison, its principal, altered the contract the performance of which was guaranteed by said bond. That said alteration consisted in the entire changing of the building from one fronting on Eleventh Street to one fronting on Harvard Street, which alteration involved the contractor in considerable expense not contemplated in the original contract, and prejudicial to defendant. That said relocation of the building necessitated a material change in grading the ground. That prior to the change of location the contractor had graded the ground as required in the contract and expended therein the sum of $2,393.90. And that by reason of the change said sum was a total loss to the contractor, and the further excavation made necessary by the change of location was done at a cost of $1,300.90.

The affidavit of defense alleged the said change in the contract without its knowledge or consent; and that the

same necessitated a material change in the grading of the land which had been previously performed by the contractor, at a considerable expenditure not contemplated in the original contract, and prejudicial to the defendant.

On motion under the 73rd Rule of the Supreme Court of the District of Columbia the court entered judgment for the plaintiff for the amount of the demand; and defendant has appealed therefrom.

By stipulation two other cases involving the same question here presented are to abide the result of this case.

The act of Congress, in compliance with the requirements of which the aforesaid bond was executed, (c. 218, 30 Stat. 906), reads as follows:

"An Act Relative to the payment of claims for material and labor furnished for District of Columbia Buildings.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter any person or persons entering into a formal contract with the District of Columbia 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 obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor and furnishing affidavit to the department under the direction of which said work is being or has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to

bring suit in the name of the District of Columbia or the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, That such action and its prosecution shall not involve the District of Columbia or the United States in any expense: Provided, That in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant.

"Approved, February 28, 1899."

The Court of Appeals further certifies that the following question of law arises upon the record; that its decision is necessary to the proper disposition of the cause; and to the end that a correct result may be reached desires the instruction of the Supreme Court of the United States upon that question, to wit:

Did the alteration of the terms of the contract by the District of Columbia and the contractor, without the knowledge or consent of the surety, have the effect to release the surety from the obligation of the bond?

Mr. J. J. Darlington, with whom *Mr. Joseph A. Burkart* and *Mr. William E. Ambrose* were on the brief, for the Equitable Surety Company:

The surety obligation is not to be extended because the surety is a corporation, or because a premium was paid.

The change of site created a new contract, not binding on the surety, either as to owner or sub-contractors.

The bond was security for labor and materials for work provided for in the contract guaranteed by the surety.

The argument *ab inconvenienti* will not apply.

In support of these contentions, see *Atlantic Trust Co.* v. *Laurinburg,* 163 Fed. Rep. 690; *American Bonding Co.* v. *Pueblo Inv. Co.,* 150 Fed. Rep. 17; *Abbott* v. *Morissette,* 46 Minnesota, 10; *Bridge Co.* v. *Bogenshot,* 48 S. W. Rep.

97, 102; *Baglin* v. *Title Guaranty Co.*, 166 Fed. Rep. 356; *Brunthaver* v. *Talty*, 31 App. D. C. 134; *Buchanan* v. *Macfarland*, 31 App. D. C. 619, 620; *Bauschard Co.* v. *Fidelity Co.*, 21 Pa. Sup. Ct. 375; *Baglin* v. *Southern Surety Co.*, 42 Wash. Law Rep. 162, 164; *Brown Co.* v. *Ligon*, 92 Fed. Rep. 851; *Chester* v. *Leonard*, 68 Connecticut, 495, 570; *Carroll* v. *Lessee of Carroll*, 16 How. 275, 286; *Conn* v. *State*, 125 Indiana, 514; *Chaffee* v. *U. S. Fidelity Co.*, 128 Fed. Rep. 918; *Dewey* v. *State*, 91 Indiana, 173; *Graham* v. *United States*, 188 Fed. Rep. 651, 657; *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291; *Henricus* v. *Englert*, 137 N. Y. 484, 494; *Miller* v. *Stewart*, 9 Wheat. 680; *McConnell* v. *Poor*, 113 Iowa, 133, 139; *O'Neal* v. *Kelley*, 65 Arkansas, 550; *Paolucci* v. *United States*, 30 App. D. C. 217, 222; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 574; *School District* v. *Greene*, 135 Mo. App. 421, 426; *Steffes* v. *Lemke*, 40 Minnesota, 29; *Thompson* v. *Chaffee*, 89 S. W. Rep. 285; *United States* v. *American Bonding Co.*, 89 Fed. Rep. 925; *United States* v. *Bagly*, 39 App. D. C. 105; *United States* v. *Boecker*, 21 Wall. 652; *United States* v. *California Bridge Co.*, 152 Fed. Rep. 559; *United States* v. *Freel*, 186 U. S. 309, 318; *Hill* v. *American Surety Co.*, 200 U. S. 197; *United States* v. *U. S. Fidelity Co.*, 178 Fed. Rep. 721; *United States* v. *Lynch*, 192 Fed. Rep. 364, 368; *United States* v. *National Surety Co.*, 92 Fed. Rep. 549; *Wetmore* v. *Karrick*, 205 U. S. 141, 155; *Young* v. *American Bonding Co.*, 228 Pa. St. 273, 280; *Zimmerman* v. *Judah*, 17 Indiana, 286.

Mr. Wharton E. Lester, with whom *Mr. Lucas P. Loving* and *Mr. Daniel W. Baker* were on the brief, for the United States to the use of McMillan & Son:

Change of contract does not release the surety from liability to materialmen and laborers. There is a dual nature of bond required by act of 1899.

The agency of the District of Columbia ends with obtaining the bond.

The materials were furnished under contract for which bond was given.

In support of these contentions, see *Mining Co.* v. *Cullins*, 104 U. S. 176; *United States &c.* v. *American Surety Co.*, 200 U. S. 199; *Fidelity & Deposit Co.* v. *Smoot*, 20 App. D. C. 376; *United States* v. *National Surety Co.*, 92 Fed. Rep. 549; *Guaranty Co.* v. *United States*, 191 U. S. 416; *United States* v. *California Bridge Co.*, 152 Fed. Rep. 559; *United States* v. *Lynch*, 192 Fed. Rep. 364; *United States* v. *Freel*, 186 U. S. 309.

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

The act of February 28, 1899 (c. 218, 30 Stat. 906), under which the bond in question was given, was modeled after an act of August 13, 1894, entitled, "An Act for the protection of persons furnishing material and labor for the construction of public works," (c. 280, 28 Stat. 278). In an action founded upon a bond given under the latter act, it was held by the Circuit Court of Appeals for the Eighth Circuit, in *United States* v. *National Surety Co.*, 92 Fed. Rep. 549, 551, that the obligation has a dual aspect, it being given, in the first place, to secure to the Government the faithful performance of all obligations which a contractor may assume towards it; and, in the second place, to protect third persons from whom the contractor may obtain materials or labor; and that these two agreements are as distinct as if contained in separate instruments. It was consequently held that the sureties in such a bond could not claim exemption from liability to persons who had supplied labor or materials to their principal, to enable him to execute his contract with the United States, simply because the Government and the

contractor, without the surety's knowledge, had made changes in the contract subsequent to the execution of the bond, the changes being such as did not alter the general character of the work contemplated by the contract or the general character of the materials necessary for its execution.

In support of this decision several cases from the state courts were cited, among them *Dewey* v. *State*, 91 Indiana, 173, 185; *Conn* v. *State*, 125 Indiana, 514, 518; *Steffes* v. *Lemke*, 40 Minnesota, 27, 29; and *Doll* v. *Crume*, 41 Nebraska, 655, 660. They fairly sustain the conclusion reached. The cases cited from the Indiana and Minnesota reports antedated the passage of the act of 1894, and may have furnished the suggestion for that enactment.

The decision of the Circuit Court of Appeals in *United States* v. *National Surety Co.*, *supra*, although never until now brought under the review of this court, has been many times cited and followed in the other Federal courts. *Brown & Haywood Co.* v. *Ligon*, 92 Fed. Rep. 851, 857; *United States* v. *Rundle*, 100 Fed. Rep. 400, 402; *United States Fid. & Guar. Co.* v. *Omaha Bldg. & Constr. Co.*, 116 Fed. Rep. 145, 147; *Chaffee* v. *United States Fid. & Guar. Co.*, 128 Fed. Rep. 918; *United States* v. *Barrett*, 135 Fed. Rep. 189, 190; *Henningsen* v. *United States Fid. & Guar. Co.*, 143 Fed. Rep. 810, 813; *City Trust &c. Co.* v. *United States*, 147 Fed. Rep. 155, 156; *United States* v. *California Bridge & Constr. Co.*, 152 Fed. Rep. 559, 562; *Title G. & T. Co.* v. *Puget Sound Engine Works*, 163 Fed. Rep. 168, 174.

In *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, and *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, this court adopted a reasonably liberal construction of the act of 1894, in view of the fact that it was evidently designed to furnish the obligation of a bond as a substitute for the security which might otherwise be obtained by attaching a lien to the property; such lien not being permissible in the case of a Government work.

It seems to us that the construction given to that act in the case in 92 Fed. Rep. is correct, and that it applies equally to the Act of 1899, now under consideration; and that this act, like the other, should receive a reasonably liberal interpretation in aid of the public object whose accomplishment is so evidently intended. Its title is, "An Act relative to the payment of claims for material and labor furnished for District of Columbia buildings." The enacting clause, as well as the title, shows that Congress recognized that no legislation was necessary in order to enable the Commissioners of the District to require "the usual penal bond with good and sufficient sureties" from a contractor engaged for the construction of a public building. The object of the legislation was to give legal sanction to the "additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract," and to give to such a laborer or materialman the right to bring an action if necessary upon the bond, either in the name of the District of Columbia or of the United States, for his own benefit, against the contractor and sureties. The nominal obligee is, with respect to these third parties, a mere trustee, and the obligors, including the surety as well as the principal contractor, enter into the obligation in full view of this. The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanic's lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that the claims will be paid.

Stress is placed by counsel for the Surety Company upon the fact that the building was materially altered, and in a

manner that involved the contractor in considerable expense not contemplated in the original contract. If these alterations were made pursuant to a stipulation for that purpose contained in the contract, they were binding upon the surety, unless they were so extensive and material as to amount to a departure from the original contract rather than a permissible modification of its details. *United States* v. *Freel*, 92 Fed. Rep. 299; 99 Fed. Rep. 237; 186 U. S. 309.

So far as the certificate shows, however, the contract here in question contained no clause permitting changes. In such case it is beside the question to inquire whether the changes were important, or, indeed, whether they prejudiced or benefited the contractor. The rule that obtains in ordinary cases is that any change in the contract made between the principals without the consent of the surety discharges the obligation of the latter, even though the change be beneficial to the principal obligor.

But it lies at the foundation of this rule of *strictissimi juris* that the agreement altering the undertaking of the principal must be participated in by the obligee or creditor, in order that it may have the effect of discharging the surety. This is expressed or implied in all the cases. *Miller* v. *Stewart*, 9 Wheat. 680, 703, 708, 709; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201, 208; *Magee* v. *Manhattan Life Ins. Co.*, 92 U. S. 93, 98; *Union Mutual Life Ins. Co.* v. *Hanford*, 143 U. S. 187, 191; *Prairie State Bank* v. *United States*, 164 U. S. 227, 233; *United States* v. *Freel*, 186 U. S. 309, 310, 317.

In the case of a bond given under a statute such as the act of February 28, 1899, there is no single obligee or creditor. The surety is charged with notice that he is entering into what is in a very proper sense a public obligation, and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee, and with respect to whom the latter is a mere

trustee, and therefore incapable, upon general principles of equity, of bartering away, for its own benefit or convenience, the rights of the beneficiaries. In the light of the statute, the surety becomes bound for the performance of the work by the principal in accordance with the stipulations of the contract, and for the prompt payment of the sums due to all persons supplying labor and material in the prosecution of the work provided for in the contract.

What would be the result of a change not contemplated in the original contract, as between the District of Columbia, consenting to the change, and the Surety Company, not consenting thereto, is a question not now before us, and respecting which we express no opinion. But with respect to obligations incurred by the contractor to laborers and materialmen, at least so far as their labor and materials are supplied in accordance with the original contract, it is obvious, we think, that a construction which would discharge the surety because of any change to which the laborers and materialmen were not parties would defeat the principal object that Congress had in view in enacting the statute. If the change were so great as to amount to an abandonment of the contract and the substitution of a substantially different one, so that persons supplying labor and materials would necessarily be charged with notice of such abandonment, a different question would be presented. But, in the case of such a change as was here made—a mere change of position and location of the building, without affecting its general character; involving changes in grading, but having nothing to do with the furnishing of the materials upon which the action is based—it seems to us that the responsibility of the surety to the materialman remains unaffected.

The question certified will be answered in the negative.

MISSOURI PACIFIC RAILWAY COMPANY *v.* LARABEE.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 135. Argued December 15, 16, 1913.—Decided June 22, 1914.

A State cannot burden the right of access to this court, nor does the power of the State extend to regulating proceedings in this court.

A state court has not, nor can a statute of the State give it, the power to assess as against one party to a suit in this court a sum for attorneys' fees for services rendered in this court as against another party to the suit, when such assessment is not authorized by the law of the United States or by the rules of this court.

A writ of error from this court to review the judgment of a state court and the supersedeas authorized by the Judiciary Act are Federal and not state acts.

A state court, when so authorized by the laws of the State, has the power to award actual damages for business losses which are suffered by reason of the acts sought to be controlled or enjoined in the suit after the allowance by this court of a writ of error and supersedeas, including reasonable attorneys' fees in the proceedings in the state court. *Quære*, whether the state court can award punitive damages.

The existence of the right to sue on a supersedeas bond does not imply an exclusion of the right to sue under an existing general and applicable law for proper and reasonable damages.

A classification which is based on the distinction between that which is ordinary and that which is extraordinary is reasonable and not repugnant to the equal protection provision of the Fourteenth Amendment which only restrains acts regulating judicial procedure so transcending the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation.

A state statute imposing reasonable attorneys' fees in actual mandamus proceedings against the party refusing to obey a peremptory writ is not repugnant to the equal protection clause of the Fourteenth Amendment either because it does not apply to other proceedings or because it is not reciprocal. The classification is not unreasonable; and so *held* as to the statute to that effect of Kansas involved in this case and as herein applied.

85 Kansas, 214, reversed.

A DISPUTE as to a small charge for demurrage having arisen between the Missouri Pacific Railway Company and

the Larabee Flour Mills Company, the Railway Company to enforce payment, suspended the rendering of a certain class of switching service which it had previously regularly performed for the Mills Company. The latter on September 15, 1906, commenced in the Supreme Court of Kansas mandamus proceedings to compel the continuance of the service. After a response to an alternative rule and a hearing on the eighth of December, 1906, the court granted a peremptory mandamus. 74 Kansas, 808. At the close of the opinion there was the following memorandum (p. 822):

"The court has authority to render judgment in favor of the plaintiff for any damage it has sustained (Gen. Stats. 1901, sec. 5193). The plaintiff is given ten days in which to file a claim for damages, stating separately the character and amount of each item. The defendant is given ten days after notice of the filing of the claim in which to except to any items which it may deem not recoverable. The court will then pass upon the exceptions, if any be taken, and make orders respecting a hearing."

Some days thereafter a claim of damages was filed enumerating fifteen items. The first eight concerned various business losses alleged to have been occasioned by the suspension of the service, such as decrease in the output of the mill, increased cost of hauling, etc., etc. Four of the claims on these subjects aggregated $4907.39, and four stated no amount but reserved the right to make a future claim for losses in case the litigation should be prolonged and the resumption of the service postponed. The remaining six items, with one exception, related to small expenses alleged to have been incurred in the mandamus suit. One of them, however, the fourteenth, made a charge of $2500 "to cash paid and plaintiff's agreement to pay Waters & Waters attorneys' fees in this case." The fifteenth item reserved the right to make a charge for future

legal services "if this case is taken to the Supreme Court of the United States, whatever such services may be worth." A few days after this claim was filed, on December 24, 1906, a writ of error was issued from this court to the judgment in mandamus and a bond to operate as a supersedeas was approved. About two years thereafter, on January 11, 1909, the case was decided in this court and the judgment below was affirmed. 211 U. S. 612.

After the mandate went down, leave was given to file an amended claim for damages and on the same day a Commissioner was appointed to hear the testimony concerning it and report. The amended claim was filed. It was divided into three general classes, first, damages asserted to have arisen from loss of business, etc.; second, damages claimed as the result of the expenses and outlay for the suit; third, cost incurred or anticipated, occasioned by the hearing of the claim. The first, that is, the business losses, was embraced in separate items substantially following the order of the original claim, that is, it was based on alleged loss of output, increased cost of operation, etc., etc. The amounts of many of these items were larger as they covered the time from the discontinuance of the service up to the filing of the amended claim. The aggregate of the claims was $18,921.90 as compared with $4907.39 made at the time of the first claim. The second, the expenses of the suit, was greatly changed. Leaving out two insignificant items, as amended the claim was in substance as follows:

The claim for $2500 paid or to be paid to Waters & Waters for personal services was changed to read, "For the reasonable value of the services of Waters & Waters to bring this action and to attend to the same in the Supreme Court of the State of Kansas, the sum of.....	$ 2,500.00

"Tenth: For the reasonable value of the services of Waters & Waters in this case in the Supreme Court of the United States, the sum of $40,000.00

"Eleventh: For cash paid out for printed briefs in the State and United States Supreme Court, the sum of 93.50

"Twelfth: For the reasonable value of the professional services of John F. Switzer, attorney at law, employed to assist Waters & Waters in the Supreme Court of the United States, the plaintiff in the best judgment of the partners composing said firm, deeming it necessary after considering the momentous and far-reaching controversy made, urged and argued in the Supreme Court of the United States and which controversy it could not avoid, the sum of 3,000.00

"Thirteenth: For the reasonable value of the professional services of the firm of Rossington & Smith, attorneys at law, also employed to present the case of the plaintiff in the Supreme Court of the United States, the plaintiff in the best judgment of the partners composing said firm, deeming it necessary, after considering the momentous and far-reaching controversy made, urged and contended for in the Supreme Court of the United States, and which controversy it could not avoid, the sum of 30,000.00

"Fourteenth: For the railroad fare, hotel bills and reasonable expenses of W. H. Rossington and J. G. Waters in attending on the United States Supreme Court in April, 1908, the sum of $250 each and making a total of 500.00

"Fifteenth: For the railroad fare, hotel bills and reasonable expenses of Charles Blood Smith and J. G. Waters in attending on the Supreme Court in October, 1908, the sum of..... 480.60

"Sixteenth: For the costs due the plaintiff in the Supreme Court of the United States, the sum of..... 148.25"

The 17th, 18th, and 19th items embraced small items of traveling and other expenses of the parties and some of their attorneys. In the items of court expenses the difference between the original claim was substantially this, that the claim had grown from about $2800 for attorneys' fees in the state court when the original claim in damages was filed to a sum in excess of $75,000.00, all of which increase resulted from charges made for professional services rendered in this court in connection with the trial of the case. The remaining items of the third class related to expenses incurred under the reference to the Commissioner before whom the case was pending with a reservation of the right to make future charges for such purpose when the reference was completed.

The Railway Company objected to the various items in the amended claim as follows: To those covering the business losses, decrease of output, increased expenses, etc., etc., besides denying that the suit was the proximate cause of the losses represented by the alleged claims and asserting their speculative nature, it was specially charged that in so far as they included items arising after the allowance of the writ of error from this court and the giving of the supersedeas bond they were not within the cognizance of the court but were matters alone of Federal competency within the jurisdiction of this court. So far as the claims for alleged outlay and expenses including attorneys' fees in the state court were concerned, it was alleged that there was no right to recover them because

the only authority under which they could be allowed was a statute of the State of Kansas relating to mandamus proceedings and that such statute as construed by the court of last resort of the State was repugnant to the due process and equal protection clauses of the Fourteenth Amendment because under such construction a right was given by the statute to a plaintiff in mandamus to recover attorneys' fees as damages, while no reciprocal right in case of success was given to a defendant and no such right was given to litigants generally. Coming to the alleged right to recover attorneys' fees for services rendered on the writ of error in this court and the other items, such as briefs, traveling expenses, hotel bills, etc., etc., it was expressly charged that under the statutes of the United States the effect of the writ of error from this court and the supersedeas was to deprive the state court of all authority over such expenses and that moreover "Under such statutes and laws of the United States, this Court has no power, authority or jurisdiction to consider the claim and demand for damages on account of attorneys' fees for services rendered in such proceedings in error from the Supreme Court of the United States to the Supreme Court of Kansas; and for the further reason that, if the said plaintiffs were entitled to any damages, their application therefor should be made to the Supreme Court of the United States, or in an independent proceeding brought on the supersedeas bond so approved and allowed as a supersedeas by the Chief Justice of this state. . . . and because, further, to allow such claim would be violative of the Constitution of the United States, and especially the Fourteenth Amendment thereof, which prohibits any state from denying to any person, company or corporation the equal protection of the laws, and prevents any state from depriving any person, company or corporation of its property without due process of law; and because of such Judiciary Act (of the United States) . . ., this court

is deprived of all jurisdiction to consider or determine any such question or element of damage in a proceeding of this kind; and because, further, the Supreme Court of the United States, in affirming the judgment of this court . . . allowed to said plaintiffs, on account of attorneys' fees, the sum of $20.00 and assessed the same against the said defendant. . . ."

After proof and hearing the Commissioner made an elaborate report stating fully what he conceived to be the facts and the law of the case. On the subject of the various claims made for the allowance of damages for a charge of fees for professional services rendered in the Supreme Court of the United States, the Commissioner made the following statement:

"I find, that no agreement has ever been had between the Mill Company and any of the attorneys as to the amount of their compensation; that neither of the attorneys has at any time entered on his books a charge against the Mill Company for services rendered; nor have they informed the Mill Company of the amount intended to be charged; nor have they determined in their own minds any definite amount intended to be charged.

"I find, that the attorneys will claim the full amount, and will accept whatever amount that shall be determined by this Court in this proceeding to be a reasonable compensation for their services in the case and allowed as part of the damages.

"I further find, that it is mutually understood between the Mill Company and the attorneys named that whatever amount is recovered in this proceeding on account of fees and expenses of counsel will be paid by the Mill Company to and accepted by the attorneys as a full discharge of the liability to them."

The conclusions of the Commissioner as to the amounts to be allowed as damages under the three classes of claims were as follows:

As to the first class, he reduced the claim for business losses, increased expenses, etc., etc., from $18,921.90 to	$ 5,658.10
As to the amount claimed as due because of the professional services of Waters & Waters in the state court the sum claimed was allowed in full	2,500.00
As to the items for professional services rendered in the Supreme Court of the United States, including hotel bill, etc., the amount was reduced from about $75,000 to	11,480.00
Under the third class three small items were allowed relating to the expenses of the parties in Kansas and concerning the reference to the Commissioner	376.00
Total	$20,014.10

Both parties excepted to the report of the Commissioner on various grounds and after a hearing the Supreme Court sustained his action and affirmed his report. 85 Kansas, 214.

Mr. B. P. Waggener for plaintiff in error.

Mr. Charles Blood Smith and *Mr. Joseph G. Waters*, with whom *Mr. John C. Waters* and *Mr. John F. Switzer* were on the brief, for defendant in error.

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

Both before the Commissioner and to the court where the report of the Commissioner was acted on the propositions under the Constitution and laws of the United States upon which the railway company relied, were pressed and overruled and the rightfulness of having so done is the

question here for decision. But first we notice a motion to dismiss for want of jurisdiction. It is difficult to grasp the ground upon which it rests. In one aspect it would seem to assert that there is no jurisdiction because the Federal rights which were passed upon below were correctly decided. But this obviously goes to the merits. In the only other possible aspect it would seem that the motion proceeds upon the theory that the Federal rights which were decided below were so obviously rightly decided that the contention of error concerning them is too frivolous to sustain jurisdiction, a view which is supported by a statement in the argument for the motion that of course there would be jurisdiction if it appeared that the judgment below "under the color and sanctity of the law inflicted exceptional and unjust exactions." But taking the most favorable view for the motion and assuming that it proceeds upon the only ground upon which it can possibly be said to rest, that is, the frivolousness of the errors relied upon, we pass from its consideration since upon such hypothesis we think on the face of the record the contention is so clearly unsound as to require no further notice.

The Federal errors relied upon concern three subjects: The allowance of business losses, etc.; the award of a sum for attorneys' fees in the state court up to and including the writ of error from this court and the supersedeas; and the grant of an amount for attorneys' fees agreed or supposedly agreed to be paid for professional services rendered in this court on the writ of error and traveling expenses and hotel bills allowed for the same purpose. The three involve different considerations and hence we consider them separately. We come first to test the question as to attorneys' fees in this court, as it is the most important and far reaching since it involves considerations of the gravest importance going to the entire structure of our system of government, based as it is upon an absolute

denial of any power whatever in the court below to deal with the subject while the other two contentions at best challenge power but relatively or partially.

First. The question of the power of the court to make the allowance for professional services rendered in this court on the former writ of error.

There can be no doubt that tested by the general principles of law controlling in this court, by the statutes of the United States relating to the subject or the rules of this court concerning the same, the award for the attorneys' fees in question was absolutely unwarranted. We do not stop to review and expound the settled line of authority demonstrating this result because it would be wholly superfluous to do so as the principles have been so long the settled rule of conduct in this court and are so elementary as to require not even a reference to the cases. Some of the cases, nevertheless, we cite: *Arcambel* v. *Wiseman*, 3 Dall. 306; *Day* v. *Woodworth*, 13 How. 363, 372; *Oelrichs* v. *Spain*, 15 Wall. 211, 230–231; *Tullock* v. *Mulvane*, 184 U. S. 497, 511, *et seq.* Indeed, this view is not disputed in the argument at bar and was not questioned in the court below, since the court placed its action in making the allowances in question, not upon the supposed authority of any act of Congress nor of any practise of this court or rule thereof sustaining the same nor upon any principle of general law, but solely upon the theory that a state statute gave the power to make the allowances. Nothing could make this view clearer than does the following statement taken from the opinion of the court below (Syllabus—5): "The damages in mandamus proceedings comprehended by Section 723 of the Code (Gen'l. Stat. 1909, Sec. 6319) are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply and the expense reasonably and necessarily incurred in compelling compliance with the alternative writ, including reasonable attorneys' fees in this court and in the Supreme

Court of the United States." And in addition the view of the court below is aptly illustrated by the following passage from the report of the Commissioner answering the claim of the Railway Company as to the effect of the writ of error from this court and the giving of the supersedeas and the resulting authority of this court over the cause under the statutes of the United States—a passage which the court below expressly adopted and made a part of its opinion (p. 221):

"Upon this objection I conclude:

"1. That the jurisdiction of this court in mandamus is the creation of the constitution and the statutes of the State of Kansas.

"2. That this court is the sole judge of what that constitution and those statutes provide.

"3. That the jurisdiction of this court in mandamus over persons within its jurisdiction cannot be affected by act of Congress.

"4. That the Judiciary Act does not and was not intended to affect the jurisdiction of this court.

"5. That the jurisdiction of this court in mandamus attaches upon the issuance of the alternative writ, and the subject-matter of the proceeding being the awarding a peremptory mandamus, that jurisdiction continues unabated, not only until the writ is awarded, but also until the writ is issued and obedience to it enforced.

"6. That the alternative writ is a command of the performance of specified and prescribed duties; and return to the writ is a refusal to perform the duties prescribed; the judgment awarding a peremptory mandamus is a conclusive adjudication that such refusal was wrongful, and the act of the court compelling compliance with the command of the alternative writ.

"7. That the damages comprehended by the Kansas statute are the injuries sustained as the natural and probable consequences of the wrongful refusal to comply

and the expenses reasonably and necessarily incurred in compelling compliance with the command of the alternative writ.

"8. That the allowance of the writ of error did not operate to remove the suit from the Supreme Court of the State into the Supreme Court of the United States; its only effect was to bring up the record for purposes of review.

"9. The allowance of the writ of error did not operate as a supersedeas; the taking the supersedeas bond brought about the supersedeas. The taking the bond, and the supersedeas itself, in so far as it can be conceived of as a substantial act, was the action of the Supreme Court of Kansas."

We observe in passing, that the views concerning the Judiciary Act and the effect of the writ of error from this court and the relevant statutes of the United States which were expounded in this passage are not required to be reviewed because they are not necessarily involved in the decision below since that decision did not rest upon them but was based upon the operative effect of the state statute, and hence the views expressed as to the United States statutes in the passage quoted must have been adopted simply because they were considered to be illustrative of the principle by which the state statute was made to control. We, therefore, without in the slightest degree admitting their correctness even for argument's sake, pass the conclusions as to the statutes of the United States expressed in the passages of the report and shall not recur to them except in so far as under the principle of *noscitur a sociis* we may find it convenient to do so as illustrating the fundamental and destructive error embodied in the conclusion of the court as to the operative power of the state statute.

The question is then, Was the court below right in holding that it had the power because the Kansas statute so authorized to assess as against one party to a suit in the

Supreme Court of the United States a sum for attorneys' fees for services rendered in that court as against another party to the suit although such assessment, as we have seen, was not authorized by the law of the United States but was in conflict with the settled rule in the Supreme Court of the United States? It seems superfluous to put the question since its very statement conveys of necessity a negative answer. For how on the face of the question, consistently with the most elementary principles of our constitutional system of government can it be possibly assumed that a state statute could be made operative in the Supreme Court of the United States to the disregard of its settled rule of procedure and of the principles which had guided its conduct from the beginning, directly sustained by express rule adopted under the sanction of Congress?

We might well go no further, but in view of the importance of the subject we briefly advert to one or more of the obvious consequences which would arise from maintaining the principle. It would follow, of course, that the right to freely seek access to the Supreme Court of the United States would cease to exist, since it would be in the power of the States to burden that right to such a degree as to render its exercise impossible. How better could this be illustrated than by the case before us, that is, by the necessary implication that there would have been power in the court below if it had deemed it just to do so, to award the claim which was made for $75,000 attorneys' fees for services rendered in this court! Indeed, in the argument at bar it was freely conceded that it may well have been that the mainspring which caused the adoption of the statute relied upon was the deterrent influence which it would produce in the prosecution of writs of error to this court. Thus the argument proceeds: "The Railway Company refuses to obey; judgment is had against it; it still refuses, it seeks delay; it initiates

a writ of error in this court. By this method it makes the suit expensive. . . . It was just this situation that the legislature of Kansas intended to correct. . . ."

And the far-reaching operation of the principle by which the state statute could alone have been made to produce the result attributed to it by the court below is illustrated by the legal conclusions of the operation and effect of the statutes of the United States stated in the report of the Commissioner which was adopted by the court as expressed in the passage which we have previously quoted. This is the case since the views thus sanctioned are necessarily illustrative of the mental atmosphere by which alone it could have been possible to conceive that the state power extended to regulate the proceedings in the Supreme Court of the United States to the disregard of the express provisions of the act of Congress. A view which is not an over-statement when it is observed that among other things the conclusion which was below sustained was that the writ of error from this court and the supersedeas authorized by the act of Congress were not Federal but purely state acts. And, moreover, it was concluded that the exertion by the Supreme Court of the United States under the Constitution and laws of the United States of the power to bring up a case from the state court in order to review it and to grant a supersedeas in order to make that right effective, operated to leave the state court in possession of the case and only to move the record, hence creating a residuum of state power which as to such case gave authority to the state court to regulate, certainly as to attorneys' fees, the proceedings in the Supreme Court of the United States.

We shall reason no further, and shall content ourselves with pointing out that in substance and effect the absolute want of foundation for the contention here made has been in express terms foreclosed. For instance, at this term in *Harrison* v. *St. Louis & San Francisco R. R.*,

232 U. S. 318, a statute of the State of Oklahoma which burdened or impeded the right of free access to the courts of the United States was held to be repugnant to the Constitution and the destructive effect of such legislation upon our institutions was pointed out. And light on the subject is afforded by a consideration of the ruling in *Tullock* v. *Mulvane*, 184 U. S. 497. See also *Insurance Co.* v. *Morse*, 20 Wall. 445, 453; *Clark* v. *Bever*, 139 U. S. 96, 102–103.

Second. The power of the court below to award damages for the business losses which were suffered after the allowance of the writ of error and the supersedeas.

The contention is that the power did not exist since the effect of the writ of error and the supersedeas was to remove the case to this court and therefore deprive the court below of the right to consider any act causing damage done after the prosecution of the writ of error and the supersedeas. But conceding in the fullest degree the asserted effect of the supersedeas, that effect ceased with the affirmance of the judgment by this court and therefore necessarily opened the way for the court below to consider and determine how far the alleged illegal conduct of the Railway Company had entailed damages and consequent responsibility. Conceding further that the bond for supersedeas embraced such acts and the resulting damages therefrom and therefore there was a right to sue on the bond, again the deduction is a *non sequitur* because the right to resort to the bond did not imply an exclusion of the right to sue under the general law to recover damages if the election was made to follow that course. Of course, as there is nothing in this case even suggesting that the award of damages for acts done pending the writ of error in this court was so excessive as to justify the extreme inference that punishment for invoking the right to resort to this court was inflicted, we need not consider the rule which would be applicable in such a contingency.

Third. The power of the court below to award damages for attorneys' fees for services rendered in the state court.

The attorneys' fees were allowed by the court below in virtue of a statute which gave such power in case of mandamus proceedings. The construction of this statute which was adopted was not original in this case but was an application of an interpretation of the statute previously affixed to it, and indeed which was made prior to the commencement of the mandamus proceedings in question. (*Carney* v. *Neeley*, 60 Kansas, 672; *McClure* v. *Scates*, 64 Kansas, 282.) The contention is that as the statute exceptionally allows attorneys' fees in mandamus proceedings against one refusing to obey the peremptory writ of mandamus and does not allow them in other cases, it contravenes the equal protection of the laws clause of the Fourteenth Amendment and is void. But it is not open to controversy that the Fourteenth Amendment was not intended to deprive the States of their power to establish and regulate judicial proceedings and that its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation. The proposition here relied upon therefore comes to this: that there is not such a distinction between the extraordinary proceeding by mandamus and the ordinary judicial proceedings as affords a ground for legislating differently concerning the two. But when thus reduced to its ultimate basis, the proposition answers itself, since it cannot be formulated without demonstrating its own unsoundness. If more were needed to be said, it would suffice to direct attention to the distinction which must obtain between that which is ordinary and usual and that which is extraordinary and unusual. Or, to state it otherwise, to call attention to the difference between the duty to perform a ministerial act concerning which there is room neither for the exercise of judgment or discretion

and the right on the other hand to bring into play, judgment and discretion as prerequisites to the performance of an act of a different character, and the distinction which justifies the classification made by the statute also answers the argument that the equal protection clause of the Fourteenth Amendment is violated because the allowance of attorneys' fees was not reciprocal *Missouri, K. & T. Ry.* v. *Cade*, 233 U. S. 642. The ruling in the case last cited also serves to demonstrate the want of merit in the contention that the question here presented is governed by *Gulf, C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150.

Again we deem it necessary to observe that the opinion here expressed is confined to the case before us. We do not therefore imply that the reasoning here applied would be controlling in a case where although the name mandamus was preserved, in substance and effect, the distinction between that writ in an accurate sense and ordinary procedure would have disappeared.

It follows from what we have said that error was committed in the court below in allowing the items of damages for attorneys' fees, traveling expenses, etc., in the Supreme Court of the United States, and that from a Federal point of view there was no error in the judgment below to the extent that it awarded the damages complained of and allowed a claim for attorneys' fees for services rendered in the state court. And to give effect to these conclusions the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

INTERMOUNTAIN RATE CASES.[1]

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 136, 162. Argued October 18, 21, 22, 1912.—Decided June 22, 1914.

Prior to the amendment of June 18, 1910, § 4 of the Act to Regulate Commerce lodged in the carrier the right to exercise a primary judgment, subject to administrative control and ultimate judicial review, concerning the necessity and propriety of making a lower rate for the longer than the shorter haul, thus giving the carrier power to exert its judgment as to things of a public nature; but the amendment withdrew that right of primary judgment and lodged it in the Interstate Commerce Commission to be exercised on request and after due investigation and consideration of the public interests concerned and in view of the preference and discrimination clauses of §§ 2 and 3 of the act.

The long and short-haul provisions of § 4 of the Act to Regulate Commerce as amended by the act of June 18, 1910, are not repugnant to the Constitution of the United States as a delegation of power to the Interstate Commerce Commission beyond the competency of Congress.

If a statute is constitutional, this court must be governed by it and its plain meaning; with the wisdom of Congress in adopting the statute this court has nothing to do.

In *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 503, this court decided that a general enforcement of the long and short-haul clause of the Act to Regulate Commerce would not be repugnant to the Constitution, and will not now reconsider and overrule that decision.

The Commerce Court had jurisdiction of a suit to enjoin the enforcement of the order of the Interstate Commerce Commission involved in these cases and which refused the request of carriers to put in force rates requested by them.

Under § 4 of the Act to Regulate Commerce, as amended by the act of June 18, 1910, the Interstate Commerce Commission has power to make an order, such as that involved in these cases, permitting a

[1] Docket title of these cases: No. 136, United States of America, Interstate Commerce Commission et al., *v.* Atchison, Topeka & Santa Fe Railway Company et al. No. 162, United States of America, Interstate Commerce Commission et al., *v.* Atchison, Topeka & Santa Fe Railway Company et al.

lower rate for the longer haul but only on terms stated in the order, establishing zones for the intermediate points and relative percentages upon which proportionate rates should be based.
191 Fed. Rep. 856, reversed.

THE facts, which involve the constitutionality of the long and short-haul provisions of the Act to Regulate Commerce as amended by the act of June 18, 1910, and the validity of an order made in pursuance thereof by the Interstate Commerce Commission, are stated in the opinion.

Mr. Attorney General Wickersham and *Mr. Assistant to the Attorney General Fowler*, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Charles Donnelly, *Mr. F. W. M. Cutcheon* and *Mr. F. C. Dillard* for appellees.

Mr. Rush C. Butler, *Mr. William E. Lamb*, *Mr. Stephen A. Foster* and *Mr. Cornelius Lynde* filed a reply brief on behalf of the Chicago Association of Commerce.

Mr. Joseph N. Teal for Portland Chamber of Commerce.

Mr. J. B. Campbell for the City of Spokane.

Mr. William A. Glasgow, Jr., for Giroux Consolidated Mines Co.

By leave of court, *Mr. Alfred P. Thom* filed a brief in behalf of certain interested parties.

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

We shall seek to confine our statement to matters which are essential to the decision of the case. The provisions of § 4 of the Act to Regulate Commerce dealing with what is known as the long and short-haul clause, the power of

carriers because of dissimilarity of circumstances and conditions to deviate from the exactions of such clause and the authority of the Interstate Commerce Commission in relation to such subjects were materially amended by the act of June 18, 1910, c. 309, 36 Stat. 539, 547. Following the form prescribed by the Commission after the amendment in question, the seventeen carriers who are appellees on this record made to the Interstate Commerce Commission their "application for relief from provisions of fourth section of Amended Commerce Act in connection with the following tariffs." The tariffs annexed to the applications covered the whole territory from the Atlantic seaboard to the Pacific coast and the Gulf of Mexico, including all interior points and embracing practically the entire country, and the petition asked the Interstate Commerce Commission for authority to continue all rates shown on the tariffs from the Atlantic seaboard to the Pacific coast and from the Pacific coast to the Atlantic seaboard and to and from interior points lower than rates concurrently in effect from and to intermediate points. It was stated in the petition: "This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of competition of various water carriers and of carriers partly by water and partly by rail operating from Pacific coast ports to Atlantic seaboard ports; competition of various water carriers operating to foreign countries from Pacific coast ports and competition of the products of foreign countries with the products of the Pacific coast; competition of the products of Pacific coast territory with the products of other sections of the country; competition of Canadian rail carriers not subject to the Interstate Commerce Act; competition of the products of Canada moving by Canadian carriers with the products of the United States; rates established via

the shorter or more direct routes, but applied also via the longer or more circuitous routes." After full hearing the Commission refused to grant unqualifiedly the prayer of the petition but entered an order permitting in some respects a charge of a lower rate for the longer haul to the Pacific coast than was asked for intermediate points provided a proportionate relation was maintained between the lower rate for the longer haul to the Pacific coast and the higher rate to the intermediate points the proportion to be upon the basis of percentages which were fixed. For the purposes of the order in question the Commission in substance adopted a division of the entire territory into separate zones which division had been resorted to by the carriers for the purposes of the establishment of the rates in relation to which the petition was filed. Refusing to comply with this order the carriers commenced proceedings in the Commerce Court praying a decree enjoining the enforcement of the fourth section as amended on the ground of its repugnancy to the Constitution of the United States and of the order as being in any event violative of the amended section as properly construed. An interlocutory injunction was ordered. The defendants moved to dismiss and on the overruling of the motions appealed from the interlocutory order, the case being No. 136. Subsequently upon the election of the defendants to plead no further a final decree was entered and appealed from, that appeal being No. 162.

It suffices at this moment to say that all the contentions which the assignments of error involve and every argument advanced to refute such contentions, including every argument urged to uphold on the one hand or to overthrow on the other the action of the Commission, as well as every reason relied upon to challenge the action of the court or to sustain its judgment, are all reducible to the following propositions:

(a) The absolute want of power of the court below to

deal with the subject involved in the complaint because controversies concerning the fourth section of the Act to Regulate Commerce of the nature here presented were by an express statutory provision excluded from the cognizance of the court below. (b) That even if this be not the case the action of the Commission which was complained of was purely negative and therefore not within the cognizance of the court because not inherently justiciable. (c) That correctly interpreting the fourth section the order made by the Commission was absolutely void because wholly beyond the scope of any power conferred by the fourth section as amended. (d) That even if in some respects the order of the Commission was within the reach of its statutory power there was intermingled in the order such an exertion of authority not delegated as to cause the whole order to be void. (e) That the order of the Commission was void even if the fourth section be interpreted as conferring the authority which the Commission exerted, since under that assumption the fourth section as amended was repugnant to the Constitution.

All the propositions, even including the jurisdictional ones, are concerned with and depend upon the construction of the fourth section as amended, and we proceed to consider and pass upon that subject and every other question in the case under four separate headings: 1, The meaning of the statute; 2, Its constitutionality; 3, The jurisdiction of the court; 4, The validity of the order in the light of the statute as interpreted.

1. *The meaning of the statute.*

We reproduce the section as originally adopted and as amended, passing a line through the words omitted by the amendment and printing in italics those which were added by the amendment, thus at a glance enabling the section to be read as it was before and as it now stands after amendment.

"SEC. 4. That it shall be unlawful for any common car-

rier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, ~~under substantially similar circumstances and conditions,~~ for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act;* but this shall not be construed as authorizing any common carrier within the terms of this Act to charge ~~and~~ *or* receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the *Interstate Commerce* Commission ~~appointed under the provisions of this Act~~, such common carrier may in special cases, after investigation ~~by the Commission~~, be authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section ~~of this Act:~~ *Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

Before considering the amended text we state briefly some of the more important requirements of the section before amendment and the underlying conceptions of private right, of public duty and policy which it embodied, because to do so will go a long way to remove any doubt as to the amended text and will moreover serve to demonstrate the intent of the legislative mind in enacting the amendment.

Almost immediately after the adoption of the Act to Regulate Commerce in 1887 (February 4, 1887, c. 104, 24 Stat. 379), the Interstate Commerce Commission in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long and short-haul clause and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul and that competition which materially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. We say primarily because of course it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing and were therefore operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where within the purview of the fourth section it had lawfully resulted that

the lesser rate was charged for a longer than was exacted for a shorter haul such exaction being authorized could not be a preference or discrimination and therefore illegal. *In re Louisville & Nashville R. R. Co.*, 1 I. C. C. 31. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin.[1] We observe, moreover, that in addition it came to be settled that where competitive conditions authorized carriers to lower their rates to a particular place the right to meet the competition by lowering rates to such place was not confined to shipments made from the point of origin of the competition, but empowered all carriers in the interest of freedom of commerce and to afford enlarged opportunity to shippers to accept, if they chose to do so, shipments to such competitive points at lower rates than their general tariff rates: a right which came aptly to be described as "market competition" because the practice served to enlarge markets and develop the freedom of traffic and intercourse. It is to be observed, however, that the right thus conceded was not absolute because its exercise was only permitted provided the rates were not so lowered as to be non-remunerative and thereby cast an unnecessary burden upon other shippers. *East Tenn. &c. R. Co.* v. *Interstate Com. Comm.*, 181 U. S. 1. As the statute as thus construed imposed no obligation to carry to the competitive point at a rate which was less than a reasonable one, it is obvious that the statute regarded the rights of private ownership and sought to impose no duty conflicting therewith. It is also equally clear that in permitting the carrier

[1] *Int. Com. Comm.* v. *Balt. & Ohio Railroad*, 145 U. S. 263; *Cinn., N. O. & Tex. Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184; *Texas & Pac. Railway* v. *Int. Com. Comm.*, 162 U. S. 197; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648; *East Tenn. &c. R. Co.* v. *Int. Com. Comm.*, 181 U. S. 1.

to judge primarily of the competitive conditions and to meet them at election the statute lodged in the carrier the right to exercise a primary judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate, since the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places, considerations all of which therefore in their ultimate aspects came within the competency of legislative regulation. It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review. And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long and short-haul clause it but gave the carrier the power to exert a judgment as to things public was long since pointed out by this court. *Texas & Pac. Railway* v. *Interstate Com. Comm.*, 162 U. S. 197, 218.

With the light afforded by the statements just made we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short-haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property" and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may

be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short-haul clause and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment or so to speak the system of law by which judgment is to be controlled remains unchanged but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound

legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

2. *The alleged repugnancy of the section as amended to the Constitution.*

But if the amendment has this meaning it is insisted that it is repugnant to the Constitution for various reasons which superficially considered seem to be distinct but which really are all so interwoven that we consider and dispose of them as one. The argument is that the statute as correctly construed is but a delegation to the Commission of legislative power which Congress was incompetent to make. But the contention is without merit. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Heinszen*, 206 U. S. 370; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. We do not stop to review these cases because the mere statement of the contention in the light of its environment suffices to destroy it. How can it otherwise be since the argument as applied to the case before us is this: that the authority in question was validly delegated so long as it was lodged in carriers but ceased to be susceptible of delegation the instant it was taken from the carriers for the purpose of being lodged in a public administrative body? Indeed, when it is considered that in last analysis the argument is advanced to sustain the right of carriers to exert the public power which it is insisted is not susceptible of delegation, it is apparent that the contention is self-contradictory since it reduces itself to an effort to sustain the right to delegate a power by contending that the power is not capable of being delegated. In addition, however, before passing from the proposition we observe that when rightly appreciated the contention but challenges every decided case since the

passage of the Act to Regulate Commerce in 1887 involving the rightfulness of the exertion by a carrier of the power to meet competition as a means of being relieved from the long and short-haul clause of the fourth section before its amendment. While what we have already said answers it, because of its importance we notice another contention. As the power of carriers to meet competition and the relation of that right to non-competitive places may concern the fortunes of numberless individuals and the progress and development of many communities, it is said, to permit authority to be exerted concerning the subject without definite rules for its exercise will be to destroy the rights of persons and communities. This danger, the argument proceeds, is not obviated by declaring that the provisions of the second and third sections as to undue preference and discrimination apply to the fourth section since without a definition of what constitutes undue preference and discrimination, no definite rule of law is established but whim, caprice or favor will in the nature of things control the power exerted. And it is argued that this view is not here urged as the mere result of conjecture, since in the report of the Commission in this case it was declared in unequivocal terms as the basis of the order entered that the statute vested in the Commission a wide and undefined discretion by virtue of which it became its duty to see to it that communities and individuals obtained fair opportunities, that discord was allayed and commercial justice everywhere given full play. Let it be conceded that the language relied upon would have the far-reaching significance attributed to it if separated from its context, we think when it is read in connection with the report of which it but forms a part, and moreover when it is elucidated by the action taken by the Commission there is no substantial ground for holding that by the language referred to it was entitled to declare that the fourth section as amended conferred the uncon-

trolled exuberance of vague and destructive powers which it is now insisted was intended to be claimed. In any event, however, we must be governed by the statute and its plain meaning. After all has been said the provisions as to undue preference and discrimination, while involving of course a certain latitude of judgment and discretion are no more undefined or uncertain in the section as amended than they have been from the beginning and therefore the argument comes once more to the complaint that because public powers have been transferred from the carriers to the Commission, the wrongs suggested will arise. Accurately testing this final result of the argument it is clear that it exclusively rests upon convictions concerning the impolicy of having taken from carriers, intimately and practically acquainted as they are with the complex factors entering into rate making and moreover impelled to equality of treatment as they must be by the law of self interest operating upon them as a necessary result of the economic forces to which they are subjected, and having lodged the power in an official administrative body which in the nature of things must act, however conscientiously, from conceptions based upon a more theoretical and less practical point of view. But this does not involve a grievance based upon the construction or application of the fourth section as amended but upon the wisdom of the legislative judgment which was brought into play in adopting the amendment, a subject with which we have nothing in the world to do. It is said in the argument on behalf of one of the carriers that as in substance and effect the duty is imposed upon the Commission in a proper case to refuse an application, therefore the law is void because in such a contingency the statute would amount to an imperative enforcement of the long and short-haul clause and would be repugnant to the Constitution. It is conceded in the argument that it has been directly decided by this court that a general enforcement

of the long and short-haul clause would not be repugnant to the Constitution (*Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 503), but we are asked to reconsider and overrule the case and thus correct the error which was manifested in deciding it. But we are not in the remotest degree inclined to enter into this inquiry, not only because of the reasons which were stated in the case itself but also because of those already expounded in this opinion and for an additional reason which is that the contention by necessary implication assails the numerous cases which from the enactment of the Act to Regulate Commerce down to the present time have involved the adequacy of the conditions advanced by carriers for justifying their departure from the long and short-haul clause. We say this because the controversies which the many cases referred to considered and decided by a necessary postulate involved an assertion of the validity of the legislative power to apply and enforce the long and short-haul clause. How can it be otherwise since if this were not the case all the issues presented in the numerous cases would have been merely but moot, affording therefore no basis for judicial action since they would have had back of them no sanction of lawful power whatever.

3. *The jurisdiction of the court.*

The argument on this subject is twofold: (a) that as by the act creating the Commerce Court (June 18, 1910, c. 309, 36 Stat. 539) that court was endowed only with the jurisdiction "now possessed by circuit courts of the United States and the judges thereof" and provided that "nothing contained in this act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court" and as new powers were created by the subsequent amendment of the fourth section, therefore the Commerce Court had no jurisdiction. But we pass any extended discussion of

the proposition because it is completely disposed of by the construction which we have given to the amended section since that construction makes it clear that the effect of the amended fourth section was not to create new powers theretofore non-existing, but simply to redistribute the powers already existing and which were then subject to review. The argument affords another manifestation of the tendency to which we have already directed attention in this case to seek to maintain and aggrandize a power by insisting upon propositions which, if they were accepted, would raise the gravest question as to the constitutional validity of the asserted power, a question which we need not at all consider in view of the want of foundation for the exercise of the power claimed in the light of the plain meaning of the act to the contrary which we have already pointed out.

(b) The second contention as to jurisdiction yet further affords an illustration of the same mental attitude, since it rests upon the assumption that the order of the Commission refusing to grant the request of the carrier made under the fourth section was purely negative and hence was not subject to judicial inquiry. The contention therefore presupposes that the power which from the beginning has been the subject of judicial review by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist. It is of course true as pointed out in *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, 470, and since repeatedly applied that findings of fact made by the Commission within the scope of its administrative

duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess. And without pausing to particularly notice it, we observe in passing that what has just been said is adequate to meet the contention that as violations of the fourth section were made criminal no power existed to enjoin an order of the Commission made under that section because the consequence would be to enjoin criminal prosecution. The right which as we have seen the act gives to test the validity of orders rendered under the fourth section is not to be destroyed by a reference to a provision of that section. The two must be harmoniously enforced.

4. *The validity of the order in the light of the statute as interpreted.*

The order is in the margin.[1] The main insistence is

[1] FOURTH SECTION ORDER NO. 124.

In the matter of the applications, Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific coast terminals.

COMMODITY RATES.

These applications, as above numbered, on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from east-

that there was no power after recognizing the existence of competition and the right to charge a lesser rate to the competitive point than to intermediate points to do more than fix a reasonable rate to the intermediate points, that is to say, that under the power transferred to it by the section as amended the Commission was limited to

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ern points of shipment which are higher to intermediate points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah, and Washington, and other States east thereof, than to Pacific coast terminals.

Full investigation of the matters and things involved in these petitions, in so far as they concern westbound commodity rates, having been had,

It is ordered, That for the purposes of the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental groups hereinafter described are as specified in R. H. Countiss, agent's, transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma State line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of Line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of Line No. 3, which is the Buffalo-Pittsburg line from Buffalo, N. Y., to Wheeling, W. Va., marking the western bound-

ascertaining the existence of competition and to authorizing the carrier to meet it without any authority to do more than exercise its general powers concerning the reasonableness of rates at all points. But this proposition is directly in conflict with the statute as we have construed it and with the plain purpose and intent manifested by its enactment. To uphold the proposition it would be necessary to say that the powers which were essential to the vivification and beneficial realization of the authority transferred had evaporated in the process of transfer and hence that the power perished as the result of the act by which it was conferred. As the prime

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ary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of Line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C

It is further ordered, (1) That those portions of the above-numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points intermediate to Pacific coast terminals that are higher to intermediate points than to Pacific coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in Zone No. 2, 15 per cent from points in Zone No. 3, and 25 per cent from points in Zone No. 4.

The commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act.

By the commission:

[SEAL] JUDSON C. CLEMENTS,
Chairman.

object of the transfer was to vest the Commission within the scope of the discretion imposed and subject in the nature of things to the limitations arising from the character of the duty exacted and flowing from the other provisions of the act with authority to consider competitive conditions and their relation to persons and places, necessarily there went with the power the right to do that by which alone it could be exerted, and therefore a consideration of the one and the other and the establishment of the basis by percentages was within the power granted. As will be seen by the order and as we have already said for the purpose of the percentages established zones of influence were adopted and the percentages fixed as to such zones varied or fluctuated upon the basis of the influence of the competition in the designated areas. As we have pointed out though somewhat modified the zones as thus selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate-making which was included in the tariffs which were under investigation and therefore we may put that subject out of view. Indeed, except as to questions of power there is no contention in the argument as to the inequality of the zones or percentages or as to any undue preference or discrimination resulting from the action taken. But be this as it may, in view of the findings of the Commission as to the system of rates prevailing in the tariffs which were before it, of the inequalities and burdens engendered by such system, of the possible aggrandizement unnaturally beyond the limits produced by competition in favor of the competitive points and against other points by the tariff in question, facts which we accept and which indeed are unchallenged, we see no ground for saying that the order was not sustained by the facts upon which it was based or that it exceeded the powers which the statute conferred or transcended the limits of the sound legal discretion which it lodged in

the Commission when acting upon the subject before it.

It results that the Commerce Court in enjoining the order of the Commission was wrong and its decree to that end must therefore be reversed and the case be remanded to the proper District Court with directions to dismiss the bill for want of equity.

Reversed.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *v.* UNION PACIFIC RAILROAD COMPANY ET AL.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., *v.* UNION PACIFIC RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

Nos. 137, 163. Argued October 18, 21, 22, 1912.—Decided June 22, 1914.

Decided on authority of preceding case.

THE facts are stated in the opinion.

Mr. Attorney General Wickersham and *Mr. Assistant to the Attorney General Fowler,* with whom *Mr. Blackburn Esterline,* Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Charles Donnelly, Mr. F. W. M. Cutcheon and *Mr. F. C. Dillard* for appellees.

Mr. Rush C. Butler, *Mr. William E. Lamb*, *Mr. Stephen A. Foster* and *Mr. Cornelius Lynde* filed a reply brief on behalf of the Chicago Association of Commerce.

Mr. Joseph N. Teal for Portland Chamber of Commerce.

Mr. J. B. Campbell for the City of Spokane.

Mr. William A. Glasgow, Jr., for Giroux Consolidated Mines Co.

By leave of court, *Mr. Alfred P. Thom* filed a brief in behalf of certain interested parties.

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

The eleven carriers who are appellees on this record filed with the Interstate Commerce Commission applications to be relieved from the long and short-haul clause of § 4 of the Act to Regulate Commerce as amended by the act of June 18, 1910, c. 309, 36 Stat. 539, 547. After full hearing the Commission entered an order granting in certain respects the relief prayed but establishing a proportionate relation to be maintained between the lower rate for the longer haul and the higher rate for the shorter haul upon the basis of percentages which were fixed with reference to defined zones. The carriers refused to obey the order and filed their bill in the Commerce Court to enjoin its enforcement. An interlocutory injunction was ordered. The defendants moved to dismiss and on the overruling of the motions appealed from the interlocutory order, that case being No. 137. Subsequently upon the election of the defendants not to plead further, a final decree was entered and appealed from, that appeal being No. 163.

These cases are governed by the opinion in Nos. 136

and 162 just decided. They were tried in the court below with the other cases, were decided by the same opinion, and, although different localities are involved, the questions presented are identical, and for the reasons given in the other cases, Nos. 136 and 162, the decree must be reversed and remanded to the proper District Court with directions to dismiss the bill for want of equity.

Reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, ON THE RELATION OF DUNNE, GOVERNOR, AND LUCEY, ATTORNEY GENERAL, *v.* ECONOMY LIGHT AND POWER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 179. Argued April 29, 30, 1914.—Decided June 22, 1914.

The provisions in the Ordinance for Government of the Northwest Territory and subsequent acts of Congress to the effect that navigable waters leading into the Mississippi and St. Lawrence rivers shall be common highways and forever free to the inhabitants of that Territory and of the United States do not determine navigability of any of the streams but only define rights dependent upon the existence of navigability.

There is no Federal right involved in the obstruction, or use by private owners, of a non-navigable stream wholly within a State.

The question of navigability of a river wholly within a State is purely one of fact, and where the state court has decided that such a river is non-navigable there is no right left to review.

A State has no Federal rights which it may exert for itself or on behalf of its citizens or of all the citizens of the United States in regard to a river wholly within its boundaries which the highest court of the State has declared to be non-navigable; nor are any such rights created by acts of Congress merely authorizing surveys for and esti-

mates of cost of, improvements and not actually authorizing or appropriating for the same.

Writ of error to review 241 Illinois, 290, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, to review a judgment of the state court based on a finding of non-navigability of a river wholly within the State, are stated in the opinion.

Mr. Merritt Starr and *Mr. Horace Kent Tenney,* with whom *Mr. Elijah N. Zoline, Mr. John S. Miller, Mr. George Packard* and *Mr. Harry A. Parkin* were on the brief, for plaintiffs in error:

The Illinois River and its North Fork, the Des Plaines, are connected with the Chicago River and Lake Michigan by the Chicago Sanitary and Ship Canal. By this means the Great Lakes are connected with the Mississippi. The Ship Canal pours 300,000 cubic feet per minute of water from Lake Michigan into the Des Plaines making it from 6 to 30 feet deep. In this chain of connected navigable waters the Des Plaines makes a link 15.6 miles long. In this link 15.6 miles long the river is from 400 to 600 feet wide and from 6 to 30 feet deep and descends 38 feet. At an island it narrows to 128 feet. In Lake Joliet it spreads out to 1,500 feet in width. A small island which formerly narrowed one place to 60 feet was blasted out and removed in building the Ship Canal. The narrowest place is 128 feet wide. At the dam site it is over 300 feet wide and 6 feet deep and actually navigable throughout. This 15.6 mile link of the Des Plaines receives this increment by Federal permit granted May 8th, 1899, under act of Congress of March 3, 1899, and was made navigable thereby. (U. S. Engrs. Report, 1899, Part I, pp. 40, 41; Ibid., 1900, Part I, p. 42; Chicago Sanitary District Proceedings, 1899, pp. 5675–6). This permanent change in the Des Plaines was made January 17, 1900. Defendant did

not buy its riparian lands forming site of proposed dam on this link of the Des Plaines until December 15, 1906, after the change was complete, the former owner settled with for the change, and all claims of damage barred by the statute of limitations. The state statutes for the construction of the Ship Canal made full provision for compensation to riparian owners on the river into which the canal discharges. (Ill. R. S. 1912, c. 24, pp. 349–359.)

These connecting waters are navigable; and the 15.6 mile link of the Des Plaines is navigable. *Escanaba* v. *Chicago* (Chicago River), 107 U. S. 569; *Huse* v. *Glover*, (the Illinois River), 15 Fed. Rep. 292; 119 U. S. 543; *Lussem* v. *Sanitary District* (the Ship Canal), 192 Illinois, 404; *Missouri* v. *Illinois*, 200 U. S. 496; "An act to create Sanitary Districts and to remove obstructions in the Des Plaines and Illinois Rivers."

Illinois act of May 29, 1889, Ill. R. S. 1912, c. 24, par. 366, § 24, and concurrent Resolution on River Improvement, L. 1889, pp. 375–6: "An Act enabling the Sanitary District to Improve and Bridge Navigable Streams," Ill. Act of May 13, 1901, L. 1901, p. 164: "An Act to enlarge the corporate limits of the Sanitary District of Chicago and provide for Navigation," etc., Ill. Act of May 14, 1903, L. 1903, p. 113; Ill. Act of February 28, 1839, dedicating the Des Plaines as a highway, M. L. 1839, p. 208; Ill. Act of Dec. 6, 1907, declaring the Des Plaines navigable. Ill. R. S., p. 144. The Des Plaines in this 16 mile reach has always been navigable; it was the regular route of the fur trade and was the most navigated commercially of any waters in the State from 1700 to 1832. A multitude of books of geography, history and travel attest this. John Kinzie to U. S. Ter. Gov. Cass, U. S. Archives, Dept. of Interior, Ind. Office Book, 204, Letter Book, Vol. 1; Gov. Ninian Edwards to Secretary of War, VI Am. St. P. Ind. Aff. Vol. II, p. 65. Secretary Gallatin's Report on Means of Communication, 1808,

Am. St. Papers, p. **735; U. S. Surveyor Hutchins in Imlay's Topographical Description, p. 503 (1778–1797); Gov. St. Clair's Report to Pres. Washington, 1790; 2 St. Clair Papers, p. 174; Treaty of Greenville Securing Water Passage, 1795; Am. St. P. Cl. 2, Ind. Add., Vol. I, p. 562; Duc de Choiseul's Memoir on Louisiana, "Affairs, etc., Correspondence Politique, Etats Unis." Supp. Vol. 6, fols. 106–112; Gov. Collot's Voyage dans L' Amerique Septrionale 1826; "Canal Communication between the Illinois River and Lake Michigan." H. R. 18th Cong. 2nd sess., Vol. I, ser. No. 172, finding "uninterrupted navigation from the river into the Lake."

There have been ten United States Surveys of the Des Plaines which treat it as navigable water of the United States, viz.: (1) U. S. Survey by Maj. S. H. Long, 1816–19 reports the Des Plaines as "affording a sufficient depth for boats of moderate draft." (Ex. Doc. 17, 16th Cong. 1st Sess.); (2) by U. S. Surveyor, John Walls, in 1821, who marked its "head of navigation" and that of the Chicago River and laid out "Portage Road" connecting the two; (3) by Gen. J. H. Wilson in 1867 (Ex. Doc. 16, H. R., 40th Cong., 1st sess.); (4) by Gen. Wilson in 1868 (14 U. S. St. L. 418–422; 1 U. S. Eng. Rep. 1868, pp. 459–465); (5) by Col. Macomb, 2 U. S. Eng. Rep. 1875, p. 525; (6) by Maj. Benyaurd, 3 U. S. Eng. Rep. 1884, pp. 195–7–62; (7) by Col. Comstock, 2 U. S. Eng. Rep. 1887, pp. 2125–67; (8) in 1889 by Capt. Marshall, Ex. Doc. 264, U. S. Eng. Rep. 1890, App., JJ. pp. 2428–2550; (9) by Col. Barlow, 50 U. S. Eng. Rep. 1900, pp. 3857, 4 U. S. Eng. Rep. 1901, pp. 3061–2; (10) by Col. Ernst and a Board of Engineers; Ex. Doc. 263, H. R., 59th Cong., 1st sess.

The Secretary of War wrote to the Attorney General of Illinois informing him that the Des Plaines was a navigable water of the U. S., and that no permit had been granted for this dam. The letter of Gen. Oliver to Mr. Munroe

appreciating his proposals but declining to give any permit binds nobody. *Hubbard, Receiver of Hudson Water Company,* v. *Fort, Governor and Attorney General of New Jersey,* 188 Fed. Rep. 993; *Minnesota Canal &c. Co.* v. *Pratt,* 101 Minnesota, 197, *S. C.,* 11 L. R. A. (N. S.) 105.

This early commercial use in the fur trade ended with the Black Hawk War in 1832 and the inrush of immigration that followed. This is the route and this the commerce which was protected by the Ordinance of 1787. In 1836 the State began building the original Illinois and Michigan Canal and filled it from the Des Plaines, returning the water to the river after a detour of eleven miles. By this interruption, the old canal superseded the river commercially until itself was superseded by the railroads. The original navigability of the Des Plaines was restored and enlarged by the discharge into it by Federal authority of the navigable waters of Lake Michigan. The public right in this historic waterway is not lost by non-user. It is inalienable. *Ill. Cent. R. Co.* v. *Illinois,* 146 U. S. 387; *People* v. *Page,* 39 N. Y. App. Div. 110; *People* v. *Vanderbilt,* 26 N. Y. 287; *S. C.,* 28 N. Y. 396; *Hartford* v. *Hartford Bridge Co.,* 10 How. 534.

The defendant demurred to the allegation that the stream as altered and improved was rendered navigable in 1900; and the state courts both sustained the demurrer as a matter of law and held that the artificial navigability so created was irrelevant and immaterial. Upon this there was no finding of fact below.

As a matter of law, a stream artificially increased in volume and otherwise improved by public action is to be judged thenceforward in its altered condition. *Phila. Co.* v. *Stimson,* 223 U. S. 605, 634–5; *Union Bridge Co.* v. *United States,* 204 U. S. 364 at 400; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 193–4; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53; *Scranton* v. *Wheeler,* 179 U. S. 141; *St. Anthony's Falls Water Co.* v. *St. Paul*

Water Comrs., 168 U. S. 349; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 561–2; *The Monticello*, 20 Wall. 430; *West Chicago St. R. Co.* v. *Chicago*, 201 U. S. 506, 524, as to Chicago River so artificially made navigable. *In re Chicago River*, 20 Opin. U. S. Atty. Gen. 101.

Federal and state action were concurrent in the improvement of the Des Plaines. The State furnished the channel at a cost of over $50,000,000, and the Federal Government furnished the navigable water from Lake Michigan. By acts of Congress of March 3, 1899 (30 Stat., p. 1121); act of June 6, 1900 (31 Ibid., p. 580); act of June 13, 1902 (32 Ibid., p. 364); act of June 25, 1902 (36 Ibid., pp. 630, 659–60), Congress has appropriated moneys for the survey and improvement of the Des Plaines and thereby impressed the Federal character upon it. That the Federal part of the improvements has not yet been built is not controlling. It is the act of Congress and not the subsequent act of the laborer in making the excavation which fixes the Federal character. "When Congress has by any expression of its will, occupied the field, that action is conclusive." *Wisconsin* v. *Duluth*, 96 U. S. 379, 387.

The act of Congress of March 3, 1899 (30 Stat., p. 1146), specifically appropriates $200,000 for the survey of the Des Plaines, and that of June 25, 1910 (36 Stat., pp. 630, 659–60), appropriates $1,000,000 for its improvement, upon coöperation by the State of Illinois, as a navigable water of the United States; and §§ 9 and 10 of the former (pp. 1146, 1151) forbid the damming of such streams. These acts apply to the Des Plaines and give the State a special interest which it can protect by suit. The lands constituting the site were canal lands granted by the U. S. to the State of Illinois for navigation purposes and are impressed with a trust therefor; and the State while owning the lands enacted the statute of 1839 dedicating the Des Plaines as a highway to be used in

connection with the canal. Such dedication is binding. *McConnell* v. *Lexington*, 12 Wheat. 582; *Morris* v. *United States*, 174 U. S. 196; *Bennett* v. *Chicago &c. R. Co.*, 73 Fed. Rep. 696; *Union Canal Co.* v. *Landis*, 9 Watts, 228. The state legislature to whom Congress confided the protection of the stream, by the act of December 6, 1907, ordered this suit brought; and by the act of 1911, ordered this proceeding to review same in this court.

The existence of similar right of action on the part of the Federal Government does not divest the right of the State. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.

The State has the right to maintain its suit as *parens patriæ* to enforce rights conferred by Federal laws upon it and its people. *Missouri* v. *Illinois*, 180 U. S. 208, 242–4, 200 U. S. 496; *Kansas* v. *Colorado*, 185 U. S. 125, 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387; *Am. Express Co.* v. *Michigan*, 177 U. S. 404.

The State may assert a right in its own courts under Federal laws and is not concluded by the judgment of its own court. It is entitled to a writ of error from this court thereon. *New Jersey* v. *Yard*, 95 U. S. 104; *Alabama* v. *Schmidt*, 232 U. S. 168.

The act of Congress of March 3, 1899, gives the state legislature the authority to permit or prevent the damming of a stream whose navigable part is in one State. The action of the state legislature in exercising this Federal grant of authority presents Federal questions for review. *United States* v. *Bellingham Boom Co.*, 176 U. S. 211; *Cummings* v. *Chicago*, 188 U. S. 410, 431.

The State, like any other party specially affected by a breach of Federal law, may maintain suit for its violation. *Hubbard, Recr. of Hudson Co.*, v. *Fort et al., State Officers of New Jersey*, 188 Fed. Rep. 993; *Wilson, Atty. Gen. of New Jersey*, v. *Hudson Co.*, 76 N. J. Eq. 543.

And the jurisdiction to review the judgment in such

suit is not abridged by the fact that the plaintiff elected to pursue an ancient remedy in the state court. *Belden* v. *Chase*, 150 U. S. 674, 691. *Egan* v. *Hart*, 165 U. S. 138, does not apply, because there the state court found the facts, here it sustained a demurrer. Here the entire evidence is certified up and shows facts diametrically opposite to those in *Egan* v. *Hart*. There the riparian owner sought to enjoin the public work, viz.: The erection of a public levee by concurrent action of state and Federal Government, from going on. Here the State seeks to enjoin the riparian owner from obstruction in order that public work, in which state and Federal Government participate, may go on. The levee in *Egan* v. *Hart* was authorized by state legislation, but here the proposed dam is not so authorized, but on the contrary is forbidden by state legislation. The bayou in *Egan* v. *Hart* connected with nothing. The Des Plaines connects the Great Lakes with the Mississippi. There the public levee obstructed high water only; here the private defendant proposes to take exclusive occupation of the stream. *Egan* v. *Hart* was decided before the enactment of the act of Congress of 1899 which establishes a new and different rule.

The judgment of the state court was reached (1) by erroneously disregarding the permanent improvements in the stream and attempting to deal with it as in a state of nature; (2) and by erroneously disregarding the only available evidence of a state of nature, viz.: That contained in the books of history, geography, travel and Government survey. The state of nature ceased to exist in 1833, and there was no living witness in 1908, who could testify thereto. But although altered, the river continued in use until 1848. As Federal questions were involved this court applies its own standards and rules to the question of navigability and to the evidence. *Mackay* v. *Dillon*, 4 How. 421, 447.

Defendant claims only as a riparian owner whose rights

are subject to the paramount right of, and changing needs of navigation. *West Chi. St. R. Co.* v. *Chicago*, 201 U. S. 506, 520; *Lewis, Oyster &c. Co.* v. *Briggs*, 229 U. S. 82, affirming 198 N. Y. 287.

The "decision" or "opinion" of the state Supreme Court on the question of artificial navigability alleged in the bill and demurred to by defendant, cannot operate as a finding of facts. *Stone* v. *United States*, 164 U. S. 380; *Saltonstall* v. *Birtwell*, 150 U. S. 417; *Jackson* v. *United States*, 230 U. S. 1, 18.

Modern developments of shallow draft navigation by boats propelled by gasoline and electricity have brought many streams which were navigated before the use of steamboats and then temporarily disused back into use as navigable streams. The variations in the art do not divest the rights of the public. *In re Debs*, 158 U. S. 564; *Phila. Co.* v. *Stimson*, 223 U. S. 605, 634–5; *Pennsylvania Co.* v. *Wheeling Bridge*, 18 How. 421, 431.

Where Federal and state action are interwoven upon a subject and Federal questions are presented, the decision of the state court is not conclusive but is reviewable here; and this court will determine the scope and significance of the Federal questions and the effect of the evidence thereon for itself. *Missouri* v. *Elliott*, 184 U. S. 530; *Kaukana* v. *Green Bay Canal*, 142 U. S. 254, 269; *Green Bay & Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *Chapman* v. *Goodnow*, 123 U. S. 540; *C., B. & Q. R. Co.* v. *People*, 200 U. S. 561; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 471; *West Chicago St. R. Co.* v. *Chicago*, 201 U. S. 506, 519, 520; *Furman* v. *Nichol*, 8 Wall. 44; *Dower* v. *Richards*, 151 U. S. 658, 667; *Mackay* v. *Dillon*, 4 How. 421, 447. The contention that there was no evidence tending to establish liability under a Federal statute, itself involves a Federal question. *St. Louis, I. M. & S. R. Co.* v. *McWhirter*, 229 U. S. 265.

"Navigable stream" as a term in the Federal statutes

is to be defined by the Federal courts; and measured and tested by Federal standards the Des Plaines is and always has been navigable. The act of May 18, 1796, 1 Stat. c. 29, pp. 464–9) and the act of Congress of March 26, 1804, 2 Ibid., p. 227, containing these terms and dedicating streams as highways, apply. *Des Plaines River Co.* v. *Schurmeyer*, 7 Wall. 272. What they apply to is a Federal question for this court to decide. These Acts continued in force after the admission of Illinois. *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Gratiot*, 14 Pet. 34. These acts of Congress were in force long before the invention of the steamboat and they protect shallow draft navigation. The defendant by denying the continued validity of these acts after the admission of Illinois drew them in question. *Sharpleigh* v. *Surdam*, 21 Fed. Cas. 1173–8; *Jones* v. *Walker*, 2 Paine, 688; *S. C.*, 13 Fed. Cas. 1059–62. The Illinois courts applied the early established local definition and standard of navigability, which rejects rafting, passenger traffic and shallow draft navigation. *Hubbard* v. *Bell*, 54 Illinois, 110; *Schulte* v. *Warren*, 218 Illinois, 108. This standard so applied, is in conflict with the Federal standard as laid down in *The Montello*, 20 Wall. 430, and *The Daniel Ball*, 10 Wall. 557, and in the acts of Congress protecting rafting and shallow draft navigation. Rev. Stat., § 5254. Acts of Congress of July 5, 1884, c. 229, § 8 (6 Fed. St. An., p. 795), and of March 23, 1906, 34 Stat., c. 1130, § 40; *United States* v. *Bellingham Boom Co.*, 176 U. S. 24; *Passenger Cases*, 7 How. 283; *Gibbons* v. *Ogden*, 9 Wheat. 1, at 189 and 215.

Mr. Frank H. Scott, with whom *Mr. Gilbert E. Porter* and *Mr. Edgar A. Bancroft* were on the brief, for defendant in error:

As no Federal question was decided by the state court adversely to plaintiff in error, this court has no jurisdiction. The assignments of error are predicated upon the

assumed existence of the one fact that the Des Plaines River is a navigable stream which is negatived by the judgment of the state court.

The question of navigability is purely one of fact; *Egan* v. *Hart*, 165 U. S. 188; and where the state court denies the existence of facts necessary to bring the case within the operation of Federal statutes, this court has no jurisdiction. *Crary* v. *Devlin*, 154 U. S. 619; *Cameron* v. *United States*, 146 U. S. 533.

Plaintiff in error contends that in the state court it set up and claimed the title, right, privilege and immunity to have the Des Plaines River preserved as a highway, free of obstruction by defendant in error's dam, under certain acts of Congress relating to navigable streams, and the Ordinance of 1787. The ordinance and acts relied on ceased to have any force in the State of Illinois upon its admission to the Union. *Van Brocklin* v. *City of Tennessee*, 117 U. S. 151; *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Hamilton* v. *Vicksburg &c. R. R. Co.*, 119 U. S. 280; *Huse* v. *Glover*, 119 U. S. 543, 546; *Permoli* v. *First Municipality*, 13 How. 589; *Pollard* v. *Hagen*, 3 How. 212; *Dixon* v. *The People*, 168 Illinois, 179; *People* v. *Thompson*, 155 Illinois, 451.

The provisions of these acts relied on do not refer to physical obstructions of navigable streams, but to political regulations which would hamper freedom of commerce, and they do not prohibit the construction of dams, even though such dams may completely obstruct navigation. *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Pound* v. *Turck*, 95 U. S. 462; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1–11, and cases cited therein; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205. Notwithstanding such acts, the rights of riparian owners are to be measured by the rules and decisions of the state courts. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358. Under the laws of Illinois

the riparian owner had the right to dam the Des Plaines River and have the benefit of the increased flow caused by artificial means. *Druley* v. *Adams*, 102 Illinois, 177; *People* v. *Economy Light & Power Co.*, 241 Illinois, 290. The effect of the decision of the state courts that the Des Plaines River was not a navigable stream at once removed the question whether plaintiffs in error had any rights under those acts. Those acts apply in terms only to navigable streams, and the decision of the state court that the river is not navigable made it unnecessary for the court to pass upon the Federal question, if one existed. *Egan* v. *Hart, supra; Chrisman* v. *Miller*, 197 U. S. 313; *King* v. *West Virginia*, 216 U. S. 92; *Mammouth Mining Co.* v. *Grand Cent. Min. Co.*, 213 U. S. 72; *Chapman &c. Land Co.* v. *Bigelow*, 206 U. S. 41; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Rankin* v. *Emigh*, 218 U. S. 27.

Plaintiff in error also claims that under the act of March 3, 1899, it has the title, right, privilege and immunity to have the Des Plaines River preserved as a highway. This right was not set up or claimed in the trial court, or passed upon by the state Supreme Court, and the claim now made thereunder confers no jurisdiction upon this court. Under the rule of procedure in Illinois, points which could have been, but were not, raised in the trial court, will not be reviewed on appeal. *Dunne* v. *Critchfield*, 214 Illinois, 292, 297; *McKenzie* v. *Penfield*, 87 Illinois, 28–40; *Masonic Ass'n* v. *City of Chicago*, 217 Illinois, 58–60; *Griveau* v. *South Chicago City Railway Co.*, 213 Illinois, 633.

Where such a rule of procedure prevails, this court will not take jurisdiction to review a Federal question not raised in the trial court unless decided by the state court on appeal, *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291; *Spies* v. *Illinois*, 123 U. S. 131, 181; *Chappell* v. *Bradshaw*, 128 U. S. 132, 133; 3 Foster's Federal Practice, 5th ed., p. 2402; *Ex parte Chadwick*, 159 Fed. Rep. 576, 577, 578,

and no question under the act of 1899 was decided by the state Supreme Court.

Plaintiff in error's contention that the Federal improvement of the Des Plaines River in coöperation with the State of Illinois, confirms the Federal character of the stream, is based upon a false premise. No Federal improvement of the Des Plaines River has ever been made, and the State of Illinois has never taken any steps for the improvement of the river. The Sanitary District Act, which plaintiff in error relies upon, did not include in its scheme the improvement of the Des Plaines River for navigation. The purpose of that act was sanitation, and up to this time no deep waterway has been attempted either by the State or the Nation, and hence there has been no coöperation between them. The state Supreme Court has so held in this case. *People* v. *Economy Power Co.*, 241 Illinois, 290, 331.

The acts of Congress of 1899, 1900, 1902, 1910, which plaintiff in error contends make appropriations for the improvement of the Des Plaines River and constitutes the exercise of jurisdiction over that river, merely make appropriations for surveys to determine the feasibility of improving the Des Plaines and Upper Illinois for navigation. Those acts recognized that the Des Plaines River was not navigable, and were not the exercise of jurisdiction over the river.

No permission for the construction of a dam was ever asked of the War Department or refused by it. The plans were submitted to the Department for the purpose of ascertaining whether they were in harmony with the plans for the deep waterway, and the Department held that they would be an aid to the deep waterway plans then under consideration, and would save to the United States a large sum of money in the construction of a deep waterway.

The War Department expressly held that the Des

Plaines River was not navigable, and that the United States had no jurisdiction over it, and that the act of 1899 did not apply to it. The State of Illinois is not entitled to restrain the construction of the dam because of the failure to procure a permit from the War Department under an act which the War Department has held does not apply to the stream.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This was a proceeding brought in the Circuit Court of Grundy County, Illinois, being an information filed by the Attorney General of the State on behalf of the people of the State on the relation of the Governor, against defendant in error, the Economy Light & Power Company, to restrain that company from erecting a dam across the Des Plaines River and from causing the waters of the river to back up and overflow the lands of the State, to refrain from permitting the obstructions placed in the river to remain therein, and that certain deeds, leases and contracts made by the canal commissioners of the State to the company be declared null and void. The information was dismissed by the Circuit Court and its decree was affirmed by the Supreme Court. This writ of error was then sued out by plaintiffs in error.

A motion is made to dismiss on the grounds—(1) that no Federal question was decided by the Supreme Court adversely to plaintiffs in error. (2) The Federal questions sought to be raised in this court were not raised in the trial court and under the practice in Illinois were not open to review in the Supreme Court, and were not reviewed. (3) The Federal questions raised are without merit. (4) The decision of the Supreme Court is sustainable upon non-Federal grounds.

The motion makes necessary a consideration of the

allegations of the information and of the grounds of decision of the court. The information alleges the following: The State of Illinois was formed out of the Northwest Territory ceded by Virginia to the United States in 1784, and by the ordinance for the government of the territory it was declared in Article 4 that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor."

On May 18, 1796 (1 Stat. 464, c. 29), Congress passed an act for the sale of lands of the United States in the territory northwest of the Ohio River and above the mouth of the Kentucky River, by § 9 of which act it was provided that all navigable rivers within the territory to be disposed of by virtue of the act should be deemed to be and remain public highways. Subsequently there was separated from such territory by an act of Congress dated May 7, 1800 (2 Stat. 58, c. 41), the portion thereof which now embraces the States of Illinois and Louisiana, to be called Indiana Territory. On March 26, 1804 (2 Stat. 277, c. 35), Congress, acting under the constitution of 1787, passed an act for the disposal of the public lands in Indiana Territory, by which it was provided that all the navigable rivers, creeks and waters within that Territory should be deemed to be and remain public highways.

By an act of February 3, 1809, 2 Stat. 514, c. 13, Congress divided the Indiana Territory and constituted that portion of it which now comprises the State of Illinois a separate territory, to be called Illinois, and provided that its inhabitants should be entitled to and enjoy all and singular the rights, privileges and advantages

granted and secured to the people of the Northwest Territory by the ordinance of July 13, 1787.

On April 18, 1818 (3 Stat. 428, c. 67), Congress passed an act to enable the people of Illinois to form a constitution and state government for admission into the Union upon an equality with other States and provided that the government should be republican and not repugnant to the ordinance of July 13, 1787. A constitution was adopted and Congress, on December 3, 1818 (3 Stat. 536), declared the admission of the State into the Union, that its constitution and government were republican and in conformity to the provisions of the articles of compact between the original States and the people and the States in the territory northwest of the river Ohio, passed on July 13, 1787 (1 Stat. 51n.).

The river Des Plaines is situated in the Northwest Territory, rises in Wisconsin and flows southerly into the State of Illinois (its course is given), in all a distance of about ninety-six miles.

The river Kankakee rises in Indiana and flows westerly into Illinois and unites in Grundy County with the Des Plaines, forming with it the Illinois which flows thence westerly and southwesterly through several counties in Illinois into the Mississippi River. Wherefore by reason of the fact that the Des Plaines River is wholly within the Northwest Territory and that it empties its waters into the Mississippi, and by reason of the other facts set forth, it is subject to the provisions of the acts of Congress set out.

It is shown by early explorations and discoveries that the Des Plaines River was navigable from a point near where is now situated the City of Chicago to its mouth, and was used as a highway for commercial purposes, and commerce was carried on over it and over the Chicago River, located in Cook County, Illinois, and connection therewith made by a short portage between the two

rivers near the site of what is now the City of Chicago and was in use as a highway of commerce leading from Lake Michigan and the waters emptying into the St. Lawrence River on the one hand, and the waters of the Mississippi River on the other, thenceforward from the time of said first use up to and at the time when the ordinance of 1787 and the several acts of Congress were respectively enacted.

Afterward the State of Illinois, by and through its legislature and in obedience to the several acts of Congress set forth, assumed charge of the river and in 1839 gave permission for the building of a toll bridge across the river, and subsequently by an act passed in 1839 amending the several laws in relation to the Illinois and Michigan Canal it was provided that no stream of water passing through the canal lands should pass by the sale so as to deprive the State of the use of such water if necessary to supply the canal without charge for the same; and it was further provided that the lands situated upon the streams which have been meandered by the surveys of public lands by the United States should be considered as bounded by the lines of those surveys and not by the streams. In the same year an act was passed declaring the river a navigable stream and providing that it should be deemed and held a public highway and should be free, open and unobstructed from its point of connection with the canal to its utmost limit within the State for the passage of all boats and water craft of every description.

In 1845 the State authorized the construction and continuance of the mill dam across the river with reservation of the right to the State of improving the dam and of using the water for the canal, and for any other purpose; and in 1849 authorized the building of a bridge at Lockport. The State by certain acts of its legislature (they are set out) created the Sanitary District of Chicago, under the provision of which a channel was constructed connecting Lake Michigan with the Des Plaines River, at a point

some sixteen miles above the site of the dam in question, and through which about 300,000 cubic feet of water per minute are drawn through the Chicago River and the Sanitary District Drainage Channel and discharged in the Des Plaines River.

It was provided that the channel when completed should be a navigable stream and that when the General Government should improve the river it should have full control over the same for navigation purposes, but not to interfere with its control for sanitary drainage purposes.

On December 6, 1907, the legislature passed an act, which is as follows:

"SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the Des Plaines and Illinois rivers throughout their courses from and below the water power plant of the main channel of the Sanitary District of Chicago in the township of Lockport, at or near Lockport, in the county of Will, are hereby recognized as and are hereby declared to be navigable streams, and it is made the special duty of the Governor and the Attorney General to prevent the erection of any structure in or across said streams without explicit authority from the General Assembly, and the Governor and Attorney General are hereby authorized and directed to take the necessary legal action or actions to remove all and every obstruction now existing in said rivers that in any wise interferes with the intent and purpose of this act."

The relator, Charles S. Deneen, is the Governor referred to in the act and that by virtue of the statute, his office and constitutional duty he has a special interest and responsibility in the matters set forth.

The purchasers from the State in section 25 and other similarly situated lands with reference to the Des Plaines River did not take, and did not claim to take, under their several purchases that portion of the lands lying between

the meander line and the water of the river and that the lands so lying have never been used by any individual under any claim of authority or right vested in the purchasers from the State of Illinois, save and except as claimed by defendant. Lands so lying, therefore, together with the bed of the stream of the river in said quarter-section, and other lands similarly situated with reference to the river, have not passed by any purchase of adjoining lands from the State of Illinois, but the same and every part thereof is owned by the State and held for the benefit of its people and of the people of the United States as a public highway for commerce.

The trustees of the Illinois and Michigan Canal executed and delivered to one Charles E. Boyer a deed bearing date October 22, 1860, to land in section 25, excepting and reserving so much as was occupied by the canal and its waters, and a strip ninety feet wide on either side of the canal, containing 196 62–100 acres, the tract being a portion of the land granted by the United States to the State to aid the State in opening a canal to connect the waters of the Illinois River with those of Lake Michigan and by the State granted to the Board of Trustees of the canal for the purposes set forth in the act of February 21, 1843.

The defendant derives its title by mesne conveyances from Boyer and certain contracts and leases entered into between the canal commissioners and one Harold F. Griswold and assigned to defendant, and in pursuance of the claim of right thus obtained defendant commenced the construction of a dam across the river, but that the said several leases, deeds and contracts are ineffectual to confer any right to build or maintain the dam.

The legislature of the State, by a proper resolution passed on October 16, 1907, has proposed the building of a deep waterway commencing at the southern end of the Chicago Drainage Canal and extending along the Des Plaines River, to be submitted to a vote of the people

of the State, and, if the same is built, as incident thereto locks and dams will necessarily be constructed across the deep waterway at or near the S. E. ¼ of section 25, which dams will incidentally afford water power of the value of several millions of dollars to the State which will be lost to the State if the defendant be permitted to construct the dam in question.

The 90-foot strip along the line of the Illinois and Michigan Canal constitutes an integral part of the canal and the trustees of the canal and the canal commissioners of the State had no right or authority under the law to convey the same by deed, lease or otherwise. Wherefore the defendant acquired no right to such strip and said deeds, leases, contracts and other agreements are void so far as they pertain to the bed of the stream of the river, and to the lands lying outside of the meander line.

By virtue of the several acts of Congress set forth, the State is the owner of such lands and other lands similarly situated. The defendant, claiming to own such lands and other lands in section 25, has actually begun the erection of the dam referred to; the Attorney General, therefore, on December 12, 1907, served notice upon the defendant to desist from the erection of the dam and from further trespassing upon the lands owned by the State, and to remove any and all obstructions placed thereon. Defendant has ignored the notice and unless prevented by injunction will complete the dam to the great impairment of navigation and to the great and irreparable damage of the people of the State.

There are other allegations in regard to the leases and contracts from the canal commissioners which are not necessary to be given.

The prayer of the information was for an injunction in accordance with the allegations.

Defendant in error summarizes its answer as follows: It denied that the Des Plaines River was or ever had been

navigable, and alleged that it never had been navigated for the purpose of commerce; and also that it had from the earliest times been completely obstructed by various bridges and dams built without legislative authority, and that the State itself had constructed and for many years maintained, and still maintains, a dam entirely across the river at Joliet. It set out correspondence with the War Department of the United States before the construction of the dam was begun, from which it appeared that the plans of the proposed structure were submitted to that Department for the purpose of ascertaining whether the project would be in harmony with the work of the improvement of the river proposed—but never decided upon—by the Government, and that the officers of the Department stated not only that it would be so in harmony but if carried out it would save the Government large sums of money. The correspondence also stated that the river had never yet been considered a navigable stream of the United States and that it was not subject to the provision of §§ 9–13 of the act of March 3, 1899 (30 Stat. 1151, c. 425), or to other similar United States legislation.

The answer further alleged that subsequently defendant in error acquired the property and that a large sum of money had been expended and heavy obligations incurred by it in carrying out the project of building the dam.

Upon the issues thus made, evidence was taken, which composes three large volumes upon which the courts below decided against plaintiffs in error; and we are to consider whether in so doing any Federal right was passed upon or denied it.

To sustain the contention that such right was passed upon and denied, it is said "that at the time the information in equity was filed, and for over six years before the defendant in error became a riparian owner, the Des Plaines River, irrespective of the question of its naviga-

bility, was a navigable river of the United States at the point where the dam was erected" and this because of the "concurrent action of the State and Federal Governments by the construction of the Chicago Sanitary Ship Canal, the connection of it with the Chicago River and Lake Michigan on the northeast and the discharge of the water into Lake Michigan from it into Des Plaines and Illinois on the southwest."

It is further contended that the state court did not decide this question adversely to plaintiffs in error but, on the contrary, excluded the admitted fact as being immaterial because that condition was artificially created. And this because defendant in error urged in that court that the navigability of the river could not be determined by its capacity as improved by the addition of the water of the Sanitary District. The court in its decision, therefore, it is the final contention, denied the rights arising from the condition of navigability thus created by state and Federal action, and plaintiffs in error insist that "if artificial navigability can create a public right which is entitled to protection against the acts of one who purchases riparian property after that condition was created, then on the conceded law the judgment of the state court was erroneous. And if those public rights are created or protected by Federal law, this court has jurisdiction to reverse the judgment."

The inquiry immediately occurs, How did the so-called public right arise? From the mere addition of water to the river or by the conditions upon which it was admitted? The bill alleges the enactment of many laws and a complex system of improvements by virtue of them, rights asserted by the State to the lands bordering on the river and rights to the bed of the river, conveyances, leases, and contracts by public officers constituted by laws which verbally, at least, confer authority upon them, and rights asserted by defendant in error arising from the execution

of such authority. But all of the questions hence arising are state questions, whether depending upon law or fact, which it is not in our province to review. It would seem, therefore, at the outset that one of the elements of the Federal right asserted is absent. However, let us see what the Supreme Court of the State has decided.

Mr. Justice Vickers, delivering the opinion of the court, says, (241 Illinois, p. 309): "Appellant [the State] bases its claim on three propositions—as follows: (1) That the State of Illinois owns the bed of the river at the point where it is proposed to build said dam; (2) That the Des Plaines River is a navigable stream, and that the proposed dam would constitute an obstruction to navigation; (3) That certain contracts executed by the commissioners of the Illinois and Michigan Canal, under which appellee [defendant in error] claims certain rights in connection with the construction of said dam, are void, and that no rights were acquired by or can be asserted under said contracts."

The first and third propositions manifestly involve state questions and were decided adversely to plaintiffs in error. They might be put out of discussion except so far as they may have bearing on the second proposition. By the second proposition the navigability of the river is presented as a question of fact, and of it the court said that it had received the most exhaustive treatment by counsel, and that if the dismissal of the bill by the court below had been without prejudice to renew the application for injunction the action of the court could be sustained because of the utter failure of the plaintiffs in error to prove that the construction of the proposed dam would be an obstruction to the then navigation of the river. "There is no proof," the court said (p. 320), "that the river is now being used as a public highway for commerce. On the contrary, the evidence not only shows that the river is not being so used, but it shows affirmatively that,

owing to the presence of numerous other dams and some fifty or more bridges which span the river, it would be impossible, under existing conditions, to navigate the same. There being at present no navigation whatever upon the river, obviously the dam in question cannot be said to be an obstruction to navigation that has no existence in fact." The trial court not making the indicated reservation but having rendered a decree based on the finding that the river was not navigable, thus settling the question for all time, the Supreme Court considered the question as presented on the merits. After a review of the evidence and the contentions of the parties, it decided that the river was not navigable in a state of nature, and declared that there was not in the entire record a well authenticated instance in which a boat engaged in commerce navigated the waters of the Des Plaines River. Referring to the testimony, the court said (p. 336), "Whatever may be thought of the preponderance of it one way or the other, it can have but little weight as against the uncontroverted fact that the river has never been used as a public highway for commerce." And again (p. 338), "After the most careful consideration of this question we are of the opinion that the Des Plaines River in its natural condition is not a navigable stream, and that the rights of parties to this suit must be determined upon that basis." The court besides rejected the contention that the Sanitary District Act declared the river to be navigable. The contention, it was said, was "based on a sentence in § 24 of said act, as follows: 'When such channel shall be completed, and the water turned therein, to the amount of 300,000 cubic feet of water per minute, the *same* is hereby declared a navigable stream.' Appellant's [the State] contention, under this statute, is thus stated in its brief: 'The *same* means that the water flowing in that channel is a navigable stream. The water so turned in was navigable in fact, and it does not lose its naviga-

bility in passing out of the artificial channel into the channel of the Des Plaines River. The water is just as navigable one-half mile southwest of Joliet as it is one-half mile northeast of Joliet.' The argument is based upon an erroneous construction of the word 'same.' That term refers to the channel of the Sanitary District and has no reference to the water after it leaves the channel" (p. 329).

The court, however, said that even if the legislature had declared in unequivocal language that the river was navigable, as it did by the act of 1907 [the act under which the information was filed], the declaration could not affect the rights of defendant in error, they being protected by the constitution of the State which forbids private property from being taken for public use without just compensation previously made, for which the court cited a number of cases and Cooley on Constitutional Limitations (side p. 591). And it was added that none of the legislative acts had the primary purpose of permitting a deep-water channel from the Lakes to the Gulf by means of improving the channel of the Des Plaines River, nor did the various acts passed in the interest of the Illinois and Michigan Canal nor the Sanitary District Act include a general scheme for the improvement of that river. "Up to this time," it was further said (p. 331), "no general plan for the deep waterway has been adopted, either by the State or the Nation," and whether any such enterprise will ever be adopted and whether it will include the Des Plaines River "are all legislative questions, with which the courts have no concern." If it be done, the court continued, it must be done "with due regard . . . to the sacred rights of every citizen, however humble and insignificant those rights may seem in contrast with the great public consummation."

We have already seen that the contention of the plaintiff in error that the bed of the river was in the State and

not in the riparian owners, among whom is defendant in error, by force of the act of the legislature of the State of February 26, 1839, in relation to the Illinois and Michigan Canal, was held untenable, and it was further held that the contracts of the canal commissioners under which defendant in error claims rights were valid. And the court further decided that the legislation of the State did not intend nor contemplate the improvement of the Des Plaines River from a condition of non-navigability to navigability and no act, except that of 1907, had declared it to be navigable, and that no act could do so and affect private rights under the constitution of the State. The supreme tribunal of the State, has, therefore, decided that plaintiffs in error have no elements of right against defendant in error.

It is said, however, as a foundation of a right under the acts of Congress alleged, that the river, although it was not navigable in its natural state became so by the addition of water from the Sanitary District. This contention was rejected by the Supreme Court, the court deciding, as we have seen, that the navigability of the river was to be determined by its natural condition and not by its condition created by artificial means. In resistance to this conclusion of the court and in assertion of a Federal right, plaintiffs in error cite, besides the acts of Congress referred to in the information certain acts of Congress passed in 1899, 1900 and 1902 appropriating money for "a survey and estimates of cost for the improvement of the upper Illinois and lower Des Plaines Rivers in Illinois, with a view to the extension of navigation from the Illinois River to Lake Michigan," and adduce, besides other recognitions by Congress of the navigability of the river, and contend that therefore, the rights of the State are based on Federal laws, and "that in its sovereign right, and as *parens patriae* and of its citizens, and *on behalf of the citizens of all of the United States* [italics counsel's], it had

the right under those Federal laws to prevent the accomplishment by defendant of an act destructive of the navigability of the stream."

Plaintiffs in error state their contention another way. They say the acts of the two sovereignties, state and National, in furtherance of a common object, are so interwoven and related that the rights and questions arising from them, and the construction of their effect necessarily create Federal questions.

But we have seen that the Supreme Court of the State decided there was no concurrence of the State in furtherance of the so-called common object, that is, that the various acts in regard to the Illinois and Michigan Canal or the Sanitary District did not include any general scheme for the improvement of the Des Plaines River, and it was certainly within the competency of the court to so determine. The court was also of the view that under the constitution of the State the State did not have the "sovereign right, and as *parens patriae*" to restrain the acts of defendant in error.

The court seemed to consider that it had decided all of the contentions of the State when it had decided the question of the navigability of the river both in its natural condition and its condition after the addition of the waters of the Sanitary District. The fact was and is pivotal. The ordinance for the government of the Northwest Territory and the subsequent acts of Congress set out in the information do not determine navigability of the streams but only define rights which depend upon its existence. Passing the question, therefore whether the ordinance or the acts refer to physical obstructions or to political regulations, and also passing the question whether they were of force after the admission of the State into the Union (on both questions see *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1), the fact of navigability having been decided against the State by the state court, there is no Federal

right left to review. *Crary* v. *Devlin*, 154 U. S. 619; *Cameron* v. *United States*, 146 U. S. 533; *Egan* v. *Hart*, 165 U. S. 188. In the latter case it was decided that the question of navigability is purely one of fact.

It is said, however, that by the acts of 1899, 1900 and 1902 Congress has taken jurisdiction of the Des Plaines River. If so, the State is not the instrument through which the jurisdiction can be exercised. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211; *Willamette Iron Bridge Co.* v. *Hatch, supra; Cleveland* v. *Cleveland Electric Ry. Co.*, 201 U. S. 529.

But the cited acts are not appropriations for improvements undertaken but for improvements which may be undertaken; not a jurisdiction exercised but a jurisdiction to be exercised. And, as we have seen, it is alleged in the answer, and the allegation is sustained by the evidence, that the plans of defendant in error's structure were submitted to the War Department and it was declared by that department, "The work proposed is in general harmony with the work of improvement recommended by the Board of Engineers appointed under the authority of the Rivers and Harbors Act of June 13, 1902 (32 Stat. 331, 334, c. 1079)." But the department, inasmuch as Congress had not authorized the improvement of the river, did "not deem it expedient to take further and definite action in the matter of approving the plans." It is manifest, therefore, that the State has no right under Federal laws which it may assert for itself or "on behalf of the citizens of all of the United States," and the motion to dismiss must be granted.

Dismissed.

LANE, SECRETARY OF THE INTERIOR, *v.* WATTS.

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

No. 889. Argued April 14, 15, 1914.—Decided June 22, 1914.

A title which has passed by location of a grant and its approval by proper officers of the Land Department cannot be subsequently divested by the then officers of the department. *Ballinger* v. *Frost*, 216 U. S. 240.

The action of the Commissioner in approving the location of a non-mineral float cannot be revoked by his successor in office, and an attempt so to do can be enjoined. *Noble* v. *Union River Logging Co.*, 147 U. S. 165.

A suit to restrain the Secretary of the Interior and the Land Commissioner from doing under color of their office, an illegal act which will cast a cloud upon the title of complainant is not one against the United States; nor in this case is it one for recovery of land merely or an attempted appeal from the decision of the Interior Department or a trial of title to land not within the jurisdiction of the court and wherein the United States is not present or suable.

A survey is necessary to segregate from the public domain lands attempted to be located by a float grant. *Stoneroad* v. *Stoneroad*, 158 U. S. 240. In this case, *held*, that a survey was made and approved.

In this case, *held*, that the report of the Surveyor General and the subsequent proceedings and survey by the Surveyor General of Arizona amounted to a survey and finding that the lands were non-mineral and that title thereto vested in the holder of the float grant selecting the lands and passed out of the United States.

Where, as in this case, in order to accommodate conflicting claims and, at the instance of the Government, claimants have given up rights to a definite tract and accepted float grants for an equal amount of land, it will be presumed that the Government would make provision for the location of the substituted land as expeditiously as possible and without expense to the holders of the float.

41 App. D. C. 139, affirmed.

THE facts, which involve the title to lands assigned on one of the Baca Float Grants issued in substitution of the Las Vegas Grant, are stated in the opinion.

See 235 U. S. 17, for further opinion in this case.

Mr. Assistant Attorney General West and *Mr. C. Edward Wright* for appellants.

Mr. Herbert Noble, Mr. G. H. Brevillier and *Mr. Joseph W. Bailey*, with whom *Mr. James W. Vroom* was on the brief, for appellees.

By leave of court *Mr. William C. Prentiss* filed a brief as *amicus curiæ*.

Mr. Justice McKenna delivered the opinion of the court.

Appeal from the decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public land laws of the United States upon lands which the decree finds were selected and located by the heirs of Luis Maria Cabeza de Baca on June 17, 1863, and known as Baca Float No. 3, the title to which, the decree further finds, passed out of the United States and vested in said heirs on April 9, 1864. The decree further directs the filing of the field notes and plats of survey of the Float for the purpose of defining the out-boundaries thereof and segregating the same from the public lands of the United States.

The origin and history of the Baca grant are set out in *Shaw* v. *Kellogg*, 170 U. S. 312, *Maese* v. *Herman*, 183 U. S. 572, and *Priest* v. *Las Vegas*, 232 U. S. 604.

It appears that there was a conflict between this grant and the grant to the town of Las Vegas, which was settled by an act passed on June 21, 1860 (12 Stat. 71, 72, c. 167), which enabled the heirs of Baca to select "an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not ex-

ceeding five in number." It was made the duty of the Surveyor General of New Mexico "to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of the act, and no longer."

The Las Vegas grant was ascertained to contain nearly 500,000 acres (496,446 96–100). The Baca heirs were, therefore, entitled to locate that many acres "in square bodies, not exceeding five in number." This controversy concerns the third of the bodies selected. The selection of each tract was to be determined by the same considerations, and those considerations are declared in *Shaw* v. *Kellogg, supra.* Each location, it is there said, would necessarily be of considerable size; in fact, each one was nearly 100,000 acres; and each as a whole was to be non-mineral. "No provision was made for indemnity lands in case mineral should be found in any section or quarter section. So that when the location was perfected the title passed to all the lands or to none." (170 U. S., p. 332.) The limits of location, it was said, was the Territory of New Mexico, limits not so broad as those of the territory ceded by Mexico; within the limits there were large areas of arid lands; "its surface was broken by a few mountain chains, and crossed by a few streams." Lands, it was declared, could not be selected already occupied by others. The lands must be vacant. Nor could lands be selected "which were then known to contain mineral." "Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and

it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries." And it was declared that the surveyor general of New Mexico was to determine the character of the lands; he was to make survey and location of the lands selected; upon him "was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select." This is emphasized by saying that "he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected" (p. 333). In the survey and location it was recognized that he was subject to the "control and direction of the Land Department," and, while he was not to act in defiance and independently of the Land Department, "it was for him to say, in the first instance at least, whether the lands so selected and by him surveyed and located, were lands vacant and non-mineral" (p. 334).

These are the elements of the decision. How do they apply to the case at bar?

First, as to the allegations of the bill. There are detailed allegations of the origin of the grant to Baca, its presentation to the surveyor general of New Mexico under the then existing law and regulations and his recommendation of its confirmation, also of the confirmation of the grant to the town of Las Vegas, "leaving," as he said, "the respective claimants the right to adjust their conflicting claims in courts." The other facts which the bill alleges we set out in narrative form as follows:

Both grants were confirmed and the right given to the heirs of Baca, as we have seen, to select other lands equal in quantity to the lands claimed by Las Vegas.

On July 26, 1860, about a month after the act was passed, the Commissioner of the General Land Office informed the surveyor general of New Mexico that it was

the latter's duty to separate from the public lands the pueblos or individual confirmed claims, and in that connection drew his special attention to the act of June 21, 1860, which referred to the "claim of the Heirs of Luis Maria Baca," and in order to give the act timely effect the surveyor general was directed to give the claim priority in surveying private land claims. That officer was directed to have the exterior lines of Las Vegas run off, and, this being done, the right would accrue to the Baca claimants to select a quantity equal to the area elsewhere in New Mexico of vacant lands, not mineral, in square bodies, not exceeding five in number. The instructions then proceed as follows:

"You will furnish them with a certificate transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square bodies according to the existing line of the surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal divisions or subdivisions, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the Register and Receiver of Santa Fe and sent on here by those officers for approval. Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the Deputy Surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections. In either case the final conditions of the certificate to this office must be accompanied by a statement from yourself and register and receiver that the land is vacant and not mineral."

The grant to the town of Las Vegas was surveyed and the fact communicated by the surveyor general to the representative of the heirs of Baca and they were informed that they were entitled to select an equal quantity of land, that he was authorized to survey and locate the same and that his office was ready to coöperate with their legal representative "and receive his application for the location of the lands granted by the Government."

Thereupon, on or about June 17, 1863, in pursuance of the notice from the surveyor general and the act of Congress, the following was addressed to the surveyor general:

"I, John S. Watts, the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the act of Congress approved June 21st, 1860, the following tract, to-wit.—Commencing at a point one mile and a half from the base of the Solero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links, to the place of beginning, the same being situate in that portion of New Mexico now included by act of Congress approved February 24, 1863, in the Territory of Arizona,—said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge.

"John S. Watts,
"Attorney for the Heirs of Luis Maria Cabeza de Baca."

On the same day the surveyor general certified to the Commissioner of the General Land Office the fact of the application, repeating it, and concluding as follows:

"And I further certify that the said tract of land being the one-fifth part of the private claim confirmed to the said heirs, contains ninety-nine thousand two hundred and eighty-nine acres and thirty-nine hundredths of an acre, and that this location is the third of the series (application to locate the same, filed in this office October 31, 1862—dated October 30, 1862—having been withdrawn—See Letter of Commissioner of the General Land Office dated February 5, 1863) and, with the three locations, numbered one, two and four heretofore made, included four-fifths of the said private claim confirmed to the heirs of Luis Maria Cabeza de Baca, by the act of Congress approved June 21, 1860.—Said location is hereby approved.

"In witness whereof I have hereto set my hand this 17th day of June, 1863.

"JOHN A. CLARK,
"Surveyor General."

The communication was mailed the following day, with a letter to the Commissioner as follows:

"SURVEYOR GENERAL'S OFFICE,
"Santa Fe, New Mexico, June 18, 1863.

"Honl. J. M. EDMUNDS, Comm'r of General Land Office,
Washington City, D. C.

"Sir: I enclose herewith copy of the application and certificate of location No. 3 of the private claim confirmed to the heirs of Luis Maria Cabeza de Baca.

"As this location is far beyond any of the public surveys, I have not deemed it necessary to procure any certificate from the Register and Receiver of the Land Office, as from the nature of the case, they cannot officially know anything concerning it.

"I am respectfully your
"Obt. servt.
"JOHN A. CLARK,
"Surveyor General."

On July 18 the Commissioner acknowledged the receipt of the communication, stating: "Your approval of the location under consideration is found to have ignored the imperative condition that the lands selected at the base of Solero Mountain now included by act of Congress approved February 24, 1863, in the Territory of Arizona, is vacant land and not mineral. Before the application of Location No. 3 of the heirs aforesaid can be approved, by this office, it is necessary that our instructions of the 26th of July 1860, should be complied with by furnishing a statement from yourself and Register and Receiver that the land thus selected and embracing one-fifth of the claim or 99,289 39–100 acres is vacant and not mineral.

"I am very respectfully,

"Your obt. sevt.

J. M. Edmunds, Commissioner."

In a letter dated April 2, 1864, the surveyor general, in reply to that of the Commissioner, stated, "that there is no evidence in the office of the surveyor general of New Mexico" that the tract selected "contains any mineral or that it is occupied. There have been no public surveys made in the neighborhood of said tract, and there is no record of, or concerning, the land in question in the surveyor general's office, nor—as I believe—in the office of the Register or Receiver of the Land Office of New Mexico. As I am personally unacquainted with that region of country, I cannot certify that the land in question is 'vacant and not mineral' or otherwise. Those facts can only be determined by actual examination and survey."

On March 25, 1864, the Receiver of the Land Office in New Mexico made a certificate stating that the lands applied for "are vacant and not mineral so far as the records of this office show (not having been surveyed)." The Register in his certificate of the same date stated that

the lands "are not surveyed, and, from all information in this office, are vacant and not mineral."

On about April 9, 1864, having been required by the Baca heirs to survey the tract located by them, the Commissioner of the General Land Office issued instructions to the surveyor general of Arizona which recited that the location by the Baca heirs had been approved by the surveyor general of New Mexico in whose jurisdiction, it was said, the application properly came at the date of the approval. The instructions referred to the act of Congress of 1860 and the rights it conferred and stated that the act of June 2, 1862, required all grants to be surveyed at the expense of the claimants and that whenever the Baca claimants should pay or secure to be paid a sum sufficient to liquidate all the expenses a survey was to be directed of the application and transcripts of the field notes and plats to be transmitted to the General Land Office to constitute "the muniments of title, the law not requiring the issue of patents of these claims." Directions as to the manner of marking lands were given. Accompanying the instructions was a copy of the certificate of the surveyor general of New Mexico dated June 17, 1863, and following that the following order:

"GENERAL LAND OFFICE,
"April 9, 1864.

"LEVI BASHFORD, ESQ., Surveyor-General, Tucson, Arizona.

"Sir: The foregoing statement and the certificate of Surveyor General Clark having been submitted to this Department and having undergone a careful examination, the location being approved by him to perfect title under the authority of the act approved June 21, 1860, application for survey having been made. Instructions (copy herewith attached) have been given to Surveyor General Levi Bashford of Arizona in which Territory the lands

located now are, to run the lines indicated and forward complete survey and plat to be placed on file for future reference as required by law.

"J. M. EDMUNDS, Commr."

In pursuance of this order a survey was undertaken, but the surveyors, while engaged in the work of the survey, were killed by hostile Indians, and no survey was ever returned (alleged on information and belief). Notwithstanding the repeated requests of the heirs of Baca, the Commissioner of the General Land Office failed and refused to continue or have made the survey ordered as above stated and persisted in such refusal until on or about June 17, 1905, on which date the Commissioner, by an official order, authorized and directed the surveyor general of Arizona to cause a survey to be made, and in pursuance of and under contract No. 136 dated June 17, 1905, one Philip Contzen was authorized and required to run the lines indicated on the application of the Baca heirs (Float No. 3) so as to adjust the lines, as near as might be, to the lines of the public surveys.

The survey was made and duly certified by the surveyor general of Arizona as strictly conformable to the field notes which had been examined, approved and filed in his office, and that the plat and survey had been examined and found correct by the Commissioner of the General Land Office.

On or about January 12, 1905, the Commissioner of the General Land Office, disregarding the decision and order of the then Commissioner of the Land Office of April 9, 1864, gave such instructions to the surveyor general of Arizona regarding his duties as to the character of the lands that that officer in December, 1906, forwarded the plat and survey hereinbefore mentioned to the Commissioner of the General Land Office with a report accompanied by the alleged information which he had gathered

and the recommendation that the location of Baca Float No. 3, made as hereinbefore stated June 17, 1863, be entirely rejected.

On or about May 13, 1907, contrary to law and without jurisdiction so to do, and disregarding the order of his predecessor, the Commissioner rendered a decision ordering a hearing before the surveyor general of Arizona to determine whether said lands were, at the time of said location, vacant and non-mineral. On or about June 2, 1908, the First Assistant Secretary of the Interior, in a decision upon an appeal from said decision of the Commissioner, contrary to law and without jurisdiction, affirmed the decision of the Commissioner in so far as it remanded the case for a hearing before the surveyor general of Arizona.

A motion to review was subsequently made and denied.

By the acts done in the selection and location of the lands, including the order of Commissioner Edmunds of April 9, 1864, requiring a survey thereof, the title to the lands vested in fee in the heirs of Baca, and it was not within the power of the Land Department to revoke or annul the prior rulings or to evade the rights of such heirs or their successors in title and that (this on information and belief) the Land Department has always treated the lands selected as segregated from the public domain and they have for many years been so marked upon the maps issued by the Department, as more specially appears from the map of the Territory of Arizona of 1903.

It is alleged that one Henry Ohm and one Lyman W. Wakefield have filed homestead applications upon land lying within the lands located by the Baca heirs and instructions have been issued from the officers of the Land Department permitting proofs to be made thereof. It is alleged that there are many other entries upon the lands and that they and Ohm's and Wakefield's applications will cast clouds upon the title of the Baca location.

The value of the lands located is alleged to be over $100,000 and that plaintiffs have no adequate remedy at law.

An injunction was prayed restraining defendants from further proceeding in the homestead applications, that they be required to place on file for future reference, as required by law, the Contzen survey and plat dated June 17, 1905; that anything shown thereby or connected therewith, other than that included in the order of the Commissioner of April 9, 1864, and other than the exterior boundaries, accessory lines, crosses and distances, monuments and measurements showing the tract located by the Baca heirs known as Location No. 3, together with any topographical features and the references to the lines of the public surveys, be canceled and expunged from the said plat of said survey, and particularly the lines, crosses and distances, monuments and measurements purporting to show the segregation from said land of the alleged mineral portion, the Tubac Township, and the conflicting portions of the San Jose, Sonoita, Tumacacori and Calabasas claims.

A demurrer was filed to the bill which set out as grounds: (1) The real purpose of the suit is to recover certain real estate situated in the Territory of Arizona by trial of the legal title thereto and that the relief, if any, plaintiffs are entitled to is at law. (2) If the legal title to the property passed to plaintiffs, as alleged, on April 9, 1864, "naught else remains for the defendants to do other than to perform the ministerial duty of receiving and recording the plat of survey and field notes thereof," and the remedy is by mandamus. (3) If the legal title to the land has not passed to plaintiffs as alleged, it is still in the United States, which it is not shown has consented to this suit; and the court in such event is without jurisdiction. (4) On the face of the bill it is impossible to grant the prayers of plaintiffs without deciding whether the title is still in

the United States. The determination of the suit therefore affects the United States and they are real and indispensable parties in interest and have not consented to be sued. (5) The acts sought to be enjoined are exclusively within the jurisdiction of the Interior Department and are not subject to judicial control. (6) The parties who have initiated claims are materially interested in the suit and are necessary parties to it. (7) The court is without jurisdiction to expunge the matters and things prayed to be expunged from the plat of the survey of the San Jose de Sonoita claim for the reason that the claimants are not parties to the suit and their claim has been confirmed by the Supreme Court of the United States (*Ely's Administrator* v. *United States*, 171 U. S. 220). (8) The citizens of Tubac Township are necessary parties. (9) There never has been an adjudication by the Secretary of the Interior and the Commissioner of the General Land Office, or either of them, that the lands involved were on June 17, 1863, non-mineral and vacant or unoccupied lands such as the heirs of Baca were authorized to select under the terms of the sixth section of the act of June 21, 1860 (12 Stat. 71, c. 167). (10) The plaintiffs are not entitled to the relief prayed for, or to any relief. (11) The bill is in other respects uncertain, informal and insufficient to entitle plaintiffs to any relief.

The demurrer was overruled, Mr. Justice Barnard of the Supreme Court saying that the main question to be decided on the demurrer was as to the effect of the act of Congress, and, considering the act and the proceedings taken under it recited in the bill, he said he was of opinion that the title to the "tract vested in the heirs of said Baca when the location was approved, and the survey ordered" and that, therefore, plaintiffs might maintain their bill for some portion, at least of the substantial relief for which they prayed, and that the demurrer, being to the whole bill, must be overruled. And he said: "This con-

clusion as to title, if correct, will enable the suit to be maintained, notwithstanding the objection made as to want of other parties defendant. Title being out of the United States, it has no interest and is not a necessary party; and the Land Department cannot rightfully treat the tract as open to public entry, and the officers may therefore be enjoined."

The defendants (appellants) then answered.

The answer admitted what must be regarded as the fundamental elements of the bill. So far as its denials of any of the averments of the bill or its allegations of fact are material we shall refer to them hereafter. The proofs taken under the bill and answer were not regarded by the Supreme Court as determining a different decision from that expressed on the demurrer to the bill, that is, the court repeated its view that the title passed on April 9, 1864, to the heirs of Baca and that the court had authority to enjoin defendants from treating the land as being public land. The injunction prayed for was granted except that the "Contzen" survey and plat were ordered to be filed unchanged. A decree was entered accordingly. It was affirmed by the Court of Appeals, as we have said.

The crux of the case in the views of the courts below is the question whether title to the lands passed out of the United States in April, 1864, and the careful and elaborate consideration of it makes the discussion of it mere repetition.

The contentions of the parties are very accurately opposed. Appellants contend that "under a proper construction of the act of June 21, 1860, title to the 'float' cannot pass until there has been an official survey and a final determination by the proper officers that the land selected in 1863 was of the character which the statute permitted the heirs to take—a matter still *sub judice* in the Department" except as to certain conflicting grants. The appellees insist, and the courts below, as we have

seen, decided, that the location of the grant and the approval of it by the surveyor general of New Mexico and subsequently in April, 1864, by Commissioner Edmunds of the Land Office transferred the title to the heirs of Baca.

There is some controversy upon the fact as to whether the Commissioner had before him the proof he had demanded of the non-mineral character of the land. We think the lower courts rightly deduced from the evidence "that the Commissioner," to quote from the opinion of the Court of Appeals, "having carefully considered all the facts in the case, concluded to adopt the approval of the surveyor general of New Mexico of this location to perfect title under the authority of said act [act of 1860], and, in order completely to segregate this land from the public domain, ordered the survey" (41 App. D. C. p. 153). And that this action was within the authority of those officers we may refer to *Shaw* v. *Kellogg*, *supra*. In that case, we have seen, the surveyor general of New Mexico was the officer selected and who was most competent to examine and pass upon the question of the character of the lands, and to pass upon them at the time of location—not upon evidence collected many years after the location, directed to what might have been known many years before. The selection and location was to be made within three years of the passage of the act in a comparative wilderness and the "title was then to pass," and "pass absolutely, and not contingently upon subsequent discoveries."

We recognized in *Shaw* v. *Kellogg* that the action of the surveyor general was subject to the supervision of the Land Department and that condition is satisfied in the case at bar. The Commissioner was put in possession of all of the facts as to the lands, and, exercising his judgment upon them, approved the location.

The facts in *Shaw* v. *Kellogg* give pertinence to its prin-

ciples, notwithstanding some differences between its facts and those in the case at bar. In that case there was a positive declaration by the surveyor general of the non-mineral character of the lands; in the case at bar it is an inference deduced from the circumstances, it being the "duty of the officers to decide the question"—a duty which they "could not avoid or evade." In that case the Land Office undertook to reserve from the grant, lands which might be subsequently discovered to be mineral. In this case it directed an inquiry of their character long after the location of the grant and seeks to determine the legality of the location by the information said to be obtained.

The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department. *Ballinger* v. *United States ex rel. Frost*, 216 U. S. 240. In other words, and specifically, the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined. *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165; *Philadelphia Company* v. *Stimson*, 223 U. S. 605. The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of appellees.

This disposes of the contentions of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department or a trial of a title to land not situated within the jurisdiction of the court "wherein an essential party is not present in the forum and is not even suable—the United States."

We agree with the courts below that a survey was necessary to segregate the lands from the public domain. *Stoneroad* v. *Stoneroad*, 158 U. S. 240. This was done by the

Contzen survey, which we have seen was directed to be filed by the lower courts without alteration, a decision which we approve.

There are other contentions of appellants which call for no extended comment, as we concur with the courts below in regard to them. For instance, it is contended that the surveyor general of New Mexico had lost authority to approve the location and that duty had devolved upon the surveyor general of Arizona. To the contention it may be replied, as the Court of Appeals in effect replied, that the act of 1860 devolved the duty on the surveyor general of New Mexico and the Land Office, upon whom devolved the ultimate responsibility, and who approved the location.

A point is made upon attempts to change the location, of which it is enough to say that they were not accepted by the Land Department and the claimants were remitted to the location under consideration.

Another contention is made on the conflict of the grant as located with other grants, to which the Court of Appeals replied that it was not now concerned with such question and that if, as suggested, a controversy should arise it "will properly be adjudicated in the courts where the lands are located." In this we concur.

Whose duty it was to pay the expense of the survey is also in controversy. The appellants assert it to have been the duty of the claimants under the act of June 2, 1862 (12 Stat. 410, c. 90), and that was the view, we have seen, of the Land Department. The appellees contend that the obligation was upon the Government under the granting act. That act provides, as we have seen, that "it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them. . . ." The obligation is explicit, and there was reason for it. To accommodate conflicting claims and at the instance of

the Government the Baca claimants gave up their rights to a definite tract of land, and, as appellees say, expressing the equities of the claimants, whatever its character or condition, and the Government therefore would naturally make provision for the location of the substituted land as expeditiously as possible and without expense to the Baca heirs. We therefore think the act of 1860, not that of 1862, applied.

The contention that appellees have not shown sufficient title is untenable.

Decree affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* BROWN.

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

No. 355. Argued May 5, 1914.—Decided June 22, 1914.

A recovery in one jurisdiction for a tort committed in another must be based on the ground of an obligation incurred at the place of the tort which is not only the ground, but the measure, of the maximum recovery.

A State cannot legislate so as to affect conduct outside of its jurisdiction and within territory over which the United States has exclusive jurisdiction.

A State may not determine the conduct required of a telegraph company in transmitting interstate messages by determining the consequences of not pursuing such conduct in another State.

The statute of South Carolina making mental anguish caused by the negligent non-delivery of a telegram a cause of action is, as applied to telegrams the negligent non-delivery of which occurred in the District of Columbia, an unconstitutional attempt to regulate conduct within territory wholly under the jurisdiction of the United

States; such statute is also unconstitutional, as to messages sent from that State to be delivered in another State, as an attempt to regulate interstate commerce.

92 So. Car. 554, reversed.

THE facts, which involve the constitutionality of a statute of the State of South Carolina in regard to negligent non-delivery of telegraph messages, are stated in the opinion.

Mr. Rush Taggart and *Mr. Francis Raymond Stark*, with whom *Mr. George E. Fearons* and *Mr. Julian Mitchell* were on the brief, for plaintiff in error:

The statute is unconstitutional, as to interstate messages at least, under the commerce clause, where there has been no breach of duty by the telegraph company within the State. In this case there was no breach in South Carolina.

The message was interstate commerce and not subject to regulation by the State of South Carolina.

Any statute is an invalid regulation of interstate commerce which imposes a liability outside of that created by the contract and unknown to the common law for an act or omission occurring in the course of interstate transportation or transmission entirely outside the borders of the State. *West. Un. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406, distinguished.

This principle has been constantly recognized in other than telegraph cases. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 500; *Birkett* v. *West. Un. Tel. Co.*, 103 Michigan, 361; *Chicago &c. R. R.* v. *Polt*, 232 U. S. 165; *Chicago &c. Ry. Co.* v. *Solan*, 169 U. S. 133; *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; *Jacob* v. *West. Un. Tel. Co.*, 135 Michigan, 600; *Mo. Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262; *Penna. Ry. Co.* v. *Hughes*, 191 U. S. 477; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *West. Un. Tel. Co.* v. *Carew*, 15 Michigan, 525; *West. Un. Tel. Co.* v. *Commercial Mill.*

Co., 218 U. S. 406; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Yazoo &c. Ry. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

The statute is unconstitutional because conflicting with the exclusive legislative power of Congress in the District of Columbia. *West. Un. Tel. Co.* v. *Chiles*, 214 U. S. 274; *West. Un. Tel. Co.* v. *Greer*, 115 Tennessee, 368; *West. Un. Tel. Co.* v. *Snodgrass*, 94 Texas, 283.

Mr. Frank J. Hogan, with whom *Mr. W. Turner Logan* and *Mr. John P. Grace* were on the brief, for defendants in error:

The statute in no way contravenes the Federal Constitution. *Atchison, Topeka &c. R. R.* v. *Matthews*, 174 U. S. 96, 100; Cooley's Const. Lim. (7th ed.), 255.

The law of the State from which the telegram is sent to the addressee in another State determines whether the addressee may recover for mental anguish caused by negligent failure to deliver or delay in delivering a message at its destination, whether the form of action be *ex contractu* or *ex delicto*. *Bryan* v. *Telegraph Co.*, 133 No. Car. 603; *Cashion* v. *West. Un. Tel. Co.*, 123 No. Car. 267; *Hancock* v. *Telegraph Co.*, 137 No. Car. 497; *Johnson* v. *Telegraph Co.*, 144 No. Car. 410; *Ligon* v. *West. Un. Tel. Co.* (Texas), 102 S. W. Rep. 429; *Lyne* v. *West. Un. Tel. Co.*, 123 No. Car. 129; *Mentzer* v. *West. Un. Tel. Co.*, 93 Iowa, 752; *Markley* v. *West. Un. Tel. Co.*, 151 Iowa, 612; *Reed* v. *West. Un. Tel. Co.*, 135 Mississippi, 861; *Shaw* v. *Postal Tel. Cable Co.* (Miss.), 56 L. R. A. 486; *Stuart* v. *West. Un. Tel. Co.*, 66 Texas, 580; *Whitehill* v. *West. Un. Tel. Co.*, 136 Fed. Rep. 499, 501; *West. Un. Tel. Co.* v. *Woodard*, 84 Arkansas, 323; *West. Un. Tel. Co.* v. *Henderson*, 89 Alabama, 510; *West. Un. Tel. Co.* v. *Frith*, 105 Tennessee, 167; *West. Un. Tel. Co.* v. *Waller*, 96 Texas, 589; *West. Un. Tel. Co.* v. *Young* (Tex.), 121 S. W. Rep. 226,

228; *West. Un. Tel. Co.* v. *Sloss* (Tex.), 100 S. W. Rep. 354; *West. Un. Tel. Co.* v. *Buchanan*, 35 Tex. Civ. App. 437; *West. Un. Tel. Co.* v. *Anderson* (Tex.), 78 S. W. Rep. 34; *West. Un. Tel. Co.* v. *Lacer* (Ky.), 93 S. W. Rep. 34; Bigelow's Leading Cases, p. 622; Jones on Tel. and Tel. Companies, § 598; Joyce on Electric Law, § 825; 2 Shearman & Redfield on Negligence, 5th ed., § 543; Thompson on Electricity, § 427; 41 L. R. A. (N. S.) 223, note.

It is the rule that in tort actions the law of the place where the injury was sustained, rather than the place where the negligence occurs, obtains. *Beacham* v. *Portsmouth Bridge*, 68 N. H. 382; *Bigby* v. *United States*, 188 U. S. 400, 408; *B. & O. So. West. Ry.* v. *Reed*, 158 Indiana, 25; *Cameron* v. *Vandergrift*, 53 Arkansas, 381; *Ex parte Phenix Ins. Co.*, 118 U. S. 610; *Herman* v. *Port Blakely Mill Co.*, 69 Fed. Rep. 648; *Johnson* v. *Elevator Co.*, 119 U. S. 388; *Le Forest* v. *Tolman*, 117 Massachusetts, 109; *Mexican Cent. Ry. Co.* v. *Gehr*, 66 Ill. App. 173; *Michael* v. *Kansas City Ry. Co.* (Mo.), 143 S. W. Rep. 67; *P. C. C. & St. L. Ry.* v. *Austin, Admr.*, 141 Kentucky, 722; *Pendar* v. *H. & B. Machine Co.* (R. I.), 87 Atl. Rep. 1; *Randolph's Admr.* v. *Snyder*, 139 Ky. 159; *Railroad Company* v. *Becker*, 67 Arkansas, 1; *Railroad Company* v. *Doyle*, 60 Mississippi, 977, 984; *Rundell* v. *La Compagnie Generale*, 100 Fed. Rep. 655; *Smith* v. *Southern Railway*, 87 So. Car. 136; *Sullivan* v. *Old Colony Street Ry.*, 200 Massachusetts, 303, 308; *The Plymouth*, 3 Wall. 20, 36; Bouvier's Law Dic., Tort, p. 650; Mr. Justice Holmes in 10 Harv. Law Rev. 471; 56 L. R. A. 216, note.

A State acting within its police powers may pass laws designed for the protection of persons within its borders, although such laws incidentally affect interstate commerce, provided Congress has not legislated upon the subject, and it is one not purely national in its nature. *Ivy* v. *West. Un. Tel. Co.*, 165 Fed. Rep. 371; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *West. Un. Tel. Co.* v.

Commercial Milling Co., 218 U. S. 406; *West. Un. Tel Co.* v. *Crovo*, 220 U. S. 364.

The statute in controversy in no way attempts to regulate interstate commerce. *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347, is not applicable and *West. Un. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406, is.

The statute does not deny to telegraph companies the equal protection of the laws.

The statute does not conflict with the exclusive power of the Congress in the District of Columbia.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of tort brought by the party to whom a telegraphic message was addressed. The message was delivered to the Company in South Carolina, addressed to the plaintiff in Washington, D. C., and read "Come at once. Your sister died this morning.' It was forwarded without delay to Washington, but there, through negligence as the jury found, was not delivered. The declaration alleges that the failure caused the plaintiff to miss attending her sister's funeral in South Carolina, and subjected the plaintiff to mental anguish, which of itself is made a cause of action by a statute of South Carolina. Civil Code, 1902, § 2223. The defendants in error state that the action was brought under this section. There was a trial at which, by the instructions to the jury, a recovery was allowed under the act for the negligence in Washington irrespective of the law prevailing here. The jury found a verdict for $750, which was sustained by the Supreme Court of the State. 92 So. Car. 354. The plaintiff in error saved its rights under the Constitution of the United States (so plainly that it is not necessary to discuss the matter) and brought the case here.

Whatever variations of opinion and practice there may

have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478, 480. (A limitation of liability may stand on different grounds. *The Titanic*, 233 U. S. 718.) The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail. The principle would be illustrated by supposing a direct clash between the state and Federal statutes, but it is the same whenever the State undertakes to go beyond its juridiction into territory where the United States has exclusive control. *Western Union Telegraph Co.* v. *Chiles*, 214 U. S. 274; see also *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406, 416.

What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the States. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one State to another or to this District by determining the consequences of not pursuing such conduct, and in that way encounters *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, a decision in no way qualified by *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406.

Judgment reversed.

THE PIPE LINE CASES.[1]

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 481, 482, 483, 506, 507, 508. Argued October 15, 16, 1913.—Decided June 22, 1914.

The provision in the Hepburn Act, amending the Act to Regulate Commerce by making persons or corporations engaged in transporting oil from one State to another by pipe lines carriers within the provisions of the act, applies to the combination of pipe lines owned and controlled by the Standard Oil Company and to the constituent corporations united in a single line, although the only oil transported is that which has been purchased by the Standard Oil Company or by such constituent corporations prior to the transportation thereof.

As applied to existing corporations, the pipe line provision of the Hepburn Act does not compel persons engaged in interstate transportation of oil to continue in operation, but it does require them not to continue to transport oil for others or purchased by themselves except as common carriers.

The fact that the article transported between interstate points has been purchased by the carrier, is not conclusive against the transportation being interstate commerce; and in this case, *held* that interstate transportation of oil purchased from the producers by the owner of the pipe is interstate commerce and under the control of Congress.

While the control of Congress over commerce among the States cannot be made a means of exercising powers not committed to it by the Constitution, it may require those who are common carriers in substance to become so in form.

The provision in the Hepburn Act requiring persons or corporations engaged in interstate transportation of oil by pipe lines to become common carriers and subject to the provisions of the Act to Regulate Commerce is not unconstitutional, either as to future pipe lines or as to the owners of existing pipe lines, as depriving them of their property without due process of law.

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[1] Docket title of these cases: No. 481. United States *v.* Ohio Oil Company. No. 482. United States *v.* Standard Oil Company. No. 483. United States *v.* Standard Oil Company of Louisiana. No. 506. United States *v.* Prairie Oil & Gas Company. No. 507. United States *v.* Uncle Sam Oil Company. No. 508. United States *v.* Benson, doing business under the Partnership Name of Tide Water Pipe Company, Limited.

234 U. S. Argument for Interstate Commerce Commission.

Requiring a person engaged in interstate transportation of oil by pipe lines to become a common carrier does not involve a taking of private property, and the provision in the Hepburn Act to that effect is not unconstitutional under the Fifth Amendment.

A corporation engaged in refining oil may draw oil from its own wells through a pipe line across a state line to its own refinery for its own use without being a common carrier under the pipe line provisions of the Hepburn Act, the transportation being merely incidental to the use of the oil at the end.

204 Fed. Rep. 798, reversed in part and affirmed in part.

THE facts, which involve the constitutionality, construction and application of the provisions in the Hepburn Act relating to interstate transportation of oil by pipe lines, are stated in the opinion.

The Solicitor General for the United States and *Mr. Charles W. Needham* for the Interstate Commerce Commission:

The pipe line amendment applies to these petitioners. Congress intended the act to apply to every interstate oil-carrying pipe line, and to compel every such interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce. Whether any particular pipe line had or had not been a common carrier prior to the passage of the act is wholly immaterial.

The debates in Congress may be consulted to ascertain the evils at which the act was aimed, its legislative history, the amendments that were offered and rejected during its passage and the general history of the times. *Am. Net. Co.* v. *Worthington*, 141 U. S. 468, 473; *Binns* v. *United States*, 194 U. S. 486, 495, 496; *Blake* v. *National Bank*, 23 Wall. 307, 319; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 465; *Jennison* v. *Kirk*, 98 U. S. 453.

Here the debates show that the evil aimed at was the monopolization of the oil business by owners of private pipe lines. Amendments restricting the application of the act to pipe lines engaged in transportation "for hire" or

"for the public" were repeatedly rejected. 40 Cong. Rec. 6361, 6365, 6999–7009, 9254–9256.

The rule of construction followed in the *Commodities Case*, 213 U. S. 366, is not applicable here. That rule applies only when the statute is ambiguous. *Employers' Liability Cases*, 207 U. S. 463, 500.

The act is constitutional. It stands the test laid down in *Minnesota* v. *Barber*, 136 U. S. 313, 320; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 592; *McCulloch* v. *Maryland*, 4 Wheat. 421, namely, that:

The object of the act is one for which the Federal authority may properly be exercised.

The means employed have in fact a real and substantial relation to the object sought. They are reasonable and not arbitrary or beyond the necessities of the case.

The object of the pipe line amendment, to regulate interstate commerce in oil by protecting well owners and independent refiners from duress by pipe line owners is one for which the authority of Congress may properly be exercised. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 109; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Continental Paper Co.* v. *Voight*, 212 U. S. 227, 271.

The private operation of pipe lines carrying oil in interstate commerce tends to monopoly. *Standard Oil Case*, 221 U. S. 1, 12, 42, 80–81; *Tex. & Pac. Ry. Co.* v. *Int. Com. Comm.*, 162 U. S. 197, 210; *Report on the Petroleum Transportation*, 59 Cong., 1st Sess., House Doc. 812, pp. 29, 37, 62; *Report of Int. Com. Comm.*, 59 Cong., 2d Sess., House Doc. 606, pp. 2, 5, 6, 14.

No other means of transportation can possibly compete with pipe lines. If a well owner cannot ship by pipe line he cannot (practically) ship at all. Without a pipe line the small producer is as truly shut in as was the mine owner in *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 597, or the arid land owner in *Clark* v. *Nash*, 198 U. S. 361. *Ohio*

Oil Co. v. *Indiana*, 177 U. S. 190. The statute is designed to prevent an unconscionable use of economic advantages.

The operation of pipe lines as common carriers is beyond question commercially practicable, as is shown by prior Federal legislation; prior Federal decisions; state legislation; state decisions; public records and reports; current sources of information, encyclopædias, etc.

The Fifth Amendment does not prohibit the adoption by Congress of this means, so found to be in fact reasonable and appropriate to the accomplishment of its purpose. Congress may prohibit a kind of commerce harmful to the public. *Hoke* v. *United States*, 227 U. S. 308; *The Lottery Cases*, 188 U. S. 358. This power may be exerted for purely economic purposes whenever the strong, preponderant public opinion believes that there is a great public need. *Noble State Bank* v. *Haskell*, 219 U. S. 104; *C., B. & Q. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592; *Standard Oil Case*, 221 U. S. 1.

In many instances regulations have taken the form of prohibition except upon such conditions as would protect the public welfare. *The Commodities Case*, 213 U. S. 366; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 202, 203; *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593; *Southern Ry.* v. *Reid*, 222 U. S. 424, 438.

It is immaterial that in the present case the condition is not express but implied. The same was true of the banking act and the Carmack Amendment, 34 Stat. 584, 595; *Noble State Bank* v. *Haskell*, 219 U. S. 213; *Atlantic Coast Line Case*, 219 U. S. 186, 203; see also *Engel* v. *O'Malley*, 219 U. S. 128; *Mugler* v. *Kansas*, 123 U. S. 623.

The present statute is valid as a means of preventing owners of pipe lines from obtaining an inequitable proportion of the oil from the common reservoir. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 210; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61. Even at common law it would have been unlawful for a single proprietor to install

at great expense pumping machinery so powerful that he could rapidly draw away the entire common reservoir. *Forbell* v. *City of New York*, 164 N. Y. 522, 526. See also *Kansas* v. *Colorado*, 206 U. S. 46. Clearly the use of such pumps might be forbidden by statute. *Manufacturers Gas Co.* v. *Indiana Gas Co.*, 155 Indiana, 461; *Oklahoma* v. *Kansas Gas Co.*, 221 U. S. 229, 262. And if their use could be prohibited absolutely, why could it not also be prohibited except upon condition that their owner should give to the adjacent proprietors an equitable proportion of the common property.

Nor does the law violate the Fifth Amendment in that, being general in its terms, it might cover pipe lines which are not public markets for oil. Whether purely private pipe lines must be entirely prohibited in order to give the public adequate protection is a matter of legislative discretion. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Booth* v. *Illinois*, 184 U. S. 425; *Lemieux* v. *Young*, 211 U. S. 489; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Silz* v. *Hesterberg*, 211 U. S. 31; *Commonwealth* v. *Gilbert*, 160 Massachusetts, 157; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *The Slaughter-house Cases*, 16 Wall. 36; The Pure Food Law, 34 Stat. 768, 770.

Nor does the act take property for public use without compensation. This clearly is true as to the prohibition of purely private operation. The exclusive element is the monopoly element. No compensation need be given for that. There is no vested right in a noxious use of property. *Standard Oil Case*, 221 U. S. 1; *Mugler* v. *Kansas*, 123 U. S. 623, 669; *Commodities Case*, 213 U. S. 366, 405; *Noble State Bank* v. *Haskell*, 220 U. S. at 100; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Slaughter-house Cases*, 16 Wall. 36; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467; *C., B. & Q. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592.

The business of the appellees is *quasi*-public. The test to determine whether a business is *quasi*-public is by as-

certaining whether public grants and franchises are essential to establish and carry on the business; if the business cannot be carried on without such privileges it is *quasi*-public; such grants and franchises subject the business to a continuing public control; as is the case with all public utility companies requiring rights in public streets and reservations.

Public markets where agents of a business determine property rights for the public by inspecting, grading, weighing and measuring staple products regularly offered for sale at such markets, are charged with a public interest. *W. W. Cargill Co.* v. *Minnesota R. & W. Comm.*, 180 U. S. 452.

Pipe lines require, and are granted, franchises to cross and run along public highways, streets, rights of way of railroads, public lands and reservations. These privileges, or some of them, have been granted to each of the appellees. Each appellee is engaged in buying crude oil in the fields of production; they have their business headquarters where oil is bought from producers; the oil is inspected, graded and gauged for sale, by the agents of the appellees and other pipe lines.

In the *Ohio Oil Case* the transportation is sixty miles and across a state line. This is not a "plant facility." It is transportation from the field of production to a point of consumption. Ownership of the pipe line, or the oil, does not change the control of Congress over it. If the State of Kansas should require a license tax of all persons or corporations bringing oil into the State by means of pipe lines, it would be held to be invalid as a burden upon interstate commerce, regardless of ownership. If it can receive protection under the commerce clause, it is certainly liable to regulation under that provision of the Constitution. *Robbins* v. *Tax. Dist. of Shelby Co.*, 120 U. S. 489.

Mr. John G. Milburn, with whom *Mr. Frank L. Crawford*, *Mr. Walter F. Taylor*, *Mr. M. F. Elliott* and *Mr.*

Chester O. Swain were on the brief, for appellees in Nos. 481, 482, and 483:

The Interstate Commerce Act as amended in 1906 does not apply to the appellee, nor to any owner of a private pipe line.

The act was intended to relate to persons engaged in the business of transporting oil. Any other interpretation raises grave and doubtful constitutional questions.

Debates in Congress may not be referred to in aid of construction of a statute. *Omaha St. Ry.* v. *Int. Com. Comm.*, 230 U. S. 324.

As construed by the Government, the act makes common carriers of persons and corporations owning and operating private pipe lines used solely for the purpose of transporting the oil of the owners in the conduct of their private business, even though such owners have never held themselves out as common carriers, have never exercised or possessed and do not now possess any right of eminent domain, and derive no powers from state laws under which common carrier corporations are organized. It follows that the act deprives such persons and corporations of their property without due process of law, and takes it for public use without just compensation.

To make the owners of private pipe lines common carriers as to those lines is to subject private property to a public use and is a "taking" of property within the meaning of the Fifth Amendment.

Since the act, as thus construed, takes private property without providing for due compensation, it violates the Fifth Amendment.

The power of Congress to regulate interstate commerce, like all other powers delegated to that body, is subject to the limitations imposed by the Fifth Amendment.

The contention of the United States that just compensation is provided is untenable. The rates to be paid for

transportation are not the compensation intended by the Fifth Amendment.

This act cannot be sustained on the theory of the United States that the operation of private pipe lines is monopolistic, that the act prohibits their operation (save as common carriers) as an appropriate means to prevent monopolistic results, and that the adoption of this means by Congress is not within the inhibitions of the Fifth Amendment.

There is nothing inherent in the nature or operation of private pipe lines which causes a tendency to monopoly.

Neither the authorities cited nor the debates in Congress nor the Report of the Commissioner of Corporations sustains the Government's position on this point.

Nor does the Report of the Interstate Commerce Commission, dated January 28, 1907.

Cases cited in support of position that the private operation of pipe lines tends to monopoly do not help the Government

There is no proof of "duress" or "oppression" on part of owners of private pipe lines. Cases cited under this head are irrelevant.

The mere extent of acquisition of business or property achieved by fair and lawful means or commercial dominance fairly resulting from the ownership of private property lawfully obtained is not the criterion of monopoly or monopolization, within the legal meaning of those words. Monopolization is the unlawful exclusion of others from opportunities and privileges which are rightfully theirs. Monopoly, in the legal sense, is the condition resulting from monopolization thus defined.

It follows therefore that the act, even regarded as an act prohibiting the operation of pipe lines save as common carriers, cannot be sustained as an appropriate means to prevent monopoly, because there is no real and substantial relation between what the act ordains and monopoly.

There is no such relation, unless the operation of a private pipe line, in the nature of things, tends to monopolization, and unless that fact would justify a "taking" of property without just compensation, which is not the case.

In fact, there is no prohibition in the act, nor any requirement of election.

The assumed prohibition and requirement to elect, if present in the act, would be unconstitutional.

The right to carry goods from one State to another is not a franchise to be granted or withheld by Congress at its pleasure, but is an inherent right of the citizen, which antedated the Constitution.

The act, as construed by the Government, violates the due process clause.

Each case under the police power is to be interpreted according to its own facts.

The act cannot be sustained, as contended on behalf of the Interstate Commerce Commission, by resorting to the doctrine of the *Elevator* and *Stockyards Cases*, because, as applied to private pipe lines, the act does not regulate a business affected with a public interest, in the sense of those cases.

Neither the utilization by a pipe line company of the right of way of a common carrier railroad for the laying of a pipe line, nor the crossing under a public highway by such pipe line, impresses upon the pipe line or its owner the nature or the obligations of a common carrier.

The Ohio act of 1868 has no bearing upon the controversy.

Prior to the transfer to the Standard Oil Company of New Jersey of the pipe lines now owned by it, their use by the National Transit Company and New York Transit Company did not constitute them common carrier lines. But, even had they been common carrier lines, they would

have been released from the obligations of common carriers upon their transfer to appellee in 1906.

In support of these contentions see, amongst many cases, the following: Amer. & Eng. Encyc. of Law (2d ed.); Angell on Highways (2d ed.); *Barclay* v. *Howell*, 6 Peters, 498; *Bloomfield Gaslight Co.* v. *Calkins*, 62 N. Y. 386; *Ches. & Pot. Tel. Co.* v. *Mackenzie*, 74 Maryland, 36; *Currie* v. *N. Y. Transit Co.*, 66 N. J. Eq. 313; Elliott on Railroads; *Huffman* v. *State*, 21 Ind. App. 449; *Morgan* v. *Louisiana*, 93 U. S. 217; *Oman* v. *Bedford-Bowling Co.*, 134 Fed. Rep. 64; *Pemberton* v. *Dooley*, 43 Mo. App. 176; *Rexford* v. *Knight*, 11 N. Y. 308; *Roebling* v. *Trenton Ry. Co.*, 58 N. J. Law, 666; *Starr* v. *Camden & Atl. R. R. Co.*, 24 N. J. Law, 592; *State* v. *Laverack*, 34 N. J. Law, 201; *Thomas* v. *Ford*, 63 Maryland, 346; *Weller* v. *McCormick*, 52 N. J. Law, 470; *Winter* v. *Peterson*, 24 N. J. Law, 524; *Wright* v. *Carter*, 27 N. J. Law, 76; *Wyoming Coal Co.* v. *Price*, 81 Pa. St. 156.

Mr. W. S. Fitzpatrick, with whom *Mr. J. B. F. Cates*, *Mr. L. W. Keplinger* and *Mr. C. W. Trickett* were on the brief, for appellee in No. 506.

Mr. Albert L. Wilson for appellee in No. 507.

Mr. W. I. Lewis, *Mr. Archibald F. Jones* and *Mr. R. R. Lewis*, for appellees in No. 508, submitted.

Mr. Justice Holmes delivered the opinion of the court.

By the act of Congress of June 29, 1906, c. 3591, 34 Stat. 584, the Act to Regulate Commerce was amended so that the first section reads in part as follows: "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of

oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act." Thereafter the Interstate Commerce Commission issued an order requiring the appellees among others, being parties in control of pipe lines, to file with the Commission, schedules of their rates and charges for the transportation of oil. 24 I. C. C. 1. The appellees thereupon brought suit in the Commerce Court to set aside and annul the order, and a preliminary injunction was issued by that court, on the broad ground that the statute applies to every pipe line that crosses a state boundary and that thus construed it is unconstitutional. 204 Fed. Rep. 798. The United States, the Interstate Commerce Commission and other intervening respondents appealed.

The circumstances in which the amendment was passed are known to every one. The Standard Oil Company, a New Jersey corporation, owned the stock of the New York Transit Company, a pipe line made a common carrier by the laws of New York, and of the National Transit Company, a Pennsylvania corporation of like character, and by these it connected the Appalachian oil field with its refineries in the east. It owned nearly all the stock of the Ohio Oil Company, which connected the Lima-Indiana field with its system; and the National Transit Company, controlled by it, owned nearly all the stock of the Prairie Oil and Gas Company, which ran from the Mid-Continent field in Oklahoma and Kansas and the Caddo field in Louisiana to Indiana and connected with the previously mentioned lines. It also was largely interested in the Tide Water Pipe Company, Limited, which connected with the Appalachian and other fields and pursued the methods of the Standard Oil Company about to be described. By the before mentioned and subordinate

lines the Standard Oil Company had made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic Ocean and carried much the greater part of the oil between those points. Before the recent dissolution the New York and Pennsylvania Companies had extended their lines into New Jersey and Maryland to the refineries and the laws of those States did not require them to be common carriers. To meet the present amendment the Standard Oil Company took a conveyance of the New Jersey and Maryland lines, and the common carrier lines now end at insignificant places where there are neither market nor appliances except those of the Standard Oil, by which it would seem that the whole transport of the carriers' lines is received. There is what seems to be merely a formal breach of continuity when the carriers' pipes stop. The change is not material to our view of the case.

Availing itself of its monopoly of the means of transportation the Standard Oil Company refused through its subordinates to carry any oil unless the same was sold to it or to them and through them to it on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them and carried across half the continent a great subject of international commerce coming from many owners but, by the duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does and constitutionally can apply to the several constituents that then had been united into a single line.

Taking up first the construction of the statute, we think it plain that it was intended to reach the combination of pipe lines that we have described. The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not in-

tended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Company and its coöperating companies were not so engaged no one was. It not only would be a sacrifice of fact to form but would empty the act if the carriage to the seaboard of nearly all the oil east of California, were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers. That is the plain meaning as has been held with regard to other statutes similarly framed. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 195, 203. Its evident purpose was to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price.

The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the States we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512. See *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111. The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act.

The control of Congress over commerce among the

States cannot be made a means of exercising powers not entrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees if they carry must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. *Hoke* v. *United States*, 227 U. S. 308, 323. *Lottery Case*, 188 U. S. 321, 357.

These considerations seem to us sufficient to dispose of the cases of the Standard Oil Company, the Ohio Oil Company, the Prairie Oil and Gas Company and the Tide Water Pipe Company, Limited. The Standard Oil Company of Louisiana was incorporated since the passage of the amendment, and before the beginning of this suit to break up the monopoly of the New Jersey Standard Oil Company. It buys a large part of its oil from the Prairie Oil and Gas Company which buys it at the wells in the Mid-Continent field and transfers the title to the Louisiana Company in that State. Its case also is covered by what we have said.

There remains to be considered only the Uncle Sam Oil

Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end. In that case the decree will be affirmed. In the others the decree will be reversed.

No. 507, *Decree affirmed.*
Nos. 481, 482, 483, 506 *and* 508, *Decrees reversed.*

THE CHIEF JUSTICE concurring.

Agreeing in every particular with the conclusions of the court and with its reasoning except as to one special subject, my concurrence as to that matter because of its importance is separately stated. The matter to which I refer is the exclusion of the Uncle Sam Oil Company from the operation of the act. The view which leads the court to exclude it is that the company was not engaged in transportation under the statute, a conclusion to which I do not assent. The facts are these: That company owns wells in one State from which it has pipe lines to its refinery in another State, and pumps its own oil through such pipe lines to its refinery and the product of course when reduced at the refinery passes into the markets of consumption. It seems to me that the business thus carried on is transportation in interstate commerce within the statute. But despite this I think the company is not

embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the Fifth Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation. It is shown beyond question that the company buys no oil and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions in my opinion there is no power under the Constitution without the exercise of the right of eminent domain to convert without its consent the private business of the company into a public one.

Of course this view has no application to the other companies which the court holds are subject to the act because as pointed out the principal ones were chartered as common carriers and they all either directly or as a necessary result of their association were engaged in buying oil and shipping it through their pipes; in other words, were doing in reality a common carrier business, disguised, it may be, in form, but not changed in substance. Under these conditions I do not see how it would be possible to avoid the conclusion which the court has reached without declaring that the shadow and not the substance was the criterion to be resorted to for the purpose of determining the validity of the exercise of legislative power.

MR. JUSTICE MCKENNA, dissenting.

I am unable to concur in the judgment of the court or in the reasoning upon which it is based. I pass by the construction of the amendment of June 29, 1906 (c. 3591, 34 Stat. 584), set out in the opinion, although its application to the business of appellee companies is in controversy. I shall assume its application, therefore, and pass to the other and more serious questions. Extended discussion

of them is not now possible. Indeed, any discussion may not be worth while, as I express only my individual views. In order to be brief, I have to refer to the principles of the decision of the court, and indeed I am impelled more to dissent from them than from the judgment. It is of little consequence, aside from the rights of the appellee companies, whether they are subject to be regulated as common carriers, but it is of great consequence whether the sanctions of property be impaired.

The outside principle of the decision is the power of Congress to regulate interstate commerce, but to assert that power solves none of the difficulties of the questions in the case. I need not pause to demonstrate that the exercise of that power is subject to other provisions of the Constitution, and one of those provisions is invoked by the appellees. It is contended that the act offends the Fifth Amendment in that it takes their property without due process of law. But what is due process of law, and wherein does its requirement limit the power of Congress? Neither question can be answered in a word, and the usual considerations are encountered when the courts are called upon to investigate the limits of legislative power. Autocracy is free from such perplexities. When authority can say, "The State—it is I!" it meets no impediments to its exercise. But that extreme illustration is not necessary. Even a government under a constitution, if it be unwritten, may have a power that leaves nothing for the courts to do other than to enforce the fiats of legislative authority. Under a written constitution, however, there is a sovereignty superior to the legislature, that of the people expressed in the Constitution. How to reconcile legislation with the limitations of the Constitution and leave government practical in its exercise is a problem which comes to this court often. It is the problem in the case at bar. It is to be regretted that there is no indisputable standard for its solution—no indisputable test of

due process of law. We know that an act of legislation does not necessarily satisfy it. It may, however, be sufficient, or, to be more careful and accurate, there may be a regulation of the uses of property whose legality cannot be denied. Regulation is not a taking, and we are brought to the inquiry, what uses of property will subject it to regulation? I mean regulation in a special sense, not in the sense in which all property, whether its uses be public or private, is subject to regulation. "Property," it is said, "becomes of public interest when used in a manner to make it of public consequence, and affect the community at large." "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389. Manifestly the principle needs the definition of the facts of the cases. In three of them the fees for storage of grain were regulated; in the other the price of fire insurance; but dominant in all, as giving character to the property, was the fact that its use was voluntarily offered to the public. There was no compulsion of use or service. This must be kept in mind as the determining circumstance. Conduct may be regulated which cannot be initially commanded. The rates of interest may be regulated, but loans can not be compelled. There is further illustration in a case subsequent to those cited. In *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, an injunction was sought against the operation of an elevator and warehouse situated on the right of way of a railroad until its operator should have obtained a license from the Railroad and Warehouse Commission of the State under a law of the State. The defendant company bought and sold grain, although its

elevator was used for storing its own grain only. The state court decided that the business was of a "public character" and was "sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State." This conclusion was put upon the ground that the elevator was a kind of public market place and it was important to see that correct weights were had, uniform grades given, proper amount of dockage taken and no dishonest practice allowed. The provision for a license was sustained. The act, however, provided for many other regulations, among others, for the receipt and storage of the grain of others and the rates of charges therefor. The state court, passing on these and other regulations, said that there were many provisions in the act which applied only to warehouses and elevators in which grain was stored for others or for the public and which could not apply to such warehouses as the one in question, and there were perhaps provisions in the act which it would be unconstitutional to apply to such warehouses. The court, however, said, "Such matters need not be considered at this time. The provision recognizing license is not one of these." One of the judges of the court was of opinion that on account of the interdependence of the provisions of the act many of them, when applied to warehouses not used for the storage of grain by others, were beyond the police power of the State and, therefore, invalid, and made the whole act so. This court, by Mr. Justice Harlan, sustained the judgment of the state court and said "that the mere requirement of a license was not forbidden by the Fourteenth Amendment." Answering the suggestion that other provisions were repugnant to the Constitution of the United States, it was said that the license would give authority to carry on the business under the valid laws of the State and the valid regulations of the Commission. The case, therefore, manifestly decides that the use of the warehouse by others could not

have been legally compelled, and in the other cases, as we have seen, it was the act of the parties, not the power of the law, which devoted the property to the public interest. In the *Munn Case* it was said of the owners of the elevators that there was no attempt to compel them "to grant the public an interest in their property, but to declare their obligations if they used it in this particular manner." And further, "He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

In the cases cited, therefore, there was a regulation of uses which were extended voluntarily to others. I recall no case where the use was compelled and by the use so compelled regulation was justified. The case at bar has no fellow in our jurisprudence.

These considerations are not touched upon in the opinion of the court, and how far they affect the decision can only be conjectured. It may be not at all. At any rate, other considerations are given explicit prominence. The impulse of the amendment is said to be the control which the Standard Oil Company had acquired over the pipe-line transportation of oil. It is further said that it availed "itself of its monopoly of the means of transportation" by refusing to carry "through its subordinates any oil unless the same was sold to them and through them to it on terms more or less dictated by itself, and thereby became master of the fields without owning them." It is not very clear whether this is intended as a statement merely of the motive of the amendment or of its legal justification. If stated as the motive of the amendment I have no concern with it; as a justification of the amendment its foundation must be considered

The facts of the cases the opinion of the court does not give. They are, however, quite necessary to a discussion of the questions which they present. I quote the summary of the Commerce Court (p. 802):

"The Prairie Oil and Gas Company is a corporation organized in 1900 under the laws of the State of Kansas. It owns and operates a system of pipe lines consisting of gathering lines in the mid-continent field, in the States of Kansas and Oklahoma, a trunk line from that field to Griffith in the State of Indiana, where it connects with the Indiana pipe line, and a trunk line in the State of Arkansas, connecting the Oklahoma pipe line with the pipe line of the Standard Oil Company of Louisiana. This company has no refinery, and its business is confined to producing, purchasing, and selling crude oil, which it delivers to its customers by means of the pipe lines described. Its own wells yield only about 12,000 barrels per day and it purchases approximately 70,000 barrels per day on the average. Its trunk lines are about 860 miles in length, of which some 300 miles are located on the right of way of the Atchison, Topeka & Santa Fe Railway Company under contract arrangement with that company.

"The Uncle Sam Oil Company is a corporation organized in 1905 under the laws of the State (then Territory) of Arizona. It owns and operates a pipe line from its wells in the State of Oklahoma to its refinery at Cherryvale, Kans. The extent to which this company purchases oil from other producers, if it engages in that business at all, does not appear from the record.

"Robert D. Benson et al. are the members of a partnership, organized in 1878 for the term of 20 years and reorganized in 1898 for a further term of 20 years, in compliance with the laws of the State of Pennsylvania, and doing business under the name of the Tide-Water Pipe Co. (Ltd.). This company transports oil from the Appalachian field in the western part of Pennsylvania, and also oil received through connecting lines from other fields, to the Tide-Water Oil Co. refinery at Bayonne, in the State of New Jersey. It also owns and operates branch lines in New York and Pennsylvania, and a line extending

from Stoy, Ill., through the States of Illinois, Indiana, Ohio, and Pennsylvania. The greater part of the crude oil transported by this company is purchased from other producers. The lines which it owns and the Bayonne refinery which it serves are under common or unified control.

"The Ohio Oil Co. is a corporation organized in 1887 under the laws of the State of Ohio. It owns and operates pipe lines in the States of Ohio, Indiana, and Illinois and also leases and operates a line from Negley, Ohio, to Centerbridge, in the State of Pennsylvania. It is an extensive purchaser of crude oil from other producers.

"Standard Oil Company, designated, for convenience, 'Standard Oil Company of New Jersey,' is a corporation organized in 1882 under the laws of the State of New Jersey, and its principal pipe lines are the following: (*a*) A line extending from Unionville, in the State of New York, near the boundary line of New Jersey, through the latter State to its refineries at Bayonne; (*b*) a line from Centerbridge, in the State of Pennsylvania, near the boundary of New Jersey, through the latter State to its refineries at Bayonne and Bayway; and (*c*) a line from Fawn Grove, in the State of Pennsylvania, near the boundary of Maryland, through the latter State to its refinery at Baltimore. The record indicates that much the greater part of the oil transported through these lines, and perhaps all of it, is oil which this company has purchased.

"The Standard Oil Company of Louisiana is a corporation organized in 1909 under the laws of that State. It owns and operates a refinery at Baton Rouge and a trunk line extending thereto from the town of Ida, near the northern line of Louisiana, and also gathering lines in the Caddo field, in the States of Louisiana and Texas. It purchases a considerable part of the crude oil which its lines transport.

"None of the petitioning corporations is organized or

derives any of its corporate powers from laws of the State of its creation under which common carrier or other public service corporations are organized, but each of them was formed and has always conducted its operations under and in compliance with state laws which relate to private as distinguished from public business."

The companies do not possess the right of eminent domain, and their lines are laid over private rights of way, except some of them for short distances have laid their lines along the rights of way of certain railroads under some contract arrangement with the railroads, one of them for a distance of about 300 miles. They, however, have in many instances also laid their lines across or along public streets and highways by permission or consent of the local authorities. None of them has ever held itself out as a common carrier or in fact ever carried oil for others, but they have carried only such oil as they produced from their own wells or purchased from other producers and which they owned when the transportation took place.

Concluding its recitation of facts, the Commerce Court said (p. 803): "In short, so far as their legal status is fixed by the laws of the States of their creation, and so far as their acts and attitude could make them such, all the petitioners [appellee companies] carry on a private business, at least in the sense that they transport only their own oil and have always refused to transport for others; and all of them have evidently sought and claimed to so conduct their operations as to avoid any public activity which might subject them to public regulation."

These being the facts, it is yet insisted that the appellee companies are common carriers "in substance" and Congress by its action has only made them so "in form," and that this is unquestionably within the power of Congress. But there is something more to be considered than an antithesis of words. There is an antithesis of

legal consequences—the subjecting of property to other uses than those of its owner. A manifest taking, therefore.

But let me get away from any appearance of considering words or forms of expression to an estimation of the facts. The Standard Oil Company of New Jersey is made prominent, and the exemplar of all of the other companies, and its stock ownership in some of them is assumed to destroy their individuality and unite them all in operation, character and effect. Indeed, it is represented as the single controlling force and master of the transportation of oil "between the oil fields east of California and the Atlantic ocean." Under its sway are pictured all the other companies except the Standard Oil of Louisiana, the latter company, however, having a baneful potency of dictation to the other owners in the oil fields, as has its exemplar, the Standard Oil of New Jersey. In other words it is argued the companies have made themselves masters of their respective fields by the constraint of the sale of the oil of other owners to them upon terms more or less dictated by them by availing themselves of their "monopoly of the means of transportation." This is the charge. The facts of the case do not sustain it except as they exhibit the advantages of the possession of property which others do not possess. Must it be shared by those others for that reason? The conception of property is exclusiveness, the rights of exclusive possession, enjoyment and disposition. Take away these rights and you take all that there is of property. Take away any of them, force a participation in any of them and you take property to that extent. These are commonplaces, but at times—it may be always—commonplaces are our best guides when rights are concerned. They are pertinent to this case. The employment of one's wealth to construct or purchase facilities for one's business greater than others possess constitutes no monopoly that does not appertain to all property. Such facilities may give

advantages and, it may be, power; so does all property and in proportion to its extent. It may well then, be asked—What extent of trade advantages, what degree of power in purchasing, what superiority in facilities of transportation or disposition of articles may be grounds of the exercise of congressional control? If the owner of a small oil well may be given rights in the facilities of the appellee companies, why may not the owner of a small business be given rights in the facilities of a larger business, if Congress sees fit to say that the public welfare requires the gift? Can any privilege be claimed for oil that cannot be claimed for other commodities? May a jobber of merchandise in Washington who conducts a trade in Baltimore and other places and owns special facilities for the transportation of his merchandise, be compelled to share them with competitors who may not be able to afford as ample ones and in consequence be forced to sell their property to him at a disadvantage? Or, recurring to the illustration of *W. W. Cargill Co.* v. *Minnesota*, can one who erects elevators for the storage of grain of his own raising (such instances exist) and uses it as well for grain of his purchase (there are more of such instances), be compelled to share their advantage with other growers or purchasers of grain? The advantages of his situation are quite as manifest as the advantages the appellees enjoy and the effect on interstate commerce transportation as marked. Upon the same principle, one who builds a railroad to a coal field or to a forest must share it with other owners in the field or forest if he ventures to purchase their productions. Such is the principle of the present decision. Under it what attribute of private property is left?

Let us not exaggerate the conditions or by form of statement put out of view essential elements. What duress is employed that is not employed when terms are exacted as a condition of the use of property? Or, rather,

and more accurately, what duress is used except the exclusion of others from the use of property which they do not own? There were no prior or present rights in other owners of oil wells to the use of the lines of the appellee companies. They contributed nothing to the construction of the lines and their exclusion from their use is the exclusion resulting from the separate ownership of property as distinguished from rights of community ownership.

There is quite a body of opinion which considers the individual ownership of property economically and politically wrong and insists upon a community of all that is profit-bearing. This opinion has its cause, among other causes, in the power—may I say the duress?—of wealth. If it accumulates 51% of political power, may it put its conviction into law and justify the law by the advancement of the public welfare by destroying the monopoly and mastery of individual ownership?

I submit, with deference, that it is misleading to say that the use of the lines by other oil owners was permitted only on terms dictated by the companies, and that through such dictation they "became masters of the fields without owning them." And I take it if the companies had not made purchases of oil or refused offers of oil, they would not be held subject to the act. Such is the situation of the Uncle Sam Company and the ground of decision in regard to that company. It is not held to be within the act. It seems to be minimized and considered not big enough for the application of the law, and yet it owns and operates a pipe line from the oil fields of Oklahoma to its refineries in Kansas. The extent to which it purchases oil from producers, if it does so at all, does not appear from the record. It may be supposed that if it venture to make purchases of oil it will lose its immunity. But why its exemption? Why is the fact of purchases of oil important? Is it not the concern of the small oil owners to get to market? Indeed, is not that the advantage they get

from the law thereby being able to break away from the supposed subjection to, and "duress" of, the superior advantages of the appellee companies? The result which the amendment under review was intended to effect was beneficial to the public welfare. The query then occurs, May all of the other oil companies give up their purchases and, if they should, will they thereby get the freedom of the Uncle Sam Company? What then of the owners of oil? It may be they cannot sell their oil at all—the local market is taken from them—a distant market is not possible for them. Is not the public welfare concerned for them in such situation? Must they remain in it dependent upon the richer owner balancing the advantages of remaining under the law or becoming free from it? Or may the power which has brought them to such situation extricate them from it by one more act of legislation in the public interest and to take from the companies their mastery of the fields of production?

United States v. *Delaware & Hudson Co.*, 213 U. S. 366, opens a curious speculation and illustrates the effect of the power exercised in the legislation under review. The appellee companies, the decision is, engaging in interstate commerce may be declared common carriers and made to carry the products of others as well as their own products. Then, having been made common carriers, under the authority of the cited case, they can be forbidden to carry their own products, and so by legal circumlocution property legally devoted to the use of its owners is forbidden such use and devoted wholly to the use of others. A queer outcome.

I have extended this discussion beyond what I had intended. Much more, however, could be said and decisions adduced on the various elements of the case. Prophecies of the result of the principles of the decision could be made which I am afraid could not be pronounced fanciful, and projects whose shadows may even now be discerned

will plead a justification by the decision in these cases. It is to be remembered that there are many jurisdictions of legislation. It is to be remembered that there cannot be one measure of control for Congress over private property and its uses and another measure of control for the States. In other words, the power which Congress has in its domain, the States have in their domain. Alarms, however, are not arguments, and I grant that legislation must be practical. But while making this concession, and giving to the legislation in question the presumption of constitutionality to which all legislation is entitled, I am yet constrained to say that it transcends the limits of the power of regulation and takes property without due process of law.

As I have not the power of decision, I do not enter into a discussion of the facts which distinguish the cases. It may be that the judgment of the Commerce Court as to the Standard Oil Company should be reversed because the lines of the Company were common carriers before their acquisition, and it may be that the Prairie Oil & Gas Company was made a common carrier by the law which created it. This, however, is in controversy.

I concur in the judgment as to the Uncle Sam Oil Company. From the judgments as to the other companies, I dissent.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY *v.* THOMPSON.

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

No. 751. Argued April 15, 16, 1914.—Decided June 22, 1914.

Under the free pass provision of the Hepburn Act of June 29, 1906, a free pass issued by a railroad company between interstate points to a member of the family of an employé is gratuitous and not in consideration of services of the employé.

As a pass issued to a member of the family of an employé of a railroad company is free under the provision of the Hepburn Act permitting it to be issued, the stipulations contained in it and on which it is accepted, including one exempting the company from liability in case of injury, are valid.

Quære whether under § 6 of the Act to Regulate Commerce, an interstate carrier can issue a pass in consideration of services.

13 Ga. App. 528, 541, reversed.

THE facts, which involve the liability of a railroad company to a member of the family of an employé traveling on a free pass issued by the company under the free pass provision of the Hepburn Act, are stated in the opinion.

Mr. F. Barron Grier and *Mr. W. K. Miller*, with whom *Mr. T. P. Cothran* was on the brief, for plaintiff in error.

Mr. William H. Fleming for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff, Lizzie Thompson, sued the Railroad Company, the plaintiff in error, to recover for personal injuries inflicted upon her while she was a passenger upon a train that was carrying her from South Carolina to Georgia. The railroad pleaded that she was traveling on a free

pass that exempted the company from liability, the same having been issued to her gratuitously under the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, § 1, as wife of an employé. This plea was struck out subject to the defendant's exception. The defendant also asked for an instruction that if the plaintiff was traveling on a free pass providing that the railroad should not be liable for negligent injury to her person she could not recover. This was refused and was made a ground for a motion for a new trial, referring to the act of Congress. The motion was overruled seemingly on the notion that by the state law the defendant was liable within the conditions of the free pass. The Court of Appeals held such a stipulation binding in a free pass, but held that the Hepburn Act created an exception and that a so-called free pass under that act issued to a member of an employé's family really was not a free pass but was issued upon consideration of the services of the employé. After this writ of error was taken it modified its statement so as to say that the jury might infer that the pass was issued for value. But no such issue was before the jury as the defence had been excluded altogether, and apart from other objections we are of opinion that the change does not help the decision. The railroad company assigns the construction of the Court of Appeals and the two rulings below as error. There is a motion to dismiss but we are of opinion that a question is presented under the act.

The main question is whether when the statute permits the issue of a 'free pass' to its employés and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by § 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is

between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employé in working for the road, the law did not contemplate his work as a conventional inducement for the pass but on the contrary contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440. *Boering* v. *Chesapeake Beach Ry. Co.*, 193 U. S. 442.

Judgment reversed.

By agreement of parties the judgment in No. 752 was to follow the foregoing. *Therefore in No. 752 also the judgment is reversed.*

INTERNATIONAL HARVESTER COMPANY OF AMERICA *v.* COMMONWEALTH OF KENTUCKY.

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

No. 297. Argued April 24, 1914.—Decided June 22, 1914.

It is essential to the rendition of a personal judgment against a corporation that it be doing business within the State; but each case must depend upon its own facts to show that this essential requirement of jurisdiction exists.

The presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State, although the business may be entirely interstate in its character.

The fact that the business carried on by a corporation is entirely interstate in its character does not render the corporation immune from the ordinary process of the courts of the State.

147 Kentucky, 655, affirmed.

THE facts, which involve the validity and sufficiency of service of process upon a foreign corporation and the determination of whether such corporation was doing business within the State, are stated in the opinion.

Mr. Alexander Pope Humphrey and *Mr. Edgar A. Bancroft*, with whom *Mr. Victor A. Remy* was on the brief, for plaintiff in error in this case and in No. 298.[1]

For cases involving questions of service of process upon foreign corporations as controlled by the Constitution of the United States, see Ky. Stats., § 571 (1909); *Commonwealth* v. *Hogan & Co.*, 25 Ky. L. R. 41; *Commonwealth* v. *Eclipse Hay Press Co.*, 31 Ky. L. R. 824; *Three States*

[1] See p. 590, *post*.

Buggy Co. v. *Commonwealth*, 32 Ky. L. R. 385; *Goldey* v. *Morning News*, 156 U. S. 518; *Conley* v. *Mathieson*, 190 U. S. 406; *Caledonian Co.* v. *Baker*, 196 U. S. 432; *Remington* v. *Cent. Pac. R. Co.*, 198 U. S. 95; *Kendall* v. *Am. Loom Co.*, 198 U. S. 477; *Peterson* v. *C., R. I. & P. Ry. Co.*, 205 U. S. 364; *Green* v. *C., B. & Q. R. R. Co.*, 205 U. S. 530; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Saxony Mills* v. *Wagner*, 94 Mississippi, 233; *Fawkes* v. *Am. Motor Co.*, 176 Fed. Rep. 1010.

At the time of the attempted service the defendant was doing nothing but an interstate commerce business with the people of Kentucky. *Commonwealth* v. *Chattanooga Co.*, 126 Kentucky, 636; *Brennan* v. *Titusville*, 153 U. S. 289; *Caldwell* v. *North Carolina*, 187 U. S. 621.

The carrying on of interstate commerce by the defendant with persons residing in this State does not constitute a doing of business in Kentucky. Cases *supra*, and *Havens* v. *Diamond*, 93 Ill. App. 557.

Merely soliciting orders is not doing business in a State. Cases *supra*, and *Green* v. *C., B. & Q. Ry. Co.*, 205 U. S. 530; *North Wisconsin Cattle Co.* v. *Oregon Short Line*, 105 Minnesota, 198; *Earle* v. *Ches. & Ohio Ry. Co.*, 127 Fed. Rep. 235, 240; *Fairbank* v. *Cincinnati &c. Ry. Co.*, 54 Fed. Rep. 420, 423; *Grace* v. *Martin Brick Co.*, 174 Fed. Rep. 131, 132; Kentucky Civil Code of Practice, § 51, subd. 3 and 6.

To hold that defendant can be prosecuted in these cases would violate the commerce clause of the Constitution. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 27; *Hadley-Dean Co.* v. *Highland Glass Co.*, 143 Fed. Rep. 242, 244; *Albertype Co.* v. *Gust-Feist Co.*, 102 Texas, 219; *Eclipse Paint Co.* v. *New Process Roofing Co.*, 55 Tex. Civ. App. 553; *Moroney Co.* v. *Goodwin Pottery Co.* (Tex. Civ. App.), 120 S. W. Rep. 1088, 1091.

The fact that the Harvester Company formerly carried on business in Kentucky does not alter the situation.

Conley v. *Mathieson Alkali Works*, 190 U. S. 406; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 226.

Under the construction given the Kentucky Process Statute by the Court of Appeals a person or corporation doing exclusively an interstate commerce business must submit to the jurisdiction of Kentucky courts.

The submission to the state courts, which is requisite to render foreign corporations subject to suit, cannot be compelled or implied where such corporation does only an interstate commerce business.

The cases relied upon by the Commonwealth do not support its contentions.

Mr. Charles Carroll, with whom *Mr. James Garnett*, Attorney General of the State of Kentucky, *Mr. Frank E. Daugherty*, *Mr. J. R. Mallory*, *Mr. J. C. Dedman*, *Mr. C. R. Hill* and *Mr. C. D. Florence* were on the brief, for defendant in error in this case and in No. 298: [1]

Plaintiff in error cannot raise the question in this court that the proceedings against it in these cases were a denial to it of due process of law. Section 157, Crim. Code, Kentucky; *Commonwealth* v. *Cheek*, 1 Duval, 26; *Commonwealth* v. *Neat*, 89 Kentucky, 242; *Payne* v. *Commonwealth*, 16 Ky. L. R. 839; *Sharp* v. *Commonwealth*, 16 Ky. L. R. 840; *York* v. *Texas*, 137 U. S. 15–20; *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 469.

The process in this case was served upon the proper person and the judgment rendered thereon was valid and binding. *St. Louis S. W. R. R. Co.* v. *Alexander*, 227 U. S. 227.

As to effect of the instructions to agents from the plaintiff in error, see *Good Roads Co.* v. *Commonwealth*, 146 Kentucky, 690; *Boyd Commission Co.* v. *Coates*, 24 Ky. L. R. 730; *Nelson Morris* v. *Rehkopf*, 25 Ky. L. R. 352; *Green* v.

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[1] See p. 590, *post*.

Chicago &c. R. R. Co., 205 U. S. 530; *Denver &c. R. R. Co.* v. *Roller*, 100 Fed. Rep. 938; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Delamater* v. *South Dakota*, 125 U. S. 93; 19 Cyc. 1347–1348.

To hold that plaintiff in error was properly served with process and the judgment rendered against it valid will not violate the commerce clause of the Constitution. *International Harvester Co.* v. *Commonwealth*, 147 Kentucky, 657.

Mr. Justice Day delivered the opinion of the court.

This case presents the question of the sufficiency of the service of process on an alleged agent of the International Harvester Company in a criminal proceeding in Breckenridge County, Kentucky, in the court of which county an indictment had been returned against the Harvester Company for alleged violation of the anti-trust laws of the State of Kentucky. The Harvester Company appeared and moved to quash the return, substantially upon the ground that service had not been made upon an authorized agent of the company and that the company was not doing business within the State of Kentucky, and it set up that any action under the attempted service would violate the due process and commerce clauses of the Federal Constitution. The only question involved, says the Court of Appeals, and we find none other in the record, is whether there was such service of process as would sustain the judgment. The court overruled the motion, and, the case being called for trial and the Harvester Company failing to appear or plead, judgment by default for $500 penalty was entered against it, which was affirmed by the Court of Appeals of Kentucky (147 Kentucky, 655).

It appeared that prior to October 28, 1911, before this indictment was returned, the Harvester Company had

been doing business in Kentucky and had designated Louisville, Kentucky, as its principal place of business, in compliance with the statutes of Kentucky in that respect. It further appeared that the Company had revoked the agency of one who had been appointed under the Kentucky statute and had not appointed anyone else upon whom process might be served.

It is conceded in the brief of the learned counsel for the plaintiff in error that whether the person upon whom process was served was one designated by the law of Kentucky as an agent to receive summons on behalf of the Harvester Company was a question within the province of the Court of Appeals of Kentucky to finally determine, and no review of that decision is asked here. We come then to the first question in this case, which is, Whether under the circumstances shown in this case the Harvester Company was carrying on business in the State of Kentucky in such manner as to justify the courts of that State in taking jurisdiction of complaints against it.

For some purposes a corporation is deemed to be a resident of the State of its creation, but when a corporation of one State goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that State. The mere presence of an agent upon personal affairs does not carry the corporation into the Foreign state. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be "doing business" within the State. *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 218, 226, and cases there cited. As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the State.

In the case now under consideration the Court of Ap-

peals of Kentucky found, with warrant for the conclusion, that the Harvester Company's method of conducting business might be shown to the best advantage from the general instruction of the company to its agents of date November 7, 1911, as follows:

"The Company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there.

"Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved. Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the Company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various States in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts

made by the general agent at Parkersburg, W. Va., will be West Virginia contracts.

"If any one of the Company's general agents deviates from what is stated in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the Company in the position where it can be held as having done business in Kentucky, will not only make the man transacting the business liable to a fine of from one hundred to one thousand dollars for each offense, but it will make the Company liable for doing business in the State without complying with the requirements of the laws of the State. We will, therefore, depend upon you to see that these instructions are strictly carried out."

Taking this as the method of carrying on the affairs of the Harvester Company in Kentucky, does it show a doing of business within that State to the extent which will authorize the service of process upon its agents thus engaged?

Upon this question the case is a close one, but upon the whole we agree with the conclusion reached by the Court of Appeals, that the Harvester Company was engaged in carrying on business in Kentucky. We place no stress upon the fact that the Harvester Company had previously been engaged in doing business in Kentucky and had withdrawn from that State for reasons of its own. Its motives cannot affect the legal questions here involved. In order to hold it responsible under the process of the state court it must appear that it was carrying on business within the State at the time of the attempted service. As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another State and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders

in Kentucky, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the State in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the State.

It is argued that this conclusion is in direct conflict with the case of *Green* v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530. We have no desire to depart from that decision, which, however, was an extreme case. There the Railway Company, carrying on no business in Pennsylvania, other than that hereinafter mentioned, and having its organization and tracks in another State, was sought to be held liable in the Circuit Court of the United States for the Eastern District of Pennsylvania by service upon one Heller, who was described as an agent of the corporation. As incidental and collateral to its business proper the Company solicited freight and passenger traffic in other parts of the country than those through which its tracks ran. For that purpose it employed Heller, who had an office in Philadelphia, where he was known as district freight and passenger agent, to procure passengers and freight to be transported over the Company's line. He had clerks and travelling passenger and freight agents who reported to him. He sold no tickets and received no payment for the transportation of freight, but took the money of those desiring to purchase tickets and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order which gave the holder the right to receive from the Company in Chicago a ticket over its road. Occasionally he sold to railroad employés, who already had tickets over intermediate lines, orders for reduced rates over the Company's line.

In some cases for the convenience of shippers who had received bills of lading from the initial line for goods routed over the Company's line, he exchanged bills of lading over its line, which were not in force until the freight had been actually received by the Company. Summarizing these facts, Mr. Justice Moody, speaking for the court, said (p. 533): "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky.

It is further contended that as enforced by the decision of the Kentucky court the law, in its relation to interstate commerce, operates to burden that commerce. It is argued that a corporation engaged in purely interstate commerce within a State cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement cannot be made the ordinary agents of the corporation, although doing interstate business within the State, cannot by its laws be made amenable to judicial process within the State. The contention comes to this, so long as a foreign corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to

find a decision to support it, nor has one been called to our attention.

True, it has been held time and again that a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character. Such corporations are within the State, receiving the protection of its laws, and may, and often do, have large properties located within the State. In *Davis* v. *Cleveland, C., C. & St. L. Ry.*, 217 U. S. 157, this court held that cars engaged in interstate commerce and credits due for interstate transportation are not immune from seizure under the laws of the State regulating garnishment and attachment because of their connection with interstate commerce, and it was recognized that the States may pass laws enforcing the rights of citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the Constitution gives sole jurisdiction to Congress, citing *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388; *Kidd* v. *Pearson*, 128 U. S. 1, 23; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477; and *The Winnebago*, 205 U. S. 354, 362, in which this court sustained a lien under the laws of Michigan on a vessel designed to be used in both foreign and domestic trade.

In *International Textbook Co.* v. *Pigg*, 217 U. S. 91, it was held that a law of Kansas which required the filing by a foreign corporation engaged in interstate commerce of a statement of its financial condition as a prerequisite of the right to do such business and which required a certificate from the Secretary of State showing that such statements had been filed as a condition precedent to the right of the corporation to maintain a suit in that State, was void. But that case did not hold, as we should be

required to do to sustain the contention of the plaintiff in error in this case, that the fact that the corporation was carrying on interstate commerce business through duly authorized agents made it exempt from suit within the State by service upon such agents.

We are satisfied that the presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the State.

It follows that the judgment of the Court of Appeals of Kentucky must be

Affirmed.

INTERNATIONAL HARVESTER COMPANY OF AMERICA *v.* COMMONWEALTH OF KENTUCKY.

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

No. 298. Argued April 24, 1914.—Decided June 22, 1914.

Where the state court has denied a motion to quash the service of process on a foreign corporation, and has also held that the statute on which the action is based is not unconstitutional, both the question of validity of the service and that of the constitutionality of the act are before this court for review.

International Harvester Company v. *Kentucky*, *ante*, p. 579, followed to effect that the plaintiff in error was doing business in the State in which process was served.

International Harvester Company v. *Kentucky*, *ante*, p. 216, followed to the effect that the provision of the anti-trust statute of Kentucky

under which this suit was brought is unconstitutional under the due process provision of the Fourteenth Amendment.
149 Kentucky, 41, reversed.

THE facts, which involve the sufficiency of service of process upon a foreign corporation doing business in the State of Kentucky and also the constitutionality of the anti-trust act of Kentucky, are stated in the opinion.

Mr. Alexander Pope Humphrey and *Mr. Edgar A. Bancroft*, with whom *Mr. Victor A. Remy* was on the brief, for plaintiff in error in this case and in No. 297.[1]

Mr. Charles Carroll, with whom *Mr. James Garnett*, Attorney General of the State of Kentucky, *Mr. Frank E. Daugherty*, *Mr. J. R. Mallory*, *Mr. J. C. Dedman*, *Mr. C. R. Hill* and *Mr. C. D. Florence*, were on the brief, for defendant in error in this case and in No. 297.[1]

MR. JUSTICE DAY delivered the opinion of the court.

A penal action was instituted by the defendant in error against the plaintiff in error in the Boyle Circuit Court of Kentucky under the anti-trust laws of that State. Summons having been served upon an alleged agent of the plaintiff in error, it filed a motion to quash the return for the reason, as alleged, that the person upon whom service had been made was not the authorized agent of the plaintiff in error and that it was not doing business in Kentucky. The facts in this case which are identical with those set out in the previous case, *International Harvester Company of America* v. *The Commonwealth of Kentucky*, just decided, *ante*, p. 579, show that the plaintiff in error had prior to the commencement of this action revoked the authority of an agent designated by it in com-

[1] For abstracts of arguments see *ante*, p. 579.

pliance with the laws of Kentucky and had removed its office from the State, but that it had continued through its agents, the party served in this case being one of them, to solicit orders to be accepted outside of the State for the sale of machines which were to be delivered in Kentucky, and that its agents were authorized to receive money, checks and drafts in payment therefor, or take the notes of purchasers payable at any bank in Kentucky.

There are two questions in this case. The Court of Appeals, deciding that this case was governed by the previous case from Breckenridge County (147 Kentucky, 655), held that the service was good and that the anti-trust act was not unconstitutional and violative of the Fourteenth Amendment to the United States Constitution. 149 Kentucky, 41. Since the Federal question involving the validity of the anti-trust act was considered and decided adversely in the Court of Appeals, it, as well as the question of due service, is properly before us. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243, and cases there cited.

As we have just dealt with the sufficiency of service in the previous case, involving the same question, it may be disposed of here by merely referring to that decision. And as the constitutional validity of the anti-trust act was specifically determined in cases Nos. 276, 291 and 292, entitled *International Harvester Company of America* v. *The Commonwealth of Kentucky*, decided June 8, 1914, *ante*, p. 216, that question is also concluded.

We therefore reach the conclusion that the plaintiff in error was doing business in Kentucky and that the service was sufficient, but that the law under which the action was brought is unconstitutional and that the judgment of the Court of Appeals must be reversed, and accordingly remand the case to that court for further proceedings not inconsistent with this opinion.

Reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* HIGDON, DOING BUSINESS UNDER THE NAME OF CRESCENT COAL COMPANY.

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

No. 322. Submitted March 19, 1914.—Decided June 22, 1914.

Attempts to inject Federal questions into the record by filing amended pleadings after the case has been remanded by the appellate court come too late to lay the foundation for review by this court, *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, except so far as the appellate court gives consideration to, and passes upon, such questions when the case again comes before it. *Miedreich* v. *Lauenstein*, 232 U. S. 236.

In this case *held*, that defendant had not been deprived of Federal rights because the state court had refused to allow him to file an amended pleading and relitigate a question already decided by setting up alleged violations of Federal rights.

The State has full authority over shipments purely intrastate, and an averment that a service required at one point as to intrastate shipments might be required at other points in regard to interstate shipments only avers an indirect effect upon interstate commerce; and a defendant carrier denied leave to file an amended pleading to that effect is not deprived of rights secured by the commerce clause of the Federal Constitution.

149 Kentucky, 321, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of the Constitution of the United States of a judgment of the state court for damages for refusal to transport coal between intrastate points, are stated in the opinion.

Mr. Benjamin D. Warfield, Mr. Charles H. Moorman, Mr. Malcolm Yeaman, Mr. Edward S. Jouett, Mr. William A. Colston and *Mr. Henry L. Stone* for plaintiff in error:

The judgment of the Court of Appeals deprives the plaintiff in error of the reasonable control of its property and facilities used in the conduct of its business in violation of the Fourteenth Amendment. Am. and Eng. Ency. 158; *C. & O. Ry. Co.* v. *Hall*, 136 Kentucky, 379; Constitution of Kentucky, §§ 214, 215; *Clark Co.* v. *Lake Shore R. R. Co.*, 11 I. C. C. 558; *Dixon* v. *Central R. R. of Georgia*, 35 S. E. Rep. 369; *Elkins* v. *Boston &c. R. R. Co.*, 28 N. H. 275; Elliott on Railroads, § 1466; *Grand Trunk Ry. Co.* v. *Michigan R. R. Comm.*, 231 U. S. 457; *Hoover* v. *Penna. R. R. Co.*, 156 Pa. St. 229; *Harp* v. *Choctaw*, 118 Fed. Rep. 169; Hutchinson on Carriers, §§ 59, 60, 144; *Int. Com. Comm.* v. *Balt. & Ohio R. R. Co.*, 145 U. S. 263; *Int. Com. Comm.* v. *Alabama Ry. Co.*, 69 Fed. Rep. 227; *Johnson* v. *Midland R. R. Co.*, 4 Exch. 367; *Kansas Pac. R. Co.* v. *Nichols*, 19 Kansas, 247; *Kentucky R. R. Commission* v. *L. & N. R. R. Co.*, 10 I. C. C. 173; *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684; *Lake Shore &c. Ry.* v. *Ohio*, 173 U. S. 285; *Laurel Cotton Mills* v. *Gulf & S. I. R. Co.*, 37 So. Rep. 134; *Lee* v. *Burgess*, 9 Bush, 652; *L. & N. R. R. Co.* v. *Kentucky*, 105 Kentucky, 179; 108 Kentucky, 628; *L. & N. R. R. Co.* v. *Cent. Stock Yards*, 212 U. S. 132; *Miner* v. *New York &c. R. R. Co.*, 11 I. C. C. 422; Moore on Carriers, p. 98; *Oxlade* v. *N. E. R. Co.*, 1 C. B. N. 454; *Pitlock* v. *Wells, Fargo & Co.*, 109 Mass. 452; *Pfister* v. *Cent. Pac. R. Co.*, 59 Am. Rep. 404; *Santa Fe &c. Ry. Co.* v. *Grant*, 108 Pac. Rep. 467; *Ellis* v. *Atlantic Coast Line*, 12 L. R. A. (N. S.) 506; *Tex. & Pac. Ry. Co.* v. *Int. Com. Comm.*, 162 U. S. 197; *Varble* v. *Bigley*, 14 Bush, 698; *Wilson Produce Co.* v. *Penna. R. R. Co.*, 14 I. C. C. 170; *Wisconsin R. R. Co.* v. *Jacobson*, 179 U. S. 287.

The judgment of the Court of Appeals in this case is contrary to the Fourteenth Amendment because it requires plaintiff in error to perform a service at a rate that does not afford reasonable compensation for such service.

Atlantic Coast Line v. *North Carolina Corp. Comm.*, 206 U. S. 1; *Attorney General* v. *Old Colony R. R. Co.*, 22 L. R. A. 112; *Chi., Mil. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Dow* v. *Beidelman*, 125 U. S. 680; *Georgia R. R. Co.* v. *Smith*, 128 U. S. 179; *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684; *Minn. & St. L. R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Mo. Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Railroad Commission Cases*, 116 U. S. 307; *Smyth* v. *Ames*, 169 U. S. 466.

The decision of the Court of Appeals and §§ 214 and 215 of the constitution of Kentucky as construed by the court in that decision impose an unreasonable burden upon the interstate commerce of plaintiff in error, and are therefore repugnant to the commerce clause of the Federal Constitution. *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Herndon* v. *Chicago &c. Ry. Co.*, 218 U. S. 135; *L. & N. R. R. Co.* v. *Eubank*, 184 U. S. 27; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Mississippi R. R. Comm.* v. *Ill. Cent. R. R. Co.*, 203 U. S. 305; *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347.

Mr. James W. Clay, *Mr. J. F. Clay* and *Mr. A. Y. Clay* for defendant in error.

Mr. Justice Day delivered the opinion of the court.

The defendant in error, Joe Higdon, doing business under the name of the Crescent Coal Company, brought suit in the Henderson Circuit Court, of Kentucky, to recover damages for alleged loss because of the failure of the Railroad Company to furnish him with cars at the Keystone Mining & Manufacturing Company's mine at Henderson, Kentucky, with which to perform certain contracts which he had made and which he was prevented

from fulfilling by the refusal of the Railroad Company. While the action was originally brought at law it was transferred upon motion of the plaintiff in error to the equity docket. The decree of the Circuit Court dismissing the petition was reversed in the Court of Appeals of Kentucky, and the case was remanded for a new trial in conformity to the opinion of that court (143 Kentucky, 73). The case was again tried and a decree for Higdon for damages was affirmed by the Court of Appeals (149 Kentucky, 321), and the case was brought here on writ of error. A motion to dismiss the writ for want of jurisdiction was, on December 16, 1912, postponed to the hearing upon the merits.

From the facts found and apparent in the record it appears: Higdon, doing business as the Crescent Coal Company, was engaged in buying and selling coal in the City of Henderson, and the Railroad Company was a common carrier having its main line running in and through that city. It had a belt line and various spurs and tracks leading from its main and belt lines into industrial plants in Henderson. The Keystone Company was operating a coal mine in Henderson, which was connected with the main and belt lines of the plaintiff in error's road by a spur which the latter operated and controlled. Higdon contracted with the Keystone Company for 20,000 tons of coal to be delivered to him on the spur track, and afterwards contracted with various plants having spur connections to deliver coal in car-load lots at certain prices. Thereafter he applied to the Railroad Company to furnish him cars at the Keystone Company's mine and to transport coal in them to other spurs at Henderson, offering to pay therefor four dollars per car or at the rate of about ten cents a ton, which he contended was according to the published rates of the Railroad Company. It refused to furnish him cars except at the rate of fifty cents a ton, which Higdon declined, and

afterwards the Railroad Company informed him that it would not furnish cars at any price. This action was brought with the result which we have stated.

No Federal question was raised in the first trial or upon the first appeal to the Kentucky Court of Appeals. The alleged Federal questions are said to arise because of two amended answers which the defendant in error tendered and which the Circuit Court refused to permit it to file. In its first amended answer the plaintiff in error alleged that it had built side tracks and spurs from its main track to certain industries in Henderson for the delivery and receipt of freight to and from points beyond that city; that it had constructed such a spur to the mine of the Keystone Company, with the express understanding that the plaintiff in error would not transport coal for the Keystone Company or for anyone else between that spur and other spurs at Henderson, but that it should be used solely for traffic coming into and going out of Henderson; that it was not engaged and did not propose to engage in the business of transportation as a common carrier between industries at Henderson or any other station, or in transporting coal from the Keystone Company's mine to spur tracks at Henderson, and that while it performed a switching service, it did so only when it preceded or followed transportation beyond Henderson. It further alleged that the service requested by Higdon was a transportation service, which the Railroad Company declined to perform because it did not profess to and did not engage in that business, and that it was not its duty as a common carrier so to do or to furnish cars for such purpose. It also alleged that its tariffs did not fix a rate for the movement of coal from the mine of the Keystone Company to the spurs at Henderson, and that it did not offer by such tariffs to perform such service; and that there was no other demand for such service, and no other coal mine at Henderson. And it alleged that it was not its duty to

perform such service for four dollars per car or for any other sum, but that a rate of fifty cents a ton, which was the legal rate in effect for hauling coal from points near Henderson to that city and which was reasonable, would have been a reasonable charge for the service requested by Higdon, and that a smaller rate would not have been adequate compensation therefor, and concluded that to compel the Railroad Company to perform the service asked by Higdon at four dollars per car or for a rate less than fifty cents a ton would be to compel it to perform a service which under the law it was not its duty to perform and at less than cost thereof and for less than the service was worth, with the result of depriving the Railroad Company of its property without due process of law and denying it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

In its second amended answer it set up, besides certain of the allegations in the first amended answer to the effect that it was not its duty to move freight between private spurs, that its facilities at Henderson for delivering and receiving freight were amply sufficient to accommodate the public; that it was engaged in interstate commerce, and that to require the defendant to perform the service asked by Higdon would impose upon it the duty of performing like services at other points on its line in Kentucky and would impose upon it unreasonable, unjustifiable and unwarrantable duties which it as a common carrier was not required to perform and would be a direct and unreasonable and unwarrantable interference with its interstate business and its duties as a carrier of interstate commerce, and would impose an unreasonable burden upon interstate commerce contrary to § 8 of Art. I, of the Constitution of the United States.

Had the Court of Appeals put its decision upon the ground that the duty of the Circuit Court was simply to

give effect to the judgment of the Court of Appeals by enforcing the rights of the parties upon the principles settled by it in its first decision and that the attempt to inject Federal questions into the record by amended pleadings after the case was remanded did not seasonably raise Federal questions reviewable by the Court of Appeals, the case would be ruled by *Union Mutual Life Ins. Co.* v. *Kirchoff*, 169 U. S. 103, in which this court held that such attempts to raise Federal questions came too late to lay the foundation for review here. See also *Yazoo & Mississippi Valley Ry. Co.* v. *Adams*, 180 U. S. 1; *Bonner* v. *Gorman*, 213 U. S. 86.

The Court of Appeals of Kentucky in the opinion delivered in the second case did affirm the principle of the binding character of its first decision, but as it gave consideration to the offered amended answers in their Federal aspect and ruled concerning them, we have concluded not to sustain the motion to dismiss, but to regard the Federal questions as so far passed upon by the Court of Appeals as to present a case reviewable here. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243.

Looking to the opinion of the Court of Appeals in the second case, as we may properly do, to determine the nature of its ruling concerning the offered amended answers, we find that it held that the first part of the first amended answer was simply an elaboration of the defense presented by the second paragraph of the original answer, and that on the former appeal it had held that those facts did not present a defense to the action and that the former opinion was the law of the case and further consideration of that matter was unnecessary. Coming then to consider the conclusion of the averment of the first amended answer that a rate of four dollars per car would be below the cost of the service and therefore confiscatory, it did not pass upon the effect of that charge if required of the Railroad Company against its will, but held that its rates as fixed

by its own tariffs, interpreted by its conduct, as held in the first opinion of the Court of Appeals, had made that rate applicable to the shipments requested by Higdon and that therefore the requirement of performing the service at four dollars per car was not imposed upon the plaintiff in error except because of its own tariff rate which it might itself change at any time, but which while it was in force should affect all shippers alike, including Higdon. A reference to the former opinion of the court shows that the question whether the published tariffs of the Railroad Company applied to such service as Higdon required was elaborately considered, and it was held that it did so apply, and that as the Railroad Company was performing that service for other shippers similarly situated, to avoid discrimination, which the Constitution and laws of Kentucky inhibited, it was required to give the same rate to Higdon. It therefore results that in the so-called denial of the Federal right set up in the first amended answer the court in effect held that the facts upon which it was based had been concluded by the former decision, which was the law of the case, and to permit the Railroad Company to relitigate these facts because the result reached was alleged to violate constitutional provisions would permit it to relitigate that which the court held had been settled against it by the first decision of the Court of Appeals in which no infraction of Federal right was duly set up as required to lay the foundation for review.

As to the matter set up in the second amended answer the court held that it made no defense within the interstate commerce clause of the Constitution of the United States, because all the court had done was to make a decision which required the carrier to obey the state constitution and laws which prevented discrimination as to purely intrastate shipments. We think the court was right in this conclusion. The State had full authority over shipments purely intrastate, and the facts set up in the

second amended answer that the requirement made at Henderson might be made at other points in the State and would result in an unnecessary and unreasonable burden upon interstate commerce, only avers an indirect effect upon such commerce of the exercise of a right clearly within the authority of the State; and being only of that indirect and consequential character it does not deprive the Railroad Company of rights secured by the commerce clause of the Constitution of the United States.

We conclude that the rulings made in the Court of Appeals of Kentucky concerning the first and second amended answers which were not permitted to be filed in the court of original jurisdiction did not deprive the Railroad Company of rights secured by the Federal Constitution.

Affirmed.

EASTERN STATES RETAIL LUMBER DEALERS' ASSOCIATION *v.* UNITED STATES.

McBRIDE, INDIVIDUALLY AND AS PRESIDENT OF THE RETAIL LUMBERMEN'S ASSOCIATION OF PHILADELPHIA, *v.* THE UNITED STATES.

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

Nos. 511, 550. Argued October 24, 27, 1913.—Decided June 22, 1914.

Conspiracies are seldom capable of proof by direct testimony and a conspiracy to accomplish that which is their natural consequence may be inferred from the things actually done.

The Sherman Law, as construed by this court in the *Standard Oil Case*, while not reaching normal and usual contracts incident to lawful purposes and in furtherance of legitimate trade, does broadly condemn all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce.

Held in this case that the circulation of a so-called official report among members of an association of retail dealers calling attention to actions

of listed wholesale dealers in selling direct to consumers, tended to prevent members of the association from dealing with the listed dealers referred to in the report, and to directly and unreasonably restrain trade by preventing it with such listed dealers, and was within the prohibitions of the Sherman Law.

While a retail dealer may unquestionably stop dealing with a wholesaler for any reason sufficient to himself, he and other dealers may not combine and agree that none of them will deal with such wholesaler without, in case interstate commerce is involved, violating the Sherman Law.

An act, harmless when done by one person, may become a public wrong when done by many acting in concert in pursuance of a conspiracy. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433.

201 Fed. Rep. 581, affirmed.

THE facts, which involve the determination of whether an arrangement between certain retail lumbermen's associations in regard to their relations with wholesale dealers amounted to a combination and conspiracy in restraint of trade within the prohibitions of the Sherman Act, are stated in the opinion.

Mr. Alfred B. Cruikshank for appellants in No. 511, and *Mr. Howard Taylor*, with whom *Mr. Charles E. Morgan*, *Mr. C. E. Morgan, 3d*, and *Mr. Charles B. Brophy* were on the brief, for appellants in No. 550:

The Sherman Act prohibits undue limitations on competitive conditions.

The combination, or concerted action, of these defendants in distributing circulars stating the true position of lumbermen in the trade, was not a combination which unduly restrained competition.

The true question under the English and American authorities is whether the circulation of the "Official Lists" is a reasonable defensive measure or is an unreasonable, offensive and malicious means to eliminate competition.

There was no combination or concert of action among defendants to boycott those whose names appeared on the "Official Reports."

The evidence concerning past occurrences, if relevant at all, tends to establish that the defendants' present intent is right and law abiding.

These present appellants are not responsible for the actions of individuals in other local associations.

There was no confederation among the various local associations, except with respect to the circulation of the "Official Reports."

No absurdities were contemplated by the Sherman Act.

In support of these contentions, see *Aikens* v. *Wisconsin*, 195 U. S. 194; *Allan* v. *Flood*, App. Cas. 1898, 1; *Bohn Mfg. Co.* v. *Hollis*, 54 Minnesota, 223; *Carew* v. *Rutherford*, 106 Massachusetts, 1, 14; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Collins* v. *American News Co.*, 34 Misc. 260; *S. C.*, aff'd, 68 App. Div. 639; *Continental Ins. Co.* v. *Underwriters*, 67 Fed. Rep. 310, 320; Cooke on Combinations (2d ed.), c. V; Cooley on Torts (2d ed.), 328; *Dueber Watch Co.* v. *Howard*, 55 Fed. Rep. 851, 854; *S. C.*, 66 Fed. Rep. 637, 645; *Ertz* v. *Produce Exchange*, 79 Minnesota, 140, 144; *Gompers* v. *Bucks Stove Co.*, 221 U. S. 418, 436; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 441; *Lawlor* v. *Loewe*, 187 Fed. Rep. 522, 526; *Loewe* v. *Lawlor*, 208 U. S. 274, 291; *Macauley Bros.* v. *Tierney*, 19 R. I. 255, 259; *Mills* v. *United States Printing Co.*, 99 App. Div. (N. Y.) 605; *Mogul Steamship Co.*, App. Cas. 1892, 25; *S. C.*, L. R. 23, Q. B. 598, 614; *Montgomery Ward Co.* v. *South Dakota Retail Ass'n*, 150 Fed. Rep. 413; *Nash* v. *United States*, 229 U. S. 373; *National Protective Ass'n* v. *Cuming*, 170 N. Y. 315; *Quinn* v. *Lathem*, App. Cas. 1901, 495, 512; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 58; *State* v. *Adams Lumber Co.*, 81 Nebraska, 392, 412; *Toledo &c. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. Rep. 730, 738; *United States* v. *Trans-Missouri Association*, 166 U. S. 290, 337; *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Amer. Tobacco Co.*, 221 U. S. 106, 177; *United States* v. *St. Louis Terminal*, 224 U. S. 383,

394; *United States* v. *Reading Co.*, 226 U. S. 324; *United States* v. *Un. Pac. R. R. Co.*, 226 U. S. 61, 84; *Wabash R. R. Co.* v. *Hannahan*, 121 Fed. Rep. 563, 569; *Walker* v. *Cronin*, 107 Massachusetts, 555, 564.

Mr. Assistant to the Attorney General Todd for the United States:

The evidence establishes an agreement or combination between the defendant retailers to prevent wholesalers from selling directly to consumers by refusing to buy from (boycotting) them if they do. This is shown by the declared purpose of the defendant associations as disclosed by their constitutions and by-laws; the compilation and circulation of the so-called "official reports" or blacklists; the actual course of conduct of defendants in concertedly withdrawing their patronage from listed wholesalers; admissions of members of defendant associations, and other testimony showing general recognition of and obedience to a tacit or moral obligation upon members so to withdraw their patronage. The inference of an agreement to boycott is confirmed by the decisions of other courts in conspiracy cases. *Commonwealth* v. *McLean*, 2 Pars. (Pa.) 367; 3 Greenleaf on Ev., § 93; *Patnode* v. *Westenhaver*, 114 Wisconsin, 460; *Regina* v. *Murphy*, 8 C. & P. 397; *Reilley* v. *United States*, 106 Fed. Rep. 896; *State* v. *Adams Lumber Co.*, 81 Nebraska, 392; *United States* v. *Sacia*, 2 Fed. Rep. 754; *Webb* v. *Drake*, 26 So. Rep. (La.) 791; 2 Wharton, Criminal Law, § 1398.

An agreement or combination by retailers to refuse to buy from (boycott) wholesalers who sell directly to consumers interferes with the free and normal flow of trade and therefore violates the Anti-trust Act. *Bailey* v. *Master Plumbers' Ass'n*, 103 Tennessee, 99; *Beck* v. *Railway Teamsters' Union*, 42 L. R. A. 407; *Bohn Mfg. Co.* v. *Hollis*, 54 Minnesota, 223; *Boutwell* v. *Marr*, 71 Vermont, 1; *Brown* v. *Jacobs Phar. Co.*, 115 Georgia, 429; *Casey* v.

Cincinnati Typographical Union, 45 Fed. Rep. 135; *Doremus* v. *Hennesy*, 176 Illinois, 608; *Ellis* v. *Inman*, 131 Fed. Rep. 183; *Gompers* v. *Bucks Stove Co.*, 221 U. S. 418; *Same* v. *Same*, 33 App. D. C. 83; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433; *Hawarden* v. *Youghiogheny Coal Co.*, 111 Wisconsin, 545; *Hopkins* v. *Oxley Stave Co.*, 83 Fed. Rep. 912; *Jackson* v. *Stanfield*, 137 Indiana, 592; *Klingel's Pharmacy* v. *Sharp*, 104 Maryland, 218; *Loewe* v. *Lawlor*, 208 U. S. 274; *Lucke* v. *Clothing Cutters Ass'n*, 77 Maryland, 396; *Macauley Bros.* v. *Tierney*, 19 R. I. 255; *Montgomery Ward & Co.* v. *So. Dak. Merchants' Ass'n*, 150 Fed. Rep. 413; *Montague* v. *Lowry*, 193 U. S. 38; *Olive* v. *Van Patten*, 7 Tex. Civ. App. 630; *Purington* v. *Hinchliff*, 219 Illinois, 159; *Retail Dealers' Ass'n* v. *State*, 48 So. Rep. (Miss.) 1021; *State* v. *Adams Lumber Co.*, 81 Nebraska, 393; *Steers* v. *United States*, 192 Fed. Rep. 1; *Thomas* v. *C., N. O. & T. P. R. Co.*, 62 Fed. Rep. 803; *Webb* v. *Drake*, 26 So. Rep. (La.) 791.

Viewing the agreement or combination between the defendants merely as one to circulate amongst themselves lists of wholesalers who sell directly to consumers, it unreasonably restricts competition between wholesalers and retailers in selling to consumers and therefore violates the Anti-trust Act. *Am. Tobacco Co.* v. *United States*, 221 U. S. 106; *Nash* v. *United States*, 229 U. S. 373; *Quinn* v. *Leatham* (1901), A. C. 495; *Standard Oil Co. Case*, 221 U. S. 1.

The plea that this combination was a reasonable and necessary measure to defend the position of retailers in the trade is irrelevant in law and unfounded in fact. *Ches. & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 610; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433; *Loewe* v. *Lawlor*, 187 Fed. Rep. 522.

Mr. Justice Day delivered the opinion of the court.

These are appeals from a decree of the District Court of the United States for the Southern District of New York

in an action brought by the United States under the Sherman Anti-Trust Act (July 2, 1890, c. 647, 26 Stat. 209), having for its object an injunction against certain alleged combinations of retail lumber dealers, which, it was averred, had entered into a conspiracy to prevent wholesale dealers from selling directly to consumers of lumber. The defendants are various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland and the District of Columbia, and the officers and directors of the associations. The record is very voluminous, but the facts essential to a consideration of the decree of the District Court are in comparatively narrow compass. While the record also concerns practices which are said to have been abandoned, the decree entered, declaring the defendants named to be in a combination or conspiracy to restrict and restrain competition, depends solely upon the method adopted and being used by the defendants in the distribution of the information contained in a certain document known as the "Official Report," the form of which, set forth in the decree, is as follows:

"OFFICIAL REPORT.

"(Name of the Particular Association Circulating it.)

"STATEMENT TO MEMBERS (WITH THE DATE).

"You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

"The following are reported as having solicited, quoted or as having sold direct to the consumers:

"(Here follows a list of the names and addresses of various wholesale dealers.)

"Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

"The number and initials of car.

"The name of consumer to whom the car is consigned.

"The initials or name of shipper.

"The date of arrival of car.

"The place of delivery.

"The point of origin";

and the defendants were enjoined from combining, conspiring or agreeing together to distribute and from distributing to members of the associations named or any other person or persons any information showing soliciting, quotations, or sales and shipments of lumber and lumber products from manufacturers and wholesalers to consumers of or dealers in lumber, and from the preparation and distribution of the lists above described as the "Official Report" or the use of a similar device.

The record discloses that the defendant associations are constituted largely of retail lumber dealers, each of whom has the natural desire to control his local trade, which the retailers contend has been unduly interfered with by the wholesalers in selling to consumers within the local territory in such wise as to conflict with what they regard as a strictly local trade, and it appears that the defendant associations have for their object, among other things, the adoption of ways and means to protect such trade and to prevent the wholesale dealers from intruding therein. The particular thing which this case concerns in the retailers' efforts to promote the end in view is the attempt in the manner shown, by the circulation of the reports in question, to keep the wholesalers from selling directly to the local trade. The trade of the wholesalers involved covers a number of states, and there is no question but that the supplying of lumber to the large num-

bers of retailers in these associations in different States is interstate trade and that if the practices are illegal within the Sherman Act they may be reached by this proceeding. *Swift & Co.* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274, 300.

The record discloses a systematic circulation among the members of the defendant associations of the official report above quoted. The method of operation as stated by the learned counsel for the appellants is thus summarized in his brief:

"The names on this list are obtained and placed thereon as the result of complaints made by individual retailers. When an individual member of a retail association learns of a sale by a wholesaler to one of the customers of the retailer he may complain in writing to the secretary of his association, whose duty it is thereupon to ascertain the facts by correspondence with the wholesaler in question and such other means as may seem proper. Should the report or complaint be without proper foundation or should the secretary become satisfied that the matter is a trifling one or the result of inadvertence, the incident usually terminates at this point; but should the complaint appear to be serious and well founded the case is submitted to the board of directors of the retail association at its next meeting and should the board be satisfied that the wholesaler is generally making a practice of selling to consumers or customers of the retail trade, the secretary is directed to report the name of such wholesaler for the official list. Thereupon the secretary sends the name to Mr. Crary of New York who adds it upon the next report to the names of those already thereupon. Each report contains the names of all wholesalers who have been reported from the very beginning as selling to consumers and whose names have not been removed for cause. The reports or lists after being printed in New York are distributed amongst the secretaries of the defendant associa-

tions; those for each association being marked with its name and in that way only being distinguished from those sent to the other associations. The secretary of each association then distributes the lists to his members. Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers. In practice the greatest care is taken to make the list accurate, and as a matter of fact, it only contains the names of such wholesalers as are absolutely committed to the practice of competing with retailers for the custom of builders and contractors."

The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to consumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade there can be but one purpose in giving the information in this form to the members of the retail associations of the names of all wholesalers who by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the

purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. Indeed this purpose is practically conceded in the brief of the learned counsel for the appellants:

"It was and is conceded by defendants and the Court below found that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was of course the very object of the defendants in circulating them."

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed.

The Sherman Act has been so frequently and recently before this court as to require no extended discussion now. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 226 U. S. 324; *United States* v. *Patten*, 226 U. S. 525; *Nash* v. *United States*, 229 U. S. 373; *Straus* v. *American Publishers' Ass'n*, 231 U. S. 22. It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. It is true that this court held in the *Standard Oil* and *Tobacco Cases*, *supra*, and in the subsequent cases following them, that in its proper construction the act was not intended to reach normal and usual contracts incident to lawful purposes and intended to

further legitimate trade, and summarizing the meaning of the act in the *Tobacco Case*, this court said (221 U. S. 179):

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

The same principle was affirmed in *Nash* v. *United States, supra.* The court in the *Standard Oil Case* construed the act as intended to reach only combinations unduly restrictive of the flow of commerce or unduly restrictive of competition, and, illustrating what were such undue or unreasonable combinations, it classed as illegal (p. 58) "all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." And in *Loewe* v. *Lawlor, supra,* this court held that a combination to boy-

cott the hats of a manufacturer and deter dealers from buying them in order to coerce the manufacturer to a particular course of action with reference to labor organizations, the effect of the combination being to compel third parties and strangers not to engage in a course of trade except upon conditions which the combination imposed, was within the Sherman Act. In *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, after citing *Loewe* v. *Lawlor*, *supra*, this court said (p. 438):

"But the principle announced by the court was general. It [the Sherman Act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter."

And see *Montague & Co.* v. *Lowry*, 193 U. S. 38.

These principles are applicable to this situation. Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him but with all others of the class who may be informed of his delinquency. "Section 1 of the act, . . . is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial

conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein." *United States* v. *Patten, supra,* p. 541. This record abounds in instances where the offending dealer was thus reported, the hoped for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired.

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the District Court, but it directly tends to prevent other retailers who have no personal grievance against him and with whom he might trade from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance when brought to the attention of others it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and puts it within the pro-

hibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe* v. *Lawlor, supra.*

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co.* v. *United States,* 175 U. S. 211, 241, 242.

Anderson v. *United States,* 171 U. S. 604, is cited and relied upon by the appellants. In that case this court sustained, as against an attack under the Sherman Law, the legality of an association called the Traders' Live Stock Exchange in Kansas City. An agreement among purchasers of cattle for the purpose of regulating and controlling the local business among themselves had been entered into, and one of the rules provided that the members of the exchange should not deal with any other yard trader unless he was a member of such exchange. It was said (p. 613):

"There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to."

As distinguished from this situation the present case shows that the trade of the listed wholesalers is hindered or impeded; that competition is suppressed and the natural flow of commerce interfered with as the direct result of the circulation of the official reports in the manner stated. The case is quite different from the *Anderson Case*. And see *Montague & Co.* v. *Lowry*, *supra*, p. 48.

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. "But," as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440, "when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding. It follows that its decree must be

Affirmed.

JONES *v.* JONES.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 339. Argued April 30, 1914.—Decided June 22, 1914.

The statute of Tennessee of 1865, c. 40, § 8, declaring that children of slave marriages should be legitimately entitled to inherit, as it has been construed by the highest court of that State as not extending the right of inheritance beyond lineal descendants of the parents, is not unconstitutional under the equal protection clause of the Fourteenth Amendment.

Inheritance is not a natural or absolute right but the creation of statute and is governed by the *lex rei sitæ*.

The rights of one claiming real property as heir, through an alien, a bastard or a slave, must be determined by the local law. *Blythe* v. *Hinckley*, 180 U. S. 333.

While a colored freedman in Tennessee could dispose of property acquired during freedom by deed or will and it descended to his issue, if any, if he died intestate, if no issue survived, it passed under the terms of the act of 1865 to his widow, if she survived, and not to his collateral relatives.

THE facts, which involve the construction and constitutionality under the Fourteenth Amendment of certain provisions of the laws of Tennessee in regard to the descent of real property, are stated in the opinion.

Mr. W. H. Harrelson, with whom *Mr. W. P. Metcalf* was on the brief, for plaintiff in error.

Mr. B. F. Booth for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a question of collateral descent arising under the Tennessee statutes.

One John Jones, a colored freedman, died in 1889, the owner of a tract of eighty-seven acres of land lying in Shelby County, Tennessee, upon which he and his wife had lived for many years. He died intestate and without issue. The title to the land was claimed by his widow, the defendant in error, Marguerite Jones, who has since the death of John Jones inter-married with the other defendant in error, Albert Jones. Her claim was rested upon § 4165, Shannon's Compilation of Tennessee laws, which provides that if one die intestate, "leaving no heirs at law capable of inheriting the real estate, it shall be inherited by the husband or wife in fee simple." The plaintiff in error, Will Jones, contested the claim of the widow, contending that the land passed to the surviving brothers and sisters of the intestate, under whom, through quit-claim deeds, he claimed the title. The widow's bill was for the purpose of cancelling these deeds as clouds upon her title. The Tennessee court sustained her bill and adjudged that the intestate having died without issue and without heirs at law capable of inheriting, his real estate passed to his widow under § 4165, *supra*.

The deeds denounced as clouds upon the widow's title were attacked upon a number of grounds, among them fraud in their procuration. The decree ordering their cancellation was apparently based only upon the ground that their makers, assuming them to be legitimate full brothers and sisters of the intestate John Jones, were sons and daughters of a born slave and themselves born slaves, and as such were not his heirs within the meaning of the Tennessee statutes of descent.

There is a Tennessee statute of descent which provides that the land of an intestate shall pass to his brothers and sisters in case the owner die without issue, and the contention is that if this statute preferring the brothers and sisters of an intestate dying without issue over the husband or widow be construed as applying only to brothers and

sisters born free, it discriminates against those born slaves and thereby violates that equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution.

This provision of the Tennessee canon of descent by which the brothers and sisters of an intestate dying without issue take his real estate is as old as the State and comes from the common law. It does not distinguish in terms between brothers and sisters born free and those born slaves. Neither does it distinguish between those who are born bastards and those born in wedlock, and those who are aliens and those who are not. Nevertheless, neither a bastard nor an alien has inheritable blood, nor are they capable of inheriting as heirs unless by aid of some statute: 2 Kent's Comm. * p. 211; 2 Blackstone's Commentaries, * p. 249; *Levy* v. *McCartee*, 6 Peters, 102. The civil status of slaves in Tennessee, as well as in other States in which slavery existed, was such as to disable them from inheriting or transmitting property by descent. Thus it was said, "They cannot take property by descent or purchase, and all they find and all they hold, belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights. They are assets in the hands of executors, for the payment of debts." 2 Kent's Commentaries, 11th ed., 278, * p. 253; *Jackson* v. *Lervey*, 5 Cowen (New York), 397. Slaves, therefore, were not within the meaning and effect of the statutes of descent, and no descent from or through a slave was possible except as provided by some special statute. The rule was the same as to aliens and illegitimates.

After the emancipation of the slaves of the South the statutes of inheritance were extended in many States so as to confer upon the children of parents born in slavery the right to inherit from their parents. But these enlargements of the canon of descent extended only to lineal descendants and did not embrace collaterals. The Ten-

nessee statute, which was claimed in the court below to be broad enough to embrace collateral relatives, is that of 1865–6, c. 40, § 5, carried into Shannon's Compilation as § 4179. That act declared that slaves who within the State had lived together as man and wife should be regarded as lawfully married, and that the children of such slave marriages should be "legitimately entitled to an inheritance in any property heretofore acquired, or that may hereafter be acquired by said parents, to as full an extent as the children of white citizens are entitled by the laws of this State." But this statute has been more than once construed as not extending the right of inheritance beyond the lineal descendants of the parents: *Sheperd* v. *Carlin*, 99 Tennessee, 64; *Carver* v. *Maxwell*, 110 Tennessee, 75. In *Sheperd* v. *Carlin*, *supra*, the question here presented was decided. Agnes Lee, a colored woman, born in slavery, died intestate and without issue. Her land was claimed by her surviving husband under § 4165, Shannon's Compilation, heretofore referred to, and by her niece as her only collateral relative. The court held that the right to inherit the real estate of an intestate born in slavery had been extended only in favor of lineal descendants and that collaterals possessed no inheritable blood. To the same effect are many cases, among them: *Tucker* v. *Bellamy*, 98 No. Car. 31; *Jones* v. *Hoggard*, 108 No. Car. 178; *Williams* v. *Kimball*, 35 Florida, 49; *S. C.*, 16 So. Rep. 783.

Inheritance is governed by the *lex rei sitæ*. It is not a natural or absolute right, but the creation of statute law. If one claim the right to succeed to the real property of another as heir and his right is denied because he must trace his pedigree or title to or through an alien, a bastard or a slave, the question is one to be determined by the local law. *Cope* v. *Cope*, 137 U. S. 682. *Levy* v. *McCartee*, *supra*. *Blythe* v. *Hinckley*, 180 U. S. 333. In *Levy* v. *McCartee*, *supra*, the question was one of inheritance, the

plaintiff tracing his pedigree through an alien ancestor. After first deciding that a question of inheritance to land in New York, was one to be determined by the law of that State, the court held; first, that an alien had no inheritable blood and could neither take land himself by descent, nor transmit it to others; second, that under the law of New York one citizen of the State could not inherit in the collateral line of another when he must make his pedigree or title through a deceased alien ancestor.

It is true that the land of the intestate John Jones was acquired when he was a freedman. Under the law of the State when he acquired it, he had the right to dispose of it by deed or will. If he died intestate leaving issue, it descended to such issue. But if he left no such descendants, it passed, by the express terms of the statute, to his widow.

We are unable to see in the Tennessee Statute of Descent any such denial of the equal protection of the law as is prohibited by the Fourteenth Amendment.

The decree is accordingly affirmed.

MOORE-MANSFIELD CONSTRUCTION CO. *v.* ELECTRICAL INSTALLATION COMPANY.

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

No. 358. Argued May 5, 1914.—Decided June 22, 1914.

A case otherwise within the jurisdiction of the District Court of the United States and reviewable in the Circuit Court of Appeals is not a case which may come direct to this court under § 238, Judicial Code, merely because in the course of the case a question has arisen as to whether a change in decision of the state court as to the effect

and scope of a state statute amounts to an impairment of the obligation of a contract.

Courts of the United States are courts of independent jurisdiction; and when a question arises in a United States court as to the effect of a change of decision which detrimentally affects contracts, rights and obligations entered into before such change, such rights and obligations should be determined by the law as judicially construed at the time the rights accrued.

Federal courts in such a case, while leaning to the view of the state court, in regard to the validity or the interpretation of a statute, should exercise an independent judgment and not necessarily follow state decisions rendered subsequently to the arising of the contract rights involved.

Where the District Court errs in following later decisions of the state court rather than those rendered prior to the making of the contract, the error may be corrected by the Circuit Court of Appeals or by this court under writ of certiorari but not by direct appeal to this court.

A change in decision of the state court in reference to the scope of a state statute *held*, in this case, not to be a law impairing the obligation of a contract.

THE facts, which involve the jurisdiction of this court of direct appeals from the District Court under § 247, Judicial Code, are stated in the opinion.

Mr. William A. Ketcham and *Mr. A. S. Worthington* for appellant.

Mr. C. C. Shirley, with whom *Mr. W. H. H. Miller*, *Mr. S. D. Miller* and *Mr. W. H. Thompson* were on the brief, for appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

The primary question concerns the jurisdiction of this court to entertain this as a direct appeal from the District Court.

The decree below was rendered under a general creditors' bill, by which the assets of the Indianapolis, Crawfordsville and Western Traction Company, an insolvent

Indiana corporation, had been impounded, its debts ascertained and the order of payment determined. Among the creditors proving their debts were some claiming liens. One was the Marion Trust Company, trustee under a general mortgage securing an issue of mortgage bonds. Another creditor was this appellant, the Moore-Mansfield Construction Company. That company had, under contract with the Traction Company, constructed a part of its line of railway, and for the balance of its debt claimed a lien upon its property. The decree from which this appeal was taken gave priority to the mortgage and denied to appellant any lien upon the property of the Traction Company and adjudged that its debt as fixed should be paid ratably out of the funds applicable to the payment of general debts.

Counsel for appellant thus states the issue upon this appeal,—"The precise controversy presented by the record is: (a) Has the Construction Company a valid, subsisting enforceable mechanic's lien under the laws of Indiana upon the railway property of the Traction Company? (b) Is such lien senior and paramount to the lien of the trust-deed or mortgage given to secure the outstanding bonds?"

The defense asserted to the mechanic's lien was that there was no statute giving to a contractor for railway construction a lien upon the railway property, and, second, if there existed any such lien, the Construction Company for the purpose of giving security to the holders of the construction bonds had expressly covenanted and agreed to waive and forego whatever right or rights it might have had at the time of the execution of its contract, or which it might thereafter acquire, to claim a lien against the property of the Railway Company under the laws of the State of Indiana.

The court filed no opinion, but the decree recites that "the construction company is not entitled to enforce a

mechanic's lien against any of the property of said defendant traction company in the hands of the receiver of this court or elsewhere, if any; nor against the proceeds thereof, and that no such lien exists."

Thus it is not clear whether the lien asserted was denied because of the waiver referred to or because the statute of Indiana of March 6, 1883, being the statute under which the lien was claimed, did not embrace contractors. Appellant moved the court to amend the decree so as to make it more specific by stating whether it had no lien, because under the law of Indiana a contractor could acquire no such lien, or because it had waived its right to any such lien as contended by the appellee. This motion was denied. We shall assume for the purpose of this case that the lien was denied upon the first ground stated and upon that basis determine whether the case is one which can come direct to this court.

That appellant could have carried this case for review to the Circuit Court of Appeals is plain. The jurisdiction of the District Court under the original bill was based only upon diversity of citizenship. Neither did the contention that in the progress of the case there arose a question claimed to involve the construction or application of the Constitution of the United States deprive the unsuccessful party of the right to go to the Circuit Court of Appeals, where all of the questions would be open to review. But the contention is that the appellant had an election to carry the case to the Circuit Court of Appeals or bring it direct to this court under § 5 of the act of March 3, 1891, 26 Stat. 826, c. 517, now § 238 of the Judicial Code of 1911, as a case "which involves the construction or application of the Constitution of the United States." Shortly stated the contention is, first, that under the decisions of the Indiana Supreme Court prior to the accruing of the rights of this appellant under its contracts, contractors were included within those who might by compliance with

the mechanics' lien statute secure liens; and, second, that the subsequent change of decision by which that court held that contractors were not included in the mechanic's lien law constituted a law which impaired the obligation of its contract within the meaning of the contract clause of the Constitution of the United States. It therefore assigns as error the action of the court below in not declaring the rights of appellant to be as they existed under the line of judicial decisions at the time such rights accrued.

The title of the Indiana act of March 6, 1883 (c. 115), under which appellant claims to have acquired a lien, was "an act concerning liens of mechanics, laborers and materialmen." A provision of the constitution of Indiana, § 19, art. 4, provides that, "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." The contention is that for many years contractors had been regarded as entitled to a lien under this act and prior acts having a similar title, though it is conceded that the sufficiency of the title had never been expressly decided. On February 18, 1909, the Indiana Supreme Court in the case of *Indianapolis Northern Traction Company* v. *Brennan*, 174 Indiana, 1, held that the act of 1883 did not include contractors or sub-contractors. The act was not held to have been unconstitutionally enacted, *Wilkes County* v. *Coler*, 180 U. S. 506, nor that contractors and sub-contractors might not have been included among those to whom the privilege of a lien was extended. The decree was confined to the single point that the title did not include contractors. It was therefore a mere construction of the act as not including obligations to contractors as distinguished from obligations to mechanics, laborers and materialmen. This is claimed to have been such a change of decision as to impair the obligation of the contract under which the appellant had constructed

the railway of the Traction Company. Curiously enough, the Supreme Court of Indiana has, pending this appeal, retracted the construction it placed upon the act of 1883 and has held that contractors are within the intent and meaning of the act. *Moore-Mansfield Construction Company* v. *Indianapolis &c. Railway*, 179 Indiana, 536. But a change in the opinion of a court as to the proper construction or scope of statute law of a State is not within Art. I, § 10, of the Constitution of the United States, which provides that "no State . . . shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." That provision is a restraint upon the legislative power of the State, and, as was said by this court, "it concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning." *Ross* v. *Oregon*, 227 U. S. 150, 161. There had been no subsequent legislation which in any wise affected liens of contractors.

It has been many times decided that a writ of error will not lie from this court to a state court under § 709, Revised Statutes, on the ground that the obligation of a contract has been impaired by a change in the decision of the court in respect to the meaning and scope of a statute, the validity of which has not been denied. "In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State and not by a decision of its judicial department only. The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by a state court to be valid, and not

when an act admitted to be valid has been misconstrued by the court." *Central Land Company* v. *Laidley*, 159 U. S. 103, 109; see also *Bacon* v. *Texas*, 163 U. S. 207, 220; *Loeb* v. *Columbia Township*, 179 U. S. 472, 493; *National Mutual &c. Assn.* v. *Brahan*, 193 U. S. 635. If, therefore, a mere change of decision by a state court in respect of the meaning and scope of a state statute, not claimed to be invalid or repugnant to the Constitution of the United States, does not constitute an impairment of a contract within the meaning of the contract clause of the Constitution, it must follow that a case otherwise within the jurisdiction of a District Court of the United States and reviewable in the Circuit Court of Appeals, is not a case which may come direct to this court merely because in the course of the case a question arises touching the effect of such a change of decision upon the rights of the parties.

Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued. In every such case the Federal courts, while leaning to the view of the state court as to the validity or interpretation of a law of the State, will exercise an independent judgment and will not necessarily follow state judicial decisions rendered subsequently. *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Loeb* v. *Columbia Township, supra.*

Under the settled rule it was the duty of the court below when confronted with the question whether appellant had acquired a lien under the act of 1883 to determine for itself the meaning and scope of that act and to declare the rights of that company under the law as it had been judicially determined. The decisions to this effect are

numerous. Some of them are: *Folsom* v. *Ninety-six*, 159 U. S. 611, 624; *Loeb* v. *Columbia Township, supra; Jones* v. *Great Southern Hotel Co.*, 86 Fed. Rep. 370, affirmed by this court, 193 U. S. 532. If the District Court erred in following the later decision of the Indiana court the error could have been corrected by the Circuit Court of Appeals, and the judgment of the latter court might be reviewed by this court under a writ of certiorari. The cases of *Folsom* v. *Ninety-six*, and *Jones* v. *Great Southern Hotel Company, supra*, reached this court through the Circuit Court of Appeals, one by a certified request for an instruction, and the other by certiorari.

The right to bring the case to this court from the District Court by a direct appeal depended upon the question whether the decree denying to appellant the lien it claimed under the law of Indiana, "necessarily and directly involved the construction or application of the Constitution of the United States." *Empire &c. Mining Co.* v. *Hanley*, 205 U. S. 225, 232. The change of decision in respect of the scope of the Indiana statutes was not a law of the State impairing the obligation of the contract which is the only basis for the claim that the case is one which involved the construction or application of the Constitution of the United States. We are, therefore, precluded from an examination of the merits of the case, *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460; *Knop* v. *Monongahela &c. Co.*, 211 U. S. 485, and the appeal

must be dismissed.

STATE OF LOUISIANA *v.* McADOO, SECRETARY OF THE TREASURY.

MOTION FOR LEAVE TO FILE PETITION.

Original. Argued April 14, 1914.—Decided June 22, 1914.

The United States may not be sued in the courts of this country without its consent.

Whether the United States is in legal effect a party is not always determined by whether it appears as a party on the record but by the effect of the decree that can be rendered.

A State which happens to operate sugar plantations by its convict labor may not review the action of the Secretary of the Treasury in determining the rate of duty to be collected on foreign sugar any more than any other producer of sugar may do so.

A suit against the Secretary of the Treasury to review his action in determining the rate of duty to be collected, under statutes and treaties, on an imported article, and to mandamus him to collect a specific amount, is in effect a suit against the United States.

Even an importer may not invoke the aid of the courts to clog the wheels of government by attempting to review by mandamus the action of the Secretary of the Treasury in determining the rate of duty to be collected on imported articles.

Determining the rate of duty to be collected under the existing statutes and treaties on foreign sugar is not a mere ministerial act on the part of the Secretary of the Treasury, but one involving judgment and discretion.

While a public officer may by law, and at the instance of one having a particular legal interest, be required to perform a mere ministerial act not requiring the exercise of judgment or discretion, he may not be so required in respect to matters committed to him by law and requiring the exercise of judgment and discretion.

The courts will not interfere with the ordinary functions of the executive department of the Government.

Application for leave to file a petition for writ of mandamus against the Secretary of the Treasury to compel him to collect a different amount of duty on sugar imported from Cuba under the provisions

of the existing statute and the treaty of 1902 with Cuba, denied, without expressing any opinion on the merits of the questions involved.

THE facts, which involve the jurisdiction of this court to entertain an original suit against the Secretary of the Treasury of the United States, and the determination of whether the suit is one against the United States, are stated in the opinion.

Mr. Ruffin G. Pleasant, Attorney General of the State of Louisiana, and *Mr. Joseph W. Bailey,* with whom *Mr. Paul J. Christian* was on the brief, for petitioner.

The Solicitor General, with whom *Mr. Assistant Attorney General Adkins* was on the brief, for the United States.

MR. JUSTICE LURTON delivered the opinion of the court.

The State of Louisiana has appeared at the bar of this court, through its Attorney General, for the purpose of obtaining permission to file this petition against the Honorable William Gibbs McAdoo, Secretary of the Treasury of the United States, and the Honorable C. S. Hamlin, Assistant Secretary of the Treasury of the United States. The United States, by its Solicitor General, has appeared in opposition, contending that the suit is one against the United States and cannot, therefore, be brought without its consent.

No principle is better established than that the United States may not be sued in the courts of this country without its consent. If, therefore, this be a suit against the United States, the State, though entitled as a State to appeal to the original jurisdiction of this court, must show some authority from Congress under which such a suit may be brought, or leave to file must be denied. *United*

States v. *Clarke*, 8 Peters, 436; *United States* v. *Lee*, 106 U. S. 196; *Kansas* v. *United States*, 204 U. S. 331, 333.

That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Kansas* v. *United States*, *supra*.

The facts, briefly stated, upon which relief is asked are these:

The State, as a part of its economic policy, operates with its convicts three sugar plantations and three sugar mills. It is therefore a producer of sugar, which must find a market in competition with that imported from the Republic of Cuba and other sugar exporting countries.

The petition avers that under the instructions of the defendant Treasury officials Cuban sugar, since March 1, 1914, the date upon which the Underwood Tariff Act became effective, is admitted into the United States at a rate of 1 1–100 cents per pound, being 80% of 75% of the rate of duty on sugar imposed by the Dingley Tariff Act of July 24, 1897, c. 11, 30 Stat. 151, which was 1 685–1000 cents per pound. The contention made is that the rate which should be collected on Cuban sugar is the rate imposed by the Dingley tariff bill, less a reduction of 20%, making the net rate legally collectible 1 348–1000 cents per pound, as provided in the commercial treaty between the United States and the Republic of Cuba of December 1, 1902, as made effective by the act of Congress of December 17, 1903, c. 1, 33 Stat. 3, "*or, in the alternative, the duty on all such sugar imported into the United States should be 75% of the Dingley bill rate, or 1 26–100 cents per pound, as provided . . . in the Underwood bill of October 3, 1913, without any preferential rate whatever being allowed in favor of said Cuban sugar.*"

Article II of the convention referred to provides that the products of the soil or industry of Cuba not included in Article I "shall be admitted at a reduction of 20% of the rate of duty as provided by the tariff act of the United States approved July 24, 1897, *or as may be provided by any tariff law of the United States subsequently approved.*" A proviso to Article VIII is in these words:

"That while this convention is in force, no sugar imported from the Republic of Cuba, and being the product of the soil or industry of the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than twenty per centum of the rates of duty thereon as provided by the tariff act of the United States approved July 24, 1897, and no sugar, the product of any other foreign country, shall be admitted by treaty or convention into the United States, while this convention is in force, at a lower rate of duty than that provided by the tariff act of the United States approved July 24, 1897."

The reduction in all sugar duties made by the Tariff Act of 1913, effective March 1, 1914, is 25% upon the former rate of the Dingley bill, and the same act after May 1, 1916, provides for the free admission of all sugar.

The contention seems to be that the proviso, that no sugar "shall be admitted into the United States at a reduction of duty greater than 20%" of the rate of duty provided by the Dingley Act, operates to prevent any reduction in favor of Cuban sugar after March 1, 1914, since the reduction made in duty on all imported sugar, including Cuban sugar, is 25% of the Dingley rate, and that as such reduction is more than the preferential under the Cuban convention, the preferential duty under that convention ceases. Upon the other hand, the contention is that the Underwood Act manifested a plain purpose to continue a preferential of 20% upon the reduced duties provided therein, a purpose manifested by the abrogation

of the proviso of Article VIII which might have interfered with such intent.

It is not the purpose of the court to intimate any opinion upon the merits of the contentions thus presented, and we have only stated the opposing views far enough to enable us to decide whether the suit is or is not one against the United States.

The petition proceeds by averring that the action of the defendant Treasury officials in instructing customs officers to admit Cuban sugar after March 1, 1914, at a reduction of 20% of the rate effective on that date, was "arbitrary, illegal and unjust . . . and will work great and irreparable injury to your petitioner unless they are restrained and inhibited from demanding and collecting the said illegal charges on Cuban sugar imported into the United States; and another, and higher duty, as shown above, be exacted and collected by said officials on said sugar instead." It is then contended that this direction to continue the allowance of a reduction of 20% upon the reduced rates fixed by the Underwood Act is such a flagrant exercise of arbitrary power as to make it the duty of a court of equity, upon application of anyone having a definite and distinct interest, to prohibit the allowance of the reduction and require the collection of the full duty imposed by the Underwood Act, or, if any preferential be allowed, it be only upon the higher duty exacted by the act of 1897.

But what definite and distinct interest has the State of Louisiana whether the rate collected be too high or too low? She is a producer of sugar which must be sold in competition with foreign sugar, and the petition avers that the lowering of the duty upon Cuban sugar will lower the price for which she must sell her sugar yet unsold. But if Louisiana, as a mere producer and seller of sugar may review the action of the Secretary of the Treasury in determining the rate to be collected on Cuban sugar, why

may not any consumer, though not an importer, make a similar complaint if in his judgment the Secretary of the Treasury is exacting a higher rate than justified by the law, thereby enhancing the price he must pay in the market upon imported articles which he uses? Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the Tariff Acts would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States. *New York Guaranty Co.* v. *Steele*, 134 U. S. 230; *Louisiana* v. *Jumel*, 107 U. S. 711; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642.

There have always been remedies by which an importer may recover an excess rate of duty exacted from him by a customs collector, either by common law action against the collector, as in *Elliott* v. *Swartwout*, 10 Peters, 137, or by statute, § 2931, Revised Statutes; act of June 10, 1890, c. 407, 26 Stat. 131, 137; act of August 5, 1909, c. 6, 36 Stat. 11. But the claim that even an importer may complain by appeal or otherwise of the exaction of too low a rate of duty seems not to have been asserted until 1912, when an appeal by an importer against an assessment as too low was sustained by the Customs Court of Appeals, 3 Customs Appeal, 24, upon the theory that one might be aggrieved by an assessment too low as well as by one too high. But this decision did not meet with favor and the remedy by appeal was confined to cases in which the duty imposed was claimed to be higher than authorized by existing law. Act of October 3, 1913, c. 16, 38 Stat., § III, part N.

But we can discover no precedent where even an importer has sought to clog the wheels of government by reviewing the action of the Secretary of the Treasury by a bill such as this.

The duties imposed upon the Secretary of the Treasury in the collection of sugar tariffs are not ministerial. They are executive and involve the exercise of judgment and discretion. The facts show a situation in which the Secretary of the Treasury was confronted with the necessity of construing the law and then instructing the customs officers as to whether the twenty per cent. preferential duty on Cuban sugar required by the convention and the act of 1903 confirming that treaty had been superseded or in any wise affected by the later provisions of the Underwood Act.

By statute originally enacted in 1792 (May 8, 1792, c. 37, 1 Stat. 280), now § 249, Revised Statutes, it is expressly provided that the Secretary of the Treasury is to "superintend the collection of customs duties as he shall think best." His interpretation of any custom law is made conclusive and binding upon all officers of customs, and upon his successors, until reversed by judicial decision. Revised Statutes, § 2652; act of March 3, 1875, c. 136, 18 Stat. 469, § 2. In the discharge of his duties, semi-judicial in character, the Secretary of the Treasury is, by statute, entitled to the opinion of the Attorney General, which, as we may judicially know, was obtained in this matter. 30 Ops. Att. Gen., February 14, 1914.

There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government.

Marbury v. *Madison*, 1 Cranch, 137; *Kendall* v. *United States*, 12 Peters, 524, 610; *United States* v. *Schurz*, 102 U. S. 378, are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are, *Decatur* v. *Paulding*, 14 Peters, 497, 514, *et seq; Mississippi* v. *Johnson*, 4 Wall. 475; *Cunningham* v. *Macon &c. Railroad*, 109 U. S. 446; *United States, ex rel. Dunlap* v. *Black*, 128 U. S. 40; *United States ex rel.* v. *Lamont*, 155 U. S. 303; *Roberts* v. *United States*, 176 U. S. 221; *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683.

This application for leave to file must be denied.

THE CHIEF JUSTICE took no part in the decision of this case.

MR. JUSTICE MCKENNA concurs upon the ground last stated.

COLLINS *v.* COMMONWEALTH OF KENTUCKY.

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

No. 35. Submitted April 22, 1914.—Decided June 22, 1914.

A state penal statute which prescribes no standard of conduct that it is possible to know violates the fundamental principles of justice embodied in the conception of due process of law.

International Harvester Co. v. *Kentucky*, *ante*, p. 216, followed to the effect that the provisions in regard to pooling crops in chapter 117 of the Laws of Kentucky of 1906 as amended by chapter 8 of the Laws of 1908, as construed by the courts of that State, in connection with the anti-trust act of 1890 and § 198 of the Kentucky constitution of 1891 do not prescribe any standard of conduct, and there-

fore amount to a denial of due process of law under the Fourteenth Amendment.

141 Kentucky, 565, reversed.

THE facts, which involve the constitutionality of provisions of the statutes of Kentucky of 1906, permitting combinations or pools of tobacco and other farm products, are stated in the opinion.

Mr. E. L. Worthington and *Mr. J. M. Collins* for plaintiff in error.

Mr. James Garnett, Attorney General of the State of Kentucky, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error, Patrick Collins, and other tobacco growers of Mason County, Kentucky, entered into a pooling contract with the Burley Tobacco Society and the Mason County Board of Control whereby they consigned to the Society their respective crops of tobacco (raised in the year 1907) to be sold by the Society as their agent upon such terms as it should prescribe, but not less than a minimum price. Because Collins disposed of his crop, without the consent of the agents of the pool, he was indicted. He demurred to the indictment upon both state and Federal grounds, setting forth as the latter that the statutes under which he was prosecuted contravened the Fourteenth Amendment of the Federal Constitution, in that they denied to him the equal protection of the laws and deprived him of liberty and property without due process of law, and also were repugnant to the commerce clause and the Federal Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209. The demurrer was overruled and trial was had. There was evidence that the tobacco had been removed by Collins to Cincinnati, Ohio, and there sold. Collins was found guilty and sen-

tenced to pay a fine. The Court of Appeals having affirmed the judgment (141 Kentucky, 564), this writ of error is prosecuted.

The conviction was under the provisions of § 3941*a* of the Kentucky statutes being the act of March 21, 1906 (Laws 1906, c. 117) as amended by the act of March 13, 1908 (Laws 1908, c. 8). The act of 1906 permitted persons to 'pool or combine' the crops of 'tobacco, wheat, corn, oats, hay or other farm products' raised by them 'for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually.' The persons so agreeing were also allowed to select agents to receive and to sell or dispose of the crops, so placed, in order to accomplish the object of the combination. The amendment of 1908, in addition to giving remedies by way of injunction and damages, provided that the agent 'when so selected' should have 'the sole right to sell said crop so pooled or combined,' that it should be unlawful 'for any owner of such crop to sell or dispose of same and for any person to knowingly purchase the same without the written consent of such agent,' and that 'upon conviction thereof,' a fine should be imposed.

This statute, as construed by the Court of Appeals of Kentucky, is not to be regarded as an independent enactment but is to be viewed in connection with the Kentucky anti-trust act of 1890 (Ky. Stats., § 3915) and in the light of § 198 of the Kentucky constitution adopted in 1891. The statute of 1890 forbade the formation of pools or combinations for the purpose of regulating, controlling or fixing the price of merchandise or property of any kind. Section 198 of the constitution provided that it should be the duty of the General Assembly from time to time to enact such laws as might be necessary "to prevent all trusts, pools, combinations or other organizations from combining to depreciate below its real value any article,

or to enhance the cost of any article above its real value." It was held that the constitutional provision did not repeal the act of 1890 (*Commonwealth* v. *Grinstead*, 108 Kentucky, 59); and in *Commonwealth* v. *International Harvester Co.*, 131 Kentucky, 551, it was further held (approving the views expressed in *Owen County Burley Tobacco Society* v. *Brumback*, 128 Kentucky, 137) that the act of 1906 did not violate § 198 of the constitution in as much as it 'did not authorize a pool to enhance the cost of crops above their real value,' but that the effect of the last mentioned act 'when considered in connection with the act of 1890, § 198 of the Constitution and the Fourteenth Amendment to the Constitution of the United States, was to confer, not only upon the farmer, but upon all others the right to pool their products, skill, or capital for the purpose of obtaining the real value thereof.' See *Commonwealth* v. *Hodges*, 137 Kentucky, 233, 241; *International Harvester Co.* v. *Commonwealth*, 144 Kentucky, 405, 410; 147 Kentucky, 557, 559; 147 Kentucky, 564, 565. Section 3941*a* is treated as an amendment to § 3915; and, as was said in *Commonwealth* v. *International Harvester Co.*, 147 Kentucky, 573, 575, the state court "upheld the validity of both statutes, but also held that the last amended or modified the first to the extent of legalizing pools, trusts, combinations, agreements, etc., but that both statutes are so governed and restricted in their operation by § 198, Constitution, as that they cannot be held to allow, but, on the contrary, prohibit persons, associations, co-partnerships or corporations, engaged or participating in a pool, trust, combination or agreement, by means thereof, to fix, control or regulate the price of any commodity or article by raising or depreciating, or attempting to raise or depreciate, it above or below its real value."

As the present prosecution was under this legislation, thus construed as constituting in effect a single act, the

question presented is the same as that decided by this court in *International Harvester Co.* v. *Kentucky* (*ante*, p. 216). It was found that the statute in its reference to 'real value' prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable.

The Harvester Company was prosecuted for being a party to a price-raising combination; Collins, for breaking a combination agreement and selling outside the pool which he had joined. With respect to each, the test of the legality of the combination was said to be whether it raised prices above the 'real value.' If it did—in Collins' case—he would be subject to penalties for remaining in the combination; if it did not, he would be punishable for not keeping his tobacco in the pool. He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these were organized to oppose. The objection that the statute, by reason of its uncertainty, was fundamentally defective was as available to Collins as it was to the Harvester Company.

In this view, it is unnecessary to consider the objection under the commerce clause or the alleged conflict, as to interstate transactions, with the Federal Anti-trust Act.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MALONE *v.* COMMONWEALTH OF KENTUCKY.

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

No. 36. Submitted April 22, 1914.—Decided June 22, 1914.

141 Kentucky, 570, reversed on the authority of the preceding case.

THE facts are stated in the opinion.

Same counsel as in *Collins* v. *Kentucky*, *ante*, p. 634, and argued simultaneously therewith.

MR. JUSTICE HUGHES delivered the opinion of the court.

This writ of error has been sued out to review a judgment of the Court of Appeals of Kentucky which affirmed the conviction of Thomas Malone, the plaintiff in error, for selling pooled tobacco, without the consent of the agents of the pool, contrary to § 3941*a* of the Kentucky statutes. 141 Kentucky, 570.

The case is the same in all material respects as that of *Collins* v. *Kentucky*, decided this day, *ante*, p. 634, with the exception that the tobacco in question was sold by the plaintiff in error within the State of Kentucky. For the reasons stated in the opinion in the *Collins Case*, the judgment must be reversed.

Judgment reversed.

ORDER OF ST. BENEDICT OF NEW JERSEY *v.* STEINHAUSER, INDIVIDUALLY AND AS ADMINISTRATOR OF WIRTH.

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

No. 267. Argued March 11, 1914.—Decided June 22, 1914.

In a suit by an ecclesiastical society to recover from the administrator of a deceased member assets of the estate as community property under the provisions of the constitution and membership, the question for the courts is not one of canon law or ecclesiastical polity, but one solely of civil rights.

Where the State has chartered a society as one of "religious men living in community," a provision in its constitution for community ownership, with renunciation of individual rights in private property during continuance of membership, with freedom of withdrawal, is not invalid as opposed to the public policy of, but is directly sanctioned by, the State creating the society.

An agreement to live in community and renounce individual rights of property, but with a right to withdraw at any time invades no constitutional right; nor, in this case, does it transgress any statute of the State of New Jersey which chartered the society with which the agreement is made.

Subject to the inhibitions of the Constitution of the United States the legislature of each State is the arbiter of its public policy.

In this case *held* that an agreement made by a member of a religious order, chartered as a society of religious men living in community, that his individual earnings and acquisitions, like those of other members, should go into the common fund, included his earnings from copyrights of books; and also *held*, that as such agreement contained a right to withdraw at any time there was no infringement of any right protected by the Constitution of the United States nor was it against the public policy of the State of New Jersey which granted the charter to the society.

194 Fed. Rep. 289, reversed.

THE facts, which involve the validity under the laws of New Jersey and the public policy of that State of an agree-

ment between an ecclesiastical order and one of its members, are stated in the opinion.

Mr. Morgan J. O'Brien, with whom *Mr. Otto Kueffner*, *Mr. Albert Schaller*, *Mr. Frederick C. Gladden*, *Mr. J. Warren Greene* and *Mr. Frank W. Arnold* were on the brief, for plaintiff in error.

Mr. William H. Pitzer and *Mr. William Hayward* for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought by The Order of St. Benedict of New Jersey, a corporation of that State, to establish its title to personal property left by Augustin Wirth, deceased, a member of the Order who died at Springfield, Minnesota, in December, 1901. The defendant, Albert Steinhauser, as administrator of the estate of the decedent, holding letters from the Probate Court of Brown County, Minnesota, filed a cross-bill asserting ownership in his representative capacity and praying discovery and account with respect to whatever part of the estate had come into the complainant's possession. The Circuit Court entered a decree dismissing the cross-bill and granting the relief sought by the complainant's bill. 179 Fed. Rep. 137. The Circuit Court of Appeals reversed this decree, directing the dismissal of the original bill and the granting of the prayer of the cross-bill. 194 Fed. Rep. 289. Certiorari was allowed.

The monastic brotherhood known as the Order of St. Benedict was established by St. Benedict in the early part of the sixth century at Subiaco, Italy, whence it spread over western Europe. It was brought to the United States in 1846. The members of the brotherhood follow what is known as 'The Rule of St. Benedict,' a collection

of mandates essentially unchanged from the beginning. The vows are those of obedience, stability, chastity and poverty.

We are not concerned in the present case with any question of ecclesiastical requirement or monastic discipline. The question is solely one of civil rights. The claim in suit rests upon the constitution of the complainant corporation, and the obligations inherent in membership.

The Order of St. Benedict of New Jersey was incorporated in 1868 by special act of the legislature of that State. The incorporators were described as 'being a society of religious men living in community and devoted to charitable works and the education of youth.' The corporation was empowered to hold property and to make by-laws for the government of the Order, provided that these should not be repugnant to the Constitution of the United States or of the State of New Jersey, that the clear yearly income of the real estate should not exceed a sum stated, and that no one should remain an incorporator 'except regular members of said religious society, living in community and governed by the laws thereof.' Under this charter the Order adopted a constitution, among the provisions of which are the following:

"Section XI. Membership is lost at once:

"1. By being dismissed according to the disciplinary statutes of the Order of St. Benedict of New Jersey approved of by Pope Pius IX for the American Cassiness Congregation of Benedictines.

"2. By voluntarily leaving the Order for any purpose whatsoever.

"3. By joining any other order or secret society or any other religious denominations.

"Section XII. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said Order and the individual earnings of its members, are and must be considered as common property of the

Order of St. Benedict of New Jersey from which the members of said Order derive their support and the balance of which income and property should serve for following up and carrying out the charitable objects of the Order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

"And, moreover, that each member individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible, to the legal title of the Order of St. Benedict of New Jersey."

Augustin Wirth was born in Bavaria in 1828. He came to this country in 1851; and, in the next year, he took the solemn vows of the Order at St. Vincent's Abbey in Pennsylvania and was ordained to the priesthood. For a few years he had charge of a church at Greenburgh, Pennsylvania, near St. Vincent's, and in 1857 he went to Kansas where he established a college and a church which afterwards became an abbey. He continued his work in Kansas until 1868 and then was sent to Minnesota where he remained until 1875. He then resumed his pastorate at Greenburgh, Pennsylvania, and later had charge of a parish at Elizabeth, New Jersey, until 1887. It is evident that while in Kansas he had joined the monastery of St. Benedict there established and in 1887, with the permission of both Abbots, he transferred his stability to St. Mary's Abbey in Newark, New Jersey, the home of the complainant, the New Jersey Order, of which he thus became a member. He remained continuously at this Abbey for about two years, until 1889; he was in ill-health and was taken care of by the Order. He was then sent to a church in Wilmington, Delaware, and after a few

months he returned to his pastorate in Elizabeth, New Jersey, in which he continued until 1897. After traveling for some time in Europe for his health, visiting Rome and various monasteries, he took a parish, in 1898, at Springfield, Minnesota, with the requisite permission *ad tempus* from the Abbot of St. Mary's; and there he remained until his death. At the request of the New Jersey Abbot he was buried in the cemetery of the Benedictine Order in Minnesota. The Circuit Court found that his membership in the complainant Order continued to the last, and this finding was not disturbed by the Circuit Court of Appeals. We regard the fact as satisfactorily established. His absence from the Abbey when engaged in pastoral work was upon the consent of the Abbot and he was subject to recall at any time.

Father Wirth published many works on religious subjects. He obtained copyrights for his books, and made his contract with the publishers, in the name of "Augustine Wirth, O. S. B." The property here in question consists chiefly of the proceeds received from sales of these books (including notes and mortgages in which they had been invested), credits on account of sales made before and after his death, and the copyrights. He received the royalties personally during his lifetime; and after his death, until October 17, 1906 (when suit was brought against the publishers by the administrator), the accruing royalties were paid to the complainant. The New Jersey Order also, through the Abbot of St. John's Abbey in Minnesota, collected certain sums on outstanding notes held by the decedent and paid therefrom the decedent's debts.

It is clear that, according to the principles of the complainant's organization, Father Wirth was not entitled to retain for his own benefit either the moneys which he received for his services in the various churches with which he was connected or those which he derived from

the sale of his books. By the explicit provision of the constitution of the complainant (§ XII), it was a necessary consequence of his continued membership, that his gains—from whatever source—belonged to it, and that as against the complainant he could not assert title to the property which he received. The claim of the Order, based upon this conception of its rights, is resisted upon the grounds, (1) that the decedent had the permission of the Abbot to retain, as his own property, the proceeds of the sales of his books, and (2) that the obligation sought to be enforced by the complainant is void as being against public policy.

1. While there was evidence that Father Wirth was required to account to the Abbot for the salary and perquisites received in his church work, it appeared that the income from his books was treated in a different manner. This income he was allowed to retain and use. When he joined the complainant, in 1887, he did not make a transfer of any property to the Order although already he had some property as a result of his literary labors. The evidence showed that he made loans and investments; and from the moneys in his hands, he paid his personal expenses including his outlays on his visit to Europe. Because of his going to Rome without leave and his expenditures on this trip, he was admonished by the Abbot Primate, O. S. B., who had already written to the Abbot of St. Mary's that Father Wirth should be required to account. But no such account was given, and it would seem that such disagreements as arose between the decedent and his ecclesiastical superiors in this country related to church moneys and not to the proceeds of book sales. The Circuit Court of Appeals, disagreeing with the finding of the Circuit Court, concluded that Father Wirth was permitted by the Abbot of St. Vincent's, and by the complainant's Abbot, to retain these proceeds as his own property.

It is undisputed that the decedent did have a special permission with respect to the use of this income. Originally given by the Abbot of St. Vincent's, it was continued by the Abbot of St. Mary's. It was given in recognition of the fact that his literary work was in addition to the duties which he was normally required to perform. But, as we think, the conclusion of the court below does not give proper weight to the testimony as to the nature and scope of the privilege thus accorded. It was explicitly testified by the Abbot that Father Wirth was permitted to keep the moneys in question, not as his own, but to have their use for charitable purposes with the permission of his superiors. It was this permission which was originally given and which the complainant's Abbot renewed. This testimony was not controverted and, in view of the constitution of the Order, we find no ground for treating the permission as being of a different character. It is said that it does not appear how the decedent while in Minnesota, for example, could have expended the money for the charitable purposes of the Order in New Jersey. But the purposes of this Order were broadly charitable and religious; the decedent prosecuted his educational and religious work with the Abbot's consent and the use of these moneys for charitable purposes, wherever he was located for the time, might well be in furtherance of the objects of the Order. It may have been the concession of a special privilege to permit the decedent to act directly in the distribution of the moneys which he had earned by his additional labors, instead of turning them over to the head of the Order, but we cannot say that it was a permission without restriction or one which essentially altered his relation to the Order and his fundamental duty while he remained a member of it.

On the contrary, we agree with the Circuit Court, not only in its finding of fact that the permission was limited as stated, but also in its holding that in view of the basic

law of the organization, there is no warrant for the conclusion that the Abbot had any authority to allow Father Wirth to assert an independent title or to hold the property as absolutely his own. It is said that the 'Rule of St. Benedict' recognizes the right of the member of the Order to keep whatever the Abbot permits him to have. But this plainly refers to the necessities of life and not to accumulations in direct antagonism to the principles of the society. Whatever indulgence may have been shown to the decedent with respect to the submission of appropriate accounts, it cannot be said that while his membership continued he had, or could have, the privilege of accumulating an individual estate for his own benefit and free from his obligations to the Order. This could not but be regarded as violative of the constitution of the complainant and beyond the competency of its official head to grant.

2. We are thus brought to the question whether the requirement, which lies at the foundation of this suit, is void as against public policy; that is, whether, by reason of repugnance to the essential principles of our institutions, the obligation though voluntarily assumed, and the trust arising from it, cannot be enforced. In support of this view, it seems to be premised that a member of the Order can be absolved from his vows only by the action of the Head of the Church and that unless the requisite dispensation is thus obtained the member is bound for life in temporal, as well as in spiritual, affairs. This, it is said, is the necessary import of testimony given by the Abbot. It is thus assumed that the vows in connection with the 'Rule' bind the member in complete servitude to the Order for life or until the Head of the Church absolves him from his obligations; and it is concluded that an agreement for such a surrender, being opposed to individual liberty and to the inherent right of every person to acquire and hold property, is unenforceable in the civil

courts and cannot form the basis for an equitable title in the complainant.

This argument, we think, disregards the explicit provision of the complainant's constitution as to voluntary withdrawal. It overlooks the distinction between civil and ecclesiastical rights and duties; between the Order of St. Benedict of New Jersey, a corporation of that State, and the monastic brotherhood subject to church authority; between the obligation imposed by the corporate organization and religious vows. As we have said, the question here is not one of canon law or ecclesiastical polity. The requirement of complainant's constitution must be read according to its terms and its validity must be thus determined. Granted that it is to be examined in the light of that to which it refers, still, obligations which are inconsistent with its express provisions cannot be imported into it. This constitution, as already stated, definitely provides: "Membership is lost at once:—2. By voluntarily leaving the Order for any purpose whatsoever." (Section XI.) This language cannot be taken to mean other than what it distinctly says. So far as the corporation, and the civil rights and obligations incident to membership therein, are concerned, it leaves no doubt that the member may voluntarily leave the Order at any time. His membership in the corporation, and the obligation he assumes, are subject to that condition. If he severs his connection with the corporation, it cannot be heard to claim any property he may subsequently acquire. His obligation runs with his membership and the latter may be terminated at will.

With this privilege of withdrawal expressly recognized, we are unable to say that the agreement—expressed in § XII of the complainant's constitution—that the gains and acquisitions of members shall belong to the corporation, must be condemned. These go to the corporation in exchange for the privileges of membership and

to further the common purpose to which the members are devoted. No constitutional right is invaded and no statutory restriction is transgressed. The legislature of New Jersey which, subject to constitutional inhibition is the arbiter of the public policy of that State, granted the charter by special act to the Benedictine Society of 'religious men living in community' and it cannot be said that the constitution adopted by the Order was repugnant to the charter provisions or exceeded the authority plainly intended to be conferred. It would seem to be clear that the obligation assumed instead of being opposed to the public policy of the State where it was created was directly sanctioned.

The validity of agreements providing for community ownership with renunciation of individual rights of property during the continuance of membership in the community, where there is freedom to withdraw, has repeatedly been affirmed. The case of *Goesele* v. *Bimeler*, 14 How. 589, related to a religious society called Separatists. By an agreement made in 1819, the members of the society agreed to unite in a 'communion of property.' They renounced 'all individual ownership of property, present or future, real or personal.' Amendatory articles of like import were signed in 1824. As to these agreements, the court said: "The articles of 1819 and 1824 are objected to as not constituting a contract which a court of equity would enforce. . . . What is there in either of these articles that is contrary to good morals, or that is opposed to the policy of the laws? An association of individuals is formed under a religious influence, who are in a destitute condition, having little to rely on for their support but their industry; and they agree to labor in common for the good of the society, and a comfortable maintenance for each individual; and whatever shall be acquired beyond this shall go to the common stock. This contract provides for every member of the

community, in sickness and in health, and under whatsoever misfortune may occur. . . .—By disclaiming all individual ownership of the property acquired by their labor, for the benefits secured by the articles, the members give durability to the fund accumulated, and to the benevolent purposes to which it is applied. No legal objection is perceived to such a partnership." (*Id.*, pp. 606, 607). In *Schwartz* v. *Duss*, 187 U. S. 8, the controversy related to the property of the Harmony Society, a community in Pennsylvania. It was said that the cardinal principle of the society was 'self-abnegation,' which was manifested 'not only by submission to a religious head, but by a community instead of individual ownership of property, and the dedication of their labor to the society.' It had been held by the Supreme Court of Pennsylvania that the agreements constituting the community were not offensive to the public policy of that State (*Schriber* v. *Rapp*, 5 Watts, 351), and, as to this, it was said by this court: "The Supreme Court observed that the point made against the articles as being against public policy was attended with no difficulty, and Chief Justice Gibson said for the court: 'An association for the purposes expressed is prohibited neither by statute nor the common law.'" (*Id.* p. 26.) In *Burt* v. *Oneida Community*, 137 N. Y. 346, in describing the character of that society, the Court of Appeals of New York said that its main purpose was the 'propagandism of certain communistic views as to the acquisition and enjoyment of property' and 'the endeavor to put into practical operation an economic and industrial scheme which should embody and illustrate the doctrines which they held and inculcated.' Necessarily, said the court (p. 353), "the basic proposition of such a community was the absolute and complete surrender of the separate and individual rights of property of the persons entering it; the abandonment of all purely selfish pursuits, and the investiture of the title to their

property and the fruits of their industry in the common body, from which they could not afterwards be severed or withdrawn except by unanimous consent. It was fashioned according to the pentecostal ideal, that all who believed should be together and have all things common. It was intended to be in fact, as they frequently styled themselves, but a single family upon a large scale with only one purse, where self was to be abjured and the general good alone considered." The court, viewing it solely as a business undertaking, held that the organization 'was not prohibited by any statute or in contravention of any law regulating the possession, ownership or tenure of property.' See also *Speidel* v. *Henrici*, 120 U. S. 377; *Gasely* v. *Separatists*, 13 Oh. St. 144; *Waite* v. *Merrill*, 4 Maine, 102; *Gass* v. *Wilhite*, 2 Dana (Ky.), 170; *State* v. *Amana Society*, 132 Iowa, 304; 8 L. R. A. (N. S.) 909, *note;* 11 Ann. Cas. 236, *note.*

It is said that in these cases, the contracts had been fully performed, and that the effort was made either to partition or distribute the property of the society, or to recover the value of property which had been actually conveyed or services which had been rendered to it. But the validity of the agreements there in question, against the objection based upon public policy, was distinctly recognized.

In the present case, there was no infringement of Father Wirth's liberty or right to property. He did not withdraw from the Order. He had agreed, by accepting membership under the complainant's constitution, that his individual earnings and acquisitions, like those of other members, should go into the common fund and, except as required for the maintenance of the members, should be used in carrying out the charitable objects of the Order. It is not unlikely that the copyrights upon his books derived their commercial value largely, if not altogether, from his membership. Certainly, the equitable ownership of these copyrights, by virtue of his obligation, vested in the com-

plainant and the moneys in question when received became in equity its property and were subject to its disposition. As to both, Father Wirth stood in the position of a trustee.

The further objection that the claim is barred by the statute of limitations was held by the Circuit Court to be untenable and we agree with that view. The applicable limitation is six years (Revised Laws, Minnesota (1905), § 4076,) and the bill was filed within six years after Father Wirth's death. There is no such clear evidence of repudiation of the trust as would warrant the conclusion that the statute began to run at an earlier date.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court is affirmed.

It is so ordered.

SELIG *v.* HAMILTON, RECEIVER OF EVANS, JOHNSON, SLOANE COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 361. Argued May 6, 1914.—Decided June 22, 1914.

The legislation of Minnesota with respect to the liability of stockholders, as construed by the courts of that State, has heretofore been reviewed and its constitutional validity upheld by this court in *Bernheimer* v. *Converse*, 206 U. S. 516, and *Converse* v. *Hamilton*, 224 U. S. 243.

A stockholder cannot, under the statutes of Minnesota, even by a *bona fide* transfer of his stock, escape liability for debts of the corporation theretofore incurred.

Bankruptcy proceedings against a Minnesota corporation do not stand in the way of a resort to the statutory method of enforcing the liability of a stockholder which is not a corporate asset.

Congress has not yet undertaken to provide that a discharge in bankruptcy of a corporation shall release the stockholders from liability.

A foreign stockholder of a Minnesota corporation is not concluded by an order of the state court in sequestration proceedings under the statute, and in which he was served only by publication without the State, as to any matter relating to his being a stockholder or as to other personal defense.

When his ownership of the stock ceases, a stockholder in a Minnesota corporation ceases to be liable for debts of the corporation thereafter incurred, although liable for debts previously incurred.

Under the state statute, the Minnesota court, in a proceeding to assess stockholders for liability, may assess persons who previously were stockholders for liability for debts incurred during the period they owned the stock.

While a stockholder not personally served may urge his personal defenses in a suit to recover the assessment made in sequestration proceedings of an insolvent Minnesota corporation, he may not reopen the amount of the assessment or the question of the necessity therefor.

What the Minnesota court determines as to the nature of the assessment and its application to present and former stockholders must be ascertained from the order itself.

Whether a former stockholder is ratably or otherwise liable with present stockholders is not a question which goes to the jurisdiction of the Minnesota court making the order, but a question to be submitted for correction, if any, to the court making the order and not to another court in a collateral attack.

In a proper judicial proceeding to determine the amount of indebtedness of an insolvent corporation and the dates of origin of such indebtedness, the individual stockholders are sufficiently represented by the presence of the corporation itself; and the decree establishing such indebtedness is admissible as evidence thereof in a suit against a stockholder.

Bernheimer v. *Converse*, 206 U. S. 516, followed to the effect that § 394, New York Code of Civil Procedure, does not apply where the corporation is not a moneyed one or a banking association and that the six year period does apply under § 382 to the claim of a receiver of a foreign business corporation for personal liability of a stockholder assessed under the state statute.

THE facts, which involve the validity of a judgment of the District Court of the United States for the Southern District of New York enforcing the liability of a stock-

holder of an insolvent Minnesota corporation, are stated in the opinion.

Mr. Abram I. Elkus, with whom *Mr. Wesley S. Sawyer* was on the brief, for plaintiff in error:

The order of assessment does not purport to decide defendant's liability, but only the amount of probable debts and assets and the extent to which it was necessary on the basis of all debts to resort to the liability of stockholders.

The decree allowing the claims filed did not adjudge when they accrued. Stockholders are not bound by this decree.

The sole determination is that an assessment on a basis of all debts of such a percentage on the capital stock will not more than pay the corporate debts. No other question was considered by the court in making the order of assessment.

Defendant is liable only ratably on an assessment based on debts which existed on September 5, 1904, and are unrenewed, and based on all stockholders liable to contribute toward such debts. No such assessment has been made.

The Minnesota court did not have jurisdiction to render a decree with the effect, as construed by the trial court, of adjudging the liability of defendant.

The order of assessment cannot be conclusive upon points other than those properly before the court and necessarily decided.

The action is barred by the statute of limitations contained in § 394 of the New York Code.

In support of these contentions, see *Alsop* v. *Conway*, 188 Fed. Rep. 568; *Balkam* v. *Woodstock Co.*, 154 U. S. 177; *Bernheimer* v. *Converse*, 206 U. S. 514; *Bauserman* v. *Blunt*, 147 U. S. 647; *Clark* v. *Wells*, 203 U. S. 163; *Commercial Bank* v. *Azotine Mfg. Co.*, 66 Minnesota, 413;

Commonwealth Ins. Co. v. *Hayden*, 60 Nebraska, 636; *Converse* v. *Hamilton*, 224 U. S. 242; *Covell* v. *Fowler*, 144 Fed. Rep. 535; *Fairfield* v. *Gallatin*, 100 U. S. 47; *French* v. *Busch*, 189 Fed. Rep. 480; *Gt. West. Tel. Co.* v. *Purdy*, 162 U. S. 329; *Green* v. *Neal*, 6 Pet. 291; *Hamilton* v. *Loeb*, 186 Fed. Rep. 7; *Harper* v. *Carroll*, 66 Minnesota, 486; *Harpold* v. *Stobart*, 46 Oh. St. 397; *Howarth* v. *Lombard*, 175 Massachusetts, 570; *Manhattan Ins. Co.* v. *Albro*, 127 Fed. Rep. 281; *McDonald* v. *Dewey*, 202 U. S. 510; *Moores* v. *Nat. Bank*, 104 U. S. 625; *Morgan* v. *Hedstrom*, 164 N. Y. 224; *Mutual Fire Ins. Co.* v. *Phœnix Co.*, 108 Michigan, 170; *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 7; *San Diego Co.* v. *Souther*, 90 Fed. Rep. 164; *Schrader* v. *Mfr's Nat. Bank*, 133 U. S. 67; *Shepard* v. *Fulton*, 171 N. Y. 184; *Staten Island Co.* v. *Hinchcliffe*, 170 N. Y. 473; *Stokes* v. *Foote*, 172 N. Y. 327; *Straw Mfg. Co.* v. *Kilbourne*, 80 Minnesota, 125; *Swing* v. *Humbird*, 94 Minnesota, 1; *Tiffany* v. *Giesen*, 96 Minnesota, 488; *Ward* v. *Joslin*, 186 U. S. 140; *Willius* v. *Mann*, 91 Minnesota, 494; Constitution of Minn., Art. 10, § 3; act of June 30, 1876, c. 176, § 1, as amended in 1892 and 1897; Rev. Stat., §§ 5151, 5152, 5234; Laws of Minn., 1894, c. 76; Laws of Minn., 1899, c. 272; Laws of Minn., 1899, c. 34, § 2599; Laws of Minn., 1905, c. 58; N. Y. Code Civ. Pro., § 394.

Mr. James E. Trask, with whom *Mr. E. H. Morphy* and *Mr. John J. Clark*, were on the brief, for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

This action was brought in the District Court of the United States, for the Southern District of New York, to enforce the liability of a stockholder of an insolvent Minnesota corporation.

In 1902, the Evans, Munzer, Pickering Company, was incorporated under the laws of Minnesota for the purpose of transacting a mercantile business. In 1904, its name was changed to the Evans, Johnson, Sloane Company. Its capital stock consisted of 1,500 shares of common and 1,000 shares of preferred stock of the par value of $100 each. The plaintiff in error, Arthur L. Selig, became the owner of 50 shares of preferred stock in 1902 and held the same until September 5, 1904, when they were transferred on the books of the Company to Max Mayer. On September 25, 1905, a petition in bankruptcy was filed against the Company in the United States District Court for the District of Minnesota; adjudication followed on October 13, 1905, and trustees in bankruptcy were appointed.

On May 28, 1906, a creditor of the Company, on behalf of itself and all other creditors, brought a sequestration suit in the District Court of Ramsey County, Minnesota, for the purpose of enforcing the liability of the stockholders of the Company. In that suit, on June 25, 1906, Charles E. Hamilton (the defendant in error here) was appointed receiver. Further order was made on June 28, 1906, requiring creditors to exhibit their claims, and become parties to the suit, within six months from the date of the first publication of the order. On July 6, 1906, in the same suit, the receiver filed a petition for an assessment upon the stockholders. The court set a date for hearing and directed notice to be given by publication and mailing. Thereupon, on September 4, 1906, the court entered its order assessing the sum of $100 against each share of the capital stock and against those liable as stockholders on account of such shares; the latter were directed to pay to the receiver the amount of the assessment within thirty days, and the receiver was authorized in default of payment to institute an action against any one liable as a stockholder, in any court having jurisdiction, whether in the State of Minnesota or elsewhere. On April 23, 1907,

the court entered a decree—in the sequestration suit—allowing the claims against the Company as set forth in an annexed schedule, which showed the nature of each claim, its amount and when it arose. A further decree allowing an additional claim was entered on February 13, 1908. It appeared from these decrees, and the schedules to which they referred, that of the claims thus allowed, upwards of $11,000 wholly arose prior to September, 1904, and in addition over $20,000 in part arose prior to that date.

Pursuant to the order of September 4, 1906, the present action was brought in December, 1909, to recover from Selig the amount assessed on 50 shares. The complaint set forth the proceedings in the sequestration suit, the statutes under which they were instituted and the order of assessment. It was also alleged that Selig, on or about September 5, 1904, had transferred his stock, when the Company was in an unsound financial condition, for the purpose of concealing his ownership, but that he remained the owner of the entire beneficial interest in the shares in question and that the transfer was fraudulent as against the creditors; and also that, under the law of Minnesota, a stockholder in a corporation could not avoid his liability for prior debts by a *bona fide* sale of his shares to a solvent person and a recorded transfer. In his answer, Selig admitted the transfer of the shares at the time mentioned, alleged that it was duly made and entered on the corporate books, and denied the other allegations pertinent to his liability.

Upon the trial the record of the proceedings in the sequestration suit, including the order of assessment and the decrees allowing the claims of creditors, were received in evidence. The entry in the stock-book showing the record of the issuance of 50 shares to Selig and its transfer, together with the original certificate as canceled, was introduced. Aside from what was contended to be the effect of the proceedings in the sequestration suit, there

was no evidence impeaching the transfer. This being the state of the proof, the plaintiff rested and the defendant moved to dismiss the complaint upon the grounds, that the plaintiff had failed to prove facts sufficient to constitute a cause of action, that the suit should have been brought in equity and not at law, and that the cause of action had accrued more than three years prior to the commencement of the action and hence was barred by the statute of limitations of the State of New York. Each party also moved for a direction of a verdict. The District Judge directed a verdict in favor of the receiver for the sum of $5,000 with interest, and in the view that, in sustaining and enforcing the order of assessment, a question arose involving the application of the Federal Constitution, this writ of error has been sued out.

The legislation of Minnesota with respect to the liability of stockholders, as construed by the state court, was reviewed and its constitutional validity was upheld in *Bernheimer* v. *Converse*, 206 U. S. 516. The conclusions there reached were reaffirmed in *Converse* v. *Hamilton*, 224 U. S. 243. Briefly re-stating them, it may be said: The constitution of Minnesota (Art. 10, § 3) provides: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him." The provision is self-executing. The liability of the stockholder, measured by the par value of his stock, 'is not to the corporation but to the creditors collectively, is not penal but contractual, is not joint but several, and the mode and means of its enforcement are subject to legislative regulation.' (See *Willis* v. *Mabon*, 48 Minnesota, 140; *McKusick* v. *Seymour*, 48 Minnesota, 158; *Minneapolis Baseball Co.* v. *City Bank*, 66 Minnesota, 441; *Hanson* v. *Davison*, 73 Minnesota, 454; *Straw & Ellsworth Co.* v. *Kilbourne Co.*, 80 Minnesota, 125; *London & Northwest Co.* v. *St. Paul Co.*,

84 Minnesota, 144; *Way* v. *Barney*, 116 Minnesota, 285.) Under the statute of 1894 (chapter 76), this liability was enforceable exclusively by means of a single suit in equity, in a court of the State, which was brought for the benefit of all the creditors against all the stockholders or as many as could be served with process within the State. *Hale* v. *Allinson*, 188 U. S. 56; *Finney* v. *Guy*, 189 U. S. 335. To make the remedy more effective, the act of 1899 (chapter 272) was passed, and under the provisions of this statute as continued in substance (*Way* v. *Barney*, *supra*, p. 294) in the Revised Laws of 1905, §§ 3184-3190, the proceedings here in question were had. Provision was made—upon hearing at the time appointed and after notice by publication or otherwise as directed by the court—for receiving evidence as to the probable indebtedness of the corporation, the expenses of the receivership, the amount of available assets, the parties liable as stockholders and the nature and extent of such liability; and, thereupon, the court was authorized to levy a ratable assessment "upon all parties liable as stockholders, or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability" as the court in its discretion might "deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment)."—The order and the assessment thereby levied, was made "conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment." After the expiration of the time fixed for payment of the amount assessed, the receiver was authorized to bring actions against every person failing to pay wherever he might be found, whether in Minnesota or elsewhere. (See chapter 272, Laws of 1899,

§§ 3–6; Revised Laws, 1905, §§ 3184–3187.) The constitutional validity of these provisions was sustained upon the ground that the statute is a reasonable regulation for enforcing the liability assumed by those who become stockholders in corporations organized under the laws of Minnesota; that while the order levying the assessment is made conclusive as to all matters relating to the amount and propriety thereof, and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or in equity he is entitled to set off against the assessment, or has any other defense personal to himself; and that while the order is conclusive against the stockholder as to the matters stated, although he may not have been a party to the suit in which it was made or notified that an assessment was contemplated, this is not a tenable objection as the order is not in the nature of a personal judgment against him and he must be deemed, by virtue of his relation to the corporation and the obligation assumed with respect to its debts, to be represented by it in the proceeding. *Straw & Ellsworth Co.* v. *Kilbourne Co.*, *supra*, pp. 133, 136; *Bernheimer* v. *Converse*, *supra*, pp. 528, 532; *Converse* v. *Hamilton*, *supra*, p. 256.

Further, it must be assumed that a stockholder cannot, even by a *bona fide* transfer of his stock, escape liability for the debts of the corporation theretofore incurred. The Minnesota statute provides that a transfer of shares "shall not in any way exempt the person making such transfer from any liabilities of said corporation which were created prior to such transfer." Gen. Stat., 1894, § 2599; Rev. Laws, 1905, § 2864. And in *Gunnison* v. *U. S. Investment Company*, 70 Minnesota, 292, 295, the court said that "by virtue of the statute a stockholder cannot relieve himself from the liability for the prior

debts of the corporation by a *bona fide* sale and transfer of his stock on the books of the corporation, whatever the rule may be in the absence of the statute."

In the light of the principles established by these decisions, it must be concluded:

(1) The bankruptcy proceedings against the corporation did not stand in the way of a resort to the statutory method of enforcing the stockholder's liability. It was not corporate assets (*Minneapolis Baseball Co.* v. *City Bank, supra,* p. 446; *Way* v. *Barney, supra);* and Congess had not undertaken to provide that the discharge in bankruptcy of a corporation should release the stockholders. No question as to this is raised by the plaintiff in error.

(2) The defendant Selig, in this action brought by the receiver against him in the District Court in New York to recover the amount assessed, was not concluded with respect to his personal liability. He was free to deny that he was, or had been, a stockholder in the Company; to dispute the allegation as to the length of time that he remained a stockholder; in short, to litigate any matter which bore upon the extent or duration of his stockholding or any other personal defense. *Straw & Ellsworth Co.* v. *Kilbourne, supra.* The order of the Minnesota court in the proceedings for the purpose of the assessment, in which he was represented by the corporation and of which he was notified only by publication and mailing of notice, did not conclude him with respect to the issue so far as it concerned the transfer of his stock or the good faith with which the transfer was made. Inasmuch as the transfer was proved to have been made in September, 1904, and no evidence was introduced to discredit the transaction, it must be assumed, for the present purpose, that the defendant's stock ownership then ceased and that he was not liable for the payment of debts subsequently contracted by the corporation.

(3) But despite the transfer, Selig remained liable for the corporate debts previously incurred. Moreover, it cannot be doubted that the authority of the Minnesota court under the statute was not confined to proceedings to assess existing stockholders. The act of 1899, by its express terms, applied in cases of liability arising upon shares "at any time held or owned by such stockholders" and provided for the making of an assessment against "all parties liable as stockholders." Laws, 1899, chapter 272, §§ 1, 3; Rev. Laws, 1905, § 3185. This obviously included former stockholders in relation to debts antedating their transfers; and the constitutional validity of the act in this aspect is as clear as is its validity with respect to the authorization of an assessment against existing stockholders. So far as the jurisdiction of the court to levy the assessment is concerned, no distinction can be maintained. The basis of jurisdiction is the same in each case; it is found in the contractual obligation assumed in becoming a member of a Minnesota corporation, and in the consequent submission to the reasonable regulations of the State for the purpose of making the liability effectual. *Bernheimer* v. *Converse, supra.*

It follows that if the court, thus having jurisdiction and acting upon the evidence before it in the statutory proceeding, assessed former stockholders for the purpose of providing for debts incurred while they held their stock, its determination with respect to the amount of the assessment and the necessity therefor must be deemed conclusive. These questions cannot be reopened in another court when the receiver sues to collect the amount of the assessment. The stockholder in such a suit is free to urge his personal defenses but this does not mean that he may resist the receiver's demand upon the ground that the assessment was not needed. The marshalling of the amounts recovered from stockholders is also the appropriate subject for the consideration of the court which

under the statute collects and distributes the fund. It is quite obvious that another court, in an action by the receiver against the stockholder, could not undertake to fix the amount required to pay the debts for which the stockholder is liable unless it virtually assumed the duty imposed by the statute of determining what a ratable assessment should be and thus denied due credit to the determination already made in a court of competent jurisdiction.

It is insisted, however, that no assessment was made against the defendant as a past stockholder; that the order of assessment as made by the Minnesota court was applicable to present stockholders only. It is true that in the receiver's petition for the levy of an assessment, the persons alleged to be liable were set forth as existing stockholders. Of these, it was averred that some (including the plaintiff in error) had transferred their stock for the purpose of avoiding liability and that others had placed their shares in the names of agents; but as to all, it was asserted that they were, and continued to be, the owners of the entire beneficial interest. But the petition prayed that the probable amount of the indebtedness and of the costs and expenses of the proceedings, and the probable amount which could be collected "from said stockholders, and all persons or parties liable, as such, on said stock," should be ascertained, and that the court should levy a ratable assessment upon each share and against each of the stockholders "liable on said stock." Taking the petition, in the light of the statute, we think that, despite the allegations with respect to the fraudulent character of the transfers mentioned and the continued ownership by the transferors of the shares described, the exercise of the jurisdiction of the court was invoked for the making of such an assessment as the court in its discretion might consider necessary in order to enforce the stockholders' liability, as it actually existed, with respect to the corporate debts remaining unpaid.

What the court did determine must be ascertained from the order of assessment. This order, after reciting that the matter came on to be heard at the time appointed pursuant to the petition, and that the court had "received and duly considered all the evidence presented," provided for an assessment of an amount equal to the par value "on each and every share of the capital stock" and "against the persons or parties liable as stockholders . . . for, upon, or on account of such shares of stock." It further provided that "each and every person or party liable as such stockholder" should pay to the receiver the amount assessed, and the receiver was authorized to collect "the several amounts due from the several persons or parties liable as stockholders," and to bring suit in case of the failure of "any person . . . liable as a stockholder" to pay as required. These provisions are certainly broad enough to include all stockholders who were actually liable, and we should not be justified in treating the order as expressing less than its terms stated.

In *Tiffany* v. *Giesen*, 96 Minnesota, 488, the plaintiff, as receiver, by virtue of an order of assessment under the statute sought to recover against a stockholder in an insolvent corporation who had transferred his shares. It appearing that the defendant was the owner of the stock during the existence of the indebtedness of the company, it was held that the plaintiff had made out a cause of action. The objection that, as the transferee was the person primarily liable the action could not be maintained against the transferor, was overruled.

It is urged that the plaintiff in error was bound to contribute only ratably with all other stockholders who were liable with respect to the debts which arose prior to September 5, 1904, the date of the transfer, and that no assessment had been made based upon those debts. But this objection, as we view it, does not go to the existence

of the jurisdiction to make the order of assessment, or to the scope of the order as it was actually made, but rather to the question whether the court committed error in the exercise of the authority which it unquestionably possessed. If it did, the remedy lay in an application to the Minnesota court for the correction deemed to be necessary and not in a collateral attack. The order in question does not provide for the distribution of the amount to be paid by the plaintiff in error, but that all moneys collected from the stockholders by the receiver should be held until the further order of the court. It is not to be assumed that these moneys will be applied to any indebtedness as to which the stockholders contributing respectively are not liable. We cannot doubt that the plaintiff in error, if he so desires, will have suitable opportunity to be heard as to the application of the amount which he may pay to the receiver, that it will be used only in the discharge of his obligation, and that any surplus to which he may be entitled will be duly returned. Laws, 1899, chapter 272, § 11. See Rev. Laws, 1905, § 3190. The statute further provides that any stockholder who has paid his assessment shall be entitled to force contribution from any stockholder who has not paid, and for that purpose shall be subrogated to the rights of the creditors or the receiver of the corporation against every such delinquent stockholder in such manner and to such extent as may be just and equitable. *Id.*

We cannot regard it as essential to the exercise of the jurisdiction of the Minnesota court that it should be required, in order not to forego recovery from stockholders who had transferred their stock, to make a separate and distinct assessment against all the then stockholders at the date of every transfer appearing upon the books. The plan of the statute was intended to afford a practicable remedy, and the order to be made thereunder was in the nature of things a provisional one representing the best

judgment of the court upon the evidence before it as to the amount of the assessment required. That assessment was leviable upon every share and against all persons liable as stockholders. If the plaintiff in error was among this number, he was not entitled to resist the recovery by reason of the nature or amount of the assessment, which was levied in conformity with the statute, but he was properly remitted to the Minnesota court for the adjustment of such equities as he might have.

It is said, however, that on the trial of the present action, there was no evidence that there were debts remaining unpaid, which antedated his transfer of stock. But the decrees, entered in the parent suit in Minnesota, which determined the amount of the outstanding claims and when they arose, were introduced in evidence. These decrees showed that there were debts, in excess of the amount demanded of the plaintiff in error, which arose before his shares were transferred. In the proceedings appropriate to the liquidation, which related to the allowance of these claims, the plaintiff in error by virtue of his connection with the corporation and the obligation he had assumed was sufficiently represented by the presence of the corporation itself (*Bernheimer* v. *Converse, supra,* p. 532); and we see no reason to question the admissibility of the evidence. There was no attempt to controvert it.

The remaining question relates to the statute of limitations. It is contended that the action is barred by § 394 of the New York Code of Civil Procedure. In *Bernheimer* v. *Converse, supra* (p. 535), the court expressed the opinion that this section did not apply where the corporation was not a "moneyed corporation or banking association" and that the period of limitation under the New York Code was six years (§ 382). (See *Platt* v. *Wilmot,* 193 U. S. 602, where, in the opinion of the court delivered by

Mr. Justice Peckham, the history of § 394 is reviewed.) We adhere to this view and the action must be regarded as brought in time.

The judgment is affirmed.

Judgment affirmed.

CHAPMAN & DEWEY LUMBER CO. *v.* ST. FRANCIS LEVEE DISTRICT.

PETITION FOR REHEARING.

No. 82. Petition for rehearing by defendant in error received and distributed to the Justices on March 6, 1914.—Decided June 22, 1914.

In presenting petitions for rehearing a duty rests upon counsel to deal with the case as it is disclosed by the record.

THE facts are stated in the opinion.

Mr. Samuel Adams, Mr. H. F. Roleson, Mr. J. C. Hawthorne and *Mr. N. F. Lamb* for petitioner.

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

Leave to file a petition for rehearing is sought in this case. The petition has been examined, and we find it so wanting in merit that leave to file it must be denied. Doubtless, a formal denial would suffice, but we prefer to notice two statements in the petition.

As our opinion (232 U. S. 186) shows, the controlling question was, whether a patent issued to the State of Arkansas in 1858 under the Swamp-land Act embraced all the lands within the exterior boundaries of a designated

township, or only the lands lying without certain meander lines shown upon the official plat which, by reference, was made part of the description in the patent. The plat showed that large areas in the township, amounting to 8,000 acres or more, were meandered as bodies of water called "Sunk Lands," and that the remaining areas were surveyed into sections and parts of sections, the aggregate of which, according to an inscription upon the plat, was 14,329.97 acres. Deducting from the latter 514.30 acres in fractional section 16, which had passed to the State under the school-land grant, left 13,815.67 acres, and this was the acreage given in the patent, from which section 16 was excepted. The mode of claiming lands under the Swamp-land Act was by presenting selection lists to the Surveyor General, and, as bearing upon what was intended to be conveyed by the patent, we stated that the list in this instance "described the township as containing 14,329.97 acres, the total of the surveyed areas as inscribed upon the plat," and that this, less the 514.30 acres in fractional section 16, was the area given in the patent.

One of the statements in the petition for rehearing is that our opinion "proceeds on the hypothesis, unsupported by the record," that the Governor of Arkansas, in his request for the patenting of the township in question, stated its acreage. In assuming that it is our duty to deal with the case as it is disclosed by the record, counsel are clearly right. A like obligation rests upon counsel. The record (p. 207) contains a certificate from the General Land Office, introduced in evidence without objection, saying: "The original selection list of swamp lands in T. 12 N., R. 7 E., [the township in question] gives the area of the township as 14,329.97 acres, and that amount was also given in the approved list. Section 16, which passed to the State under the school grant, contains 514.30 acres, and as such lands were not granted under the swamp-land laws, the area of section 16 was deducted from the

total of the township, leaving 13,815.67 acres, which amount was accounted for in the patent." The certificate stands uncontradicted in the record and was accepted by the Supreme Court of the State as determinative of the facts recited in it (100 Arkansas, 94, 97). Nothing more need be said upon this point.

Another statement in the petition is that we erred in treating the meandered areas embodying the lands in controversy as unsurveyed lands. The record (p. 1) shows that the complaint filed in the court of first instance, and which counsel seek to maintain, alleged that these lands "were left unsurveyed by the United States Government." The sunk lands were also described by the representative of the State as "not yet surveyed," when the State's claims under the Swamp-land grant were being adjusted and settled in 1895. H. R. Rep. No. 1634, 54th Cong., 1st Sess., pp. 5 and 32. This will suffice upon this point.

Leave to file petition denied.

BURKE *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

LAMPRECHT *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

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

Nos. 279, 280. Argued January 13, 14, 1913.—Decided June 22, 1914.

The act of July 27, 1866, making a grant of alternate odd numbered sections of public land to the Southern Pacific Railroad Company in aid of the construction of its main-line railroad did not include mineral lands, but on the contrary excluded them from its operation

and provided that the company should receive other lands as indemnity for them.

The administration of the grant, including the issue of patents following the construction of the road, was committed to the Land Department of which the Secretary of the Interior is the supervising officer.

It was contemplated by the granting act that the mineral or non-mineral character of the lands should be determined by the Land Department and that, depending upon the result, patents should issue or indemnity be allowed.

The patents were to be the legally appointed evidence that the lands described in them had passed to the company under the grant.

A patent issued under such a grant is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it.

If the land officers are induced by false proofs to issue such a patent for mineral lands, or if they issue it fraudulently or through mere inadvertence, a bill in equity on the part of the Government will lie to cancel the patent and regain the title; or, in the like circumstances, a prior mineral claimant who had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by a stranger who had no interest in the land at the time the patent was issued and was not prejudiced by it.

One who relocates land under the mining law (Rev. Stat., § 2324) by reason of the failure of a prior locator to perform the required annual assessment or development work is not in privity with such prior locator.

The officers of the Land Department are without authority to insert in patents exceptions not contemplated by law, and when they place unauthorized exceptions in patents the exceptions are void.

An exception inserted in patents issued under the grant here under consideration to the effect that if any of the lands described should be found to be mineral the same should be excluded from the operation of the patents is unauthorized and void, because the granting act contemplated that the patents should effectually and unconditionally pass the title.

An agreement between the railroad company and the land officers that such an exception in the patents should be effective is of no greater

force as an estoppel than the exception itself, and the latter is of no force whatever.

The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. Neither can the land officers enter into any agreement upon the subject. They are not principals but agents of the law, and must heed only its will.

If the land officers enter into any forbidden arrangement whereby public land is transferred to one not entitled to it, the patent may be annulled at the suit of the Government, but those officers cannot alter the effect which the law gives to a patent while it is outstanding.

The joint resolution of June 28, 1870, relating to this grant did not authorize the use of any excepting clause in the patents.

THE facts, which involve the construction and validity of patents for land issued to the Southern Pacific Railroad Company under the Land Grant Act of July 27, 1866, and the effect of provisions in the patents as to the effect of subsequent discovery of minerals, are stated in the opinion.

Mr. Frederic R. Kellogg and *Mr. Roberts Walker*, with whom *Mr. Edmund Burke, pro se*, was on the brief, for Burke.

Mr. D. J. Hinkley, with whom *Mr. T. J. Butler* was on the brief, for Lamprecht and Aiken, trustees.

Mr. Maxwell Evarts, with whom *Mr. Henry W. Clark*, *Mr. Gordon M. Buck* and *Mr. A. A. Hoehling, Jr.*, were on the brief, for the Southern Pacific Railroad Co.

By leave of court, *The Solicitor General* filed a memorandum on behalf of the United States.

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

In 1910 Edmund Burke filed a bill in equity in the Circuit Court of the United States for the Southern District

of California, against the Southern Pacific Railroad Company, the Kern Trading and Oil Company, and several individuals, wherein he sought a decree establishing certain rights claimed by him in five sections of land in Fresno County, California, and enjoining the defendants from asserting any right or interest therein. A cross-bill was filed by J. I. Lamprecht and other individual defendants, and the two corporate defendants demurred to both bills. The demurrers were sustained and a decree was entered dismissing the bills, for reasons assigned in an opinion announced the same day in *Roberts* v. *Southern Pacific Co.*, 186 Fed. Rep. 934. The complainant and cross-complainants appealed to the Circuit Court of Appeals, and it certified the case here under the Judicial Code, § 239, for instruction upon designated questions of law.

According to the certificate, the bill alleged, in substance, that in 1892 the five sections were public lands and were located as placer mining claims under the mining laws of the United States, each location being preceded by a discovery of mineral within its limits; that on May 9, 1892, the railroad company, with knowledge of these locations, made application at the local land office to have the five sections, with others, patented to it under the land grant made to it by the act of July 27, 1866, c. 278, 14 Stat. 292, §§ 3, 4, 18, and the joint resolution of June 28, 1870, 16 Stat. 382, No. 87, and did then corruptly cause one Madden, its land agent, to make and present at such land office, in support of such application, a false and fraudulent affidavit stating that the application contained a correct list of lands inuring to the railroad company under its grant, and that the listed lands were vacant, unappropriated and not interdicted, mineral or reserved lands; that no notice of such application was given to any of the placer claimants, and no hearing was had in the local office or in the Land Department with the purpose of

determining the character of the lands; that on July 10, 1894, without any such investigation or determination, a patent was issued to the railroad company purporting to convey to it, among other lands, the five sections in controversy; that the patent contained a clause reading: "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands"; that the railroad company accepted the patent and caused it to be recorded in Fresno County; that in virtue of the patent the railroad company claims to own all the lands described therein, including the five sections; that in March, 1909, the original mineral claimants having failed to perform the required assessment or development work for the preceding year, the complainant and certain associates of his entered upon the five sections and relocated the same as placer mining claims under the mining laws of the United States, each of the new locations being preceded by a discovery of mineral within its limits; that the lands contain petroleum in commercial quantities, which makes them more valuable for mining than for agricultural purposes; that the complainant is the owner of an undivided one-tenth interest in the mining claims created by the new locations; and that the oil company, although claiming as a lessee of the railroad company, is a mere instrument of the latter, being entirely owned, dominated and controlled by it.

According to the certificate, the cross-bill set forth substantially a like state of facts, sought the same relief, and also contained the following allegation: "These cross-complainants further say and show unto the court that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to

be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and Joint Resolution, and in said patent, or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the Recorder of the County of Fresno, and State of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said Act of Congress and Joint Resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part or any thereof."

The questions propounded in the certificate are as follows:

"FIRST. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

"SECOND. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

"THIRD. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

"FOURTH. If the reservation of mineral lands as ex-

pressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

"FIFTH. Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral land from the railroad land grants?

"SIXTH. Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

"SEVENTH. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

At the outset it is well to observe that this is not a suit by the Government to cancel or annul a patent for fraud practiced upon the land officers in its procurement or for any fraudulent act, error of law, or mistake committed by them in issuing it (see *United States* v. *Minor*, 114 U. S. 233; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *Germania Iron Co.* v. *United States*, 165 U. S. 379); nor is it a suit to have one to whom a patent has issued declared a trustee for another who, at the time of its issue, had acquired such a right to the land as to entitle him to that form of equitable relief (see *Silver* v. *Ladd*, 7 Wall. 219, 228; *Lee* v.

Johnson, 116 U. S. 48; *Duluth & Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587; *Svor* v. *Morris*, 227 U. S. 524). On the contrary, the suit is one wherein rights asserted under a patent are called in question by parties whose only claim to the land was initiated more than fourteen years after the date of the patent.

As the fifth question has been presented in separate briefs and the occasion for considering the other questions turns upon the answer to it, we take it up first. It is: "Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral land from the railroad land grants?"

This granting act, like several others of that period, expressly excluded from its operation "all mineral lands" other than iron and coal lands. No attempt was made at defining "mineral lands," and doubtless the ordinary or popular signification of that term was intended. Apparently it was used in a sense which, if not restricted, would embrace iron and coal lands, else care hardly would have been taken to declare that it should not include them. This was deemed a reasonable inference in *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S. 526, where a contention that it embraced only metalliferous lands was rejected. The question there was, whether it included lands containing valuable bodies of granite, and the holding was that it did. While avoiding an exact definition, the court was of opinion that it comprehended all lands "chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

Petroleum has long been popularly regarded as a mineral oil. As its derivation indicates, the word means "rock oil," an oily substance so named because found naturally oozing from crevices in rocks. Its existence in this country was known from very early times, and when this and other railroad land grants, containing an

exception of mineral lands, were made, the extraction of oil from its natural reservoir in subterranean rocks had come to be a promising industry and was extending over an increasing area through discoveries of new oil fields. An official report laid before Congress a few months before this grant was made showed that the daily output of the oil wells in Pennsylvania, Ohio, West Virginia, and Kentucky was 12,000 barrels. H. R. Ex. Doc. No. 51, 39th Cong., 1st Sess. In the same year the Supreme Court of Pennsylvania, in disposing of an oil-land controversy, not only treated the oil as a mineral but spoke of the work of extracting it from the containing rocks as "mining for oil," and, in concluding the opinion, said: "Until our scientific knowledge on the subject is increased, this is the light in which the courts will be likely to regard this valuable production of the earth." *Funk* v. *Haldeman*, 53 Pa. St. 229. And in another case that court said: "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." *Gill* v. *Weston*, 110 Pa. St. 312, 317. Its mineral character has also been affirmed by the courts of other States. *Williamson* v. *Jones*, 39 W. Va. 231, 256; *Kelley* v. *Ohio Oil Co.*, 57 Oh. St. 317, 328; *Murray* v. *Allred*, 100 Tennessee, 100; *Wagner* v. *Mallory*, 169 N. Y. 501, 505. Congress at different times has spoken of it as a mineral (15 Stat. 58, 59, c. 41, § 1; Id. 125, 167, c. 186, § 109; 29 Stat. 526, c. 216; 32 Stat. 691, 702, c. 1369, § 42; 36 Stat. 847, c. 421), and this court did so in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 202.

In the legislation of Congress the term "mineral lands" is not confined to railroad land grants. It occurs in the mining laws, in an excepting clause in the homestead law, and in like clauses in other public-land laws. Evidently it has the same meaning in all. The administration of these laws has rested with the Land Department, and there-

fore its course of action in respect of oil-bearing lands—whether it has held them to be mineral or otherwise—requires to be noticed. The various mining circulars, instructions and decisions, as published from time to time, show that the matter probably was not considered prior to the first mining circular, July 15, 1873, but that since then the Department has regarded petroleum as a mineral and has treated lands chiefly valuable therefor as mineral lands.[1] With a single exception, the rulings have been uniform, and lands of great value have passed into private ownership under them. The single exception is the case of *Union Oil Co.*, 23 L. D. 222, 226, decided August 27, 1896, which was revoked on a motion for review November 6, 1897, 25 L. D. 351. It appears from the later decision that action upon other pending cases turning upon the same question had been suspended in the meantime, so, practically speaking, there has been no break in the Department's rulings. The case of *Union Oil Company* presented a controversy between that company and the Southern Pacific Railroad Company over a tract of land in California, the former claiming under a placer mining claim and insisting that the land was chiefly valuable for petroleum and therefore mineral, and the latter seeking a patent under its land grant and insisting that the land, even if chiefly valuable for petroleum, was not mineral. In the original decision the Secretary of the Interior held that the word "mineral" embraced only "the more precious metals," such as "gold, silver, cinnabar, etc.," but on the rehearing this view was rejected and the prior rulings holding petroleum to be a mineral

[1] Circular July 15, 1873, Copp's Mineral Lands, 61; Letter of Commissioner Burdett, January 30, 1875, Sickles' Mining Laws, 491; *Maxwell* v. *Brierly*, 10 Copp's L. O. 50; Instructions January 30, 1883, 1 L. D. 572; *Roberts* v. *Jepson*, 4 L. D. 60; *Piru Oil Co.*, 16 L. D. 117; *Union Oil Co.*, 25 L. D. 351; *McQuiddy* v. *California*, 29 L. D. 181; *Tulare Oil Co.* v. *Southern Pacific Railroad Co.*, 29 L. D. 269.

were reaffirmed and applied, the railroad company's application for a patent being denied.

Notwithstanding these persuasive considerations for now regarding petroleum lands as mineral lands within the meaning of the excepting clause in the granting act, we are asked to give effect to the strictly scientific view that petroleum is a resultant of the decomposition of organic matter under certain conditions of temperature and pressure and therefore is not a mineral. As we understand it, scientists are not in full accord upon this point, some ascribing to petroleum an inorganic origin. Encyclopædia Britannica, 11th ed., Vol. 21, p. 318. But, passing this seeming divergence in opinion and assuming that when subjected to a strictly scientific test petroleum is not a mineral, we think that is not the test contemplated by the statute. It was dealing with a practical subject in a practical way, and we think it used the words "mineral lands," and intended that they should be applied, in their ordinary and popular sense. In that sense, as before indicated, they embrace lands chiefly valuable for petroleum.

Our answer to the fifth question must therefore be in the affirmative.

The other questions are so closely related one to another and turn so largely upon principles of general application to controversies arising out of the public-land laws, including railroad land grants, that it seems the better course to consider them in a general way in connection with those principles, and then to come to the specific answers to be given to them separately.

We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of

the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti* v. *Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant should not be treated as a mere gift.

Two distinct land grants were made to the Southern Pacific Railroad Company, one on behalf of the construction of a main line, and the other (act March 3, 1871, 16 Stat. 573, 579, c. 122, § 23) on behalf of a branch line. We are not here concerned with the latter. The former was made by the act of July 27, 1866, 14 Stat. 292, c. 278. That act first made provision for the construction of a line of railroad, by the Atlantic & Pacific Railroad Company, from Springfield, Missouri, westward through northern Arizona to the Pacific Ocean, and by its third and fourth sections made the following grant of public lands to that company:

"SEC. 3. That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, *not mineral,* designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: . . . *Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further,* That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: . . .

"SEC. 4. That whenever said Atlantic and Pacific Rail-

road Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

By its eighteenth section the act made provision for the construction by the Southern Pacific Railroad Company of a connecting line of railroad from the eastern boundary of California to San Francisco, and in that connection made the grant now under consideration. That section reads:

"That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare

with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

Turning to §§ 3 and 4, as must be done, to ascertain the nature, extent, conditions and limitations of the grant made by this section, it will be seen that it was of "every alternate section of public land, not mineral, designated by odd numbers," etc., and was accompanied by a declaration "That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided." Words hardly could make it plainer that mineral lands were not included but expressly excluded. This is fully recognized by counsel on both sides. But by whom and when was it to be determined whether lands otherwise within the grant were mineral and therefore excluded, or non-mineral and therefore included? How long was the question of the exclusion or inclusion of particular sections to be an open one? Was it to depend upon a discovery of mineral at any time in the future, even a hundred years after the completion of the railroad, or was it intended that the mineral or non-mineral character of the lands should be determined in administering the grant, and that, depending on the result, patents should issue or indemnity be allowed? We think these questions find clear and decisive answers in the granting act when considered in the light of settled principles of general application to the administration of the public-land laws, including railroad land grants.

As has been seen, the exclusion was of "all mineral lands." It was not a mere reservation of minerals, but

an exclusion of mineral lands, coupled with a provision that the company should receive other lands, not mineral, in lieu of them. This shows that a determination of the character of the lands, as mineral or non-mineral, was plainly contemplated. Besides, there was an exclusion of all sections and parts of sections "granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of" when the line of the road should be definitely located, and this was followed by a similar provision for lieu lands. The two exclusions and the indemnity provisions made it practically imperative that there be an authoritative identification of the lands passing under the grant and of those excluded, for otherwise great uncertainty in titles, conflicting claims, and vexatious litigation would be inevitable. Appreciative of this, Congress confided the identification of the lands, both included and excluded, to the Land Department, of which the Secretary of the Interior is the supervising officer. We say their identification was confided to that Department, because the granting act expressly provided for the issue of patents "confirming to said company the right and title to said lands," obviously meaning the lands granted but not the excluded lands, and also directed that the indemnity lands be selected "under the direction of the Secretary of the Interior," and because that Department was already expressly charged with the administration and execution of all public-land laws as to which it was not specially provided otherwise. Rev. Stat., §§ 441, 453, 2478. In *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166, 167, which related to a grant, the identification and extent of which depended, as here, upon an ascertainment of matters of fact made material by the granting act, this court said: "While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general

powers vested in that department. . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

True, the grant now under consideration was *in præsenti* in the sense that the title to the granted lands, when they should be identified, passed as of the date of the granting act; but, as has been indicated, the act did not itself identify them, and in the nature of things that was not practicable. It was not certain that the road would be constructed, or what lands would be free from other claims at the time of its definite location, or what would be mineral. This led to the use of general descriptive terms which required to be applied to particular lands, should the road be constructed. And so it was that provision was made for issuing patents "confirming to said company the right and title to said lands" after construction. A real necessity would then arise for identifying the lands passing under the grant. This was obviously the purpose of the patents. They were to be in confirmation of the company's "right and title," and so were to be the legally appointed evidence that the lands described in them had passed to the company under the grant.

As it plainly was not intended that patents should issue for excluded lands, to which the company was not to have any right or title, the direction respecting the issue of patents necessarily carried with it the power and the duty of determining in every instance whether the land came within the terms of the grant, or for any reason was ex-

cluded from it, and of giving appropriate effect to the result by granting or refusing a patent. This is the theory upon which the Land Department uniformly has proceeded in the administration and adjustment of this and other railroad land grants, and this court repeatedly has pronounced it the true theory. The departmental view and practice are shown in *Central Pacific Railroad Co.* v. *Valentine,* 11 L. D. 238, where it was said by Secretary Noble (p. 243): "It is not questioned that the Land Department has jurisdiction until patent, or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved, or otherwise disposed of,' or was subject to 'a preëmption or homestead claim,' and therefore excepted from the grant. That such jurisdiction exists, there can be no doubt, and I am unable to perceive upon what principle of logic or process of reasoning it can be claimed that a like jurisdiction does not exist for the purpose of determining whether the lands are mineral, and for that reason, excepted from the grant. Manifestly, the jurisdiction to determine the exception is the same, whether the inquiry is instituted as to the character of the land, or as to its particular status, at the date when the rights of the company attached under the grant." Again (p. 244): "All the lands within the primary limits of a railroad grant do not necessarily pass to the railroad, but only such as are not within the exceptions named in the grant, and the Secretary of the Interior is clothed with the authority of determining in the first instance which lands pass by the grant and which do not pass, and this he does by approving lists for certification or patent." And again (p. 246): "Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to, or for the use of, the railroad company. By reason of this jurisdic-

tion it has been the practice of that Department, for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character, at any time before the date of the patent."

The same subject came before this court in *Barden* v. *Northern Pacific Railroad Co.*, 154 U. S. 288. The case arose under a grant (July 2, 1864, c. 217, 13 Stat. 365) containing an exclusion of mineral lands, provisions for indemnity, and a direction for patents, identical with those now under consideration; the grant being followed by a joint resolution (January 30, 1865, 13 Stat. 567) which, referring to that and other grants made at the same session, declared that none "shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." On the part of the railroad company it was insisted that the conditions existing when the line of railroad was definitely located should be taken as decisive of whether lands were mineral or otherwise in the sense of the mineral-land exclusion, and much apprehension was expressed lest a different ruling would put the matter so at large that a discovery of mineral at any time in the future would defeat titles supposedly complete. By leave of the court, the Solicitor General appeared on behalf of the Government, and took the position shown by the following extract from his brief (154 U. S. 296–298; Brief, pp. 4–7):

"The act itself provides for the issuing of patents to the railroad company, and contemplates therefore that the Secretary of the Interior, prior to such issue, shall determine whether the lands sought to be patented come within the terms of the grant; in other words, whether they are in odd sections, unappropriated, not mineral, etc.

"But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for

lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. The authorities upon this point are cited in Mr. Shields' original brief (pp. 46 to 60).

"The point is also covered by the case of *Davis* v. *Weibbold*, 139 U. S. 507, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the town-site act (Rev. Stat., § 2392) that 'no title shall be acquired to any mine of gold, silver, cinnabar, or copper,' does not apply where the mines were discovered after a patent has been issued.

"Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in *Cowell* v. *Lammers* [21 Fed. Rep. 200, 206]: 'There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent.'

"And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar, while Secretary of the Interior [5 L. D. 194]: 'The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent.'

"And again, page 524: 'The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated.'

"In *Moore* v. *Smaw*, 17 California, 199, it was decided, in the first opinion delivered by Mr. Justice Field as chief justice of the supreme court of California, that the patent of the United States passes title to minerals.

"Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitles the Secretary of the Interior to have the patent canceled, as was done in *Morton* v. *Nebraska*, 21 Wall. 660, and in *The Western Pacific Railroad Company* v. *The United States*, 108 U. S. 510. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals.

"Here, then, is a method of adjusting the company's grant according to the procedure contemplated by the act itself, which protects fully the interests of both the Government and the railroad, and which is in accordance with the practice which has always prevailed in the Department of the Interior." Citing Secretary Noble's decision in *Central Pacific Railroad Co.* v. *Valentine*, *supra*.

The court rejected the contention that the conditions existing at the date of definite location were decisive of whether the land was mineral or non-mineral, and held that the question remained an open one until the issue of a patent. In the latter connection the court referred to prior decisions respecting the power and duty of the Land Department, in issuing patents, to inquire and determine whether the lands are of the class prescribed, whether there are other claims to them, and whether the applicant is entitled to a transfer of the title; reaffirmed its ruling in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640, that a patent not only "operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary

to its issue have been complied with;" and further said (pp. 328, 329):

"If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preëmption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. . . . If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight* v. *Land Association*, 142 U. S. 161, 178, as the 'supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. . . .

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

And then, after quoting approvingly what we have already extracted from Secretary Noble's decision in *Central Pacific Railroad Co.* v. *Valentine*, *supra*, it was added (p. 330): "It is true that the patent has been issued

in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the Government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

Of the decision in that case it was concisely said in *Shaw* v. *Kellogg*, 170 U. S. 312, 339: "It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of

the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Maxwell Land Grant Case*, 121 U. S. 325, 379–381; *Heath* v. *Wallace*, 138 U. S. 573, 585; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 174; *Burfenning* v. *Chicago, &c. Railway Co.*, 163 U. S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it. *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 313; *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 239; *Germania Iron Co.* v. *United States*, 165 U. S. 379; *Duluth & Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587, 590; *Hoofnagle* v. *Anderson*, 7 Wheat. 212, 214–5. In the last case this court said, speaking through Chief Justice Marshall: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. . . . If the patent has been issued irregularly, the Government

may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself." Of the same import are *Cooper* v. *Roberts*, 18 How. 173, 182; *Spencer* v. *Lapsley*, 20 How. 264, 273; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68.

The patent here in question was issued July 10, 1894. Apparently, the Government never brought a bill to have it vacated or annulled, and the time for doing so apparently expired in 1900 or 1901. Acts, March 3, 1891, 26 Stat. 1093, c. 559; March 2, 1896, 29 Stat. 42, c. 39, § 1; *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 450. Apparently, also, the prior mineral claimants never sought to have the patentee declared a trustee for them, for it is admitted that they abandoned their locations. The present mineral claimants, who are assailing the patent, claim under relocations made in March, 1909, more than fourteen years after the date of the patent and eight years after the apparent expiration of the time within which the Government could ask that it be vacated or annulled. Plainly, there is no privity between the earlier and later mineral claimants, for the relocations were not made in furtherance of the prior locations but in hostility to them. See Rev. Stat., § 2324.

But, referring to the clause in the patent, "excluding and excepting all mineral lands should any such be found in the tracts aforesaid," the contention is made, first, that the patent shows that the Land Department did not consider or determine whether the lands were mineral or not, and, second, that all lands embraced in the patent which then had been or thereafter should be discovered to be mineral were expressly excepted from the operation of the patent and therefore remained public lands. This contention must be tested in the light of the established practice in the Land Department in such matters and of the office which the granting act intended the patents to perform. The clause relied upon is not peculiar to this

patent or to those issued under this grant, but appears in all the patents issued from 1866 to 1904 under railroad land grants containing an exclusion of mineral lands. Its first mention in any public document was in the annual report of the Commissioner of the General Land Office for 1868. It was there said (pp. 152–154):

"In every case reported from the district land officers of selections made under the acts of 1862 and 1864, for the Pacific Railroad, the agent of the company in the first instance is required to state in his affidavit that the selections are not interdicted, mineral nor reserved lands, and are of the character contemplated by the grant. Upon the filing of lists with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections in the particulars mentioned, and in other respects. They subsequently undergo scrutiny in this office, are tested by our plats, and by all the data on our files, sufficient time elapsing after the selections are made for the presentation of any objections to the department before final action is taken; and to more effectually guard the matter, there is inserted in all patents issued to said railroad company a clause to the following effect: 'Yet excluding and excepting from the transfer by these presents all mineral lands, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, not extending to coal and iron land.' . . . It has been suggested to this office that the Government should appoint a commission to segregate the mineral from the residue of the public lands; but let anyone consider the vast amount of money expended by practical miners in excavations to test the value of mines, subsequently abandoned as worthless, and some idea may be formed of the time and expense such an undertaking would require, and how little confidence it would be likely to inspire. . . . The regulation of filing affidavits is simply a means of ascertaining the class

to which a particular tract of land may belong, and although it may not be the best that could be devised, it is the only practical mode that has suggested itself to meet the difficulty of disposing of different classes of land mingled together in such a way as to render it frequently impossible to tell, without great labor and expense, whether a particular subdivision belongs to one or the other class."

In addition to what was thus said respecting the affidavits and certificates required and the examination of whatever data were available, regulations were promulgated calling attention, among other things, to the mineral-land exclusion in the grants, directing that the lists be carefully and critically examined by the Register and Receiver and mineral lands be excluded therefrom, and prescribing forms of affidavits and certificates reciting, among other things, that the listed lands were non-mineral and of the character contemplated by the grant.[1] It also appears from the published land decisions that hearings were often had in the local land offices to determine whether lands sought to be listed were mineral or otherwise, and that appeals in such matters were not infrequently heard by the Secretary of the Interior.[2] From all this it is manifest that the excepting clause never was intended to take the place of an inquiry into the character of the land or to dispense with a determination of that question, and that its presence in the patents does not at all signify that no inquiry or determination was had. On the contrary, it appears that it was the accustomed practice to exact proofs respecting the character of the

[1] See 2 Lester's Land Laws, 362–365; 2 Copp's Land Laws, 715, 719, 727; 19 L. D. 21.

[2] See *Central Pacific Railroad Co.*, 8 L. D. 30; *Central Pacific Railroad Co.* v. *Valentine*, 11 L. D. 238; *North Star Mining Co.* v. *Central Pacific Railroad Co.*, 12 L. D. 608; *Southern Pacific Railroad Co.* v. *Allen Gold Mining Co.*, 13 L. D. 165; *California & Oregon Railroad Co.*, 16 L. D. 262; *Barden* v. *Northern Pacific Railroad Co.*, 19 L. D. 188.

land, to give opportunity for contests, and to give effect to whatever information was obtained. At most according to the Commissioner's report, the clause was intended to serve merely as an additional safeguard; and its words suggest that its use was with an eye to future discoveries rather than to existing conditions.

Coming to its effect in a patent, which is of more importance than how it came to be there, we find that this question came before the Land Department in the case of *Samuel W. Spong*, 5 L. D. 193. The tract in question had been patented to the Central Pacific Railroad Company under its grant, the patent containing the excepting clause. Spong applied at the local land office to enter the tract under the mining law, claiming that it was mineral and therefore excepted from the patent. The local officers refused his application, assigning as a reason that the title had passed to the company under the patent, and the Commissioner of the General Land Office affirmed their decision. The matter was then taken before Secretary Lamar, who sustained the decisions below, saying (p. 194): "The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent." Again (p. 195): "In the case of *Deffeback* v. *Hawke* (115 U. S. 393), the court reviewed and commented on the several acts of Congress relative to the disposition of mineral lands, and held that the officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed." And again (p. 196): "While the exception of mineral lands from the grant to said company is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that Congress intended to grant only such lands which may

after the lapse of an indefinite number of years prove to be agricultural in character." The question was also presented in *Courtright* v. *Wisconsin Central Railroad Co.*, 19 L. D. 410. The land involved had been patented under a railroad land grant like that now before us, the patent containing the same exception. Courtright, claiming that the land was mineral, and was known to be such since before the patent, insisted that it remained public land and sought to make entry of it. The local officers held that this could not be done in the presence of the patent, and their ruling was sustained by the Commissioner. On appeal, Secretary Smith affirmed the action of the other officers, saying (p. 413):

"The issuing of patent is a determination by the Department that the lands embraced therein are of the character described in the grant.

* * * * * * * *

"If it was the intention of the officers of the Government to leave as an open question the character of the lands embraced in the patent, then they acted without authority, for when patent issued, that was the end of the jurisdiction of the Department over the lands. The exception contained in the patent went beyond 'giving expression to the intent of the statute,' as construed by the supreme court, and added a restriction upon the grant which is not to be found in the granting act.

"I am therefore of the opinion that the Department has not jurisdiction to determine the character of the land in controversy after issuance of patent. If it be true that the lands in question contain minerals in paying quantities, and that this fact was known to the officers or agents of the company at the date of selection, or date of patent, and they failed to make the fact known to the Department, such conduct was a fraud upon the Government, and the courts can grant relief."

It thus appears that the Land Department has regarded

the issuing of such a patent as a determination of the non-mineral character of the land and as effectually and unconditionally passing the title. There has been no departmental decision to the contrary. Indeed, on December 10, 1903, the Secretary of the Interior directed that the excepting clause be omitted from future patents, because he regarded it as without any warrant in law and void. 32 L. D. 342.

This clause was extensively considered by Circuit Judge Sawyer in *Cowell* v. *Lammers*, 21 Fed. Rep. 200. The patent in that case had been issued under the Central Pacific grant. The suit was to enjoin a trespass in the nature of waste, the complainant being the grantee of the railroad company and the defendant a miner who had located part of the patented tract as a lode mining claim. He had applied to the Land Department to enter the claim under the mining law, and his application had been rejected because the patent was outstanding. In granting the injunction the court said (p. 206): "The lands are either patentable under the act or they are not. If patentable, the issue of a patent is authorized. If not patentable, it is unauthorized, and the issue of a patent is, clearly, as conclusive evidence of the determination of the fact of patentability, upon a collateral attack, in the one case as in the other. Suppose it should afterwards turn out that all is mineral land. The exception would be as broad as the grant, and be void as an exception. Is it any the less so, in this class of cases, as to a part? . . . There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent." Again (p. 208): "A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant [patent] itself whether anything is granted or not, and, if anything be granted, what

it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."

In principle, the effect of the excepting clause in the patent is not an open one, under the decisions of this court. It is foreclosed by what has been held upon full consideration. In *Deffeback* v. *Hawke,* 115 U. S. 392, where was involved the right to certain valuable townsite improvements upon land patented as a placer mining claim, the contention was advanced that as the owner of the improvements was the prior occupant the patent should have contained a reservation excluding them and all rights necessary to their enjoyment from its operation, but the contention was declared untenable, the court saying (p. 406): "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed." The case of *Davis* v. *Weibbold,* 139 U. S. 507, directly involved the validity of a clause in a townsite patent declaring that no title should be thereby "acquired to any mine of gold, silver, cinnabar or copper." By the mining laws mineral lands were withdrawn from disposal under other laws and the townsite law specially declared that no title to any mine of gold, silver, cinnabar, or copper should be acquired under its provisions. The defendant claimed under the townsite patent and a deed of release and quit-claim from the probate judge, who was the townsite trustee, and the plaintiff claimed under a later patent for a mining claim located upon part of the townsite and based upon an actual discovery of a valuable vein of gold after the issue of the townsite patent.

The decision and the reasons for it are fully comprehended in the following extracts from the opinion:

(p. 519) "The exceptions of mineral lands from preemption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditures for its extraction, and known to be so at the date of the grant." (As shown in *Barden* v. *Northern Pacific Railroad Co.*, [19 L. D. 188] the word "grant" here means the patent and not the act making the grant.)

(p. 524) "It would seem from this uniform construction of that Department [1] of the Government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant [patent] known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in *Deffeback* v. *Hawke*, already referred to, and in the cases of the *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 328, and *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 683."

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[1] The reference is to several Land Department decisions cited and reviewed in that opinion.

(p. 525) "It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of Congress, or that any construction should be given to the provision in question which could lead to such results."

(p. 527–8) "But we do not attach any importance to the exception, for the officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers. *Deffeback* v. *Hawke*, 115 U. S. 392, 406. . . . The laws of Congress provide that valuable mineral deposits in lands of the United States shall be open to exploration and purchase. They do not provide, and never have provided, that such mineral deposits in lands which have ceased to be public, and become the property of

private individuals, can be patented under any proceedings before the Land Department, or otherwise."

The case of *Shaw* v. *Kellogg*, 170 U. S. 312, related to a claim or right, conferred by statute, entitling its owner to select in a body about 100,000 acres "of vacant land, not mineral," in New Mexico, it being the duty of the Surveyor General "to make survey and location of the lands so selected," and this action being subject to the supervision of the Commissioner of the General Land Office. The owner of the right having made the selection, applied to the surveyor general in 1862 for the survey and location of the tract, and that officer reported the application to the Commissioner, saying in that connection that he had theretofore been informed that the purpose of the owner was to make such a selection as "would cover rich minerals in the mountains." The Commissioner replied that it was essential to the approval of the application by him that "it be accompanied by the certificates of the surveyor general and the register and receiver that the land selected is vacant and not mineral." Such certificates were furnished, but the Commissioner hesitated to act upon them because they were not based upon personal knowledge, but information informally elicited from others, the lands being remote and in an unsurveyed region. Finally, the Commissioner concluded that "the difficulty" could "be avoided" by directing the Surveyor General to proceed and in approving the survey to add to his certificate of approval "the special reservation stipulated by the statute, but not to embrace mineral land." Being instructed accordingly, the Surveyor General, after the field notes and plat of the survey were completed, endorsed upon the field notes a mere approval and upon the plat an approval qualified by the words "subject to the conditions and limitations" of the statute, naming it. The field notes and plat were then forwarded to and accepted by the Commis-

sioner. No patent was issued, the approved survey taking the place of one under the statute. A few years later, when inquiries were made respecting the right of prospectors to take advantage of mineral discoveries in the tract, the Commissioner took the position that the approval of the survey operated as a determination that the land was of the class and character designated in the act; that the title had passed from the Government, and that, notwithstanding the apparently conditional approval, the Land Department was without authority to reopen the question of the character of the land. The case, as presented to this court, involved the possession of a mine located within the tract after the approval of the survey. The plaintiff claimed under the selection of 1862 and the defendant under the mining laws, the controversy turning upon the effect to be given to the condition in the approval of the survey. In disposing of that question the court reaffirmed and applied its rulings in *Deffeback* v. *Hawke*, and *Barden* v. *Northern Pacific Railroad Co.*, *supra*, and said (p. 337):

"What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was an agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the Surveyor General to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Un-

doubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, preëmption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether."

(p. 341) "But, it is said, no patent was issued in this case, and therefore the holding in the *Barden Case*, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word 'patent,' or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued."

(p. 343) "While the approval entered upon the plat by the Surveyor General under the direction of the Land Department was in terms 'subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860,' such limitation was beyond the power of executive officers to impose."

According to the statute relating to placer mining claims

the patent, save in an instance not material here, should contain an exception of any vein or lode *known* to exist within the boundaries of the claim *at the date of the application for patent*, but in the early patents the exception was so stated that it embraced any vein or lode *claimed or known* to exist *at the date of the patent*. The change was a material one, not only because of the difference between "claimed" and "known" but also because a year or so sometimes elapsed between the date of the application and that of the patent, and in the meantime a vein or lode might be discovered within the boundaries of the placer claim. Ultimately cases presenting the question of the effect of the exception as stated in the patents came before this court, and it was held that "the exception of the statute cannot be extended by those whose duty it is to supervise the issuing of the patent." *Sullivan* v. *Iron Silver Mining Co.*, 143 U. S. 431, 441, and cases cited.

These decisions are applicable and controlling here. The reasoning upon which they proceed compels their reaffirmance, and, besides, they have come to be recognized as establishing a rule of property. Not only has the Land Department accepted them as determinative of the invalidity of the excepting clause now before us, but innumerable titles within the limits of the western railroad land grants have been acquired with a like understanding and are now held in the justifiable belief that they are impregnable.

We come now to a contention which seeks to distinguish patents under this grant from those under other railroad grants. It is that the insertion of the excepting clause in the former was expressly authorized by Congress. Evidently this has not been the view of the Land Department. It not only began to use the clause before this grant was made, but used it in all patents of this class; and when, in December, 1903, its use was discontinued, the order embraced this grant along with the others. But passing

this as suggestive but not controlling, we turn to the joint resolution of June 28, 1870, upon which the contention is rested. Its chief purpose was to sanction a route which the Secretary of the Interior had disapproved. *Southern Pacific Railroad Co.* v. *United States*, 183 U. S. 519, 523. It reads as follows (16 Stat. 382, * No. 87):

"That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

It will be observed that there is no direct mention of mineral lands, nor any indirect reference to them save such as is involved in the general mention of the "conditions and restrictions" of § 3 of the granting act.

As stated in one of the briefs, the contention is this: "The resolution provided in express terms that these

patents should cover all of the lands coterminous with the constructed sections of the railroad, and in effect provided that the patents should save and reserve the lands excepted by the provisions of section 3 of the original granting act, which included the exception of mineral lands." In other words, it is meant that the resolution required that all the odd-numbered sections within the primary limits of the grant and coterminous with the constructed road should be patented to the railroad company without any inquiry or investigation to determine which of those sections were sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of at the date of definite location, or were mineral, and that a general exception conforming to that in the granting act was to be inserted in the patents. This would mean that lands already sold were to be patented to the company, that reserved lands were to be patented to it, and that lands occupied by homestead settlers or preëmpted were to be dealt with in the same way; in short, that the grant, instead of being administered and adjusted in an orderly way by the officers customarily charged with that duty and in possession of the records and data without which little could be done, was to be administered and adjusted in the courts through the ordinary channels of litigation. Manifestly, that is not what Congress contemplated. It did not intend that the company's title should be so uncertain, and clearly it did not intend that the title to lands already sold or those reserved should be thus beclouded or that homesteaders and preëmptioners should be placed in a situation which would be so embarrassing and discouraging to them. What would become of the indemnity provisions under that theory? Certainly, it was not intended that the company should receive a patent for lands in the place limits and also indemnity for the same lands. We think there is a more reasonable view of the provision in the resolution than the one suggested. Omit-

ting its saving clause, the provision is not materially different from § 4 of the original act, being the section providing for patents. As already said, the chief purpose of the resolution was to sanction a route—the one indicated on the map mentioned. The Secretary of the Interior had disapproved it because not within prior authorization. If it was to be approved it was but reasonable that the existing right to the patents should be applied to it. This evidently is what was intended. Another matter also claimed consideration. Three years had passed since the filing of the map, and in the meantime the situation had been complicated by a withdrawal of the adjacent lands, a revocation of the withdrawal and a suspension of the revoking order. The validity of the route shown on the map and of the withdrawal had been the subject of differing opinions, and some of the lands had come to be occupied by settlers, whose status was uncertain in view of the withdrawal. See 16 Op. A. G. 80. As reported to the Senate by one of its committees, the resolution was in its present form without the saving clause. That was added when the resolution was under consideration.[1] Without it the resolution had two purposes, one to sanction the route which had been pronounced unauthorized, and the other to make secure the right to patents along that route. What was the purpose of the saving clause? Its words and the situation just mentioned leave no doubt that one purpose was to take care of the actual settlers then on the lands. Another, equally plain, was to require that the conditions and restrictions, that is, the exclusions and exceptions, of § 3 (the granting section) of the original act be applied to that route. But how were these purposes to be accomplished? Was it to be by patenting all the lands to the railroad company, even those occupied by

[1] Congressional Globe, 41st Cong., 2d Sess., parts 4 and 5, pp. 3349–3351, 3828–3830, 3950–3953.

actual settlers, and inserting saving clauses in the patents? Or was it to be by giving effect to the rights of the settlers and to the exclusions and exceptions in the normal and rational way, that is, by patenting to the company no lands occupied by actual settlers or otherwise excluded or excepted from the grant? The latter seems to us the only admissible conclusion.[1]

Lastly, it is urged that the railroad company accepted the patent with the mineral-land exception therein and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement upon the subject. They are not principals but agents of the law, and must heed only its will. *Deffeback* v. *Hawke*, 115 U. S. 392, 406; *Davis* v. *Wiebbold*, 139 U. S. 507, 527; *Shaw* v. *Kellogg*, 170 U. S. 312, 337, 343. Nor can they indirectly give effect to what is unauthorized when done directly. Of course, if they enter into any forbidden arrangement whereby public land is transferred to one not entitled to it the patent may be annulled at the suit of the Government, but they cannot alter the effect which the law gives to a patent while it is outstanding.

Taking up the several questions in the light of what we have here said, we answer them as follows:

1. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to

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[1] See *Tome* v. *Southern Pacific R. R. Co.*, 5 Copp's L. O. 85; *Southern Pacific R. R. Co.* v. *Rahall*, 3 L. D. 321.

be such at or prior to the date of the patent of July 10, 1894?

Answer.—Mineral lands, known to be such at or prior to the issue of patent, were not included in the grant but excluded from it, and the duty of determining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents.

2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so, but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes the title (*Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 174–175), subject to the right of the Government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. *McLaughlin* v. *United States*, 107 U. S. 526; *Western Pacific Railroad Co.* v. *United States*, 108 U. S. 510.

3. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Answer.—The mineral land exception in the patent is void.

4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

Answer.—It is conclusive upon a collateral attack.

5. Is petroleum or mineral oil within the meaning of the term "mineral" as it was used in said acts of Congress reserving mineral land from the railroad land grants?

Answer.—Petroleum lands are mineral lands within the meaning of that term in railroad land grants.

6. Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Answer.—It does.

7. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Answer.—No; such an agreement is of no greater force as an estoppel than the exception in the patent. The latter being void, the patent passes the title and is not open to collateral attack or to attack by strangers whose only claim was initiated after the issue of the patent.

HULL *v.* BURR.

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

No. 767. Argued March 3, 1914.—Decided June 22, 1914.

A suit does not arise under the laws of the United States unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of some law of the United States upon the determination of which the case depends and so appears not by mere inference but by distinct averments according to rules of good pleading.

In this case, *held* that a suit to restrain trustees in bankruptcy from prosecuting an equity suit against complainants in the state court on the ground that the bankruptcy proceedings were a fraud and that the appointment of the trustees was void was one arising under the laws of the United States within the meaning of § 24, Judicial Code, and the decision of the Circuit Court of Appeals is not final.

Although there may be a general prayer for relief, if no relief other than injunction against prosecution of a suit in the state court is brought to the attention of either the District Court or the Circuit Court of Appeals, the general prayer should be treated as abandoned.

The prohibition, § 720, Rev. Stat., now § 265, Judicial Code, against granting the writ of injunction by the Federal court to stay proceedings in a state court except where authorized by the Bankruptcy Act, *held*, in this case, to apply to a case commenced after adjudication of bankruptcy to enjoin the trustee from prosecuting a suit in ejectment, in the courts of the State where the land is situated. Such a case is not within the exception or in aid of the bankruptcy proceeding.

206 Fed. Rep. 4; 207 Fed. Rep. 543, affirmed.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals and also the construction and application of § 265, Judicial Code (§ 720, Rev. Stat.), are stated in the opinion.

Mr. George C. Bedell, with whom *Mr. H. Bisbee* was on the brief, for appellants.

Mr. Frank L. Simpson, with whom *Mr. E. R. Gunby* and *Mr. James F. Glen* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

The appellants, Joseph Hull, The Prairie Pebble Phosphate Company (hereinafter referred to as the Prairie Company), and the Savannah Trust Company, brought this action in equity in the District Court of the United States for the District of Massachusetts against appellees, Arthur E. Burr, Frank L. Simpson, and J. Howard Edwards, who are trustees in bankruptcy of the Port Tampa Phosphate Company, a corporation organized and existing under the laws of the State of Massachusetts. The bill was filed in August, 1912, and, defendants having demurred, an amended bill was filed, and it was stipulated that the demurrer should stand as a demurrer to the substituted bill. The District Court entered a decree sustaining the demurrer and dismissing the bill (206 Fed. Rep. 1). The Circuit Court of Appeals affirmed the decree (206 Fed. Rep. 4), and denied a petition for rehearing (207 Fed. Rep. 543).

The amended bill, besides showing diversity of citizenship, avers in substance as follows: That prior to the transactions in question, Stewart and Meminger were the owners in fee simple of a tract of land in Polk County, Florida, containing 440 acres, together with certain buildings and personal property situate upon it; that on May 22, 1905, in consummation of a prior contract, they conveyed all their right, title, and interest in the property to Hull by deed duly recorded, which vested in him a good legal title in fee simple to the real estate, with full title to the personal property and the right to possession as against all persons, "and his recorded paper title to all the said properties was perfect;" that before the delivery of the deed by Stewart and Meminger to Hull the Port Tampa

Company claimed to own some equitable interest in the property, under a contract between it and Stewart and Meminger, which interest Hull purchased for a full consideration, and before the delivery of said deed to Hull the Port Tampa Company adopted and placed upon its records a resolution reciting its agreement to sell the property to Hull, and authorizing and directing Stewart and Meminger to make a deed to him; that soon after the delivery of the deed Hull took possession; that on June 7, 1907, he executed and delivered to the Prairie Company a deed of conveyance of all his right, title, and interest in said properties for the consideration of about $37,000, which deed was shortly afterwards recorded, and the Prairie Company took actual and peaceable possession of the property and has continued to hold it until the present time, having made valuable improvements upon it; that afterwards, and prior to March 26, 1908, the Prairie Company executed and delivered to the Trust Company a deed of trust conveying its right, title, and interest in said properties, together with other properties, to secure the payment of bonds amounting to about $1,800,000, and the deed of trust was duly recorded; that it came to the knowledge of Hull that certain creditors of the Port Tampa Company had asserted that the company owned some interest in said properties, and on the twenty-eighth of November, 1905, he commenced an action of ejectment against that company in the United States Circuit Court for the Southern District of Florida, being the district in which the property was situate; that the company was served with process therein on December 6, 1905, and such further proceedings were had that on March 13, 1906, upon the verdict of a jury, a judgment was rendered adjudging that Hull was entitled to recover from the Port Tampa Company the fee simple title and right of possession of the lands in question. The bill sets up that on November 8, 1905, a petition in bank-

ruptcy was filed against the Port Tampa Company "in this court of bankruptcy" [the District Court of the United States for the District of Massachusetts]; that a subpœna was issued thereon returnable on the twentieth day of the same month, and returned served, and that on the return-day an appearance was entered for the company by one J. H. Robinson. Copies of the creditors' petition, the subpœna, and the appearance are appended to the bill as an exhibit. The bill alleges that defendants assert that by virtue of a decree in bankruptcy made in said District Court on November 27, 1905, adjudging the Port Tampa Company bankrupt, they are the owners of an equitable interest or estate in the said lands and other properties, and that the defendant Burr was, on December 27, 1905, appointed sole trustee in bankruptcy of the company; that he resigned as such trustee on March 12, 1909, and on the same day his resignation was accepted, and Burr, Simpson, and Edwards were appointed trustees in his place; and that defendants claim that by the adjudication in bankruptcy and their appointment the title to an interest or estate in said lands became vested in them as such trustees; that on or about March 26, 1908, and before he resigned as trustee, Burr brought a suit by bill in equity in the circuit court in and for Polk County, Florida, against complainants, to establish such interest or estate, but there has been no trial of this suit on the merits, nor had the same been brought to final issues of fact and law before Burr's resignation; that on January 9, 1912, the defendants filed in said state court a supplemental bill of complaint, wherein they averred that said suit was brought by Burr as trustee in bankruptcy, and that Burr resigned as such trustee on March 12, 1909, and prayed that they might be substituted as complainants in his place; that the present complainants filed an answer to the said supplemental bill, but that the issues have not been tried, and no decree has been rendered mak-

ing the defendants as trustees complainants in said suit. The present bill then proceeds to attack the proceedings and adjudication in bankruptcy, and the title of the defendants as trustees, as fraudulent and void upon various grounds, which may be summarized as follows: That the Port Tampa Company's principal place of business was not in Massachusetts, as alleged in the petition, and that it had no business except in Florida; that it was not insolvent, and did not commit the act of bankruptcy alleged, or any act of bankruptcy; that the petitioning creditors were directors of the company and knew the company was solvent and had committed no act of bankruptcy; that the jurisdictional facts were falsely and fraudulently averred, being fabricated for the purpose of pretending to state a cause within the jurisdiction of the court; that the petitioning creditors controlled both sides of the litigation through their ownership of a majority of the company's stock; that Robinson, who entered the appearance in behalf of the Port Tampa Company, was not in fact authorized to appear for or represent the company; and that the petition was fraudulently made to appear as an involuntary petition by creditors, whereas in truth and in legal effect it was a voluntary petition on the part of the company and its officers and directors. It is also alleged that the appointment of defendants as trustees in the place of Burr on March 12, 1909, was invalid, because no judge or referee appointed them, their claim being that in fact they were appointed trustees at a meeting of creditors, whereas complainants allege that the pretended call by the referee for the meeting of creditors was issued at a time when there was no vacancy in the office of trustee; that ten days' notice of the meeting was not given by mail to all the creditors as required by law; that the only creditor who attended the meeting was one Wills, a director of the company, and that there were ten other creditors who had proven claims; that Wills did

not own a *bona fide* provable claim to the amount of one-half of the claims that had been proven; and that the appointment of defendants as trustees was made by Wills alone. Complainants insist that there was no power or jurisdiction in any creditor or creditors to appoint defendants as trustees on March 12, 1909, because at that time there was no vacancy in the office of trustee, since Burr had not then resigned and his resignation had not been accepted by the court. The bill further avers that in their answer to the supplemental bill in the equity suit in the circuit court of Polk County, Florida, the present complainants set up the defense of "want of jurisdiction of the said court of bankruptcy to render any decree of adjudication, and that such alleged decree was void on the face of the said proceedings"; that this part of the answer was excepted to and the exceptions sustained by the order of the Polk County circuit court; that on appeal, the Florida Supreme Court affirmed this order on July 3, 1912, ruling that all such defenses were collateral attacks upon the bankruptcy proceedings, which were not permissible, the ruling being expressed in the following words: "The assaults made upon the bankruptcy proceedings in the Federal Court of Massachusetts by the answer of the appellants to the supplemental bill of the appellees in the particulars wherein said answer was excepted to by the appellees is simply a collateral attack upon the judgments, orders and proceedings in said bankruptcy court that is not permissible either by way of defence to the supplemental bill or to the original bill as amended;" that by reason of the said judgment of the Florida courts the present complainants cannot by way of defense to the bills of complaint in those courts "have and obtain that speedy, adequate and appropriate relief that this court is competent to render upon this original bill of complaint; and your orators fear that the Florida courts will decline to adjudicate as to the character

and title of the defendants as trustees and their competency to attack your orators' title to said properties, as herein set forth, upon any answer to the said bills in the said state court." The present amended bill further sets up that "Upon the facts hereinbefore set forth, which are conclusively provable to be true by the record of the proceedings of the said court of bankruptcy, if the said Port Tampa Company had any title to any of the aforesaid properties, legal or equitable, at the time of the said alleged decree of adjudication, such title still remains in the said company; that your orators are still liable to be sued by the said company in any court of competent jurisdiction to assert such title, and that a final decree in the Florida state court for or against the defendants as such alleged trustees would not be pleadable in bar of a suit by the said company against your orators to assert such title." The specific prayer is for a decree to restrain defendants "from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title or interest in or to any of the properties herein described until the further decree of this court." There is also a prayer for general relief. Appended as exhibits and made a part of the bill are the copies of the petition, subpœna, return, and appearance in the bankruptcy proceedings, already mentioned, and a transcript of the record of the ejectment suit in the United States Circuit Court for the Southern District of Florida.

The District Court, in sustaining the demurrer, held that since upon the face of the bankruptcy proceedings there was no want of jurisdiction over the parties or the subject-matter, and the decree was not void in form, it could not be collaterally attacked, and could be assailed only by a direct proceeding in a competent court; citing *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, 662; *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 178. Treating the present suit as a direct at-

tack, the court held, first, that no right or interest of complainants appeared to be so prejudiced by the adjudication in bankruptcy as to entitle them to equitable relief against it; that the adjudication concerned only the bankrupt and its creditors, since it made no difference to complainants whether the claim to the Florida properties was asserted by the bankrupt itself or by its trustees; that the allegation that a final decree in the Florida suit would not bar an action brought by the company itself was a mere conclusion of law, not admitted by the demurrer, and an unsound conclusion in view of the facts alleged; that, the adjudication not having been questioned by the bankrupt or its creditors, they were bound by it, and by virtue of it the trustees were in the bankrupt's place so far as concerned any claim that it could assert to the Florida properties. And, secondly, that there was a defect of necessary parties, because the only defendants named in the bill were the bankruptcy trustees, respecting whom it was not alleged that they were parties to the bankruptcy proceedings, nor that they participated in the fraud whereby the adjudication was alleged to have been procured.

The Circuit Court of Appeals, while agreeing with this reasoning, placed its decision upon the ground that complainants were invoking not the powers of the District Court in bankruptcy, but its general powers as a court in equity; that it also appeared that the proceedings in Florida were insituted by a bill in equity with the parties reversed; that the Florida court was a chancery court and a court of superior jurisdiction in equity, and for present purposes of equal dignity and authority with the District Court of the United States for the District of Massachusetts; that the bill in substance merely invoked the general equitable jurisdiction of the District Court in order to restrain proceedings in a state court proceeding in equity in a prior suit between the same parties; and that this ran

counter to § 720, Rev. Stat. (§ 265, Jud. Code, 36 Stat. 1162, c. 231), as well as to the general principle that the authority of the court first acquiring jurisdiction, the parties being the same, must prevail; citing *Marshall* v. *Holmes*, 141 U. S. 589, 596; and *Central National Bank* v. *Stevens*, 169 U. S. 432, 462.

There is a motion to dismiss the appeal, based upon the ground that the jurisdiction of the District Court depended solely upon diversity of citizenship, and that therefore the decree of the Circuit Court of Appeals is final, under § 128, Judicial Code (36 Stat. 1133, c. 231). The motion must be granted unless the suit was one arising under the laws of the United States, within the meaning of the first subdivision of § 24 of the Code. The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal law. *Hanford* v. *Davies*, 163 U. S. 273, 279; *Mountain View Mining & Milling Co.* v. *McFadden*, 180 U. S. 533, 535; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Arbuckle* v. *Blackburn*, 191 U. S. 405, 413; *Bankers Casualty Co.* v. *Minneapolis &c. Ry. Co.*, 192 U. S. 371, 383; *Shulthis* v. *McDougal*, 225 U. S. 561, 569.

We have not considered whether the action could be regarded as ancillary to the proceedings in bankruptcy, and for that reason maintainable in the District Court as a suit arising under the laws of the United States (see *Freeman* v. *Howe*, 24 How. 450, 460; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633; *Buck* v. *Colbath*, 3 Wall. 334,

345; *Christmas* v. *Russell*, 14 Wall. 69, 81; *Krippendorf* v. *Hyde*, 110 U. S. 276, 281; *Lammon* v. *Feusier*, 111 U. S. 17, 19; *Covell* v. *Heyman*, 111 U. S. 176, 179, 180; *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, 333; *Gumbel* v. *Pitkin*, 124 U. S. 131, 144; *Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171, 201; *Byers* v. *McAuley*, 149 U. S. 608, 615; *Root* v. *Woolworth*, 150 U. S. 401, 413; *Moran* v. *Sturges*, 154 U. S. 256, 274; *White* v. *Ewing*, 159 U. S. 36, 39; *Carey* v. *Houston & Texas Ry.*, 161 U. S. 115, 130; *In re Johnson*, 167 U. S. 120, 125; *Pope* v. *Louisville &c. Ry.*, 173 U. S. 573, 577; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54), because complainants have not planted themselves upon that ground.

Complainants are not parties to the proceeding in bankruptcy, and are setting up rights in opposition to the adjudication and the appointment of trustees therein. They seek to have the trustees restrained from prosecuting the equity suit against them in the state court of Florida, and to that end undertake to show (a) that the bankruptcy proceedings were void for want of jurisdiction; (b) that the entire proceedings were a fraud upon the Bankrupt Act; and (c) that, even if the proceedings were valid, the appointment of the trustees was void. This is the theory of the bill of complaint, and it is by this that the right of ultimate appeal to this court is to be tested, rather than by the grounds upon which the District Court and the Circuit Court of Appeals reached conclusions adverse to the relief prayed. Were the views adopted by those courts found to be untenable, it would be necessary to pass upon the attack made by complainants upon the title of the trustees in bankruptcy; and to do this would require us to determine the construction and effect of those provisions of the Bankruptcy Act that bear upon the matters of fact averred as the basis of the attack. We deem, therefore, that the suit is one arising under the laws of the United States, within the meaning of

§ 24, Judicial Code, and the motion to dismiss will be denied.

Upon the merits, we find it unnecessary to consider the views expressed by the District Court, since it seems to us that the view of the Circuit Court of Appeals as to the effect of § 720, Rev. Stat., is correct, and is sufficient to dispose of the case.

The substance of the matter is that complainants allege that they are the owners of certain property in Florida in which defendants, as trustees in bankruptcy of the Port Tampa Company, assert an equitable claim or interest, to establish which they are prosecuting or attempting to prosecute an equitable action in a Florida state court against complainants. The latter aver that because of fraud, or for other reasons, the proceedings and adjudication in bankruptcy and the appointment of defendants as trustees are invalid, and that for this reason any decree that may be made by the Florida state court will not be binding upon the Port Tampa Company. As already mentioned, the specific prayer is that defendants may be restrained from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title or interest in the property. There is a prayer for general relief, but it was pointed out by the Circuit Court of Appeals (207 Fed. Rep. 543, 544) that no right to relief other than by way of an injunction was brought to the attention of the District Court or of the Court of Appeals upon the hearing. The general prayer should therefore be treated as abandoned.

So far as the action already pending in the Florida court of equity is concerned, the case is clearly within § 720, Rev. Stat. (§ 265, Judicial Code, 36 Stat. 1162, c. 231): "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bank-

ruptcy." The latter clause formerly had reference to § 5106, Rev. Stat. (§ 21 of the Bankruptcy Act of March 2, 1867, 14 Stat. 517, 526, c. 176); in the place of which we now have § 11 and sub-divisions 7 and 15 of § 2 of the Bankruptcy Act of July 1, 1898 (30 Stat. 544, 546, 549, c. 541). It is quite evident that the injunction sought by the present complainants is not one authorized by the Bankruptcy Act.

The prohibition against injunctions to stay proceedings in state courts originated in the act of March 2, 1793 (c. 22, § 5, 1 Stat. 333, 335), and has been constantly observed by the courts. See *Diggs* v. *Wolcott*, 4 Cranch, 179; *Peck* v. *Jenness*, 7 How. 612, 625; *Watson* v. *Jones*, 13 Wall. 679, 719; *Haines* v. *Carpenter*, 91 U. S. 254, 257; *Dial* v. *Reynolds*, 96 U. S. 340; *Chapman* v. *Brewer*, 114 U. S. 158, 172; *United States* v. *Parkhurst-Davis Co.*, 176 U. S. 317, 320; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 338; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.

It is recognized, however, that § 720 was not intended to limit the power of the Federal courts to enforce their authority in cases that on other grounds are within their proper jurisdiction; and hence, it has been held that, in aid of its jurisdiction properly acquired, and in order to render its judgments and decrees effectual, a Federal court may restrain proceedings in a state court which would have the effect of defeating or impairing such jurisdiction. *French, Trustee*, v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245.

The contention that the present case falls within this exception to the general application of § 720, because the bill is really filed in aid of the judgment of a Federal court, that is to say, the judgment in favor of Hull in the ejectment suit in the Circuit Court of the United States for

the Southern District of Florida, will not bear analysis. The ejectment suit was commenced after the adjudication of bankruptcy, and the bill does not aver that the judgment cut off the equitable rights of the Port Tampa Company, but on the contrary declares that if that company had any title to the property, legal or equitable, at the time of the adjudication of bankruptcy, such title still remains in the company. It is not averred that the claim of equitable right on the part of the company is inconsistent with the judgment, or should be subordinated to it. The present trustees, or either of them, were not made parties to the ejectment suit, nor is the company made a party to the present action. And, upon the whole, it seems to us that by no interpretation or construction can the present bill be deemed to have been filed in aid of the judgment in ejectment, or be sustained upon that theory.

It is argued that the bill cannot be deemed to have as its object the staying of a pending suit in the state court, because that action abated upon Burr's resignation as trustee, and no further proceeding can be had until his successors have been made parties. To this point a decision of the Florida Supreme Court in the very action is cited; *Hull* v. *Burr*, 62 Florida, 499. We do not interpret this decision as sustaining the contention, and in a subsequent stage of the same litigation (64 Florida, 83), the court distinctly held that the action did not abate on the resignation of Burr, but might be proceeded with by his successors when appointed, the same as if originally instituted by them; and that a supplemental bill was the proper procedure to have such successors formally brought into the case as parties. Indeed, it is only upon the theory that defendants are prosecuting that suit that the complainants show ground for an injunction against them.

To the suggestion that the term "any court," in the bill of complaint, may include other Federal courts, it is

sufficient to say that the bill is devoid of any showing that defendants are asserting claims against complainants' title in any court other than the Florida state court. Hence there is no occasion to invoke the general rule that the court first obtaining jurisdiction of a controversy should be permitted to proceed without interference. *Peck* v. *Jenness*, 7 How. 612, 624; *Central National Bank* v. *Stevens*, 169 U. S. 432, 459; *Bigelow* v. *Old Dominion Copper Co.*, 74 N. J. Eq. 457, 473, *et seq.*

We deem that the main object of the bill, to which all else is incidental, is in contravention of § 265 of the Judicial Code (formerly § 720 of the Revised Statutes), and that therefore the decree should be

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* CROCKETT.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 826. Submitted April 16, 1914.—Decided June 22, 1914.

Motion to dismiss a writ of error to the state court to review a judgment in an action under the Employers' Liability Act in which the construction of the Safety Appliance Acts was involved, denied.

By the Employers' Liability Act the defense of assumption of risk remains as at common law, save in those cases mentioned in § 4 where the violation by the carrier of any statute enacted for the safety of employés contributed to the accident.

This court has heretofore construed the letter of the Safety Appliance Act in the light of its spirit and purpose as indicated by the title no less than by the enacting clauses and that guiding principle should be adhered to.

Although the original Safety Appliance Act may not have applied to vehicles other than freight cars, the amendment of 1903 so broadened its scope as to make its provisions, including those respecting

height of draw-bars, applicable to locomotives other than those that are excepted in terms.

By the amendment of 1903 to the Safety Appliance Act the standard height of draw-bars was made applicable to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles, including locomotives, used in connection with them so far as the respective safety devices and standards are capable of being installed upon the respective vehicles. *Chicago &c. Ry. Co.* v. *United States*, 196 Fed. Rep. 882, approved.

THE facts, which involve the construction and application of the provisions of the Safety Appliance Acts and of the Employers' Liability Act, are stated in the opinion.

Mr. L. E. Jeffries and *Mr. L. D. Smith* for plaintiff in error:

The Safety Appliance Act did not require a draw-bar thirty-one and one-half inches high. A switch-engine is not a freight car. The words "all cars" in § 2 are not applicable to height of draw-bars. The effect of the act of 1893, and the effect of the amendment of 1903 were misconceived by the Circuit Court of Appeals.

The defendant in error assumed the risk: such was the common-law rule and that doctrine was not abolished by the Federal Employers' Liability Act.

In support of these contentions, see *American R. R. Co.* v. *Birch*, 224 U. S. 544; *Baker* v. *Kansas City &c.*, 129 Pac. Rep. 1151; *Bowers* v. *Southern Ry. Co.*, 73 S. E. Rep. 679; *Burns* v. *Delaware Tel. Co.*, 7 N. J. L. 745; *California Bank* v. *Kennedy*, 167 U. S. 362; *Central Vt. Ry. Co.* v. *Bethune*, 206 Fed. Rep. 868; *Choctaw, O. & G. R. Co.* v. *McDade*, 191 U. S. 64; *Cleveland &c. Ry.* v. *Bassert*, 87 N. E. Rep. 158; *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Eau Claire Bank* v. *Jackman*, 204 U. S. 522; *Employers' Liability Cases*, 223 U. S. 6; *Freeman* v. *Powell*, 114 S. W. Rep. 1033; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94; *Gulf &c. Ry.* v. *McGinnis*, 228 U. S. 173; *Hammond* v. *Whitt-*

redge, 204 U. S. 538; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514; *Johnson* v. *Railroad Co.*, 196 U. S. 1; *Kan. City Sou. Ry. Co.* v. *Albers Com. Co.*, 223 U. S. 573; *Kizer* v. *Texarkana Ry. Co.*, 179 U. S. 199; *Louis. & Nash. R. R. Co.* v. *Lankford*, 209 Fed. Rep. 321; *McCormick* v. *Market Bank*, 165 U. S. 538; *Mich. Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 59; *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1; *Neil* v. *Idaho*, 125 Pac. Rep. 331; *Neilson* v. *Lagow*, 12 How. 98; *Nutt* v. *Knut*, 200 U. S. 12; *Pennell* v. *Phila. & R. Ry. Co.*, 231 U. S. 675; *Rector* v. *City Deposit Bank Co.*, 200 U. S. 405; *St. L., I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281; *St. L., I. M. & S. R. Co.* v. *McWhirter*, 229 U. S. 275; *St. L., S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 220 U. S. 590; *Seaboard Air Line* v. *Duvall*, 225 U. S. 477; *Seaboard Air Line* v. *Moore*, 228 U. S. 433; *Southern Ry. Co.* v. *Gadd*, 207 Fed. Rep. 277; *Swafford* v. *Templeton*, 185 U. S. 487; *Tex. & Pac. Ry. Co.* v. *Archibald*, 170 U. S. 665; *Tex. & Pac. Ry. Co.* v. *Swearingen*, 196 U. S. 51; *Un. Pac. R. R. Co.* v. *O'Brien*, 161 U. S. 451; *Un. Pac. R. R. Co.* v. *Fuller*, 202 Fed. Rep. 45; *Worthington* v. *Elmer*, 207 Fed. Rep. 306.

Mr. J. A. Fowler, *Mr. A. C. Grimm* and *Mr. H. G. Fowler* for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

Crockett, the defendant in error, brought this action in the Circuit Court of Knox County, Tennessee, to recover damages for personal injuries sustained by him while in the employ of the Railway Company. The action was based upon the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, in connection with the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat.

531, and the amendments of 1896 and 1903, c. 87, 29 Stat. 85; c. 976, 32 Stat. 943. He recovered a judgment in the trial court, which was affirmed by the Court of Civil Appeals. A petition for a writ of certiorari being presented to the Supreme Court of Tennessee, that court dismissed the petition and affirmed the judgment.

The facts, so far as material, are as follows: Defendant was an interstate carrier by railroad, and plaintiff was in its employ as a switchman and was engaged in a movement of interstate commerce at the time he was injured. The date of the occurrence was October 15, 1910. In making up a freight train, a switch-engine, with a freight car attached, was being moved down grade towards where other freight cars were standing upon the track, when the single car became uncoupled from the engine, and, being propelled by gravity towards the standing cars, came into contact with them. Plaintiff, being upon the car which thus became uncoupled, was by the impact thrown against the brake and injured. He insisted that the car became detached from the engine because of the defective condition of the track at that point, in conjunction with the insufficient height of the draw-bar on the engine. There was evidence tending to show that the ground upon which the track rested was wet and marshy, and the cross-ties broken and insufficient, so that the track was uneven and rough, and that, as a result, the engine and the car attached to it were made to alternately rise and fall at the ends where they were coupled together; and tending further to show that the draw-bar upon the engine, which was used in coupling the car to it, was not more than thirty inches high, measured from the track to the center of the draw-bar; that it was too low to engage properly with the couplers of ordinary freight cars, and that because of the resulting inadequacy of the coupling, together with the unevenness of the track, the car in question became detached. There was, however, evidence

tending to show that plaintiff knew of the defective condition of the track and of the engine; that he had passed over the same track frequently with the same engine, and that prior to the occurrence in question cars had, as he knew, repeatedly become detached from the engine because of the conditions mentioned. It was either found or assumed by the state courts that defendant's railway was of standard gauge, and that the standard height of draw-bars for freight cars ranged between a maximum of 34½ inches and a minimum of 31½ inches. See Resolution of Interstate Commerce Commission, June 6, 1893 (Ann. Rep. I. C. C., 1893, pp. 74, 263), construed in *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 286; see also, Ann. Rep. I. C. C., 1896, p. 94. It should be noted that the alleged cause of action arose October 15, 1910, after the enactment of the amendment of that year to the Safety Appliance Act, but before the taking effect of the Commission's order respecting draw-bars, made pursuant to the new law. This order while dated October 10, 1910, became effective on December 31 following.

Defendant requested the trial court to direct a verdict in its favor, upon the ground that plaintiff admittedly knew of the defects and therefore assumed the risk. The court refused the motion, and likewise refused the request of defendant for an instruction to the jury in the following terms: "If the jury should find from the evidence that the draw-bar of the engine was defective by being too low, or the track defective, and that this caused the engine to become detached from the cars, and this caused the plaintiff's injury, still, if you should further find that these defective conditions had existed prior to that time with the knowledge of the plaintiff, and plaintiff knew before he went to work that the defect existed at that time and that by reason thereof the engine had been accustomed to become uncoupled, and he appreciated the danger, then the court charges you that under those facts the plaintiff

could not recover, and your verdict should be in favor of the defendant."

The contentions of defendant, overruled by each of the state courts and here renewed, are, that by the true interpretation of the Employers' Liability Act the common-law rule respecting the assumption of risk was not abolished except in cases where the violation by the carrier of some statute enacted for the safety of employés contributed to the injury of the employé; and that by the Safety Appliance Act and amendments, as properly interpreted, the height or construction of the draw-bars of locomotives was not regulated, so that the fact that the draw-bar in question was only thirty inches high was not a violation of these acts, and hence afforded no ground for a recovery under the Employers' Liability Act.

There is a motion to dismiss, based upon the insistence that the record presents no question reviewable in this court under § 237, Jud. Code (act of March 3, 1911, c. 231, 36 Stat. 1087, 1156). The motion must be overruled, upon the authority of *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 293; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477, 486; *St. Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S. 265; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 499.

Upon the merits, we of course sustain the contention that by the Employers' Liability Act the defence of assumption of risk remains as at common law, saving in the cases mentioned in § 4, that is to say: "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." *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 502.

This leaves for determination the question whether the provision of § 5 of the Safety Appliance Act of 1893 respecting the standard height of draw-bars, together with the order of the Interstate Commerce Commission promul-

gated in pursuance of it, and the 1903 amendment of that act, had the effect of regulating the height of draw-bars upon locomotive engines, as contended by plaintiff, or upon freight cars only, as contended by defendant.[1]

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[1] SAFETY APPLIANCE Act of March 2, 1893, c. 196, 27 Stat. 531.

"An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted, etc., That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

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SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety four, and immediately to give

In *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, a case that arose under the act as it stood before the 1903 amendment, it was held that the provision of § 2 rendering it "unlawful for any such common carrier to haul or permit

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notice thereof as aforesaid. After July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation . . . *Provided*, that nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

* * * * * * * *

SEC. 8. That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

AMENDMENT OF APRIL 1, 1896, c. 87, 29 Stat. 85.

"*Be it enacted*, etc., That section six of an Act entitled . . . be amended so as to read as follows:

'SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation . . . *Provided*, that nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or loccmotives are exclusively used for the transportation of logs.'"

AMENDMENT OF MARCH 2, 1903, c. 976, 32 Stat. 943.

"*Be it enacted*, etc., That the provisions and requirements of the Act entitled 'An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three,

to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," was broad enough to embrace locomotive engines within the description "any car." This conclusion was based upon the declared purpose of Congress to promote the safety of employés and travelers upon railroads engaged in interstate commerce, and the specific intent to require the installation of such an equipment that the cars would couple with each other automatically by impact and obviate the necessity of men going between them either for coupling or for uncoupling. The court, by Mr.

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and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

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AMENDMENT OF APRIL 14, 1910, c. 160, 36 Stat. 298.

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"SEC. 3. . . . Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission."

Chief Justice Fuller, pointed out (pp. 20, 21) that by the amendment of March 2, 1903, the provisions and requirements of the act were extended to common carriers by railroad in the Territories and the District of Columbia, and were made to apply "in all cases, whether or not the couplers brought together are of the same kind, make, or type," and that the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of draw-bars, were made to apply to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce." And it was said that this amendment was affirmative and declaratory of the meaning attributed by the court to the prior law.

In *Schlemmer* v. *Buffalo, Rochester &c. Railway*, 205 U. S. 1, 10, it was held that a shovel car was within the contemplation of § 2.

In *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 26, it was held that the 1903 amendment had enlarged the scope of the original act so as to embrace all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, whether the particular vehicles were at the time employed in interstate commerce or not.

In *Pennell* v. *Phila. & Reading Ry.*, 231 U. S. 675, the question was whether the provision respecting automatic couplers was applicable to the coupling between the locomotive and the tender. This was answered in the negative, the court saying (p. 678): "Engine and tender are a single thing; separable, it may be, but never separated in their ordinary and essential use. The connection between them, that is, between the engine and tender, it was testified, was in the nature of a permanent coupling, and it was also testified that there was practically no opening between the engine and tender, and that attached to the engine was a draw-bar which fitted in the

yoke of the tender, and the pin was dropped down to connect draw-bar and yoke. The necessary deduction from this is that no dangerous position was assumed by an employé in coupling the engine and tender for the reason that the pin was dropped through the bar from the tank of the tender."

In each of these cases, the letter of the act was construed in the light of its spirit and purpose, as indicated by its title no less than by the enacting clauses. The same guiding principle should be adhered to in considering the question now presented. Conceding that it may be doubtful whether the act, in its original form, evidenced an intent on the part of Congress to standardize the height of draw-bars upon vehicles other than freight cars, and therefore assuming for argument's sake that the act was not in this respect applicable to locomotive engines, it seems to us that the amendment of 1903, manifestly enacted for the purpose of broadening the scope of the original act, must upon a fair construction be deemed to extend its provisions and requirements respecting the standard height of draw-bars, so as to make them applicable to locomotives, excepting such as are in terms exempted.

There was abundant reason for applying the standard to locomotives. The draw-bar—sometimes called the "draw-head"—carries at its outer end the device or mechanism for coupling the cars. The height of the draw-bar determines the height of the coupler, and has an intimate relation not only to the safety of the coupling operation but to the security of the coupling when made. See Car-Builders Dict. (1884), *tit.* "Draw-bar" and "Draw-head," and Figs. 395–643; Voss, Railway Construction (1892), pp. 16, 91, etc. The evidence in this case shows, without contradiction, that the gripping surface of the coupling knuckle on the freight car in question, measured vertically, was between seven and nine inches, and that

because of the comparatively low level of the engine's draw-bar the effective grip was reduced to the point of practical inefficiency. Indeed, it is not seriously disputed that there exists as much reason for having the draw-bars of the locomotive adjusted to a standard of height as exists in the case of freight cars.

The experience of the Interstate Commerce Commission, in seeing to the enforcement of the act of 1893, tended to emphasize the importance of interchangeable equipment upon the rolling stock of railroads engaged in interstate commerce, so that cars used in such commerce would readily couple with cars not so used, and that locomotives could be readily coupled with cars of either sort. The 16th Annual Report of the Commission, 1902, pp. 60, 61, recommended to Congress, *inter alia:* "That provisions relating to automatic couplers, grab irons, and the height of draw-bars, be made to apply to all locomotives, tenders, cars, and similar vehicles, both those equipped in interstate commerce and those used in connection therewith (except those trains, cars, and locomotives exempted by the acts of March 2, 1893, and April 1, 1896)." This recommendation appears to have been evoked by the decision of the Circuit Court of Appeals in *Johnson* v. *Southern Pacific Co.*, 117 Fed. Rep. 462, afterwards reversed by this court in 196 U. S. 1. The Court of Appeals held that there was nothing in the act of 1893 to require a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or to require that every car should be equipped with a coupler that would couple automatically with every other coupler with which it might be brought into contact; and also that the act did not forbid the use of an engine not equipped with automatic couplers. Congress not only responded to the recommendation of the Commission, but enlarged the act more broadly by enacting (Amendment of March 2, 1903, set forth in foot-note,

supra) that the provisions and requirements of the original act should be held (a) to apply to common carriers by railroad in the Territories and the District of Columbia; (b) to apply in all cases whether or not the couplers brought together are of the same kind, make, or type; (c) that "the provisions and requirements . . . relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," excepting those exempted by the act of March 2, 1893, as amended April 1, 1896, and those used upon street railways. We have to do especially with the latter clause. As was intimated in *Southern Railway Co.* v. *United States*, 222 U. S. 20, 25, its collocation of phrases is not altogether artistic. But at least the purpose is plain that where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard. We cannot assent to the argument that the clause means only that the locomotives used upon all railroads engaged in interstate commerce and in the Territories and the District of Columbia are to be equipped with the appliances provided by the original act for locomotives, and so on with the other classes of cars, and that hence the amendatory act has merely the effect of prescribing the standard height of draw-bars with respect to freight cars, because the original act required such a standard only with respect to cars of that type. This would give altogether too narrow a construction to the language employed by Congress, and would lose sight of the spirit and purpose of the legislation. We deem the true intent and meaning to be that the provisions and requirements

respecting train brakes, automatic couplers, grab irons, and the height of draw-bars shall be extended to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles used in connection with them, so far as the respective safety devices and standards are capable of being installed upon the respective vehicles. It follows that by the act of 1903 the standard height of draw-bars was made applicable to locomotive engines as well as to freight cars. And so it was held by the Circuit Court of Appeals for the Ninth Circuit in *Chicago &c. Railway Co.* v. *United States*, 196 Fed. Rep. 882, 884.

Judgment affirmed.

ROLLER *v.* MURRAY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 966. Motion to dismiss or affirm submitted May 25, 1914.—Decided June 22, 1914.

A mere error of law not involving a Federal question and committed in the exercise of jurisdiction by giving conclusive effect to a judgment rendered in another State affords no opportunity for a review in this court.

If the court rendering the judgment had jurisdiction of the subject-matter and the parties, the merits of the controversy are not open for reinvestigation in the courts of another State; but, under the full faith and credit clause of the Federal Constitution and § 905, Rev. Stat., the latter must give the judgment such credit as it has in the State where it was rendered.

The proper method of obtaining a review of the Federal question adversely decided by the state court is by writ of error to this court under § 237, Judicial Code, and not by collaterally attacking the judgment on the ground that it denies due process of law when it is invoked in the courts of another State.

Where the effect of the judgment of another State dissolving an injunction as *res judicata* is denied on the ground that it is not a final decree, if the contention that a final decree was subsequently rendered which concluded the merits was not presented to the court, there is no basis for review in this court under § 237, Judicial Code on the ground that full faith and credit was not given to the original judgment.

Writ of error to review 71 W. Va. 161, dismissed.

THE facts, which involve the application of the full faith and credit clause of the Federal Constitution and the jurisdiction of this court to review a judgment of the state court, under § 237, Judicial Code, are stated in the opinion.

Mr. Holmes Conrad and *Mr. Edward S. Conrad*, for defendants in error, in support of the motion.

Mr. John E. Roller, pro se, and *Mr. Herbert W. Wyant*, for plaintiff in error, in opposition to the motion.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error was sued out under § 237, Jud. Code (act of March 3, 1911, 36 Stat. 1087, 1156, c. 231), in order to bring under review a judgment of the Supreme Court of Appeals of the State of West Virginia (71 W. Va. 161), which affirmed a decree of the Circuit Court of Pendleton County, in that State, in an equitable action brought by plaintiff in error against defendants in error. His original bill was filed May 10, 1901, and an amended bill was filed in December, 1907. Complainant therein averred that in the year 1872 he was employed by the late Emily Hollingsworth, of the city of Philadelphia, as attorney, to recover for her a tract of 52,000 acres of land situate in the counties of Rockingham and Augusta, in the State of Virginia, and the county of Pendleton, in the State of West Virginia, and immediately undertook

the necessary work and labor, and diligently and faithfully endeavored to discharge the duties imposed upon him by the employment; that from time to time various parcels of land were recovered from adverse claimants, some by compromise settlements and others by actions of ejectment, until the entire tract of 52,000 acres was recovered, the actual litigation not being completed until some time in the year 1893; that portions of the property had been sold, so that in the year 1889 there remained of the lands recovered about 44,000 acres undisposed of, from the proceeds of the sale of which complainant was to receive payments on account of his services; that on or about April 1, 1889, the said Emily Hollingsworth made a deed of gift of the unsold lands, amounting to about 44,000 acres, to Mary H. Murray, one of the defendants, upon condition that she should pay to complainant one-fifth of the proceeds thereafter to be realized on the sale of the lands, and that she should hold the same as trustee for complainant, and complainant avers that the said Mary H. Murray accepted said deed upon that condition, and became liable to complainant for the said proportion of said proceeds of sale and for the reasonable value of his services rendered by him to Miss Hollingsworth and to be thereafter rendered to the said Mary H. Murray; that the latter, having accepted the conveyance, continued to act under it and in conformity with it until May 25, 1901, when for the first time she repudiated it. The object of the bill was to enforce a trust as to the undivided one-fifth of the land and of the purchase money upon sales made of the same, as against Mary H. Murray and her grantees with notice. Mrs. Murray pleaded that in a chancery cause brought by the same complainant against her, with others, in the Circuit Court for the County of Rockingham, in the State of Virginia, a court of competent jurisdiction, complainant asserted and claimed that there was due to him from her the same sum of money and the same

debt, as compensation for the same services alleged in his present bill, and that the cause of action was the same as now set up and asserted; that on June 24, 1907, a final decree was made and entered in said cause by the said Circuit Court, and this, on appeal, was affirmed by the Supreme Court of Appeals of Virginia in accordance with opinions found in 59 S. E. Rep. 421 (107 Virginia, 527), in which it was held that defendant Mary H. Murray was a privy in estate to Miss Hollingsworth, her grantor, and a privy also to the contract with complainant, and that the said Supreme Court of Appeals of Virginia, affirming the Circuit Court, determined that complainant had no right to recover on said cause of action, wherefore defendant pleaded the final adjudication of the Virginia court as *res adjudicata*. There was filed with the plea a certified copy of the record of the proceedings had in the Circuit Court of Rockingham County, Virginia, and in the Supreme Court of Appeals of that State. Subsequently, complainant filed in the Pendleton County Court written objections to the plea of *res adjudicata*, upon the following grounds: First, that the Circuit Court of Rockingham County, Virginia, after the rendition of the judgment pleaded by defendant, in another cause pending in that court between the Chesapeake-Western Company and the complainant, John E. Roller, and others, in which latter cause the said Mary H. Murray was impleaded as a party, decreed that the matters involved in the cause pending in the Circuit Court of Pendleton County, West Virginia, were not concluded by the judgment and decree of the Circuit Court of Rockingham County, Virginia, and did therefore vacate and dissolve certain injunctions previously awarded in that cause restraining complainant from further prosecution in the West Virginia court of his present suit against said Mary H. Murray. Secondly, that the cause of action and grounds of jurisdiction and relief in the present cause are

not the same as those set out in the record filed in the plea of *res adjudicata*. And thirdly, that the record and judgment of the Virginia court should not be enforced as *res adjudicata* for the following reasons: (a) that the courts of West Virginia do not enforce foreign judgments that are contrary to the laws and public policy of that State; (b) that the decree rests not upon rights arising *ex contractu*, or upon torts based on natural rights, but upon a penalty denounced by the policy of the law of Virginia which is not so denounced by the policy of the law of the State of West Virginia, and that it is not one of such nature as the courts of West Virginia will enforce; and (c) that the *lex loci rei sitæ* determines the jurisdiction and relief to be given by this court as to the land in the bill referred to, regardless of the judgment of any sister State as to land therein situate.

The Circuit Court of Pendleton County, West Virginia, sustained the plea of *res adjudicata* and dismissed the bill, and it is the judgment of the court of last resort of West Virginia affirming this decree that is now under review.

There are three assignments of error, the substance of which is as follows:

First, that the court erred in holding that the plea of *res adjudicata* filed by the defendant Mary H. Murray was a good and sufficient plea, for the reason that the decree therein relied upon in terms provided that it should be without prejudice to complainant's right to institute other proceedings upon a *quantum meruit* if so advised, and that the record shows the cause of action and ground of jurisdiction were not the same in the present West Virginia action as those set out and contained in the record in the Virginia action; the present action being based upon a *quantum meruit* for just and reasonable compensation for services rendered by complainant in and about the recovery of the tract of land in controversy.

Second, that the court erred in sustaining the action of the court below upholding the plea of *res adjudicata*, because the decrees in the Virginia courts presented in that plea were void and of no effect since they had denied to complainant due process of law, in that they had denied to him the right to file the third amended bill of complaint tendered by him, and denied him a hearing upon the case thereby presented.

Third, that the court erred in sustaining the action of the court below in overruling the objections made by complainant to the plea of *res adjudicata*, because in the suit of *Chesapeake-Western Company* v. *Roller, et al.*, it was necessarily decided that the matters involved in the case in the West Virginia courts were not concluded by the decrees rendered in the first cause of *Roller* v. *Murray* in the Virginia courts.

There is a motion to dismiss or affirm, based upon the ground that no Federal question is raised by the record, or that if any such question is raised it is so frivolous as not to need further argument.

It appears that the Virginia court (107 Virginia, 527), denied relief to complainant with respect to the lands in that State upon the ground that the contract upon which the action was based was champertous, and therefore illegal under the laws of the Commonwealth. The Supreme Court of Appeals of West Virginia (71 W. Va. 161), finding that this decision was rendered not in a mere proceeding *in rem* or *quasi in rem*, but in an action *in personam* (defendants having appeared, and the validity of the contract constituting the basis of the plaintiff's claim to the fund or to the land having been actually litigated by the parties and decided by the courts), that decision necessarily settled and determined the question of the validity of the contract in the State of Virginia, and that under the "full faith and credit" clause of the Constitution of the United States the decision was entitled to the same credit

in West Virginia that it had in the Commonwealth of Virginia. Upon this ground, although assuming that the contract was valid under the law of West Virginia viewed independently of the Virginia decision, the court held itself bound by the Virginia decision to deny relief to complainant.

It is argued under the first assignment of error that the contract in controversy must be held to be a Pennsylvania contract, and that its validity and enforcement in the courts of West Virginia did not depend upon the decision of the Virginia courts, but required an independent consideration upon its merits by the courts of West Virginia, and that their failure to give such consideration was a denial of due process of law. We are unable to find that it was contended in the courts of West Virginia that the contract in question was made in Pennsylvania or ought for other reasons to be regarded as a Pennsylvania contract; nor are we able to find that the "due process of law" clause was invoked in the West Virginia courts upon the ground that to follow the Virginia decision would be a denial of the right of plaintiff in error to such process. Assuming the contention to have been made, we are unable to see that any Federal question was thereby raised. Supposing the courts of West Virginia erred in giving conclusive effect to the Virginia decision, this was no more than an error of law, committed in the exercise of jurisdiction over the subject-matter and the parties; and such an error—not involving a Federal question—affords no opportunity for a review in this court.

The same response must be made to the second argument presented under the first assignment of error, which is that the contract in controversy shows that its terms, so far as they related to the property within the jurisdiction of West Virginia, were different from those which related to the property in Virginia, and that the West Virginia court, in holding them to be the same and refusing

to recognize the contract as a West Virginia contract deprived plaintiff in error of his property without due process of law.

It is not contended that the West Virginia court, in holding the Virginia judgment to be conclusive upon the present controversy, violated the "full faith and credit" clause of the Federal Constitution. By that clause, and by the act of Congress (§ 905, Rev. Stat.) passed to carry it into effect, it was incumbent upon the West Virginia court to give to the judgment the same faith and credit that it had by law or usage in the courts of Virginia. The effect of this was that, provided the Virginia court had jurisdiction of the subject-matter and of the parties (which was not questioned), the merits of the controversy there concluded were not open to reinvestigation in the courts of West Virginia. It is not here questioned that the West Virginia courts gave such credit to the Virginia judgment as was thus required.

Under the second assignment of error, the argument is that plaintiff in error was denied due process in the Virginia courts in that the Circuit Court of Rockingham County arbitrarily and unlawfully rejected his third amended bill, and its action in so doing was affirmed by the court of last resort of that State. Upon this point the West Virginia court (71 W. Va. 170), said:

"The said amendment was offered at a very late stage of the proceedings. The court based its rejection thereof upon two grounds, the delay in tendering it without excuse or explanation and its failure to show a contract materially different from that set up in the original and first and second amended bills. In disposing of the amendment, the court said: 'The bill had been amended twice already, and after these amendments, and after a thorough argument of the case on its merits, the court announced its decision. A due regard for the orderly procedure of the court and the rights of the opposing party required

that some limit be set to the privilege of amendments. The amendments now presented are offered without explanation or excuse, and in the main are unsubstantial, and would not change the opinion of the court on the merits of the case.' Having said this, the court proceeded to analyze the amendments and show their lack of merit and insufficiency to bring about a different conclusion if they had been filed. The decision relied upon to sustain this contention is *Hovey* v. *Elliott*, 167 U. S. 409, asserting lack of due process in the entry of a decree for the plaintiff, after having stricken out the defendant's answer, because he was guilty of contempt in neglecting to pay into court a certain sum of money. This was a total denial of the right of defense, upon an insufficient ground. In that case, the action of the court was arbitrary and oppressive. Here, the plaintiff had been allowed a hearing. He had filed an original and two amended bills and had no doubt had opportunity to tender the third amended bill long before the submission of the cause. It is certainly competent for a court to say, within reasonable limits, what amounts to a compliance with its rules and the principles of law, respecting the order and limitations of proceedings in a case. Besides, in the opinion of the court, the proposed amendment would not have changed the character of the plaintiff's claim, nor relieved the contract of its infirmity. An erroneous decision in respect to either of these matters would not amount to a denial of due process of law. As to them, it is not a case in which the plaintiff has had no day in court."

For present purposes it is sufficient to say that there is nothing upon the face of the record to indicate that the refusal of the Virginia court to entertain complainant's third amended bill was arbitrary or unlawful, or otherwise inconsistent with the "due process of law" clause of the Fourteenth Amendment; that there is nothing to show that in the Virginia court complainant based his right to

file a third amended bill upon the Fourteenth Amendment; and that if he had in fact set up such a right in the Virginia court and it had been there denied, his proper mode of obtaining a review of the Federal question would have been by prosecuting a writ of error under § 709, Rev. Stat. (§ 237, Jud. Code) to review the judgment of the court of last resort of Virginia, and not by attacking the judgment collaterally upon that ground when it was invoked against him in the courts of West Virginia.

With respect to the third assignment of error, it is contended that the Supreme Court of Appeals of West Virginia refused to give full faith and credit to the objection interposed by plaintiff in error to the plea of *res adjudicata* based upon the decrees rendered in the Virginia case of *Roller* v. *Murray*, the objection being based upon the record in the case of *Chesapeake-Western Company* v. *Roller*, a subsequent decision in the Virginia courts, which, it is contended, overruled the decision in the first Virginia suit so far as it tended to debar plaintiff in error from suing upon a *quantum meruit*. It appears that the decision in the *Chesapeake-Western Company Case* was to dissolve an injunction that had been issued against the prosecution of the West Virginia suit. Its effect as *res adjudicata* was denied by the West Virginia court (71 W. Va. 172), upon the ground that it was not a final decree. It is now contended that subsequent to the decree dissolving the injunction a final decree was rendered in the same cause which in effect concluded the merits. We find nothing in the record, however, to show that any such contention was presented to the West Virginia courts.

Since we are unable to find that any substantial question of Federal right was raised by plaintiff in error in the courts of West Virginia and there decided against him, it follows that the writ of error must be

Dismissed.

OPINIONS PER CURIAM, ETC., FROM APRIL 6, TO JUNE 22, 1914.

No. 887. CLINCHFIELD COAL CORPORATION, PLAINTIFF IN ERROR, *v.* R. L. MANESS. In error to the Supreme Court of the State of Tennessee. Motion to dismiss or affirm submitted March 23, 1914. Decided April 6, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Patterson* v. *Colorado,* 205 U. S. 454; *Preston* v. *Chicago,* 226 U. S. 447. *Mr. John W. Price* and *Mr. J. Norman Powell* for the plaintiff in error. *Mr. Isaac Harr* and *Mr. Robert Burrow* for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF G. & C. MERRIAM COMPANY, PETITIONER. Submitted March 23, 1914. Decided April 6, 1914. Motion for leave to file a petition for a writ of mandamus denied. *Mr. William B. Hale* for the petitioner.

No. 244. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* PINE TREE LUMBER COMPANY, LIMITED. In error to the Court of Appeals for the Second Circuit of Louisiana. Submitted March 9, 1914. Decided April 6, 1914. Judgment affirmed with costs by an equally divided court. *Mr. Thomas S. Buzbee* for the plaintiff in error. *Mr. Walter Elder* for the defendant in error.

No. 418. NORTHERN TRUST COMPANY, AS TRUSTEE, ETC., PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE

OF ILLINOIS. In error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted March 16, 1914. Decided April 13, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Hazeltine* v. *Central Bank of Missouri,* 183 U. S. 130; *M. & K. Interurban Railway Co.* v. *Olathe,* 222 U. S. 185; *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99; *Pons* v. *Yazoo & Miss. Valley R. R. Co.,* 232 U. S. 720. *Mr. Samuel Alschuler* and *Mr. Charles R. Holden* for the plaintiff in error. *Mr. Patrick J. Lucey* and *Mr. Lester H. Strawn* for the defendant in error.

No. 879. THOMAS W. SYNNOTT, ETC., APPELLANT, *v.* THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED, ETC. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss or affirm submitted April 6, 1914. Decided April 13, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon authority of: 1. *Coder* v. *Arts,* 213 U. S. 223, 234–235; *Tefft, Weller & Co.* v. *Munsuri,* 222 U. S. 114, 118; 2. *Chapman* v. *Bowen,* 207 U. S. 89, 91; *Calnan Co.* v. *Doherty,* 224 U. S. 145, 147; 3. *Conboy* v. *First National Bank of Jersey City,* 203 U. S. 141, 144–145. *Mr. Amos L. Taylor* for the appellant. *Mr. Aldis B. Browne, Mr. Alexander Britton, Mr. Evans Browne, Mr. Everett E. Ellinwood* and *Mr. John Mason Ross* for the appellee.

No. 1000. HENRY E. MEEKER, SURVIVING PARTNER, ETC., PETITIONER, *v.* LEHIGH VALLEY RAILROAD COMPANY; and

No. 1001. HENRY E. MEEKER, PETITIONER, *v.* LEHIGH VALLEY RAILROAD COMPANY. Petitions submitted April 6,

1914. Decided April 13, 1914. *Per Curiam.* Petitions for writs of certiorari granted, upon the authority of § 262 of the Judicial Code; *In re Chetwood,* 165 U. S. 443, 462; *Whitney* v. *Dick,* 202 U. S. 132; *McClellan* v. *Garland,* 217 U. S. 268; *United States* v. *Beatty,* 232 U. S. 463, 467. *Mr. William A. Glasgow, Jr.,* for the petitioner. No appearance for the respondent. *Mr. Joseph W. Folk* and *Mr. Charles W. Needham* filed a brief for The Interstate Commerce Commission.

No. —. Original. *Ex parte:* IN THE MATTER OF HENRY H. EVANS, PETITIONER. Submitted April 6, 1914. Decided April 13, 1914. Motion for leave to file petition for a writ of mandamus denied. *Mr. Albert J. Hopkins* for the petitioner.

No. —. Original. *Ex parte:* IN THE MATTER OF JOHN DENNETT, JR., ET AL., PETITIONERS. Submitted April 13, 1914. Decided April 20, 1914. Motion for leave to file petition for writs of prohibition and mandamus denied. *Mr. William M. Seabury* for the petitioners.

No. 806. LOUIS W. PRENICA, ETC., ET AL., PLAINTIFFS IN ERROR, *v.* MAY BULGER. In error to the Supreme Court of the State of Nebraska. Motion to dismiss submitted April 20, 1914. Decided April 27, 1914. *Per Curiam.* Dismissed for want of jurisdiction on the authority of: 1. *Consol. Turnpike* v. *Norfolk &c. Ry. Co.,* 228 U. S. 596, 600, and cases cited; 2. *De Bary & Co.* v. *Louisiana,* 227 U. S. 108, and cases cited. *Mr. William C. Prentiss* and *Mr. Walter L. Clark* for the plaintiffs in error. *Mr. W. T. Thompson* for the defendant in error.

No. 738. STEPHEN M. EGAN, PLAINTIFF IN ERROR, *v.* THE STATE OF NEW JERSEY. In error to the Court of Errors and Appeals of the State of New Jersey. Motion to dismiss or affirm submitted April 20, 1914. Decided April 27, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Zeller* v. *New Jersey*, 231 U. S. 737, and cases cited. *Mr. John Franklin Fort* for the plaintiff in error. *Mr. Robert H. McCarter* and *Mr. Pierre P. Garven* for the defendant in error.

No. 652. SEABOARD AIR LINE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* J. M. PACE MULE COMPANY. In error to the Supreme Court of the State of North Carolina. Submitted April 16, 1914. Decided May 4, 1914. *Per Curiam.* Judgment reversed with costs and cause remanded for further proceedings upon the authority of *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Chicago &c. R. Co.* v. *Miller*, 226 U. S. 513; *Missouri &c. R. Co.* v. *Harriman Bros.*, 227 U. S. 657. *Mr. Murray Allen* for the plaintiff in error. No appearance for the defendant in error.

No. 701. THE CITY OF LEWISTON, PLAINTIFF IN ERROR, *v.* JOHN CHAMBERLAIN ET AL. In error to the Supreme Court of the State of Idaho. Motion to dismiss or affirm submitted April 27, 1914. Decided May 4, 1914. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *McCorquodale* v. *Texas*, 211 U. S. 432; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 118; *Kansas City Star Co.* v. *Julian*, 215 U. S. 589; *Consol. Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 326, 334. *Mr. James H. Forney* for the plaintiff in error. *Mr. Burton L. French* for the defendants in error.

No. —. Original. *Ex parte:* IN THE MATTER OF DANIEL E. STRUB, PETITIONER. Submitted April 27, 1914. Decided May 4, 1914. Motion for leave to file petition for writ of mandamus denied. *Mr. Joe Kirby* for the petitioner.

No. 273. WALTER A. LEDBETTER, RECEIVER, ETC., PLAINTIFF IN ERROR, *v.* KAUFMAN MANDELL. In error to the Supreme Court of the State of New York. Argued March 11, 12, 1914. Decided May 4, 1914. Judgment affirmed with costs by an equally divided court. *Mr. Arthur F. Gotthold, Mr. Joseph W. Bailey* and *Mr. Walter A. Ledbetter* for the plaintiff in error. *Mr. Louis Marshall* for the defendant in error.

No. 92. FRANK B. CRAIG, PLAINTIFF IN ERROR, *v.* WILLIAM P. JARRETT, SHERIFF, ETC. In error to the Supreme Court of the Territory of Hawaii. Motion to dismiss submitted May 4, 1914. Decided May 11, 1914. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of *Johnson* v. *Hoy*, 227 U. S. 245, 247. *Mr. Warren C. Gregory, Mr. W. H. Chickering, Mr. Edward M. Watson* and *Mr. Aldis B. Browne* for the plaintiff in error. *Mr. Sidney Ballou* for the defendant in error.

No. 344. THE PACIFIC EXPRESS COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* I. RUDMAN. In error to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas. Submitted May 4, 1914. Decided May 11, 1914. *Per Curiam.* Judgment reversed

with costs on the authority of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173; *Kansas Southern Ry.* v. *Carl*, 227 U. S. 637–652. *Mr. Cecil H. Smith* and *Mr. James L. Minnis* for the plaintiffs in error. *Mr. Mark McMahon* and *Mr. H. A. Cunningham* for the defendant in error.

No. 359. PETER GALLAGHER, ADMINISTRATOR, ETC., PLAINTIFF IN ERROR *v.* FLORIDA EAST COAST RAILWAY COMPANY. In error to the District Court of the United States for the Southern District of New York. Submitted May 4, 1914. Decided May 11, 1914. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Fore River Shipbuilding Company* v. *Hagg*, 219 U. S. 175; *Bogart* v. *Southern Pacific Company*, 228 U. S. 137, 144, and cases cited. *Mr. William A. McQuaid* for the plaintiff in error. *Mr. George S. Scofield* for the defendant in error.

No. 342. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* W. W. BEATTY. In error to the Supreme Court of the State of Oklahoma. Submitted May 4, 1914. Decided May 25, 1914. *Per Curiam.* Judgment reversed with costs, and cause remanded for further proceedings, upon the authority of *Houston & Texas Cent. R. R. Co.* v. *Mayes*, 201 U. S. 321; *Yazoo & Miss. Valley Ry. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1. *Mr. F. C. Dillard* and *Mr. C. O. Blake* for the plaintiff in error. No appearance for the defendant in error.

No. 930. THE CINCINNATI NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE E. DILLON. In

error to the Supreme Court of the State of Ohio. Motion to dismiss or affirm or place on the summary docket submitted May 25, 1914. Decided June 22, 1914. *Per Curiam.* Judgment affirmed upon the authority of *Southern Ry. Co.* v. *Carson,* 194 U. S. 136, 140; *Southern Ry. Co.* v. *Bennett,* 233 U. S. 80, 85; *Grand Trunk Ry. Co.* v. *Lindsay,* 233 U. S. 42, 49; *Chicago Junction Ry. Co.* v. *King,* 222 U. S. 222; *Southern Ry. Co.* v. *Gadd,* 233 U. S. 572. *Mr. Frank L. Littleton* for the plaintiff in error. *Mr. W. H. Dailey* for the defendant in error.

No. 1031. Missouri, Kansas & Texas Railway Company, Appellant, *v.* L. E. Goodrich. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted May 25, 1914. Decided June 22, 1914. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *York* v. *Texas,* 137 U. S. 15; *Kauffman* v. *Waters,* 138 U. S. 285; see *Missouri, K. & T. Ry. Co.* v. *Goodrich,* 229 U. S. 607. *Mr. Joseph M. Bryson* and *Mr. Evans Browne* for the appellant. *Mr. J. A. L. Wolfe* for the appellee.

No. —. Thomas D. Thomas, Petitioner, *v.* South Butte Mining Company. Submitted June 8, 1914. Decided June 22, 1914. Motion for leave to file and prosecute petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit *in forma pauperis* denied. *Mr. P. P. Wells* for the petitioner.

Decisions on Petitions for Writs of Certiorari from April 6 to June 22, 1914.

No. 928. FRANK SULLIVAN, PETITIONER, *v.* THE UNITED STATES. April 6, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. P. Cox* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 938. HAVANA CENTRAL RAILROAD COMPANY, PETITIONER, *v.* CENTRAL TRUST COMPANY OF NEW YORK. April 6, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert A. Heyn* for the petitioner. *Mr. Louis H. Freedman* for the respondent.

No. 877. BEACH FRONT HOTEL COMPANY, PETITIONER, *v.* RICHARD R. SOOY. April 13, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Edwin G. C. Bleakly, Mr. Henry F. Stockwell, Mr. John W. Wescott* and *Mr. Gilbert Collins* for the petitioner. *Mr. Robert H. McCarter* for the respondent.

No. 963. WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, PETITIONER, *v.* INTERNATIONAL CURTIS MARINE TURBINE COMPANY ET AL. April 13, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr.*

James R. Sheffield and *Mr. Clifton V. Edwards* for the petitioner. *Mr. Frederick P. Fish* and *Mr. Charles Neave* for the respondent.

No. 977. Moy Guey Lum, Petitioner, *v.* The United States. April 13, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. H. Ralph Burton* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 982. Emilie M. Bullowa et al., Petitioners, v. Sara J. Thurston. April 13, 1914. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Rudolph H. Yeatman, Mr. W. J. Lambert, Mr. D. W. Baker* and *Mr. Frank S. Bright* for the petitioners. *Mr. Fulton Lewis* and *Mr. John Ridout* for the respondent.

No. 962. M. C. Kiser Company et al., Petitioners, *v.* Georgia Cotton Oil Company et al. April 20, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harold Remington* for the petitioners. No appearance for the respondents.

No. 964. Thomas J. Kemp, Petitioner, *v.* The United States. April 20, 1914. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John E. Laskey* and *Mr. R. H. Liggett* for the

petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 972. THE HOCKING VALLEY RAILWAY COMPANY, PETITIONER, *v.* THE UNITED STATES. April 20, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James H. Hoyt, Mr. William B. Stewart, Mr. Lawrence Maxwell* and *Mr. Clarence Brown* for the petitioner. *The Attorney General* and *Mr. Assistant to the Attorney General Todd* for the respondent.

No. 985. SUNDAY CREEK COMPANY, PETITIONER, *v.* THE UNITED STATES. April 20, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William O. Henderson* for the petitioner. *The Attorney General* and *Mr. Assistant to the Attorney General Todd* for the respondent.

No. 986. THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* GEORGE C. MAYNOR ET AL. April 20, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Lee Estes* and *Mr. A. L. Burford* for the petitioner. *Mr. Cone Johnson* and *Mr. James M. Edwards* for the respondents.

No. 999. GEORGE B. TAYLOR, CLAIMANT, ETC., PETITIONER, *v.* THE CLEVELAND GRAIN COMPANY. April 20, 1914. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank S. Masten* for the petitioner. *Mr. William B. Cady* for the respondent.

No. 1005. FRENCH MUTUAL GENERAL SOCIETY OF MUTUAL INSURANCE AGAINST THEFT, PETITIONER, *v.* THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE. April 20, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hyland P. Stewart* for the petitioner. *Mr. J. Kemp Bartlett* and *Mr. Edgar Allan Poe* for the respondent.

No. 1025. NORTHERN PACIFIC RAILWAY COMPANY, PETITIONER, *v.* MARY A. MEESE ET AL. April 27, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles W. Bunn* for the petitioner. No appearance for the respondents.

No. 994. THE NEW YORK TIMES COMPANY, PETITIONER *v.* SUN PRINTING & PUBLISHING ASSOCIATION. April 27, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Nathan* and *Mr. Max J. Kohler* for the petitioner. *Mr. James M. Beck* and *Mr. Charles K. Carpenter* for the respondent.

No. 998. JAMES LANSBURGH ET AL., PETITIONERS, *v.* MYRON M. PARKER ET AL. April 27, 1914. Petition for

a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles H. Merillat* and *Mr. Alexander Wolf* for the petitioners. *Mr. J. J. Darlington* and *Mr. John Ridout* for the respondents.

No. 1002. THE BIRGE-FORBES COMPANY, PETITIONER, *v.* CARL R. HEYE. April 27, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Cecil H. Smith* for the petitioner. *Mr. Newton H. Lassiter* for the respondent.

No. 1006. SOLOMON RIPINSKY, PETITIONER, *v.* G. W. HINCHMAN ET AL. April 27, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. H. Cobb* for the petitioner. No appearance for the respondent.

No. 1022. SADIE A. STEAD, EXECUTRIX, ETC., ET AL., APPELLANTS, *v.* ISABELLA M. CURTIS ET AL. May 4, 1914. Petition for a writ of certiorari herein denied. *Mr. Horace W. Philbrook* for the appellants in support of the petition. *Mr. Joseph C. Campbell* and *Mr. John S. Partridge* for the appellees in opposition thereto.

No. 1011. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER, *v.* L. HILTON-GREEN ET AL. May 11, 1914. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

granted. *Mr. Emmett Wilson* and *Mr. P. D. Beall* for the petitioner. *Mr. William A. Blount* and *Mr. A. C. Blount* for the respondent.

No. 1024. GREAT NORTHERN RAILWAY COMPANY, PETITIONER *v.* THE UNITED STATES. May 11, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. E. C. Lindley, Mr. F. V. Brown* and *Mr. C. S. Albert* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 1026. TELEFUNKEN WIRELESS TELEGRAPH COMPANY OF THE UNITED STATES, PETITIONER, *v.* NATIONAL ELECTRIC SIGNALING COMPANY ET AL. May 11, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Hector T. Fenton* for the petitioner. *Mr. Melville Church* and *Mr. F. W. H. Clay* for the respondents.

No. 1033. AMERICAN ICE COMPANY, PETITIONER, *v.* CAMILLA PORRECA. May 11, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank R. Savidge* for the petitioner. No appearance for the respondent.

No. 1040. ALBERT DELLEVIE, SOLE SURVIVING EXECUTOR, ETC., PETITIONER, *v.* FECHHEIMER-FISHEL COMPANY, BANKRUPT. May 11, 1914. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Roger Foster* for the petitioner. *Mr. Louis F. Doyle* for the respondent.

No. 1044. JOHN N. MCCLINTOCK, PETITIONER, *v.* CITY OF PAWTUCKET. May 11, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. John N. McClintock, pro se. Mr. William R. Tillinghast* for the respondent.

No. 1039. CORNELIA G. GOODRICH ET AL., PETITIONERS, *v.* THE HOUSTON OIL COMPANY OF TEXAS ET AL. May 25, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Gordon* for the petitioners. No appearance for the respondents.

No. 1048. MONONGAHELA RIVER COAL & COKE COMPANY, PETITIONER, *v.* RIVER AND RAIL STORAGE COMPANY. May 25, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. Arthur Lynham* for the petitioner. *Mr. C. H. Trimble* for the respondent.

No. 1057. EASTERN OREGON LAND COMPANY, PETITIONER, *v.* WILLOW RIVER LAND & IRRIGATION COMPANY. May 25, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth

Circuit denied. *Mr. J. N. Teal, Mr. Wirt Minor, Mr. Aldis B. Browne, Mr. Alexander Britton, Mr. Evans Browne* and *Mr. Francis W. Clements* for the petitioner. *Mr. J. H. Richards* and *Mr. Oliver O. Haga* for the respondent.

No. 1036. The Grand Rapids and Indiana Railway Company, Petitioner, *v.* The United States. June 8, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James H. Campbell* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 1037. Nichols & Cox Lumber Company, Petitioner, *v.* The United States. June 8, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ganson Taggart* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 1051. Warren E. Talbert, Petitioner, *v.* The United States. June 8, 1914. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Matthew E. O'Brien* and *Mr. James A. O'Shea* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 1058. Louis Steinberger, Petitioner, *v.* General Electric Company et al. June 8, 1914. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William G. Johnson* and *Mr. Charles H. Wilson* for the petitioner. *Mr. Charles Neave* and *Mr. William G. McKnight* for the respondent.

No. 1060. WILLIAM J. KAHN, PETITIONER, *v.* THE UNITED STATES. June 8, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Terence J. McManus* and *Mr. David W. Kahn* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 1070. F. A. WILLIAMS, TRUSTEE, ETC., PETITIONER, *v.* GEORGE G. FRIEDRICHS. June 8, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Girault Farrar* and *Mr. E. D. Saunders* for the petitioner. No appearance for the respondent.

No. 1076. WILLIAM H. HOTCHKISS ET AL., PETITIONERS, *v.* L. K. LINN. June 8, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John Lord O'Brien* for the petitioners. No appearance for the respondent.

No. 1083. ALLEN BOTSFORD, PETITIONER, *v.* THE UNITED STATES. June 8, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Sixth Circuit denied. *Mr. Theodore F. Horstman* and *Mr. Michael G. Heintz* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 1093. WALTER WALDIN, PETITIONER, *v.* WALTER R. COMFORT. June 22, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. A. Boggs* for the petitioner. *Mr. Frank B. Shutts* for the respondent.

No. 1095. THE DAVIDSON STEAMSHIP COMPANY, PETITIONER, *v.* THE WESTERN TRANSIT COMPANY. June 22, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank S. Masten* and *Mr. Harvey D. Goulder* for the petitioner. *Mr. George Clinton, Jr.*, for the respondent.

No. 1103. CUDAHY PACKING COMPANY, PETITIONER, *v.* GRAND TRUNK WESTERN RAILWAY COMPANY. June 22, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arthur B. Hayes, Mr. Charles B. Morrison* and *Mr. Wells M. Cook* for the petitioner. No appearance for the respondent.

No. 1109. NAHONA STAYTON, PETITIONER, *v.* THE UNITED STATES. June 22, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Fifth Circuit denied. *Mr. Theodore Mack* for the petitioner. No appearance for the respondent.

No. 1110. CHARLES KAPLAN ET AL., PETITIONERS, *v.* ISAAC E. LEECH, TRUSTEE, ETC., ET AL. June 22, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Joseph Gross* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM APRIL 6, TO JUNE 22, 1914.

No. 709. THE UNITED STATES, PETITIONER, *v.* NIPISSING MINES COMPANY. On a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. April 6, 1914. Dismissed on motion of *Mr. Solicitor General Davis* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the petitioner. *Mr. George F. Hurd* for the respondent.

No. 448. CONTINENTAL LIFE INSURANCE & INVESTMENT COMPANY, PLAINTIFF IN ERROR, *v.* I. C. HATTABAUGH, AS INSURANCE COMMISSIONER OF THE STATE OF IDAHO. In error to the Supreme Court of the State of Idaho. April 6, 1914. Dismissed per stipulation. *Mr. Charles C. Cavanah* for the plaintiff in error. *Mr. J. H. Peterson* for the defendant in error.

No. 1015. LEOCADIO PAJARILLO ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. April 13, 1914. Docketed and dismissed, on motion of *Mr Solicitor General Davis* for the defendant in error. *The Attorney General* for the defendant in error. No one opposing.

No. 363. ROY C. HECOX, AS TRUSTEE, ETC., APPELLANT, *v.* THE COUNTY OF TELLER, STATE OF COLORADO, ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. April 13, 1914. Dismissed per stipulation. *Mr. Ernest Morris* and *Mr. William W. Grant, Jr.*, for the appellant. *Mr. C. S. Thomas* for the appellees.

No. 426. ALABAMA & VICKSBURG RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* PEARL MORRIS. In error to the Supreme Court of the State of Mississippi. April 16, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Robert H. Thompson* and *Mr. J. Blanc Monroe* for the plaintiffs in error. No appearance for the defendant in error.

No. 380. WISCONSIN CENTRAL RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* NORTHERN PACIFIC RAILWAY COMPANY. In error to the Supreme Court of the State of Minnesota. April 20, 1914. Dismissed per stipulation. *Mr. J. L. Erdall, Mr. M. D. Munn* and *Mr. A. H. Bright* for the plaintiffs in error. *Mr. Charles W. Bunn* and *Mr. Emerson Hadley* for the defendant in error.

No. 465. The Colorado & Southern Railway Company, Plaintiff in Error, *v.* The State Railroad Commission of Colorado et al. In error to the Supreme Court of the State of Colorado. April 27, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. E. E. Whitted* for the plaintiff in error. *Mr. Barney L. Whatley* for the defendants in error.

No. 351. John W. Price, Plaintiff in Error, *v.* Pecos Valley & Northeastern Railway Company. In error to the Supreme Court of the State of New Mexico. May 1, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles R. Brice* for the plaintiff in error. *Mr. William C. Reid* and *Mr. Robert Dunlap* for the defendant in error.

No. 357. Henry Athol Edwards, Appellant, *v.* H. B. McCoy, Collector of Customs of the Philippine Islands. Appeal from the Supreme Court of the Philippine Islands. May 4, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. C. L. Bouve* for the appellant. *Mr. Felix Frankfurter* for the appellee.

No. 376. The Brown Shoe Company, Plaintiff in Error, *v.* C. Ross Hume, Trustee, etc. In error to the Supreme Court of the State of Oklahoma. May 6, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. James R. Keaton* for the plaintiff in error. *Mr. W. F. Wilson* for the defendant in error.

No. 527. Bob Kirkpatrick, Plaintiff in Error, *v.* The State of Georgia. In error to the Court of Appeals

of the State of Georgia. May 25, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. B. Z. Phillips* for the plaintiff in error. *Mr. Thomas S. Felder* for the defendant in error.

No. 825. SUCCESSION OF RAMON PEREZ VILLAMIL, APPELLANT, *v.* MARIA DE JESUS. Appeal from the Supreme Court of Porto Rico. May 25, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Frederic R. Coudert* for the appellant. No appearance for the appellee.

No. 187. ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM H. WINDOLPH, TO THE USE OF LEON WEINER ET AL. In error to the Supreme Court of the State of Pennsylvania. June 8, 1914. Judgment reversed with costs, and cause remanded for further proceedings per stipulation of counsel. *Mr. Thomas DeWitt Cuyler* and *Mr. John Lewis Evans* for the plaintiff in error. *Mr. Russell Duane* for the defendants in error.

No. 455. ELLEN M. MORSE ET AL., APPELLANTS, *v.* H. ROZIER DULANY, TRUSTEE, ETC. Appeal from the Court of Appeals of the District of Columbia. June 22, 1914. Dismissed with costs on motion of counsel for the appellants. *Mr. Holmes Conrad* and *Mr. John Selden* for the appellants.

No. 521. THE NATIONAL COUNSEL, JUNIOR ORDER UNITED AMERICAN MECHANICS, PLAINTIFF IN ERROR, *v.*

MARTHA BROWN, FORMERLY RINGO. In error to the Court of Appeals of the State of Kentucky. June 22, 1914. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. Pattison A. Reece* for the plaintiff in error. No appearance for the defendant in error.

No. 841. ANTONIO BALASQUIDE GOMEZ, APPELLANT, *v.* ENRIQUE COMACHO, ETC. Appeal from the Supreme Court of Porto Rico. June 22, 1914. Dismissed per stipulation. *Mr. F. Kingsbury Curtis* and *Mr. Hugo Kohlmann* for the appellant. *Mr. Frederic D. McKenney, Mr. John Spalding Flannery, Mr. William Hitz* and *Mr. Francis H. Dexter* for the appellee.

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ADMINISTRATIVE ORDERS.

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ADMIRALTY.

1. *Jurisdiction; locality as test of.*

As a general principle, the test of admiralty jurisdiction in this country is locality. *Atlantic Transport Co.* v. *Imbrovek*, 52; *Atlantic Transport Co.* v. *Szczesek*, 63.

2. *Jurisdiction of suit in personam against stevedore by employé.*

Admiralty has jurisdiction of a suit *in personam* by an employé of a stevedore against the employer to recover for injuries sustained through the negligence of the latter while engaged in loading a vessel lying at the dock in navigable waters. *Ib.*

3. *Jurisdiction; scope of; quære as to non-maritime torts.*

The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history, *The Blackheath*, 195 U. S. 361, and *quære* as to the exact extent to which admiralty jurisdiction extends where the tort is not maritime although committed on navigable waters. *Ib.*

4. *Torts; when maritime.*

A tort committed on a vessel in connection with a service thereto may be maritime even if there is no fault on the part of, or injury to, the ship itself. *Atlantic Transport Co.* v. *Imbrovek*, 52.

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COMMON CARRIERS.

1. *What constitutes; conversion of plant facility into.*

Although a railroad may have originally been a mere plant facility, after it has been acquired by a common carrier duly organized under the law of the State and performing service as such and regulated and operated under competent authority, it is no longer a plant facility but a public institution, even though the owner of the

CONSTRUCTION OF STATUTES.

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DUTIES ON IMPORTS.

See MANDAMUS, 3, 4, 6;
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ECCLESIASTICAL BODIES.

1. *Community ownership of property; repugnance to public policy.*

Where the State has chartered a society as one of "religious men living in community," a provision in its constitution for community ownership, with renunciation of individual rights in private property during continuance of membership, with freedom of withdrawal, is not invalid as opposed to the public policy of, but is directly sanctioned by, the State creating the society. *St. Benedict Order* v. *Steinhauser*, 640.

2. *Community ownership of property; validity of agreement as to.*

An agreement to live in community and renounce individual rights of property, but with a right to withdraw at any time invades no constitutional right; nor, in this case, does it transgress any statute of the State of New Jersey which chartered the society with which the agreement is made. *Ib.*

3. *Community ownership of property; validity under Constitution and public policy of agreement as to.*

In this case *held* that an agreement made by a member of a religious order chartered as a society of religious men living in community that his individual earnings and acquisitions, like those of other members, should go into the common fund, included his earnings from copyrights of books; and also *held*, that as such agreement contained a right to withdraw at any time there was no infringement of any right protected by the Constitution of the United States nor was it against the public policy of the State of New Jersey which granted the charter to the society. *Ib.*

See COURTS, 6.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 23, 39.

EXEMPTION FROM LIABILITY.

See INTERSTATE COMMERCE, 21.

FACTS.

See CLAIMS AGAINST UNITED STATES; INTERSTATE COMMERCE COMMISSION, 2, 12, 13, 14; JURISDICTION, A 12; PRACTICE AND PROCEDURE, 3–6; STATES, 1.

FEDERAL QUESTION.

1. *Claim of impairment of Federal right; when precluded by decision of state court.*

The criticism that a police statute requires a carrier to comply with conditions beyond its control and, therefore, deprives it of its property without due process of law, is not open in this court if the state court has construed the statute as not so requiring the carrier. *Atlantic Coast Line* v. *Georgia*, 280.

2. *Not involved in obstruction of non-navigable stream wholly within State.*

There is no Federal right involved in the obstruction, or use by private owners, of a non-navigable stream wholly within a State. *Illinois* v. *Economy Power Co.*, 497.

3. *Deprivation of Federal right; effect of refusal of state court to allow filing of amended pleading.*

In this case *held*, that defendant had not been deprived of Federal rights because the state court had refused to allow him to file an amended pleading and relitigate a question already decided by setting up alleged violations of Federal rights. *Louisville & Nashville R. R. Co.* v. *Higdon*, 592.

See CONSTITUTIONAL LAW, 9; JURISDICTION; PRACTICE AND PROCEDURE, 10, 11.

FEES.

See BANKRUPTCY, 4; CONSTITUTIONAL LAW, 8, 11, 18, 34; COURTS, 4, 5; INTERSTATE COMMERCE, 25.

FERRIES.

1. *Right to maintain under common law.*

At common law the right to maintain a public ferry lies in franchise. *Port Richmond Ferry* v. *Hudson County*, 317.

INHERITANCE.

See CONSTITUTIONAL LAW, 35;
DESCENT AND DISTRIBUTION.

INJUNCTION.

To stay proceeding in state court; power of Federal court to issue; application of prohibition in § 265, Judicial Code.

The prohibition, § 720, Rev. Stat., now § 265, Judicial Code, against granting the writs of injunction by the Federal court to stay proceedings in a state court except where authorized by the Bankruptcy Act *held*, in this case, to apply to a case commenced after adjudication of bankruptcy to enjoin the trustee from prosecuting a suit in ejectment, in the courts of the State where the land is situated. Such a case is not within the exception or in aid of the bankruptcy proceeding. *Hull* v. *Burr*, 712.

See ACTIONS, 1; JURISDICTION, A 2; D;
COURTS, 5; PUBLIC LANDS, 5;
PUBLIC WORKS, 2.

INSURANCE.

See CONSTITUTIONAL LAW, 11;
PAYMENT;
STATES, 4, 5.

INTERSTATE COMMERCE.

1. *What constitutes; transportation by ferry as; power of States to regulate.*

Transportation of persons and property from one State to another by ferry is interstate commerce and subject to regulation by Congress, and it is beyond the competency of the States to impose direct burdens thereon; Congress not having acted on the subject, however, the States may exercise a measure of regulatory power not inconsistent with the Federal authority and not actually burdening, or interfering with, interstate commerce. *Port Richmond Ferry* v. *Hudson County*, 317.

2. *What constitutes; effect of purchase by carrier of article transported.*

The fact that the article transported between interstate points has been purchased by the carrier, is not conclusive against the transportation being interstate commerce; and in this case, *held* that interstate transportation of oil purchased from the producers by the owner of the pipe is interstate commerce and under the control of Congress. *The Pipe Line Cases*, 548.

INTERSTATE COMMERCE COMMISSION.

LIQUORS.

See INDIANS, 6–11.

LOCAL LAW.

District of Columbia. Materialmen's Act of 1899 (see Contracts, 6, 7, 8). *Equitable Surety Co.* v. *McMillan*, 448.

Georgia. Locomotive Headlight Law (see Constitutional Law, 12). *Atlantic Coast Line* v. *Georgia*, 280.

Kansas. Allowance of attorney's fees in mandamus proceedings (see Constitutional Law, 34). *Missouri Pacific Ry. Co.* v. *Larabee*, 459.

Kentucky. Anti-trust act of 1890 (see Constitutional Law, 21). *Collins* v. *Kentucky*, 634; *Malone* v. *Kentucky*, 639.
Anti-trust laws of 1900 and 1906 (see Constitutional Law, 29). *International Harvester Co.* v. *Kentucky*, 216.
Pooling crops; c. 117, Laws of 1906, as amended by c. 8 of Laws of 1908 (see Constitutional Law, 21). *Collins* v. *Kentucky*, 634; *Malone* v. *Kentucky*, 639.

Minnesota. Liability of stockholders (see Constitutional Law, 22). *Selig* v. *Hamilton*, 652 (see Corporations, 4, 5, 7, 8, 9). *Ib.*

Mississippi. Suits to dispel cloud on title; right to maintain under § 975, Rev. Code of 1871. As construed by the highest court of Mississippi, § 975, Rev. Code of 1871 of that State entitles the rightful owner of real property in that State to maintain a suit to dispel a cloud cast upon the title thereto by an invalid deed, even though, under applicable principles of equity, it be void on its face. *Louisville & Nashville R. R. Co.* v. *Western Union Tel. Co.*, 369.
Eminent Domain; attack on judgment of special court of (see Jurisdiction, C 2). *Louisville & Nashville R. R. Co.* v. *Western Union Tel. Co.*, 369.

Missouri. Anti-trust laws of 1899 and 1909 (see Constitutional Law, 26). *International Harvester Co.* v. *Missouri*, 199.
Loans on policies of life insurance (see States, 5). *New York Life Ins. Co.* v. *Head*, 149.

New Mexico. Negotiable Instrument Act of 1907; effect of fraud in procurement of signature. Under the construction of the Negotiable Instrument Act of 1907 of New Mexico accepted by the courts of that State, the title of a person negotiating commercial paper is

LONG AND SHORT HAUL.

See INTERSTATE COMMERCE, 33, 34, 35;
INTERSTATE COMMERCE COMMISSION, 9.

LUMBER.

See INTERSTATE COMMERCE, 22, 23, 24;
INTERSTATE COMMERCE COMMISSION, 4.

MANDAMUS.

1. *Functions of writ directed to judicial officer.*

The writ of mandamus lies to compel the exercise by a judicial officer of existing jurisdiction but not to control his decision. *Ex parte Roe*, 70.

2. *Availability of writ in case of refusal of judicial officer to remand cause.*

Mandamus may not be used to correct alleged error in a refusal to remand, especially where the order may be reviewed after final judgment on writ of error or appeal. (*Ex parte Harding*, 219 U. S. 363.) *Ib.*

3. *Right of importer to review action of Secretary of Treasury in determining rate of duty on import.*

Even an importer may not invoke the aid of the courts to clog the wheels of government by attempting to review by mandamus the action of the Secretary of the Treasury in determining the rate of duty to be collected on imported articles. *Louisiana* v. *McAdoo*, 627.

4. *Nature of action of Secretary of Treasury in determining rate of duty on import.*

Determining the rate of duty to be collected under the existing statutes and treaties on foreign sugar is not a mere ministerial act on the part of the Secretary of the Treasury, but one involving judgment and discretion. *Ib.*

5. *Public officers; acts compellable by.*

While a public officer may by law, and at the instance of one having a particular legal interest, be required to perform a mere ministerial act not requiring the exercise of judgment or discretion, he may not be so required in respect to matters committed to him by law and requiring the exercise of judgment and discretion. *Ib.*

6. *Availability of writ to compel action by Secretary of Treasury in respect of collection of duty on import.*

Application for leave to file a petition for writ of mandamus against the Secretary of the Treasury to compel him to collect a different

States and after completion the Secretary of War is to take charge of the canal, does not make the United States responsible, prior to completion, where Congress has expressly declared that the canal will only be accepted after completion, and that the local authorities shall meanwhile assume all responsibility in connection therewith. *Ib.*

See CONTRACTS.

PUBLIC WRONGS.

See CONSPIRACY, 1.

RAILROADS.

See COMMON CARRIERS, 1, 2, 3;
CONSTITUTIONAL LAW, 12, 32;
INTERSTATE COMMERCE;
PUBLIC LANDS, 16–21;
SAFETY APPLIANCE ACT;
STATES, 6, 7.

RATES.

See FERRIES, 5, 6;
INTERSTATE COMMERCE, 6, 14, 16, 26–36;
INTERSTATE COMMERCE COMMISSION, 1, 2, 9, 10, 11.

REAL PROPERTY.

See DESCENT AND DISTRIBUTION, 2.

REBATES.

See INTERSTATE COMMERCE, 36, 38, 39.

RECEIVERS.

See BANKRUPTCY, 5, 6, 8;
CONSTITUTIONAL LAW, 32;
CORPORATIONS, 10.

RECOMMENDATIONS OF THE PRESIDENT.

See CONGRESS, POWERS OF.

RECORD.

See PRACTICE AND PROCEDURE, 12.

REHEARINGS.

Duty of counsel in dealing with case.

In presenting petitions for rehearing a duty rests upon counsel to deal with the case as it is disclosed by the record. *Chapman & Dewey* v. *St. Francis Levee District*, 667.

STATUTE OF LIMITATIONS.

STATUTES.

A. CONSTRUCTION OF.

WORDS AND PHRASES.

WRIT AND PROCESS.