UNITED STATES REPORTS

VOLUME 235

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1914

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1915

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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.
CHARLES EVANS HUGHES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JOSEPH RUCKER LAMAR, Associate Justice.
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.[2]

JAMES C. McREYNOLDS, Attorney General.[3]
THOMAS WATT GREGORY, Attorney General.[4]
JOHN WILLIAM DAVIS, Solicitor General.
JAMES D. MAHER, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.[5]
FRANK KEY GREEN, Marshal.[6]

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

[2] James Clark McReynolds of Tennessee was appointed by President Wilson to succeed Mr. Justice Horace H. Lurton, who died during vacation on July 12, 1914; he was confirmed by the Senate of the United States on August 29, 1914; he took the oath of office September 5, 1914; the Judicial Oath was administered, and he took his seat on the bench on the opening of October Term 1914.

[3] Resigned September 2, 1914.

[4] On August 19, 1914, President Wilson nominated Thomas Watt Gregory of Texas as Attorney General to succeed James C. McReynolds, resigned. He was confirmed by the Senate August 29, 1914, and took the oath of office on September 3, 1914.

[5] Died January 3, 1915. See p. vi, *post*.

[6] Appointed Marshal to succeed John Montgomery Wright, deceased, January 5, 1915.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER 19, 1914.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last 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, JAMES C. MCREYNOLDS, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

[1] For previous allotment see 234 U. S., p. iv.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 12, 1914.

THE CHIEF JUSTICE said:

"It gives me pain to say that since the court adjourned at the end of the last term it has come to pass that the nation may no longer enjoy the fruitful and beneficent results to arise from the continued enlightened and devoted discharge by MR. JUSTICE LURTON of his public duties. He died at Atlantic City on the 12th day of July. In addition to the sorrow which they share with their countrymen at so great a loss, the members of the Court have suffered the pang caused by the severance of the close personal ties which bound them to MR. JUSTICE LURTON; ties the strength of which cannot be fully appreciated without understanding how completely his attainments and his lovable traits of personal character commanded the respect and drew to him the warm affection of those who had the privilege of being associated with him in the performance of his judicial duties."

THE CHIEF JUSTICE also said:

"In the month of August the HON. JAMES CLARK MCREYNOLDS was appointed an Associate Justice of this court, to fill the vacancy caused by the death of MR. JUSTICE LURTON, and on the 3d day of September the oath of office required by section 1756 of the Revised Statutes was administered to Mr. McReynolds by THE CHIEF JUSTICE. The new Justice is present to-day, and before he takes his seat the Clerk will read the commission and will administer to him the oath pointed out by section 257 of the Judicial Code; that is, the judicial oath."

The Clerk then read the commission, and Mr. McReynolds took the oath of office, and was escorted by the Marshal to his seat on the Bench.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 4, 1915.

THE CHIEF JUSTICE said:

"Gentlemen of the bar: It is my painful duty to announce that since we last met the Marshal of the court, Major John Montgomery Wright, has died. This day twenty-seven years ago he entered upon the performance of his duties as Marshal of this court, and from that time until a few hours ago, when he was called to his last account, with that modesty, simplicity, and honorable devotion to duty exhibited in so many instances by the children of that great school out of which he came—the Military Academy of West Point—he discharged the responsibilities resting upon him as the Marshal of this court. In war and in peace he exemplified in his life a patient, simple, brave, single-minded, and devoted performance of public duty. Therefore, as a token of the affection we bore him and of the respect we had for him, we shall do nothing to-day but hear motions to admit and other motions and adjourn until to-morrow morning."

SUPREME COURT OF THE UNITED STATES.

TUESDAY, JANUARY 5, 1915.

ORDER: It is ordered by the court that Frank K. Green be, and he is hereby, appointed Marshal of this court in the place of John Montgomery Wright, deceased.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

	PAGE
Adkins *v.* Arnold	417
Albertucci, Monagas *v.*	81
Alexander Bryant Company *v.* New York Steam Fitting Company	327
American Publishers Association, Straus *v.*	716
American Water Softener Company *v.* Lankford and others, Composing the State Banking Board of the State of Oklahoma	496
Anderson *v.* Swedish Evangelical Mission Covenant of America	692
Anderson, Petitioner, *v.* Chenault	700
Anderson, Petitioner, *v.* Forty-two Broadway Company	699
Arctic Lumber Company, Borden *v.*	704
Arizona & New Mexico Railway Company *v.* Clark	669
Arkansas, St. Louis Southwestern Railway Company *v.*	350
Arnold, Adkins *v.*	417
Atchison, Topeka & Santa Fe Railway Company, McCabe *v.*	151
Atchison, Topeka & Santa Fe Railway Company *v.* Ritterbusch	683
Atlantic Coast Lumber Corporation *v.* Minshew	685
Aton Piano Company, Chicago, Milwaukee & St. Paul Railway Company *v.*	715
Automobile Supply Manufacturing Company, Lovell-McConnell Manufacturing Company *v.*	383
Bache, Petitioner, *v.* United States	702
Backus, Cardonnel *v.*	715

Table of Cases Reported.

PAGE

Backus, Kum *v.* 714
Bank (Continental & Commercial Trust & Savings), Fallows *v.* 300
Bank (First National of Albuquerque), Miller *v.* . 689
Bank (German of Carroll County, Iowa) *v.* Lee . 709
Bank (Mechanics & Metals National), Howell *v.* . 702
Bank (National City of Chicago), Rogers *v.* . . . 698
Bank (National of Commerce of Seattle), Russo-Chinese Bank *v.* 696
Bank (Russo-Chinese) *v.* National Bank of Commerce of Seattle 696
Bankers Surety Company, Petitioner, *v.* Elkhorn River Drainage District 702
Banking Board of Oklahoma, American Water Softener Company *v.* 496
Banking Board of Oklahoma *v.* Farish 498
Banking Board of Oklahoma, Farish *v.* . . . 498
Banking Board of Oklahoma *v.* Platte Iron Works Company 461
Baron Du Laurens d'Oiselay, People of Porto Rico *v.* 251
Bartlett, United States *v.* 72
Behrman, Mayor of the City of New Orleans, Louisiana Railway & Navigation Company *v.* . 164
Berwind-White Coal Mining Company *v.* Chicago & Erie Railroad Company 371
Blagg, Jeffrey Manufacturing Company *v.* . . . 571
Board of Supervisors of Harrison County, Iowa, Ruffcorn *v.* 708
Borden, Petitioner, *v.* Arctic Lumber Company . 704
Borland, Petitioner, *v.* Central Trust Company of Illinois 701
Brady, Sizemore *v.* 441
Braker's Trustee, Brown, Trustee for Schermerhorn Under Will of Cunningham *v.* . . . 589
Braker's Trustee, Provident Life & Trust Company as Executor of Wood *v.* 589

Table of Cases Reported.

PAGE

Breuker & Kessler Company, Dejonge & Company *v.* 33
Britton *v.* Wheeler 687
Broughton, United States *v.* 133
Brown, John Ii Estate, Limited, *v.* 342
Brown, Petitioner, *v.* Pacific Coast Coal Company . 705
Brown, Trustee for Schermerhorn Under Will of Cunningham, *v.* Fletcher, Trustee of Braker . 589
Brown's Trustee in Bankruptcy, Scotten *v.* . . . 407
Bryant Company *v.* New York Steam Fitting Company 327
Bussell, Washington Dredging & Improvement Company *v.* 688

California, Peralta *v.* 686
Canal Commissioners of Illinois *v.* Pittsburgh, Fort Wayne & Chicago Railway Company . . 689
Canal Company (Twin Falls) *v.* State of Idaho . 690
Canavan *v.* Romero 709
Cardonnel *v.* Backus 715
Castleman, Mound City Company *v.* 689
Ceballos and Fiske *v.* Wilson 712
Central Trust Company of Illinois, Borland *v.* . 701
Champion Fibre Company, Petitioner, *v.* Russell . 700
Chenault, Anderson *v.* 700
Chicago, Willoughby *v.* 45
Chicago, Burlington & Quincy Railroad Company, United States *v.* 696
Chicago City Railway Company, Venner *v.* . . . 713
Chicago & Erie Railroad Company, Berwind-White Coal Mining Company *v.* 371
Chicago, Milwaukee & St. Paul Railway Company *v.* Hanson 693
Chicago, Milwaukee & St. Paul Railway Company, Twin City Separator Company *v.* 716
Chicago, Milwaukee & St. Paul Railway Company *v.* Uber 715

Table of Cases Reported.

PAGE

Chicago, Milwaukee & St. Paul Railway Company *v.* W. H. Aton Piano Company . . . 715
Choctaw, Oklahoma & Gulf Railroad Company *v.* Harrison, Sheriff of Pittsburg County, Oklahoma 292
Citizens Insurance Company of Missouri *v.* Clay . 711
Citizens Trust Company *v.* Tilt 710
City of Chicago, Willoughby *v.* 45
City of Cleveland, Cleveland & Pittsburgh Railroad Company *v.* 50
City of Covington, South Covington & Cincinnati Street Railway Company *v.* 537
City of New Orleans, Louisiana Railway & Navigation Company *v.* 164
City of Omaha, Missouri Pacific Railway Company *v.* 121
City and County of San Francisco, Pacific States Supply Company *v.* 709
City of Seattle, Missouri *ex rel.* St. Joseph Water Company *v.* 694
City of Seattle, Washington *ex rel.* Smith *v.* . . . 695
Clark, Arizona & New Mexico Railway Company *v.* 669
Clark, Petitioner, *v.* Schieble Toy & Novelty Company 707
Clay, Citizens Insurance Company of Missouri *v.* . 711
Clendaniel *v.* Conrad 712
Cleveland, Cleveland & Pittsburgh Railroad Company *v.* 50
Cleveland & Pittsburgh Railroad Company *v.* City of Cleveland 50
Coal Company (Lehigh Valley) *v.* Yensavage . . . 705
Coal Company (Pacific Coast), Brown *v.* . . . 705
Cohen, Petitioner, *v.* United States 696
Coldwell-Gildard Company, Stafford Company *v.* . 700
Cole, Jarrell *v.* 697
Commissioner of Immigration, Cardonnel *v.* . . . 715

Table of Cases Reported.

PAGE

Commissioner of Immigration, Kum *v.* . . 714
Commonwealth Trust Company *v.* Trocon . . 685
Comptroller of the State of Florida, Pullman Company *v.* 23
Comptroller of the State of New York, People of the State of New York on the Relation of Cornell Steamboat Company *v.* 549
Concepcion Veve de Belavel *v.* Fajardo Sugar Growers Association 713
Conrad, Clendaniel *v.* 712
Continental & Commercial Trust & Savings Bank, Trustee in Bankruptcy of Tengwall Company, Fallows *v.* 300
Coos County's Sheriff *v.* Thaw 432
Cope, Sioux Remedy Company *v.* 197
Copperman, Doing Business as Thalia Music Hall, Universal Film Manufacturing Company *v.* . 704
Cornell Steamboat Company *v.* Sohmer, as Comptroller of the State of New York . . . 549
Corvallis & Eastern Railroad Company *v.* West . 691
Covington, South Covington & Cincinnati Street Railway Company *v.* 537
Cowan *v.* People of the State of Illinois *ex rel.* Wayman, State's Attorney 692
Cox, Rixey *v.* 687

Danbury Hatters' Case (Lawlor *v.* Loewe) . . 522
Daugherty *v.* L. D. George Lumber Company . 703
David, Administratrix of Selleck, Gilbert, Administrator of Selleck, *v.* 561
Davis, Dean *v.* 702
Dean, Petitioner, *v.* Davis 702
Deaver-Jeter Company, Southern Railway Company *v.* 710
De Belavel *v.* Fajardo Sugar Growers Association . 713
Dejonge & Company *v.* Breuker & Kessler Company 33

Table of Cases Reported.

PAGE

Denver Chemical Manufacturing Company, Petitioner *v.* Lilley 706
Detroit & Mackinac Railway Company *v.* Michigan Railroad Commission 402
Dicks, Hull *v.* 584
Dill, Skelton *v.* 206
Donahoo, Moore *v.* 706
Dowagiac Manufacturing Company *v.* Minnesota Moline Plow Company 641
Dowagiac Manufacturing Company *v.* Smith . 641
Doyle & Son *v.* Schmidheiser 693
Drew, Petitioner, *v.* United States 697
Drew, Sheriff of Coos County, New Hampshire, *v.* Thaw 432
Drury and Maddox, Trustees, Magruder *v.* . . 106
Dunlevy, New York Life Insurance Company *v.* . 705
Du Pont De Nemours Powder Company, Petitioner, *v.* Schlottman 705

Easterling Lumber Company *v.* Pierce . . 380
E. I. Du Pont De Nemours Powder Company, Petitioner, *v.* Schlottman 705
Electric Lines Company (N. Y.) *v.* Empire City Subway Company 179
Elkhorn River Drainage District, Bankers Surety Company *v.* 702
Elliott Company, Lagonda Manufacturing Company *v.* 697
Emerson & Norris Company, Petitioner, *v.* Simpson Brothers Corporation 707
Emmanuel, Baron Du Laurens d'Oiselay, People of Porto Rico *v.* 251
Empire City Subway Company, New York Electric Lines Company *v.* 179
Empire State Surety Company, United States *v.* . 713
Erie Railroad Company, United States *v.* . . 513

Table of Cases Reported.

PAGE

Ernst, Hotchkiss *v.* 684
Ex parte: In the Matter of Jared Flagg, Petitioner 683
Ex parte: In the Matter of Leo M. Frank, Petitioner 694

Fajardo Sugar Growers Association, De Belavel *v.* 713
Fallows *v.* Continental & Commercial Trust & Savings Bank, Trustee in Bankruptcy of Tengwall Company 300
Fargo, Reid *v.* 703
Farish *v.* State Banking Board of the State of Oklahoma 498
Farish, State Banking Board of Oklahoma *v.* . 498
Fay *v.* United States 707
F. B. Williams Cypress Company, Ltd., *v.* State of Louisiana 714
Fidelity & Guaranty Company (U. S.) *v.* Poetker . 683
Finn and others as Railroad Commission of Kentucky, Louisville & Nashville Railroad Company *v.* 601
First National Bank of Albuquerque, Miller *v.* . 689
Fishback, Robison *v.* 714
Flagg, *Ex parte* 683
Fletcher *et al.*, Petitioners, *v.* United States . . 706
Fletcher, Trustee of Braker, Brown, Trustee for Schermerhorn Under Will of Cunningham, *v.* . 589
Fletcher, Trustee of Braker, Provident Life & Trust Company as Executor of Wood, *v.* . . 589
Florida, Pullman Company *v.* 23
Folger, Petitioner, *v.* Putnam 712
Ford, Vicksburg Water Works Company *v.* . . 716
Forter-Miller Engineering Company *et al.*, Petitioners, *v.* Morgan Construction Company . 698
Forty-two Broadway Company, Anderson *v.* . 699
Frank, *Ex parte* 694

Table of Cases Reported.

PAGE

Gard *v.* People of the State of Illinois . . . 691
Garrett, Administrator of Lewis, *v.* Louisville & Nashville Railroad Company 308
George Lumber Company, Inc., Petitioner, *v.* Daugherty 703
Georgia, Wadley Southern Railway Company *v.* . 651
German Bank of Carroll County, Iowa, *v.* Lee . 709
Gifford, Northern Pacific Railway Company *v.* . 711
Gilbert, Administrator of Selleck, *v.* David, Administratrix of Selleck 561
Goldman, Philadelphia & Reading Railway Company *v.* 715
Grace & Company, Rainey *v.* 704
Greenwald & Champenois, Mobile & Ohio Railroad Company *v.* 717
Groo, Petitioner, *v.* Whitney 703

Hampe, Sage *v.* 99
Hanson, Chicago, Milwaukee & St. Paul Railway Company *v.* 693
Harrison, Sheriff of Pittsburg County, Oklahoma, Choctaw, Oklahoma & Gulf Railroad Company *v.* 292
Hebard, Hopkins *v.* 287
Hendrick *v.* State of Maryland 610
Henkel, United States Marshal, Henry *v.* . . . 219
Henry *v.* Henkel, United States Marshal . . 219
Holbrook, Norfolk & Western Railway Company *v.* 625
Holden, Knapp *v.* 714
Holland-American Line, United States *v.* . . . 686
Homer, Oregon Short Line Railroad Company *v.* . 693
Hooker, Corser & Mitchell Company, Mohawk Overall Company *v.* 685
Hopkins *v.* Hebard 287
Hotchkiss *v.* Ernst 684
Howell, Petitioner, *v.* Mechanics & Metals National Bank 702

Table of Cases Reported.

PAGE

Hull *v.* Dicks 584
Hyde, Minerals Separation, Limited, *v.* . . 701

Idaho, Twin Falls Canal Company *v.* . . . 690
Ii Estate, Limited, *v.* Brown 342
Illinois *ex rel.* Wayman, Cowan *v.* . . . 692
Illinois, Gard *v.* 691
Illinois, Suing by the Canal Commissioners *v.* Pittsburgh, Fort Wayne & Chicago Railway Company 689
Illinois State Trust Company, Kelly *v.* . . 701
Indemnity Company (Western Life of Illinois) *v.* Rupp 261
Indiana, Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company *v.* 710
Insurance Company (Citizens, of Missouri) *v.* Clay 711
Insurance Company (N. Y. Life) *v.* Dunlevy . . 705
Interstate Commerce Commission, Pennsylvania Railroad Company *v.* 708

Jackson Oil & Refining Company, Wathen *v.* . . 635
Jarrell *et al.*, Petitioners, *v.* Cole 697
Jeffrey Manufacturing Company *v.* Blagg . . 571
Jenkins *v.* Maxwell Land Grant Company . . 691
John Ii Estate, Limited, *v.* Brown . . . 342
Joplin Mercantile Company *et al.*, Petitioners, *v.* United States 699
Judson, Petitioner, *v.* Nash 703

Kelly, Petitioner, *v.* Illinois State Trust Company . 701
Kentucky Railroad Commission, Louisville & Nashville Railroad Company *v.* 601
Knapp *v.* Holden 714
Knott, Comptroller of the State of Florida, Pullman Company *v.* 23
Krieg, Lewis *v.* 708
Kum *v.* Backus 714

Table of Cases Reported.

PAGE

Lagonda Manufacturing Company, Petitioner, *v.* Elliott Company 697
Lamar *v.* Splain 695
Lane *v.* Watts 17
Lankford and others, Composing the State Banking Board of Oklahoma, American Water Softener Company *v.* 496
Lankford and others, Composing the State Banking Board of the State of Oklahoma, *v.* Platte Iron Works Company 461
Lawlor *v.* Loewe 522
L. D. George Lumber Company, Inc., Petitioner, *v.* Daugherty 703
Leavenworth, Smith *v.* 690
Lee, German Bank of Carroll County, Iowa, *v.* . 709
Lehigh Valley Coal Company, Petitioner, *v.* Yensavage 705
Leora, Minneapolis, St. P. & Sault Ste. Marie Railway Company *v.* 694
L. E. Waterman Company *v.* Modern Pen Company 88
L. E. Waterman Company, Modern Pen Company *v.* 88
Lewis *v.* Krieg 708
Lewis' Administrator *v.* Louisville & Nashville Railroad Company 308
Lewis, United States *v.* 282
Life Indemnity Company (Western of Illinois) *v.* Rupp 261
Life Insurance Company (N. Y.) *v.* Dunlevy . 705
Life & Trust Company (Provident) as Executor of Wood *v.* Fletcher, Trustee of Braker . . 589
Lilley, Denver Chemical Manufacturing Company *v.* 706
Littlefield, Trustee of Brown, Bankrupt, Scotten *v.* 407
Loewe, Lawlor *v.* 522
Louisiana, F. B. Williams Cypress Company *v.* . 714
Louisiana, Rabb *v.* 688

Table of Cases Reported.

PAGE

Louisiana Railway & Navigation Company *v.* Behrman, Mayor of the City of New Orleans . 164
Louisville & Nashville Railroad Company *v.* Finn and others as Railroad Commission of Kentucky 601
Louisville & Nashville Railroad Company, Garrett, Administrator of Lewis, *v.* 308
Louisville & Nashville Railroad Company, United States *v.* 314
Lovell-McConnell Manufacturing Company *v.* Automobile Supply Manufacturing Company 383
Lumber Company (Arctic), Borden *v.* 704
Lumber Company (Easterling) *v.* Pierce . . 380
Lumber Company (L. D. George) *v.* Dougherty . 703
Lumber Corporation (Atlantic Coast) *v.* Minshew 685

McCabe *v.* Atchison, Topeka & Santa Fe Railway Company 151
McGovern, Administratrix, *v.* Philadelphia & Reading Railway Company 389
Macy & Company *v.* Notaseme Hosiery Company 700
Magruder *v.* Drury and Maddox, Trustees . . 106
Major, Western Union Telegraph Company *v.* . 711
Manufacturing Company (Automobile Supply), Lovell-McConnell Manufacturing Company *v.* 383
Manufacturing Company (Dowagiac) *v.* Minnesota Moline Plow Company 641
Manufacturing Company (Dowagiac) *v.* Smith . 641
Manufacturing Company (Lovell-McConnell) *v.* Automobile Supply Manufacturing Company . 383
Maryland, Hendrick *v.* 610
Maryland Steel Company of Baltimore County *v.* United States 451
Matter of Flagg, Petitioner 683
Matter of Frank, Petitioner 694
Maxwell Land Grant Company, Jenkins *v.* . . 691
Mayer, United States *v.* 55

Table of Cases Reported.

PAGE

Mayor of the City of New Orleans, Louisiana Railway & Navigation Company *v.* . . . 164
Mechanics & Metals National Bank, Howell *v.* . 702
Meisner *v.* People of the State of Michigan . . 709
Mercelis *v.* Wilson 579
Michigan, Meisner *v.* 709
Michigan Railroad Commission, Detroit & Mackinac Railway Company *v.* 402
Miller *v.* First National Bank of Albuquerque . 689
Miller, Washington *v.* 422
Mills *v.* Territory of New Mexico . . . 687
Minerals Separation, Limited, *et al.*, Petitioners, *v.* Hyde 701
Minidoka & Southwestern Railroad Company *v.* United States 211
Mining Company (Berwind-White) *v.* Chicago & Erie Railroad Company 371
Minneapolis, St. Paul & Sault Ste. Marie Railway Company *v.* Leora 694
Minnesota Moline Plow Company, Dowagiac Manufacturing Company *v.* 641
Minshew, Atlantic Coast Lumber Corporation *v.* . 685
Missouri *ex rel.* St. Joseph Water Company *v.* City of Seattle 694
Missouri, Kansas & Texas Railway Company *v.* United States 37
Missouri Pacific Railway Company *v.* City of Omaha 121
Mobile & Ohio Railroad Company *v.* Greenwald & Champenois 717
Modern Pen Company *v.* L. E. Waterman Company 88
Modern Pen Company, L. E. Waterman Company *v.* 88
Mohawk Overall Company *v.* Hooker, Corser & Mitchell Company 685
Monagas *v.* Albertucci 81
Moore *et al.*, Petitioners, *v.* Donahoo . . . 706

Table of Cases Reported.

PAGE

Moose John, United States *v.* 276
Morgan Construction Company, Forter-Miller Engineering Company *v.* 698
Mound City Company *v.* Castleman 689

Nash, Judson *v.* 703
National Bank of Commerce of Seattle, Russo-Chinese Bank *v.* 696
National Bank (First of Albuquerque), Miller *v.* . 689
National Bank (Mechanics & Metals), Howell *v.* . 702
National City Bank of Chicago, Rogers *v.* . . . 698
National Discount Company *v.* Sheppard . . . 712
Nelson Land & Cattle Company, Petitioner, *v.* Smith 699
New Mexico, Mills *v.* 687
New Orleans, Louisiana Railway & Navigation Company *v.* 164
New York, Cornell Steamboat Company *v.* . . . 549
New York on the Relation of Cornell Steamboat Company *v.* Sohmer, as Comptroller of the State of New York 549
New York Electric Lines Company *v.* Empire City Subway Company 179
New York Life Insurance Company, Petitioner, *v.* Dunlevy 705
New York Steam Fitting Company, United States for the use of Alexander Bryant Company *v.* . 327
Nixon *et al.*, Receivers of the St. Louis & San Francisco Railroad Company, United States *v.* . 231
Norfolk & Western Railway Company *v.* Holbrook . 625
North Carolina *v.* Tennessee 1
Northern Pacific Railway Company *v.* Gifford . 711
Northern Pacific Railway Company, United States *v.* 696
Norton, Petitioner, *v.* United States 699
Notaseme Hosiery Company, Straus *et al.*, Trading as Macy & Company, *v.* 700

Table of Cases Reported.

	PAGE
Oil & Refining Company (Jackson), Wathen *v.*	635
Oklahoma, Overton *v.*	31
Oklahoma State Banking Board, American Water Softener Company *v.*	496
Oklahoma State Banking Board *v.* Farish	498
Oklahoma State Banking Board, Farish *v.*	498
Oklahoma State Banking Board *v.* Platte Iron Works Company	461
Oliver *v.* State of Texas	710
Omaha, Missouri Pacific Railway Company *v.*	121
Oregon Short Line Railroad Company *v.* Homer	693
Overton *v.* State of Oklahoma	31
Pacific Coast Coal Company, Brown *v.*	705
Pacific States Supply Company *v.* City and County of San Francisco	709
Parker, Taylor *v.*	42
Paylor, Petitioner, *v.* United States	704
Pen Company (Modern) *v.* L. E. Waterman Company	88
Pen Company (Modern), L. E. Waterman Company *v.*	88
Pennsylvania Railroad Company *v.* Interstate Commerce Commission	708
People of Porto Rico *v.* Emmanuel, Baron Du Laurens d'Oiselay	251
People of the State of Illinois *ex rel.* Wayman, Cowan *v.*	692
People of the State of Illinois, Gard *v.*	691
People of the State of Illinois, Suing by the Canal Commissioners, *v.* Pittsburgh, Fort Wayne & Chicago Railway Company	689
People of the State of Michigan, Meisner *v.*	709
People of the State of New York on the Relation of Cornell Steamboat Company *v.* Sohmer, as Comptroller of the State of New York	549

Table of Cases Reported.

PAGE

Peralta *v.* State of California 686
Perry *et al.*, Petitioners, *v.* Weed Chain Tire Grip Company 698
Philadelphia & Reading Railway Company *v.* Goldman 715
Philadelphia & Reading Railway Company, McGovern, Administratrix *v.* 389
Pierce, Easterling Lumber Company *v.* . . . 380
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company *v.* State of Indiana . . . 710
Pittsburgh, Fort Wayne & Chicago Railway Company, People of the State of Illinois, Suing by the Canal Commissioners *v.* 689
Platte Iron Works Company, Lankford and others, Composing the State Banking Board of Oklahoma *v.* 461
Plow Company (Minnesota Moline), Dowagiac Manufacturing Company *v.* 641
Poetker, United States Fidelity & Guaranty Company *v.* 683
Portale, United States *v.* 27
Porto Rico *v.* Emmanuel, Baron Du Laurens d'Oiselay 251
Provident Life & Trust Company as Executor of Wood *v.* Fletcher, Trustee of Braker . . 589
Pullman Company *v.* Knott, Comptroller of the State of Florida 23
Putnam, Folger *v.* 712

Rabb *v.* State of Louisiana 688
Railroad Commission of Kentucky, Louisville & Nashville Railroad Company *v.* 601
Railroad Commission of Michigan, Detroit & Mackinac Railway Company *v.* 402
Railway Company (A., T. & S. F.), McCabe *v.* . 151
Railway Company (A., T. & S. F.) *v.* Ritterbusch . 683

Table of Cases Reported.

PAGE

Railway Company (Arizona & New Mex.) *v.* Clark 669
Railroad Company (C., B. & Q.), United States *v.* . 696
Railway Company (Chicago City), Venner *v.* . . 713
Railroad Company (Chicago & Erie), Berwind-White Coal Mining Company *v.* . . . 371
Railway Company (C., M. & St. P.) *v.* Hanson . 693
Railway Company (C., M. & St. P.), Twin City Separator Company *v.* 716
Railway Company (C., M. & St. P.) *v.* Uber . . 715
Railway Company (C., M. & St. P.) *v.* W. H. Aton Piano Company 715
Railroad Company (C. & P.) *v.* City of Cleveland . 50
Railroad Company (Choctaw, O. & G.) *v.* Harrison, Sheriff of Pittsburg County, Oklahoma . . 292
Railroad Company (Corvallis & Eastern) *v.* West 691
Railway Company (Detroit & M.) *v.* Michigan Railroad Commission 402
Railroad Company (Erie), United States *v.* . . 513
Railroad Company (L. & N.), Garrett, Administrator of Lewis, *v.* 308
Railroad Company (L. & N.), United States *v.* . 314
Railroad Company (L. & N.) *v.* Finn and others as Railroad Commission of Kentucky . . 601
Railway Company (La. Ry. & N.) *v.* Behrman, Mayor of the City of New Orleans . . 164
Railroad Company (Minidoka & S. W.) *v.* United States 211
Railway Company (Minn., St. P. & Sault Ste. Marie) *v.* Leora 694
Railway Company (Mo., K. & T.) *v.* United States 37
Railway Company (Mo. Pac.) *v.* City of Omaha . 121
Railroad Company (Mobile & Ohio) *v.* Greenwald & Champenois 717
Railway Company (N. & W.) *v.* Holbrook . . 625
Railway Company (Nor. Pac.) *v.* Gifford . . 711
Railway Company (Nor. Pac.), United States *v.* . 696

Table of Cases Reported.

PAGE

Railroad Company (Oregon Short Line) *v.* Homer . 693
Railroad Company (Penna.) *v.* Interstate Commerce Commission 708
Railway Company (Philadelphia & Reading) *v.* Goldman 715
Railway Company (Phila. & Reading), McGovern, Administratrix, *v.* 389
Railway Company (Pittsburgh, C., C. & St. L.) *v.* State of Indiana 710
Railway Company (Pittsburgh, Ft. Wayne & Chicago), People of State of Illinois *v.* . . . 689
Railroad Company (St. Louis & S. F.), United States *v.* 231
Railway Company (St. L. S. W.) *v.* State of Arkansas 350
Railway Company (South Covington & Cin.) *v.* City of Covington 537
Railway Company (Southern) *v.* Deaver-Jeter Company 710
Railway Company (Tex. & Pac.) *v.* Rosborough . 429
Railway Company (Wadley Southern) *v.* Georgia . 651
Railroad Company (Wasatch & Jordan Valley), Raphael *v.* 684, 701
Railroad Company (Yazoo & M. V.) *v.* Wright . 376
Rainey, Petitioner, *v.* W. R. Grace & Company . 704
Raphael *v.* Wasatch & Jordan Valley Railroad Company 684, 701
Reid, Petitioner, *v.* Fargo 703
Remedy Company (Sioux) *v.* Cope 197
Renehan *v.* Retsch 711
Retsch, Renehan *v.* 711
Reynolds, United States *v.* 133
Ritterbusch *v.* Atchison, Topeka & Santa Fe Railway Company 683
Rixey *v.* Cox 687
Robison *v.* Fishback 714
Rogers, Petitioner, *v.* National City Bank of Chicago 698

Table of Cases Reported.

PAGE

Romero, Canavan *v.* 709
Rosborough, Texas & Pacific Railway Company *v.* 429
Ruffcorn *v.* Board of Supervisors of Harrison County, Iowa 708
Rupp, Western Life Indemnity Company of Illinois *v.* 261
Russell, Champion Fibre Company *v.* 700
Russo-Chinese Bank, Petitioner, *v.* National Bank of Commerce of Seattle 696

Sage *v.* Hampe 99
St. Joseph Water Company *v.* City of Seattle . 694
St. Louis & San Francisco Railroad Company's Receivers, United States *v.* 231
St. Louis Southwestern Railway Company *v.* State of Arkansas 350
Salen, United States *v.* 237
San Francisco, Pacific States Supply Company *v.* . 709
Schermerhorn's Trustee Under Will of Cunninghan *v.* Fletcher, Trustee of Braker 589
Schieble Toy & Novelty Company, Clark *v.* . . . 707
Schlottman, E. I. Du Pont De Nemours Powder Company *v.* 705
Schmidheiser, Doyle & Son *v.* 693
Scotten *v.* Littlefield, Trustee of Brown, Bankrupt . 407
Seattle, Missouri *ex rel.* St. Joseph Water Company *v.* 694
Seattle, Washington *ex rel.* Smith *v.* 695
Secretary of the Interior *v.* Watts 17
Selleck's Administrator *v.* David, Administratrix of Selleck 561
Selleck's Administratrix, Gilbert, Administrator of Selleck, *v.* 561
Shapiro *v.* United States 412
Sheppard, National Discount Company *v.* . . . 712
Sheriff of Coos County, New Hampshire, *v.* Thaw . 432
Simpson Brothers Corporation, Emerson & Norris Company *v.* 707

Table of Cases Reported.

PAGE

Sioux Remedy Company *v.* Cope . . . 197
Sizemore *v.* Brady 441
Skelton *v.* Dill 206
Smith *v.* City of Seattle 695
Smith, Dowagiac Manufacturing Company *v.* . 641
Smith *v.* Leavenworth 690
Smith, Nelson Land & Cattle Company *v.* . . 699
Sohmer, as Comptroller of the State of New York, People of the State of New York on the Relation of Cornell Steamboat Company *v.* . . . 549
South Covington & Cincinnati Street Railway Company *v.* City of Covington 537
Southern Railway Company *v.* Deaver-Jeter Company 710
Splain, Lamar *v.* 695
Stafford Company, Petitioner, *v.* Coldwell-Gildard Company 700
State Banking Board of Oklahoma, American Water Softener Company *v.* 496
State Banking Board of Oklahoma *v.* Farish . 498
State Banking Board of Oklahoma, Farish *v.* . . 498
State Banking Board of Oklahoma *v.* Platte Iron Works Company 461
State of Arkansas, St. Louis Southwestern Railway Company *v.* 350
State of California, Peralta *v.* 686
State of Georgia, Wadley Southern Railway Company *v.* 651
State of Idaho, Twin Falls Canal Company *v.* . . 690
State of Illinois *ex rel.* Wayman, Cowan *v.* . . 692
State of Illinois, Gard *v.* 691
State of Illinois, suing by the Canal Commissioners, *v.* Pittsburgh, Fort Wayne & Chicago Railway Company 689
State of Indiana, Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company *v.* 710

Table of Cases Reported.

PAGE

State of Louisiana, F. B. Williams Cypress Company *v.* 714
State of Louisiana, Rabb *v.* 688
State of Maryland, Hendrick *v.* 610
State of Michigan, Meisner *v.* 709
State of Missouri *ex rel.* St. Joseph Water Company *v.* City of Seattle 694
State of New York, Cornell Steamboat Company *v.* . . 549
State of New York on the Relation of Cornell Steamboat Company *v.* Sohmer, as Comptroller of the State of New York 549
State of North Carolina *v.* State of Tennessee . . . 1
State of Oklahoma, American Water Softener Company *v.* 496
State of Oklahoma *v.* Farish 498
State of Oklahoma, Farish *v.* 498
State of Oklahoma, Overton *v.* 31
State of Oklahoma *v.* Platte Iron Works Company 461
State of Tennessee, State of North Carolina *v.* . . . 1
State of Texas, Oliver *v.* 710
State of Washington, E. V. Bussell *et al.*, Washington Dredging & Improvement Company *v.* . . 688
State of Washington *ex rel.* Smith *v.* City of Seattle 695
Steamboat Company (Cornell) *v.* Sohmer, as Comptroller of the State of New York 549
Straus *v.* American Publishers Association . . . 716
Straus *et al.*, Trading, etc., as Macy & Company *v.* Notaseme Hosiery Company 700
Street Railway Company (South Covington & Cin.) *v.* City of Covington 537
Subway Company (Empire City), N. Y. Electric Lines Company *v.* 179
Swedish Evangelical Mission Covenant of America, Anderson *v.* 692

Table of Cases Reported.

	PAGE
Taylor *v.* Parker	42
Telegraph Company (W. U.) *v.* Major	711
Tengwall Company's Trustee in Bankruptcy, Fallows *v.*	300
Tennessee, North Carolina *v.*	1
Territory of New Mexico, Mills *v.*	687
Texas, Oliver *v.*	710
Texas & Pacific Railway Company *v.* Rosborough	429
Thalia Music Hall, Universal Film Manufacturing Company *v.*	704
Thaw, Drew, Sheriff of Coos County, New Hampshire, *v.*	432
Theurer, United States *v.*	706
Tilt, Citizens Trust Company *v.*	710
Trocon, Commonwealth Trust Company *v.*	685
Trust Company (Central of Illinois), Borland *v.*	701
Trust Company (Citizens) *v.* Tilt	710
Trust Company (Commonwealth) *v.* Trocon	685
Trust Company (Illinois State), Kelly *v.*	701
Trust Company (Provident Life &) as Executor of Wood *v.* Fletcher, Trustee of Braker	589
Twin City Separator Company *v.* Chicago, Milwaukee & St. Paul Railway Company	716
Twin Falls Canal Company *v.* State of Idaho	690
Uber, Chicago, Milwaukee & St. Paul Railway Company *v.*	715
United States, Bache *v.*	702
United States *v.* Bartlett	72
United States *v.* Broughton	133
United States, Petitioner, *v.* Chicago, Burlington & Quincy Railroad Company	696
United States, Cohen *v.*	696
United States, Drew *v.*	697
United States *v.* Erie Railroad Company	513
United States, Fay *v.*	707

Table of Cases Reported.

PAGE

United States, Fletcher *v.* 706
United States *v.* Holland-American Line . . 686
United States, Joplin Mercantile Company *v.* . 699
United States *v.* Lewis 282
United States *v.* Louisville & Nashville Railroad Co. 314
United States, Maryland Steel Company of Baltimore County *v.* 451
United States *v.* Mayer, Judge of the District Court of the United States for the Southern District of New York 55
United States, Minidoka & Southwestern Railroad Company *v.* 211
United States, Missouri, Kansas & Texas Railway Company *v.* 37
United States *v.* Nixon *et al.*, Receivers of the St. Louis & San Francisco Railroad Company . 231
United States, Petitioner, *v.* Northern Pacific Railway Company 696
United States, Norton *v.* 699
United States, Paylor *v.* 704
United States *v.* Portale 27
United States *v.* Reynolds 133
United States *v.* Salen 237
United States, Shapiro *v.* 412
United States, Petitioner, *v.* Theurer . . . 706
United States, Weeks *v.* 697
United States *v.* Weisberger and Empire State Surety Company 713
United States *v.* Wigger, alias Moose John . . 276
United States for the use of Alexander Bryant Company *v.* New York Steam Fitting Company . 327
United States Fidelity & Guaranty Company *v.* Poetker 683
Universal Film Manufacturing Company, Petitioner, *v.* Copperman, Doing Business as Thalia Music Hall 704

Table of Cases Reported.

PAGE

Venner *v.* Chicago City Railway Company . . 713
Vicksburg Water Works Company *v.* Ford . . 716

Wadley Southern Railway Company *v.* Georgia . 651
Wasatch & Jordan Valley Railroad Company, Raphael *v.* 684, 701
Washington *v.* Miller 422
Washington Dredging & Improvement Company *v.* State of Washington, E. V. Bussell *et al.* 688
Washington, E. V. Bussell *et al.*, Washington Dredging & Improvement Company *v.* . . . 688
Washington *ex rel.* Smith *v.* City of Seattle . . 695
Waterman Company *v.* Modern Pen Company . 88
Waterman Company, Modern Pen Company *v.* . 88
Wathen *v.* Jackson Oil & Refining Company . . 635
Watts, Lane *v.* 17
Wayman, Cowan *v.* 692
Weed Chain Tire Grip Company, Perry *v.* . . 698
Weeks, Petitioner, *v.* United States . . . 697
Weisberger, United States *v.* 713
West, as Governor, *v.* Corvallis & Eastern Railroad Company 691
Western Life Indemnity Company of Illinois *v.* Rupp 261
Western Union Telegraph Company *v.* Major . 711
W. H. Aton Piano Company, Chicago, Milwaukee & St. Paul Railway Company *v.* 715
Wheeler, Britton *v.* 687
Whitney, Groo *v.* 703
Wigger, alias Moose John, United States *v.* . . 276
Williams Cypress Company *v.* State of Louisiana . 714
Willoughby *v.* City of Chicago 45
Wilson, Ceballos and Fiske *v.* 712
Wilson, Mercelis *v.* 579
Wood's Executor *v.* Fletcher, Trustee of Braker . 589

Table of Cases Reported.

PAGE

W. R. Grace & Company, Rainey *v.* 704
Wright, Yazoo & Mississippi Valley Railroad Company *v.* 376

Yazoo & Mississippi Valley Railroad Company *v.* Wright 376
Yensavage, Lehigh Valley Coal Company *v.* . 705

TABLE OF CASES

CITED IN OPINIONS.

	PAGE
Abbott *v.* Bradstreet, 3 Allen, 587	117
Adams *v.* Russell, 229 U. S. 353	369, 688
Adams Express Co. *v.* New York, 232 U. S. 14	201
Adams Express Co. *v.* Ohio, 165 U. S. 194	368
Adams Express Co. *v.* State, 161 Indiana, 328	657
Adkins *v.* Arnold, 32 Oklahoma, 167	420
Afro-American Industrial Benefit Ass'n *v.* Florida, 61 Florida, 85	27
Allen *v.* Alleghany Co., 196 U. S. 458	275
Allen *v.* Pullman Co., 191 U. S. 171	368
Aluminum Company *v.* Ramsey, 222 U. S. 251	382
Ambler *v.* Eppinger, 137 U. S. 480	597
American Land Co. *v.* Zeiss, 219 U. S. 47	67
American Railroad of Porto Rico *v.* Didricksen, 227 U. S. 145	312, 629
American Tobacco Co. *v.* Werckmeister, 207 U. S. 284	36
American Water Softener Co. *v.* Lankford, 235 U. S. 496	510, 512
Anderson *v.* Pacific Coast S. S. Co., 225 U. S. 187	67
Anderson *v.* Santa Anna, 116 U. S. 356	478
Anderson *v.* White Star Mining Co., 205 U. S. 540	692
Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373	203
Appleby *v.* Buffalo, 221 U. S. 524	53, 685
Appleyard *v.* Massachusetts, 203 U. S. 222	439
Arizona *v.* Copper Queen Mining Co., 233 U. S. 87	687
Arizona & New Mexico Ry. *v.* Clark, 207 Fed. Rep. 817	673
Armour Packing Co. *v.* Lacy, 200 U. S. 226	368
Aspen Mining Co. *v.* Billings, 150 U. S. 31	415
Atchison &c. R. R. *v.* Denver &c. R. R., 110 U. S. 667	657
Atchison, T. & S. F. Ry. *v.* Mateo Fajardo *et ux.*, 74 Kansas, 314	399
Atherton *v.* Fowler, 91 U. S. 143	200
Atlantic Coast Line *v.* Georgia, 234 U. S. 280	548, 623
Atlantic Coast Line *v.* Goldsboro, 232 U. S. 548	128, 129, 170, 187
Atlantic &c. Tel. Co. *v.* Philadelphia, 190 U. S. 160	365
Ayers, *In re,* 123 U. S. 443	494
Ayers *v.* Watson, 113 U. S. 594	70
Bachtel *v.* Wilson, 204 U. S. 36	369
Bacon *v.* Rutland R. R. Co., 232 U. S. 134	406, 661
Bacon *v.* Texas, 163 U. S. 207	170

PAGE

Bagley *v.* General Fire Extinguisher Co., 212 U. S. 477 683, 684, 689
Bailey *v.* Alabama, 219 U. S. 219 143, 144, 146, 149
Baltimore & Ohio R. R. *v.* Baugh, 149 U. S. 368 478
Baltimore & Ohio R. R. *v.* Interstate Com. Comm., 215 U. S. 216 66
Baltimore & Potomac R. R. *v.* Mackey, 157 U. S. 72 633
Banholzer *v.* New York Life Ins. Co., 178 U. S. 402 275
Bank of Augusta *v.* Earle, 13 Pet. 519 203
Bank of United States *v.* Moss, 6 How. 31 67
Bank of the United States *v.* Smith, 11 Wheat. 171 312
Barbier *v.* Connolly, 113 U. S. 27 623
Bardon *v.* Northern Pac. Ry., 145 U. S. 535 216
Barlow *v.* Scott, 24 N. Y. 40 488
Barney *v.* Baltimore, 6 Wall. 280 599
Barney *v.* Saunders, 16 How. 535 113
Barron *v.* Baltimore, 7 Pet. 243 685
Bartlett *v.* United States, 203 Fed. Rep. 410 79
Bath County *v.* Amy, 13 Wall. 244 496
Beavers *v.* Henkel, 194 U. S. 73 227, 229
Belding *v.* Hebard, 103 Fed. 532; *S. C.*, 43 C. C. A. 296 10, 13, 289
Bell's Gap R. R. *v.* Pennsylvania, 134 U. S. 232 26, 368
Bemis Car Co. *v.* Brill Co., 200 Fed. Rep. 749 650
Berwind-White Co. *v.* Chi. & Erie R. R., 171 Ill. App. 302 375
Bethell *v.* Mathews, 13 Wall. 1 583
Beutler *v.* Grand Trunk Ry., 224 U. S. 85 67
Binghamton Bridge, The, 3 Wall. 51 193, 488

PAGE

Birdsall *v.* Coolidge, 93 U. S. 64 647, 648
Blake *v.* McClung, 172 U. S. 239 203, 204
Board of Commissioners *v.* New Orleans & San Francisco R. R., 112 Louisiana, 1011 167
Board of Liquidation *v.* McComb, 92 U. S. 531 494
Boise Water Co. *v.* Boise City, 230 U. S. 84 192, 193
Bolln *v.* Nebraska, 176 U. S. 83 159
Bonnett *v.* Vallier, 136 Wisconsin, 193 662, 665
Boston & Maine R. R. *v.* Hooker, 233 U. S. 97 693
Bowe *v.* Scott, 233 U. S. 658 695
Bradford *v.* Gillespie, 8 Dana, 67 271
Brady *v.* Sizemore, 33 Oklahoma, 169 446
Braxton County Court *v.* West Virginia, 208 U. S. 192 162
Brennan & Co. *v.* Dowagiac Co., 162 Fed. Rep. 472 644
Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116 170
Bronson *v.* Schulten, 104 U. S. 410 67, 69
Brooks *v.* Norris, 11 How. 204 71
Brown *et al.*, *In re*, 193 Fed. Rep. 24; *S. C.*, 213 Fed. Rep. 701; *S. C.*, 175 Fed. Rep. 769 410, 411
Brown & Co., *In re*, 213 Fed. Rep. 705 410
Brown *v.* Alton Water Co., 222 U. S. 325 415, 417
Brown *v.* Brown, 11 Hawaii, 47; *S. C.*, 15 Hawaii, 308 347, 349
Brown *v.* Vancleave, 86 Kentucky, 381 271
Bryan *v.* Winburn, 43 Arkansas, 28 421
Bryant *v.* Swofford Bros., 214 U. S. 279 689
Bucks Stove Co. *v.* Vickers, 226 U. S. 205 202
Burgess *v.* Seligman, 107 U. S. 20 478

PAGE

Burt *v.* Smith, 203 U. S. 129 25
Bushnell *v.* Kennedy, 9 Wall. 387 596, 597
Byers *v.* McAuley, 149 U. S. 608 70
Caillot *v.* Deetken, 113 U. S. 215 686
Calaf *v.* Calaf, 232 U. S. 371 349, 406
Cameron *v.* M'Roberts, 3 Wheat. 591 67
Capdevielle *v.* New Orleans R. R., 110 Louisiana, 904 167
Capital City Light & Fuel Co. *v.* Tallahassee, 186 U. S. 401 193, 194
Capron *v.* Douglass, 193 N. Y. 11 675, 680
Capron *v.* Van Noorden, 2 Cranch, 126 583
Carondelet Canal Co. *v.* Louisiana, 233 U. S. 362 171
Cassidy *v.* Colorado, 233 U. S. 707 688
Cassidy *v.* Hunt, 75 Fed. Rep. 1012 649
Castillo *v.* McConnico, 168 U. S. 674 25, 690
Castro *v.* United States, 3 Wall. 46 686
Catala *v.* Grahame, 4 P. R. Fed. Rep. 538 580, 581
Cathcart *v.* Robinson, 5 Pet. 264 421
Central Land Co. *v.* Laidley, 159 U. S. 103 170
Central Pacific R. R. *v.* California, 162 U. S. 91 298
Chamberlain *v.* Painesville & Hudson R. R., 15 Oh. St. 225 488
Chambers *v.* Baltimore & Ohio R. R., 207 U. S. 142 203
Chapman, *In re*, 166 U. S. 661 226
Chappedelaine *v.* Dechenaux, 4 Cranch, 305 600
Charlton *v.* Kelly, 229 U. S. 447 440
Chesapeake & Ohio Ry. *v.* Kentucky, 179 U. S. 388 160
Chesapeake, Ohio &c. R. R. *v.* Heath, 87 Kentucky, 651 271

PAGE

Chetwood, *In re*, 165 U. S. 443 71
Chicago *v.* Mecartney, 216 Illinois, 377 49
Chicago *v.* Willoughby, 249 Illinois, 249 49
Chicago & Alton R. R. *v.* Wiggins Ferry Co., 119 U. S. 615 275
Chicago, B. & Q. Ry. *v.* Drainage Commissioners, 200 U. S. 561 127
Chicago, B. & Q. R. R. *v.* Hall, 229 U. S. 511 587
Chicago, B. & Q. R. R. *v.* McGuire, 219 U. S. 549 623
Chicago, B. & Q. R. R. *v.* Nebraska, 170 U. S. 57 127, 129
Chicago, B. & Q. Ry. *v.* Williams, 214 U. S. 492; *S. C.*, 205 U. S. 444 66
Chicago Junction Ry. *v.* King, 222 U. S. 222 378, 430
Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574 194, 195
Chicago, M. & St. P. Ry. *v.* Hanson, 235 U. S. 693 694
Chicago, M. & St. P. Ry. *v.* Minneapolis, 232 U. S. 430 127
Chicago, M. & St. P. Ry. *v.* Minnesota, 134 U. S. 418 660, 661
Chicago, M. & St. P. Ry. *v.* Tompkins, 176 U. S. 167 661
Chicago, R. I. & P. Ry. *v.* Brown, 229 U. S. 317 378
Chiles *v.* Chesapeake & Ohio Ry., 218 U. S. 71 160
Choate *v.* Trapp, 224 U. S. 665 80, 450
Choctaw, Oklahoma &c. R. R. *v.* McDade, 191 U. S. 64 379
Cincinnati, Indianapolis & Western Ry. *v.* Connersville, 218 U. S. 336 127
Cincinnati Packet Co. *v.* Bay, 200 U. S. 179 560
Citizens' St. R. R. *v.* Burke, 98 Tennessee, 650 313
City of Lewiston *v.* Chamberlain, 234 U. S. 751 684, 685, 695

PAGE

City of Manning *v.* German Ins. Co., 107 Fed. Rep. 52 70
City of New York *v.* Bryan, 196 N. Y. 158 192, 195
City of Rochester *v.* Rochester Ry., 182 N. Y. 99 192
Clark *v.* Wooster, 119 U. S. 322 648
Cleveland & Pittsburg R. R. *v.* Cleveland, 235 U. S. 50 695
Cleveland &c. Ry. *v.* Backus, 154 U. S. 439 366, 367
Clyatt *v.* United States, 197 U. S. 207 143, 144, 149
Coal & Coke Ry. *v.* Conley, 67 West Va. 129 662, 666, 668
Coder *v.* Arts, 213 U. S. 223 684
Collins *v.* Texas, 223 U. S. 288 162, 621
Columbia Bank & Trust Co. *v.* United States Fid. & Guar. Co., 33 Oklahoma, 535; *S. C.*, 126 Pac. Rep. 556 476, 490, 491
Columbus *v.* Mercantile Trust &c. Co. of Baltimore, 218 U. S. 645 195
Compagnie Francaise &c. *v.* Board of Health, 186 U. S. 380 688
Connell *v.* Smiley, 156 U. S. 335 583
Consolidated Gas Co. *v.* Mayer, 146 Fed. Rep. 150 662
Consolidated Gas Co. *v.* New York, 157 Fed. Rep. 849 662
Consolidated Turnpike *v.* Norfolk &c. Ry., 228 U. S. 326 684, 686, 692, 695
Converse, *In re*, 137 U. S. 624 688
Cook *v.* Thayer, 11 Illinois, 617 307
Corbus *v.* Alaska Gold Mining Co., 187 U. S. 455 640
Cotting *v.* Kansas City Stock Yards, 183 U. S. 79 662, 663, 667
County of Cass *v.* Johnston, 95 U. S. 360 496
County of Clinton *v.* Ramsey, 20 Ill. App. 577 488
County of Greene *v.* Daniel, 102 U. S. 187 496

PAGE

Coupe *v.* Royer, 155 U. S. 565 649
Covington &c. Bridge Co. *v.* Kentucky, 154 U. S. 204 544
Cowley *v.* Northern Pacific R. R., 159 U. S. 569 583
Coyle *v.* Oklahoma, 221 U. S. 559 159
Craig *v.* Smith, 100 U. S. 226 291
Crandall *v.* Nevada, 6 Wall. 35 624
Creswill *v.* Knights of Pythias, 225 U. S. 246 32
Criscoe *v.* Hambrick, 47 Arkansas, 235 421
Cross *v.* Evans, 167 U. S. 60 66
Cross Lake Club *v.* Louisiana, 224 U. S. 632 170
Crow Dog, *Ex parte*, 109 U. S. 556 428
Crutcher *v.* Kentucky, 141 U. S. 47 201
Cunningham *v.* Macon & Brunswick R. R., 109 U. S. 446 494
Cutler *v.* Rae, 7 How. 729 70
Dallinger *v.* Richardson, 176 Massachusetts, 77 110, 117
Darnell *v.* Indiana, 226 U. S. 390 576
Davenport *v.* County of Dodge, 105 U. S. 237 496
David Kaufman & Sons Co. *v.* Smith, 216 U. S. 610 688
Davidson *v.* New Orleans, 96 U. S. 97 368
Davidson Marble Co. *v.* Gibson, 213 U. S. 10 272
Davis' Estate, *In re*, 32 Oklahoma, 209 428
Davis *v.* C., C., C. & St. L. Ry., 217 U. S. 157 272
Davis & Farnum *v.* Los Angeles, 189 U. S. 207 162, 640
De Bearn *v.* Safe Deposit Co., 233 U. S. 24 690
Dejonge *v.* Breuker, 182 Fed. Rep. 150; *S. C.*, 191 Fed. Rep. 35; *S. C.*, 111 C. C. A. 567 36
De Luca *v.* Hughes, 96 Fed. Rep. 923 312

PAGE

Deming *v.* Carlisle Packing Co., 226 U. S. 102 686, 692
Deni *v.* Pennsylvania R. R., 181 Pa. St. 525 398, 399, 400
Deputron *v.* Young, 134 U. S. 241 567
Deshler *v.* Dodge, 16 How. 622 597
Detroit *v.* Dean, 106 U. S. 537 639
Detroit *v.* Detroit &c. Ry. Co., 184 U. S. 368 192
Det. & Mackinac Ry. *v.* Mich. R. R. Comm., 203 Fed. Rep. 864; *S. C.*, 171 Michigan, 335 404, 405
Det. & Mackinac Ry. *v.* Mich. R. R. Comm., 235 U. S. 402 661
Detroit &c. Ry. *v.* Osborn, 189 U. S. 383 129
Dicks, *In re*, 198 Fed. Rep. 293 585
District of Columbia *v.* Camden Iron Works, 181 U. S. 453 460
Dobbins *v.* Los Angeles, 195 U. S. 223 130
Doctor *v.* Harrington, 196 U. S. 579 639
Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267 94
Douglas *v.* Kentucky, 168 U. S. 488 170, 186
Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 118 Fed. Rep. 136; *S. C.*, 183 Fed. Rep. 314 643
Dundas *v.* Bowler, 3 McLean, 204 596
Dowagiac Mfg. Co. *v.* Smith, 108 Fed. Rep. 67; *S. C.*, 183 Fed. Rep. 314 643
Duryea Power Co. *v.* Sternbergh, 218 U. S. 299 694
East Alabama Ry. *v.* Doe, 114 U. S. 340 478
East Tenn. &c. Ry. *v.* Interstate Com. Comm., 181 U. S. 1 320, 326
Eastern States Retail Lumber Dealers' Association *v.* United States, 234 U. S. 600 534

PAGE

Eddy *v.* Lafayette, 163 U. S. 456 234
Edwards *v.* Bates, 7 Man. & G. 590 599
Ely *v.* New Mexico R. R., 129 U. S. 291 582
Ely's Administrator *v.* United States, 171 U. S. 220 22
Emmanuel *v.* Porto Rico, 5 P. R. Fed. Rep. 89; *S. C.*, 5 P. R. Fed. Rep. 362 254
Emmanuel *v.* The People, 7 P. R. 216; *S. C.*, 2 Castro P. R. Dec. 103 253, 256
Empire Rubber Mfg. Co. *v.* Morris, 73 N. J. Law, 602 488
Engel *v.* O'Malley, 219 U. S. 128 576
Ennis Water Works *v.* Ennis, 233 U. S. 652 686, 690, 692
Epstein *v.* Railroad, 250 Mo. 1 680
Equitable Life Assurance Society *v.* Brown, 187 U. S. 308 692
Erb *v.* Morasch, 177 U. S. 584 234
Erie R. R. *v.* Purdy, 185 U. S. 148 687, 693, 694
Escanaba Co. *v.* Chicago, 107 U. S. 678 159
Eustis *v.* Bolles, 150 U. S. 361 685, 688, 690
Ewing *v.* City of Leavenworth, 226 U. S. 464 560
Ewing *v.* Howard, 7 Wall. 499 488
Fallows *v.* Continental Savings Bank, 201 Fed. Rep. 82 304, 307
Farmers Bank *v.* Minnesota, 232 U. S. 516 298
Farmers Loan & Trust Co. *v.* Galesburg, 133 U. S. 156 195
Farmington *v.* Pillsbury, 114 U. S. 138 567
Farrell *v.* O'Brien, 199 U. S. 89 687
Faxon *v.* United States, 171 U. S. 244 22
First National Bank *v.* Estherville, 215 U. S. 341 684, 685
First National Bank of Baltimore *v.* Staake, 202 U. S. 141 305

PAGE

First National Bank of Princeton *v.* Littlefield, Trustee, 226 U. S. 110 410
Fishburn *v.* C., M. & St. P. Ry., 137 U. S. 60 70
Fisher *v.* New Orleans, 218 U. S. 438 170
Flint & Walling Mfg. Co. *v.* McDonald, 21 S. Dak. 526 202
Flynn *v.* Des Moines Ry., 63 Iowa, 490 458
Folmina, The, 212 U. S. 354 66
Folsom *v.* Ninety-six, 159 U. S. 611 478
Forrest *v.* Portland Ry. L. & P. Co., 64 Oregon, 240 680
Freeman *v.* United States, 217 U. S. 539 149
Fuller *v.* Dame, 18 Pick. 472 105
Fuller *v.* United States, 182 U. S. 562 70
Galveston, Harrisburg &c. Ry. *v.* Texas, 210 U. S. 217 298, 363, 364
Garrett *v.* Louisville & Nashville R. R., 197 Fed. Rep. 715 311
Gelston *v.* Hoyt, 3 Wheat. 246 200
Ghee *v.* Northern Union Gas Co., 158 N. Y. 510 192
Gibson *v.* Lyon, 115 U. S. 439 478
Gila Valley Ry. *v.* Hall, 232 U. S. 94 113
Gildersleeve *v.* New Mexico Mining Co., 161 U. S. 573 691
Given *v.* Wright, 117 U. S. 648 194
Glasgow *v.* Moyer, 225 U. S. 420 229
Glenn *v.* Garth, 147 U. S. 360 275
Globe Refining Co. *v.* Landa Cotton Oil Co., 190 U. S. 540 104
Goldey *v.* Morning News, 156 U. S. 518 272
Gompers *v.* United States, 233 U. S. 604 535
Goodman *v.* Lehigh Valley R. R., 78 N. J. L. 317 431
Gorman *v.* Littlefield, 229 U. S. 19 410, 411
Grace *v.* Taylor, 1 Bibb, 430 271
Gracie *v.* Palmer, 8 Wheat. 699 70

PAGE

Graham *v.* United States, 231 U. S. 474 536
Grand Trunk R. R. *v.* Indiana R. R. Comm., 221 U. S. 400 660
Grand Trunk R. R. *v.* Richardson, 91 U. S. 454 431
Grand Trunk Western Ry. *v.* South Bend, 227 U. S. 544 187, 192
Grant Bros. *v.* United States, 232 U. S. 647 113
Graves *v.* Hughes, 4 Bibb, 84 271
Graves *v.* Johnson, 156 Mass. 211; *S. C.*, 179 Mass. 53 106
Green *v.* Elbert, 137 U. S. 615 686
Greene *v.* Henkel, 183 U. S. 249 227, 230
Gregory, *In re*, 219 U. S. 210 229
Grenada County Supervisors *v.* Brogden, 112 U. S. 261 369
Gring *v.* Ives, 222 U. S. 365 690, 692
Gritts *v.* Fisher, 224 U. S. 640 450
Gulf, Colorado &c. Ry. *v.* McGinnis, 228 U. S. 173 312, 629
Gulf, Colorado &c. Ry. *v.* Miami Steamship Co., 86 Fed. Rep. 407 657
Gunnison *v.* Bancroft, 11 Vt. 490 488
Gunter *v.* Atlantic Coast Line, 200 U. S. 273 512
Hagood *v.* Southern, 117 U. S. 52 494
Hall *v.* DeCuir, 95 U. S. 485 548
Hallowell *v.* United States, 209 U. S. 101 66
Hallowell *v.* United States, 221 U. S. 317 67
Ham *v.* Van Orden, 84 N. Y. 257 599
Hampe *v.* Sage, 87 Kan. 536 104
Hanley *v.* Donoghue, 116 U. S. 1 275
Harkness *v.* Hyde, 98 U. S. 476 272
Harman *v.* Chicago, 147 U. S. 396 559
Harris, Matter of, 221 U. S. 274 67
Harrison *v.* Nixon, 9 Pet. 483 313

PAGE

Harrison *v.* Perea, 168 U. S. 311 691
Hatch *v.* Reardon, 204 U. S. 152 610, 621
Hawes *v.* Oakland, 104 U. S. 450 639
Hayes *v.* Barringer, 168 Fed. Rep. 221; *S. C.*, 93 C. C. A. 507 44
Hebard *v.* Belding, 194 Fed. Rep. 301 288, 290, 291
Helwig *v.* United States, 188 U. S. 605 66
Henderson *v.* Mayor of New York, 92 U. S. 259 149, 362
Hernandez *v.* Ochoa, 4 P. R. Fed. Rep. 400 581
Herrick *v.* Snow, 94 Me. 310 599
Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554 94
Hertz *v.* Woodman, 218 U. S. 205 67
Hewitt *v.* Filbert, 116 U. S. 142 686
Hickman *v.* Fort Scott, 141 U. S. 415 67
Hoffman *v.* Knox, 50 Fed. Rep. 484 411
Holden *v.* Hardy, 169 U. S. 366 623
Holden *v.* Stratton, 191 U. S. 115 694
Holden Land Co. *v.* Interstate Trading Co., 233 U. S. 536 685, 688, 690
Hollman, *Ex parte*, 60 S. E. Rep. 19 146
Hooker *v.* Burr, 194 U. S. 415 162
Hooper *v.* California, 155 U. S. 648 203
Hopkins *v.* Clemson College, 221 U. S. 636 476
Hopkins *v.* Hebard, 194 Fed. Rep. 301 289, 291
Hornbuckle *v.* Toombs, 18 Wall. 648 582
Houston & Tex. Cent. R. R. *v.* Texas, 177 U. S. 66 171
Howe Scale Co. *v.* Wyckoff, Seamans & Benedict, 198 U. S. 118 94
Hubert *v.* New Orleans, 215 U. S. 170 171

PAGE

Hudson *v.* Guestier, 7 Cranch, 1 67
Hulbert *v.* Chicago, 202 U. S. 275 49
Hume *v.* Bowie, 148 U. S. 245 67
Humphrey *v.* Tatman, 198 U. S. 91 689
Hunt *v.* Blackburn, 128 U. S. 464 680
Hunt *v.* Cassiday, 64 Fed. Rep. 585; *S. C.*, 12 C. C. A. 316 649
Huse *v.* Glover, 119 U. S. 543 624
Hyde *v.* Shine, 199 U. S. 62 229
Illinois Cent. R. R. *v.* Behrens, 233 U. S. 473 67
Illinois Cent. R. R. *v.* Glover, 24 Ky. Law Rep. 1447; *S. C.*, 71 S. W. Rep. 630 270
Illinois Cent. R. R. *v.* Paducah Brewery Co., 157 Ky. 357 605
Indianapolis & St. L. R. R. *v.* Horst, 93 U. S. 291 69
Indianapolis &c. R. R. *v.* Backus, 154 U. S. 438 365
Ingersoll *v.* Coram, 211 U. S. 335 600
Insurance Co. *v.* Baring, 20 Wall. 159 630
Intermountain Rate Cases, 234 U. S. 476 323, 326
International Silver Co. *v.* Rogers Corporation, 67 N. J. Eq. 646 99
International Text Book Co. *v.* Pigg, 217 U. S. 91 202
Interstate Com. Comm. *v.* Delaware, L. & W. R. R., 220 U. S. 235 320
Interstate Com. Comm. *v.* Illinois Cent. R. R., 215 U. S. 452 320
Interstate Com. Comm. *v.* Louisville & Nashville R. R., 227 U. S. 88 320, 321, 606, 607
Int. Com. Comm. *v.* Union Pacific R. R., 222 U. S. 541 606
Jack *v.* Kansas, 199 U. S. 372 685
Jackson *v.* Thompson, 38 Wash. 282 44
Jacobs *v.* Beecham, 221 U. S. 263 94

PAGE

Jacobs *v.* George, 150 U. S. 415 686
Jacobson *v.* Massachusetts, 197 U. S. 11 688
James *v.* Stone & Co., 227 U. S. 410 684
Janvrin, Petitioner, 174 Mass. 514 406
Japanese Immigrant Case, The, 189 U. S. 86 370
Jason, The, 225 U. S. 32 67
Jefferson Branch Bank *v.* Skelly, 1 Black, 436 170
Jenison *v.* Hapgood, 7 Pick. 1 117
Jewell *v.* Knight, 123 U. S. 426 66
John *v.* Paullin, 231 U. S. 583 687
John Ii Estate *v.* Brown, 201 Fed. Rep. 224; *S. C.*, 119 C. C. A. 458 346
Johnson *v.* Hoy, 227 U. S. 245 229
Johnson *v.* White Star Mining Co., 205 U. S. 540 692
Jones *v.* Montague, 194 U. S. 147 695
Jordan *v.* Cass County, 3 Dill. 185; *S. C.*, Fed. Cas. No. 7517 496
Jordan *v.* Roche, 228 U. S. 436 67
Jordon *v.* Dyer, 34 Vt. 104; *S. C.*, 80 Am. Dec. 668 488
Kaizo *v.* Henry, 211 U. S. 146 229
Kalem Co. *v.* Harper Brothers, 222 U. S. 55 105
Kansas *v.* United States, 204 U. S. 331 41
Kansas City So. Ry. *v.* Albers Comm. Co., 223 U. S. 573 32, 375
Kansas City Star Co. *v.* Julian, 215 U. S. 589 688, 695
Kauffman *v.* Wootters, 138 U. S. 285 272
Kelly *v.* Harper, 7 Ind. Terr. 541 105
Kellyville Coal Co. *v.* Petraytis, 195 Ill. 217 399
Kentucky *v.* Dennison, 24 How. 66 439
Keokee Consolidated Coke Co. *v.* Taylor, 234 U. S. 224 26
Kilbourn *v.* Thompson, 103 U. S. 168 226

PAGE

Knox *v.* Exchange Bank, 12 Wall. 379 50, 170
Kolze *v.* Hoadley, 200 U. S. 76 598
Kuhn *v.* Fairmont Coal Co., 215 U. S. 349 478
Lake Shore & M. S. Ry. *v.* Ohio, 173 U. S. 285 548, 623
Lange, *Ex parte*, 18 Wall. 163 228
Lankford *v.* Oklahoma Engraving and Printing Co., 35 Okla. 404; *S. C.*, 130 Pac. Rep. 278 491, 493
Lankford *v.* Platte Iron Works, 235 U. S. 461 497, 498, 510, 512, 513
Larson *v.* First National Bank, 62 Nebr. 303 105
Lawlor *v.* Loewe, 209 Fed. Rep. 721; *S. C.*, 126 C. C. A. 445 534
Lawrence *v.* Bayard, 7 Paige, 70 599
Lawton *v.* Steele, 152 U. S. 133 623
L. E. Waterman Co. *v.* Standard Drug Co., 202 Fed. Rep. 167; *S. C.*, 120 C. C. A. 455 93
Leathe *v.* Thomas, 207 U. S. 93 690
Lee *v.* Johnson, 116 U. S. 48 200
Lehigh Valley R. R. *v.* Pennsylvania, 145 U. S. 192 560
Lehigh Water Co. *v.* Easton, 121 U. S. 388 170
Leloup *v.* Port of Mobile, 127 U. S. 640 368
Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61 382, 577
Little *v.* Giles, 118 U. S. 596 567
Lloyd *v.* Matthews, 155 U. S. 222 275
Lockhart *v.* Johnson, 181 U. S. 516 22
Loewe *v.* Lawlor, 208 U. S. 274 533, 534
Logan *v.* United States, 169 U. S. 255 459
Loney, *In re*, 134 U. S. 372 228
Longacre El. L. & P. Co., Matter of, 188 N. Y. 361 196

PAGE

Louisiana *v.* Jumel, 107 U. S. 711 494, 495
Louisiana Ry. & Nav. Co. *v.* New Orleans, 235 U. S. 164 187
Louisville *v.* Cumberland Telephone Co., 224 U. S. 649 192
Louisville & Nashville R. R. *v.* Behlmer, 175 U. S. 648 326
Louisville & Nashville R. R. *v.* Garrett, 231 U. S. 298 27, 406, 602, 658, 660
Louisville & Nashville R. R. *v.* Kentucky R. R. Comm., 214 Fed. Rep. 465 604
Louisville & Nashville R. R. *v.* McChord, 103 Fed. Rep. 216 662
Louisville & Nashville R. R. *v.* Melton, 218 U. S. 36 275, 382
Louisville & Nashville R. R. *v.* Woodford, 234 U. S. 46 693, 694
Louisville &c. Ry. *v.* Mississippi, 133 U. S. 587 160
Lovett *et al. v.* Lankford *et al.*, 145 Pac. Rep. 767 475, 491
Loving, Matter of, 224 U. S. 183 67
Ludwig *v.* West. Un. Tel. Co., 216 U. S. 146 363, 364
Luria *v.* United States, 231 U. S. 9 382
McAlester-Edwards Coal Co. *v.* Trapp, 38 Okla. 792 298
McCabe *v.* Atchison, T. & S. F. Ry., 186 Fed. Rep. 966 159
McClellan *v.* Carland, 217 U. S. 268 66
McCorquodale *v.* Texas, 211 U. S. 432 684
M'Culloch *v.* Maryland, 4 Wheat. 316 298
McCullough *v.* Virginia, 172 U. S. 102 171
McCune *v.* Baltimore & Ohio R. R., 154 Fed. Rep. 63 650
McDonald *v.* Oregon Navigation Co., 233 U. S. 665 687, 690, 691
McDowell *v.* Chesapeake, Ohio &c. R. R., 90 Ky. 346 270

PAGE

McGovern *v.* Philadelphia & Reading R. R., 209 Fed. Rep. 975 397
McKenzie, *In re*, 142 Fed. Rep. 383 589
McLaughlin *v.* Hallowell, 228 U. S. 278 273
McLean *v.* Arkansas, 211 U. S. 539 128, 577
McSherry Co. *v.* Dowagiac Co., 160 Fed. Rep. 948; *S. C.*, 163 Fed. Rep. 34 644
Mackay *v.* Uinta Development Co., 229 U. S. 173 674
Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283 368
Magruder *v.* Drury, 37 D. C. App. 519 112, 119
Maine *v.* Grand Trunk Ry., 142 U. S. 217 364
Maiorano *v.* Baltimore & Ohio R. R., 213 U. S. 268 398, 399
Mallers *v.* Commercial Loan & Trust Company, 216 U. S. 613 53, 685
Mansfield &c. Ry. *v.* Swan, 111 U. S. 379 583
Manufacturing Co. *v.* Cowing, 105 U. S. 253 650
Marshall *v.* Dye, 231 U. S. 250 691
Martin's Adm'r *v.* Baltimore & Ohio R. R., 151 U. S. 673 70
Marvin *v.* Trout, 199 U. S. 212 55
Maryland Steel Co. *v.* United States, 48 Ct. Cl. 53 455, 456, 460
Matheson's Adm'r *v.* Grant's Adm'r, 2 How. 263 67
May *v.* Illinois, 232 U. S. 720 684, 685
Mercantile Trust Co. *v.* Texas & Pacific Ry., 51 Fed. Rep. 529 662, 663
Mercelis *v.* Grahame, 5 P. R. Fed. Rep. 492 581
Merchants Bank *v.* Pennsylvania, 167 U. S. 461 368
Metropolitan Trust Co., *In re*, 218 U. S. 312 67
Metropolitan Water Co. *v.* Kaw Valley District, 223 U. S. 519 415

PAGE

Mexican Cent. Ry. *v.* Pinkney, 149 U. S. 194 272, 273
Michigan Cent. R. R. *v.* Powers, 201 U. S. 245 368
Michigan Cent. R. R. *v.* Vreeland, 227 U. S. 59 312, 629, 633
Michigan Telephone Co. *v.* St. Joseph, 121 Mich. 502 406
Michigan Trust Co. *v.* Ferry, 228 U. S. 346 349
Michoud *v.* Girod, 4 How. 503 120
Miedreich *v.* Lauenstein, 232 U. S. 236 32
Milhau *v.* Sharp, 27 N. Y. 611 192
Minnesota *v.* Hitchcock, 185 U. S. 373 70
Minnesota Iron Co. *v.* Kline, 199 U. S. 593 382
Minnesota Rate Cases, 230 U. S. 352 201, 546, 624, 663
Minor *v.* Mechanics' Bank, 1 Pet. 46 312
Missouri *v.* Dockery, 191 U. S. 165 49
Missouri *v.* Lewis, 101 U. S. 22 203
Missouri & Kansas Interurban Ry. *v.* Olathe, 222 U. S. 187 170
Missouri, K. & T. Ry. *v.* Cade, 233 U. S. 642 576, 621
Missouri, K. & T. Ry. *v.* Meyer, 204 Fed. Rep. 140 298
Missouri, K. & T. Ry. *v.* United States, 47 Ct. Cl. 59 38
Missouri, K. & T. Ry. *v.* West, 232 U. S. 682 32
Missouri Pacific Ry. *v.* C. & A. R. R., 132 U. S. 191 70
Missouri Pacific Ry. *v.* Kansas, 216 U. S. 262 545
Missouri Pacific Ry. *v.* Nebraska, 217 U. S. 196 661, 662, 664
Missouri Pacific Ry. *v.* Omaha, 197 Fed. Rep. 516 126
Missouri Pacific Ry. *v.* Tucker, 230 U. S. 340 640, 662, 664
Mobile, J. & K. R. R. *v.* Turnipseed, 219 U. S. 35 382
Mobile & Ohio R. R. *v.* Tennessee, 153 U. S. 486 170

PAGE

Monagas *v.* Albertucci, 17 Porto Rico, 684 83
Monongahela Navigation Co. *v.* United States, 148 U. S. 312 624
Montana Ry. *v.* Warren, 137 U. S. 348 113
Moore-Mansfield Construction Co. *v.* Electrical Installation Co., 234 U. S. 619 50, 54
Morris *v.* Gilmer, 129 U. S. 315 569
Morris *v.* New York &c. Ry., 148 N. Y. 88 675
Muhlker *v.* New York & Harlem R. R., 197 U. S. 544 50
Mulhall *v.* Fallon, 176 Mass. 266 399, 400
Mullen *v.* United States, 224 U. S. 448 210
Munsey *v.* Clough, 196 U. S. 364 439
Murray *v.* Wilson Distilling Co., 213 U. S. 151 472, 473, 475, 476, 477, 492
Mutual Life Ins. Co. *v.* Phinney, 178 U. S. 327 71
Nadal *v.* May, 233 U. S. 447 349
National Bank *v.* Kentucky, 9 Wall. 353 53
Neal *v.* Clark, 95 U. S. 704 249
Nelson *v.* Howard, 5 Md. 327 599
Newhall *v.* Sanger, 92 U. S. 761 40
New Orleans *v.* Louisiana Ry. & Nav. Co., 127 La. 775 167, 170
New Orleans Gas Light Co. *v.* Louisiana Light &c. Co., 115 U. S. 650 192
New Orleans Water Works Co. *v.* Louisiana, 185 U. S. 336 195, 690
New Orleans Water Works *v.* Louisiana Sugar Co., 125 U. S. 18 170
New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674 192
Newton, *In re*, 122 Fed. Rep. 103 589
New York *v.* Eno, 155 U. S. 89 228

PAGE

New York Economical Printing Co., *Re*, 110 Fed. Rep. 514 307
New York Electric Lines Co., Matter of, 201 N. Y. 321 186, 191
New York Guaranty Co. *v.* Steele, 134 U. S. 230 494
New York, L. E. & W. R. R. *v.* Estill, 147 U. S. 591 536
New York, N. H. & H. R. R. *v.* New York, 165 U. S. 628 548, 623
Noble State Bank *v.* Haskell, 219 U. S. 104 470
Norfolk & Western Ry. *v.* Holbrook, 215 Fed. Rep. 687 627
North Carolina R. R. *v.* Zachary, 232 U. S. 248 312, 629
North Carolina *v.* Tennessee, 235 U. S. 1 290
Northern Pacific Ry. *v.* Duluth, 208 U. S. 583 127
Nutt *v.* Knut, 200 U. S. 12 104
Ohio Tax Cases, 232 U. S. 576 299, 369, 604, 640
Oklahoma *v.* Wells, Fargo & Co., 223 U. S. 298 296, 299, 364
Old Nick Williams Co. *v.* United States, 215 U. S. 541 71
Omaha & Council Bluffs Street Ry. *v.* Interstate Com. Comm., 230 U. S. 324 545
Oregon R. R. & Nav. Co. *v.* Campbell, 173 Fed. Rep. 957 661
Oregon R. R. & Nav. Co. *v.* Fairchild, 224 U. S. 510 661, 668
Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261 105
Overby *v.* Gordon, 177 U. S. 214 117
Owensboro *v.* Cumberland Telephone Co., 230 U. S. 58 192
Oxley Stave Company *v.* Butler County, 166 U. S. 648 53

PAGE

Pacific Express Co. *v.* Seibert, 142 U. S. 339 368
Packet Co. *v.* Sickles, 19 Wall. 611 649
Parschen, *In re*, 119 Fed. Rep. 976 589
Patek *v.* American Smelting Co., 154 Fed. Rep. 190 399
Paul *v.* Virginia, 8 Wall. 168 203
Pearsall *v.* Great Northern Ry., 161 U. S. 646 193
Pennock *v.* Dialogue, 2 Pet. 1 421
Pennoyer *v.* McConnaughy, 140 U. S. 1 494
Pennoyer *v.* Neff, 95 U. S. 714 273
Pennsylvania *v.* York Silk Mfg. Co., 232 U. S. 718 694
People *v.* Albany & Vermont R. R., 24 N. Y. 261 194
People *v.* Broadway R. R. Co. of Brooklyn, 126 N. Y. 29 194
People *v.* O'Brien, 111 N. Y. 1 192
People *ex rel.* Cornell Steamboat Co. *v.* Sohmer, 206 N. Y. 651 556
People *ex rel.* Hastings *v.* Jackson, 112 U. S. 233 691
People *ex rel.* N. Y. Electric Lines Co. *v.* Ellison, 188 N. Y. 523; *S. C.*, 214 U. S. 529 190, 191
People *ex rel.* New York Electric Lines Co. *v.* Squire, 107 N. Y. 593; *S. C.*, 145 U. S. 175 189
People *ex rel.* Woodhaven Gas Co. *v.* Deehan, 153 N. Y. 528 192
Perego *v.* Dodge, 163 U. S. 160 583
Permoli *v.* First Municipality, 3 How. 589 159
Pettibone *v.* Nichols, 203 U. S. 192 439
Phillips *v.* Negley, 117 U. S. 665 67, 68
Phillips *v.* Seymour, 91 U. S. 646 457, 458
Philp *v.* Nock, 17 Wall. 460 648
Phœnix Ry. *v.* Landis, 231 U. S. 578 687
Pickett's Heirs *v.* Legerwood, 7 Pet. 144 67

PAGE

Pierce *v.* Creecy, 210 U. S. 387 440
Pierce *v.* Easterling Lumber Co., 64 So. Rep. 461 381
Pittsburgh &c. Ry. *v.* Backus, 154 U. S. 421 365
Pleasants *v.* Fant, 22 Wall. 116 630
Plessy *v.* Ferguson, 163 U. S. 537 160
Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531 369, 576, 610
Polleys *v.* Black River Co., 113 U. S. 81 200
Porter *v.* Dement, 35 Ill. 478 307
Portland Ry. *v.* Oregon R. R. Comm., 229 U. S. 397 32
Porto Rico *v.* Rosaly, 227 U. S. 270 257
Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688 364, 366
Prentis *v.* Atlantic Coast Line, 211 U. S. 210 404, 405, 661
Preston *v.* Chicago, 226 U. S. 447 691
Price *v.* Price, 156 Pa. St. 617 569
Providence Tool Co. *v.* Norris, 2 Wall. 45 105
Pullman Co. *v.* Knott, 235 U. S. 23 299
Quincy *v.* Steel, 120 U. S. 241 639
Railroad Comm. *v.* Louisville & Nashville R. R., 140 Ga. 817 658, 660
Railroad Comm. of Ohio *v.* Worthington, 225 U. S. 101 545
Railroad Comm. of Oregon *v.* Oregon R. R. & Nav. Co., 68 Wash. 160 661, 668
Rainey *v.* W. R. Grace Co., 231 U. S. 703 387, 388
Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 362 495
Reed *v.* Welty, 197 Fed. Rep. 419 210
Reid *v.* Colorado, 187 U. S. 137 363
Reitler *v.* Harris, 223 U. S. 437 382
Rentie *v.* McCoy, 35 Oklahoma, 77 210
Rex Buggy Co. *v.* Dinneen, 23 S. Dak. 474 201

PAGE

Rexford *v.* Brunswick-Balke Co., 228 U. S. 339 70
Richardson *v.* Green, 130 U. S. 104 686
Richardson *v.* McChesney, 218 U. S. 487 695
Ricker *v.* Powell, 100 U. S. 104 291
Riggins *v.* United States, 199 U. S. 547 229
Roberts *v.* Lewis, 144 U. S. 653 567
Roberts *v.* Reilly, 116 U. S. 80 439
Robinson *v.* Belt, 187 U. S. 41 421
Rock Island Plow Co. *v.* Reardon, 222 U. S. 354 305
Rodgers *v.* United States, 185 U. S. 83 428
Roeser *v.* Pease, 37 Okla. 222 680
Rogers *v.* Clark Iron Co., 217 U. S. 589 684, 685, 687
Rogers *v.* Jones, 214 U. S. 196 690
Rolston *v.* Missouri Fund Commrs., 120 U. S. 390 495
Root *v.* Railway Co., 105 U. S. 189 649
Rosaly *v.* Graham, 227 U. S. 584 82, 255
Rose *v.* Perry, 8 Yerg. 156 313
Rosenthal *v.* New York, 226 U. S. 260 576
Ross *v.* Oregon, 227 U. S. 150 54
Royall, *Ex parte*, 117 U. S. 241 228, 229
Royall, *In re*, 125 U. S. 696 230
Royall *v.* Virginia, 116 U. S. 572; *S. C.*, 121 U. S. 102 230
Rupp *v.* Western Indemnity Co., 138 Ky. 18 268
Russell *v.* Sebastian, 233 U. S. 195 170, 175, 192
St. Louis Consolidated Coal Co. *v.* Illinois, 185 U. S. 203 577
St. Louis, S. F. & T. R. R. *v.* Seale, 229 U. S. 156 545
St. Louis S. W. Ry. *v.* Arkansas, 106 Ark. 321 356, 361
St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142 187, 695
Salomon *v.* United States, 19 Wall. 17 460
Salter *v.* Dunn, 64 Ky. 311 271
San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439 406

PAGE

San Joaquin Co. *v.* Stanislaus County, 233 U. S. 459 661
Sauer *v.* New York, 206 U. S. 536 50
Sayles *v.* FitzGerald, 72 Conn. 391 568
Schlemmer *v.* Buffalo, Rochester &c. Ry., 205 U. S. 1; *S. C.*, 220 U. S. 590 379
Schuyler *v.* Littlefield, 232 U. S. 707 410
Seaboard Air Line *v.* Horton, 233 U. S. 492 379, 398
Seaboard Air Line *v.* Moore, 228 U. S. 433 378
Seabolt, *In re*, 113 Fed. Rep. 766 589
Seattle *v.* Kelleher, 195 U. S. 351 49
Security Co. *v.* Black River Bank, 187 U. S. 211 599
Security Life Ins. Co. *v.* Prewitt, 200 U. S. 446 695
Sere *v.* Pitot, 6 Cranch, 332 596
Seward *v.* Denver & R. G. R. R., 17 New Mex. 557; *S. C.*, 131 Pac. Rep. 980 661
Shapiro *v.* United States, 196 Fed. Rep. 268 414
Shedd *v.* People, 217 U. S. 597 692
Sheldon *v.* Sill, 8 How. 441 596
Shoecraft *v.* Bloxham, 124 U. S. 730 596, 598
Shulthis *v.* McDougal, 225 U. S. 561 683, 684, 689
Sibbald, *Ex parte*, 12 Pet. 488 67
Siler *v.* Louisville & Nashville R. R., 213 U. S. 175 605
Silvis *v.* Aultman, 141 Ill. 632 307
Simon, *Ex parte*, 208 U. S. 144 229
Sioux Remedy Co. *v.* Cope, 28 S. Dak. 397 200
Sioux Remedy Co. *v.* Cope, 235 U. S. 197 363
Sioux Remedy Co. *v.* Lindgren, 27 S. Dak. 123 201
Skelton *v.* Dill, 30 Okla. 278 207
Skelton *v.* Dill, 235 U. S. 206 420
Slack, *In re*, 111 Fed. Rep. 523 589
Smith *v.* Alabama, 124 U. S. 465 623
Smith *v.* Farbenfabriken of Elberfeld Co., 197 Fed. Rep. 894 388
Smith *v.* Reeves, 178 U. S. 436 494
Smith *v.* St. Louis & S. W. Ry., 181 U. S. 248 363
South Covington Ry. *v.* Covington, 146 Ky. 592 544
Southern Pacific Co. *v.* Denton, 146 U. S. 202 272, 273
Southern Pacific Ry. *v.* Schuyler, 227 U. S. 601 32
Southern Ry. *v.* Atlanta Sand Co., 135 Ga. 35 660
Southern Ry. *v.* Gadd, 233 U. S. 572 378
Southern Ry. *v.* Greene, 216 U. S. 400 203, 366
Southern Railway *v.* King, 217 U. S. 524 576, 610
Spies, *Re*, 123 U. S. 131 53
Spies *v.* Illinois, 123 U. S. 131 687, 693, 694
Standard Stock Food Co. *v.* Wright, 225 U. S. 540 576, 610
Stanly County *v.* Coler, 190 U. S. 437 478
State *v.* Cockrell, 112 Pac. Rep. 1000 474, 475
State *v.* Etowah Lumber Co., 153 Ala. 77 148
State *v.* Lancashire Ins. Co., 66 Ark. 466 370
State *v.* Moore, 76 Ark. 197 370
State *v.* Union Pacific R. R., 143 N. W. Rep. 918 128, 131
State *v.* Western & Atlantic R. R., 138 Ga. 835 660
State *ex rel.* Railroad Comm. *v.* Oregon R. R. & Nav. Co., 68 Wash. 160 661
State *ex rel.* Taylor *v.* Cockrell, 27 Okla. 630; *S. C.*, 112 Pac. Rep. 1000 474, 489, 491, 492
State *ex rel.* Yaple *v.* Creamer, 85 Oh. St. 349 573
Steigleder *v.* McQuestion, 198 U. S. 141 567
Stevenson *v.* Fain, 116 Fed. Rep. 147 11, 16
Stockard *v.* Morgan, 185 U. S. 27 363
Stone *v.* Stone, 43 Ark. 160 421

PAGE

Straus *v.* Foxworth, 231 U. S. 162 687
Stringer *v.* Young, 191 N. Y. 157 599
Suburban Rapid Transit Co. *v.* The Mayor, 128 N. Y. 510 192
Suffolk Co. *v.* Hayden, 3 Wall. 315 648
Summers *v.* United States, 231 U. S. 92 277
Synnott *v.* Mines Co., 234 U. S. 749 684
Tallcot *v.* Arnold, 61 N. Y. 616 488
Tampa Water Works Co. *v.* Tampa, 199 U. S. 241 50
Taylor *v.* Parker, 33 Okla. 199 43, 44
Taylor *v.* Parker, 235 U. S. 42 428
Tefft, Weller & Co. *v.* Munsuri, 222 U. S. 114 684
Terrett *v.* Taylor, 9 Cranch, 43 194
Tevis *v.* Ryan, 233 U. S. 273 349
Texas Cement Co. *v.* McCord, 233 U. S. 157 67, 338, 340
Texas & N. O. R. R. *v.* Miller, 221 U. S. 408 275
Texas & N. O. R. R. *v.* Sabine Tram Co., 227 U. S. 111 545
Texas & Pacific Ry. *v.* Archibald, 170 U. S. 665 379
Texas & Pacific Ry. *v.* Behymer, 189 U. S. 468 379
Texas & Pacific Ry. *v.* Cisco Oil Mill, 204 U. S. 449 375
Texas & Pacific Ry. *v.* Howell, 224 U. S. 577 430
Texas & Pacific Ry. *v.* Watson, 190 U. S. 287 431
Thomas *v.* Gay, 169 U. S. 264 298
Thomas *v.* Harvie's Heirs, 10 Wheat. 146 291
Thomas *v.* Iowa, 209 U. S. 258 695
Thomas *v.* Woods, 173 Fed. Rep. 585; *S. C.*, 178 Fed. Rep. 1005 589
Thompson *v.* Fairbanks, 196 U. S. 516 689

PAGE

Thomson *v.* Pacific Railroad, 9 Wall. 579 298
Tiger *v.* Western Investment Co., 221 U. S. 286 296, 448
Tilghman *v.* Proctor, 125 U. S. 136 647, 648
Tilghman *v.* Werk, 39 Fed. Rep. 680 411
Tinsley *v.* Treat, 205 U. S. 20 227
Toland *v.* Sprague, 12 Pet. 300 70
Townsend *v.* Little, 109 U. S. 504 428
Transportation Co. *v.* Parkersburg, 107 U. S. 691 624
Treat *v.* Grand Canyon Ry., 222 U. S. 448 687
Trist *v.* Child, 21 Wall. 441 105
Tubman *v.* Baltimore & Ohio R. R., 190 U. S. 38 67
Tucker *v.* United States, 196 Fed. Rep. 260 414
Tullis *v.* Lake Erie & W. R. R., 175 U. S. 348 382
Turpin *v.* Lemon, 187 U. S. 51 162
Twining *v.* New Jersey, 211 U. S. 78 685
Tyler *v.* Judges, 179 U. S. 405 162
Union Pacific R. R. *v.* Harris, 215 U. S. 386 40
Union Pacific Ry. *v.* O'Brien, 161 U. S. 451 379
Union Pacific R. R. *v.* Peniston, 18 Wall. 5 298
Union Trust Co. *v.* Westhus, 228 U. S. 519 416
United Dictionary Co. *v.* Merriam Co., 208 U. S. 260 650
United States *v.* Alamogordo Lumber Co., 202 Fed. Rep. 700 674
United States *v.* Bailey, 9 Pet. 267 66
United States *v.* Bethlehem Steel Co., 205 U. S. 105 457, 458
United States *v.* Broughton, 213 Fed. Rep. 345 139
United States *v.* Buchanan, 232 U. S. 72 216
United States *v.* Chandler-Dunbar Water Power Co., 209 U. S. 447 559

	PAGE
United States *v.* Chase, 135 U. S. 255	249
United States *v.* Coombs, 12 Pet. 72	369
United States *v.* Denver &c. Ry., 150 U. S. 1	175
United States *v.* George, 228 U. S. 14	236
United States *v.* Greathouse, 166 U. S. 601	428
United States *v.* Hall, 131 U. S. 50	66
United States *v.* Harris, 177 U. S. 305	233
United States *v.* Healey, 160 U. S. 136	428
United States *v.* Huckabee, 16 Wall. 414	583
United States *v.* Ju Toy, 198 U. S. 253	67
United States *v.* Keitel, 211 U. S. 370	31
United States *v.* Knight, 206 Fed. Rep. 145	424
United States *v.* Memphis, 97 U. S. 284	583
United States *v.* Miller, 223 U. S. 599	375
United States *v.* Minidoka R. R., 190 Fed. Rep. 491; *S. C.*, 176 Fed. Rep. 762	215
United States *v.* Patten, 226 U. S. 525	236
United States *v.* Percheman, 7 Pet. 51	349
United States *v.* Plumer, 3 Cliff. 28	68
United States *v.* Portale, 235 U. S. 27	287
United States *v.* Pridgeon, 153 U. S. 48	66
United States *v.* Ramsey, 197 Fed. Rep. 144	234
United States *v.* Reese, 92 U. S. 214	250
United States *v.* Reynolds, 213 Fed. Rep. 352	139
United States *v.* Shock, 187 Fed. Rep. 870	79
United States *v.* 1621 Pounds of Fur Clippings, 106 Fed. Rep. 161	70
United States *v.* Stevenson, 215 U. S. 190	31
United States *v.* Union Pacific Ry., 168 U. S. 505	66
United States Bank *v.* Planters' Bank, 9 Wheat. 904	595
United States Express Co. *v.* Minnesota, 223 U. S. 335	364
United States Frumentum Co. *v.* Lauhoff, 216 Fed. Rep. 610	650
University *v.* People, 99 U. S. 309	170
Upham *v.* Draper, 157 Mass. 292	599
Urquhart *v.* Brown, 205 U. S. 179	229
Vaughan *v.* Northup, 15 Pet. 1	117
Vermont Marble Co. *v.* National Surety Co., 213 Fed. Rep. 429	339, 341
Villabolos *v.* United States, 6 How. 81	686
Virginia *v.* Tennessee, 148 U. S. 503	16, 249
Virginia Coupon Cases, 114 U. S. 325	162
Wadley Southern Ry. *v.* Georgia, 235 U. S. 651	640
Wadley Southern Ry. *v.* State, 137 Ga. 497	654, 662
Walla Walla *v.* Walla Walla Co., 172 U. S. 1	192
Ward *v.* Race-Horse, 163 U. S. 504	159
Washington *v.* Miller, 34 Okla. 259	424
Washington Dredging & Improvement Co. *v.* State of Washington, 231 U. S. 742	688
Waterman *v.* Hawkins, 75 Ark. 120	370
Waterman Pen Co. *v.* Modern Pen Co., 183 Fed. Rep. 118; *S. C.*, 105 C. C. A. 408; *S. C.*, 193 Fed. Rep. 242; *S. C.*, 197 Fed. Rep. 534; *S. C.*, 117 C. C. A. 30; *S. C.*, 197 Fed. Rep. 536; *S. C.*, 117 C. C. A. 32	93
Waters-Pierce Oil Company *v.* Texas, 212 U. S. 112	53
Webb, *Ex parte*, 225 U. S. 663	296

PAGE

Webster *v.* Cooper, 10 How. 54 66
Weir *v.* Rountree, 216 U. S. 607 683, 684, 689
Western Indemnity Co. *v.* Rupp, 147 Ky. 489 270, 274
Western Union Tel. Co. *v.* Alabama, 132 U. S. 472 368
Western Union Tel. Co. *v.* Gottlieb, 190 U. S. 412 366
Western Union Tel. Co. *v.* Kansas, 216 U. S. 1 203, 204, 363, 364
Western Union Tel. Co. *v.* Massachusetts, 141 U. S. 40; *S. C.*, 125 U. S. 530 365, 368
Western Union Tel. Co. *v.* Taggart, 163 U. S. 1 366
Westinghouse Co. *v.* Wagner Co., 225 U. S. 604 644, 646, 647, 651
Wetmore *v.* Karrick, 205 U. S. 141 67, 68
Wetmore *v.* Rymer, 169 U. S. 115 567, 568
Wharton *v.* Clay, 4 Bibb, 167 271
White *v.* Hoyt, 73 N. Y. 505 488
White Star Mining Co. *v.* Hultberg, 205 U. S. 540 692
Whitney *v.* Dick, 202 U. S. 132 65, 66
Wight, *In re*, 134 U. S. 136 68
Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1 159
Willcox *v.* Consolidated Gas Co., 212 U. S. 19 640, 660, 662, 664
Williams *v.* Hagood, 98 U. S. 72 162
Williams *v.* Mississippi, 170 U. S. 213 362

PAGE

Williams *v.* United States, 168 U. S. 382 235
Williams *v.* Walsh, 222 U. S. 415 621
Wm. W. Bierce, Ltd., *v.* Hutchins, 205 U. S. 340 691
Williamson *v.* Osenton, 232 U. S. 619 569
Willoughby *v.* Chicago, 235 U. S. 45 693, 694
Wisconsin & Michigan Ry. *v.* Powers, 191 U. S. 379 364
Wisconsin Cent. R. R. *v.* United States, 164 U. S. 190 459
Wood, *Ex parte*, 155 Fed. Rep. 190 662
Wood *v.* Chesborough, 228 U. S. 672 690
Woodhaven Gas Co. *v.* Deehan, 153 N. Y. 528 192
Woodward *v.* Woodward, 16 N. J. Eq. 83 599
Work *v.* United Globe Mines, 231 U. S. 595 687
Yazoo & M. V. R. R. *v.* Jackson Vinegar Co., 226 U. S. 217 576
Yazoo & Mississippi R. R. *v.* Adams, 180 U. S. 41 695
Yazoo & Mississippi R. R. *v.* Brewer, 231 U. S. 245 685, 690
Yazoo & Mississippi R. R. *v.* Wright, 207 Fed. Rep. 281 378
Yick Wo *v.* Hopkins, 118 U. S. 356 130, 160
York *v.* Texas, 137 U. S. 15 272, 273
Young, *Ex parte*, 209 U. S. 123 640, 660, 662, 663, 664
Zadig *v.* Baldwin, 166 U. S. 485 53

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

PAGE

1789, Sept. 24, § 11, 1 Stat. 73, c. 20 595
1799, March 2, 1 Stat. 627, c. 22 245
1800, April 4, § 19, 2 Stat. 19, c. 19 587
1823, March 1, 3 Stat. 729, c. 21 245
1841, August 19, 5 Stat. 440, c. 9 587
1854, July 22, § 8, 10 Stat. 308, c. 103 ..... 21, 22
1854, August 4, 10 Stat. 575, c. 245 ..... 21, 22
§ 8 22
1860, June 21, 12 Stat. 71, c. 167 ..... 20, 21, 22
1866, July 25, § 1, 14 Stat. 236, c. 241 38
§ 8 38
§ 9 ..... 38, 39, 41
1867, March 2, § 12, 14 Stat. 517, c. 176 587
1868, July 27, § 7, 15 Stat. 240, c. 273 279
1873, March 3, 17 Stat. 602, c. 266 216
1874, April 7, 18 Stat. 27, c. 80 ..... 254, 255
1874, June 18, 18 Stat. 78, c. 301 35
1875, March 3, 18 Stat. 470, c. 137 595
§ 5 ..... 566, 567
1875, March 3, 18 Stat. 482, c. 152 ..... 215, 216
1879, March 1, § 5, 20 Stat. 327, c. 125 413

PAGE

1881, March 3, 21 Stat. 502, c. 138 93
1883, March 3, 22 Stat. 488, c. 121 245
1884, May 17, 23 Stat. 24, c. 53 279
1887, Feb. 4, 24 Stat. 379 c. 104 ..... 375, 606
§§ 2, 3 ..... 325, 326
§ 4 ..... 322, 324
1887, Feb. 8, § 5, 24 Stat. 388, c. 119 104
1887, March 3, 24 Stat. 552, c. 373 ..... 595, 597
1888, August 13, 25 Stat. 433, c. 866 595
1890, May 2, § 30, 26 Stat. 81, c. 182 424
§ 31 ..... 420, 424
1890, June 10, 26 Stat. 131, c. 407 ..... 245, 250
§§ 16, 17 246
1890, July 2, § 7, 26 Stat. 209, c. 647 533
1891, March 3, 26 Stat. 826, c. 517 417
§§ 2, 6 65
§ 12 66
1892, July 16, 27 Stat. 183, c. 196 413
1894, August 13, 28 Stat. 278, c. 280 331
1894, August 15, 28 Stat. 286, c. 290 105
1897, June 7, 30 Stat. 62, c. 3 425
1898, June 28, 30 Stat. 495, c. 517 296
§§ 26, 28 425

PAGE

1898, July 1, 30 Stat. 544, c. 541 ..... 304, 305
§ 8 ..... 585, 586, 587, 588
§ 67-c 304
§ 67-f 305
§ 70 ..... 585, 586
1899, March 3, §§ 43, 90, Tit. II, 30 Stat. 1253, c. 429 277, 280
1900, April 12, §§ 33, 34, 31 Stat. 77, c. 191 582
§ 35 254
1900, May 31, § 7, 31 Stat. 221, c. 598 105
1900, June 6, § 4, 31 Stat. 321, c. 786 280
1901, March 1, 31 Stat. 861, c. 676 .. 207, 424, 425, 426, 447, 448
§ 7 425
§ 23 41
§ 28 ..... 208, 425, 447
1901, May 25, 32 Stat. 1971 447
1902, May 27, 32 Stat. 245, c. 888 ..... 426, 448
1902, June 17, 32 Stat. 388, c. 1093 ..... 216, 217, 218
1902, June 30, 32 Stat. 500, c. 1323 ..... 207, 424
§ 6 ..... 208, 426, 428, 448
§ 7 208
§ 8 208
§ 16 ..... 78, 208, 210, 420
1902, July 1, 32 Stat. 641, c. 1362 ..... 41, 43
§§ 12, 15, 16 43
1902, July 1, 32 Stat. 716, c. 1375 41
1902, July 1, 32 Stat. 725, c. 1375 450
1902, August 8, 32 Stat. 2021 448
1903, Feb. 19, 32 Stat. 841, c. 707 420
1904, April 28, 33 Stat. 573, c. 1824 427
§ 2 44
1905, Feb. 24, 33 Stat. 811, c. 778 331
1905, March 3, 33 Stat. 991, c. 1424 ..... 216, 218
1905, March 3, §§ 2, 4, 33 Stat. 1264, c. 1496 ..... 232, 233, 234

PAGE

1906, April 26, § 19, 34 Stat. 137, c. 1876 80
§ 23 44
§ 27 41
1906, June 16, § 3, 34 Stat. 267, c. 3335 159
1906, June 21, 34 Stat. 325, c. 3504 450
1906, June 30, 34 Stat. 669, c. 3913 ..... 282, 283
1907, March 2, 34 Stat. 1246, c. 2564 .. 138, 233, 234, 235, 236, 239, 277, 283
1908, April 22, 35 Stat. 65, c. 149 .. 310, 311, 378, 397, 400, 627, 629, 672
§ 1 398
1908, May 27, 35 Stat. 312, c. 199 44
§ 1 ..... 78, 79
§§ 4, 5 80
1909, March 3, § 2, 35 Stat. 838, c. 269 280
1909, March 4, 35 Stat. 1075, c. 320 35
1909, August 5, 36 Stat. 11, c. 6 .... 237, 244, 245, 247
§§ 15, 16 250
§ 18 246
§ 28 (6) 239
1910, April 5, 36 Stat. 291, c. 143 ..... 311, 397, 672
§ 6 674
1910, June 18, § 4, 36 Stat. 539, c. 309 .. 322, 323, 324, 325, 326
§§ 2, 3 ..... 325, 326
1910, June 20, § 33, 36 Stat. 557, c. 310 ..... 673, 674
1910, June 25, § 6, 36 Stat. 825, c. 395 29
1911, Feb. 13, 36 Stat. 901, c. 47; U. S. Comp. Stat. Supp. 1911, p. 275 387
1911, March 3, 36 Stat. 1087, c. 231 255
§ 24 .. 594, 595, 597, 598, 600, 674
§ 28 674
§ 37 566
§ 117 65
§ 128 ..... 65, 66
§ 237 ..... 53, 369

PAGE

1911, March 3, § 238 . 336, 337, 565
§ 239 . . . . . 65, 66
§ 240 644
§ 244 255
§ 262 . . . . . 65, 71
§ 266 . . . . 404, 604, 639, 661
§ 269 69
§ 294 597
1912, August 24, 37 Stat. 512, c. 387 . . . . . 277, 280, 281
§ 3 . . . . . 278, 279
§§ 4, 9 278
§ 20 279
1913, March 4, 37 Stat. 828, c. 145 . . . . . 233, 234, 235
1913, March 4, 37 Stat. 1013, c. 160 661
Revised Statutes.
§ 101 225
§ 102 225
§ 103 225
§ 104 . . . . . 225, 227
§ 629 595
§ 709 53
§ 716 66
§ 752 228
§ 905 274
§ 1014 226
§ 1024 277
§ 1990 139
§ 2288 . . . . . 216, 218
§ 2289 217
§ 2290 217
§ 2291 . . . . . 216, 217
§ 3296 413
§ 3317 413
§ 3318 413
§ 3324 413
§ 3326 413
§ 3455 413
§ 3456 413
§ 3985 520

PAGE

Revised Statutes (*cont.*)
§ 4400 558
§ 4401 558
§ 4438 558
§ 4439 558
§ 4440 558
§ 4441 558
§ 4442 558
§ 4443 558
§ 4884 650
§ 4921 647
§ 4952 35
§ 4970 35
§ 5526 139
Judicial Code.
§ 24 . . 594, 595, 597, 598, 600, 674
§ 28 674
§ 37 566
§ 117 65
§ 128 . . . . . 65, 66
§ 237 . . . . . 53, 369
§ 238 . . . . . 336, 337, 565
§ 239 . . . . . 65, 66
§ 240 644
§ 244 255
§ 262 . . . . . 65, 71
§ 266 . . . . 404, 604, 639, 661
§ 269 69
§ 294 597
Criminal Code.
§ 184 . . . . . 515, 521
§ 269 139
§ 335 413
Constitution, Art. 1, § 8 544
subd. 3 559
Art. I, § 10 . . . . 49, 53, 55, 166, 544
Clause 3 16
Art. III, § 2 478
Art. IV, § 1 274
§ 2 439

(B.) Statutes of the States and Territories.

Alabama.
Code, § 6846 . . . . . 142, 143
§ 6848 142
§§ 7632–7635 141
§ 7635 147
Alaska.
1913, April 26, Sess. Laws, 65 . . . . . 277, 281
Alaska (*cont.*)
Code Civ. Proc., §§ 698 *et seq.* 280
Comp. Laws, §§ 2152, 2199 277
pp. 277–362, 378–638 280

PAGE

Arizona.
Rev. Stat. 1901, § 2535, subd. 6 675

Arkansas.
1911, March 8, Acts, 1911, p. 48, Act 87 ..... 351, 363
§§ 8, 9 352
1911, March 23, Acts, 1911, p. 67, Act 112 ..... 351, 352, 353, 354, 355, 360, 361, 363, 366
§§ 1–6 352
§§ 4–6 360
§ 12 353
§ 14 353
§ 15 ..... 353, 370
§ 20 ..... 353, 368, 369, 370
1911, May 4, Acts 1911, p. 233, Act 251 ..... 353, 355, 360, 363, 366
§ 2 354
§ 9 354
§ 10 354
1911, May 26, Acts 1911, p. 285, Act 313 353
Mansfield's Digest of 1884, c. 27, § 648 ..... 420, 421
c. 49, § 2532 ..... 424, 425, 426, 448, 449, 451
c. 104, § 4621 ..... 420, 421

Florida.
1907, Laws of 1907, c. 5596, §§ 46, 47 25
1907, Laws of 1907, c. 5597 25
1913, Laws of 1913, c. 6421, §§ 44, 45 25

Georgia.
1907, August 26, Laws 1907, p. 72, § 12 653
Civ. Code 1911, § 2625 ..... 653, 658, 667
§ 4041 585

Hawaii.
Civ. Code, 1859, § 1142 348

Illinois.
1893, June 22, Laws of 1893, § 9, p. 117 269

PAGE

Illinois (*cont.*)
Hurd's Rev. Stat., 1913
c. 77, § 9 305
c. 95, §§ 1, 4 305

Kentucky.
Civ. Code, § 755 271
Stats., 1909, § 631 267
Stats. (Carroll), § 816 604
§ 820a 604, 605, 606, 608
§ 829 ..... 604, 605, 606, 608, 609, 610

Louisiana.
Civ. Code, Art. 2021 178

Maryland.
1910, July 1, Laws 1910, c. 207, p. 168 619
§ 132 620
§ 133 ..... 618, 619
§ 136 619
§ 137 620
§ 140a 620, 621

Michigan.
1909, Pub. Acts, 1909, No. 300, § 26 405
Const., Art. II 404

Mississippi.
1908, Laws of 1908, c. 194, p. 204 381
1912, Laws 1912, c. 157, p. 165 638
1912, Laws of 1912, c. 215, p. 290 381

Nebraska.
Comp. Stats., 1911, c. 12-a, § 128 128

New York.
1848, Laws of 1848, c. 265 187
1853, Laws of 1853, c. 471 187
1881, Laws of 1881, c. 483 187
1884, Laws of 1884, c. 534 185
1885, Laws of 1885, c. 499 ..... 185, 188, 189
§ 3 188
1886, Laws of 1886, c. 503 ..... 185, 188, 189

PAGE

New York (*cont.*)
1887, Laws of 1887, c. 716 185
1891, Laws of 1891, c. 231 186
Code Civ. Proc., § 834 . 675
§ 836 . 676
Cons. Laws, c. 60, § 184 555, 558
Penal Law, § 34 440
§ 580 438
§ 583 438
§ 1120 440

North Carolina.
1789, Laws of 1789, c. 3, p. 3 ..... 3, 6
1796, Laws of 1796, c. 18, p. 16 6
1819, Laws of 1819, c. 11, p. 18 6

Ohio.
Page & Adams Ann. Gen. Code, Vol. I, §§ 1465 *et seq.* 573, 574

Oklahoma.
1907, Dec. 17, Laws of 1907, p. 145 478
1907, Dec. 18, Laws of 1907, §§ 1–6 158
§ 7 .....158, 160
§ 12 158
1908, May 26, Sess. Laws 1908, p. 640, § 6 297, 298
1909, March 27, Laws 1909, p. 624 297
1911, Sess. Laws, 1911, Art. 2, c. 31, § 3 468
1911, Laws 1911, p. 54
§ 1 493
§ 3 .....468, 478, 482, 483, 491

PAGE

Oklahoma (*cont.*)
§ 5 .....480, 483
§ 6 ....480, 483, 486, 493
§ 8 .....480, 481, 484
1913, March 6, Sess. Laws 1913, c. 22, p. 27 478, 481, 482, 483
Bledsoe's Indian Land Laws, 2d ed., §§ 829–831 .....424, 449
Comp. Laws, 1909, § 7943 490
Const., Art. 2, § 6 ..485, 492
Const., Art. 5, § 55 482
Const., Art. 10, § 15 ... 482
Creek Laws, 1867, § 6 .. 424
Perryman's Comp. Creek Laws, 1890, § 6, p. 32 .....424, 449
§ 8, p. 76 424
Rev. Laws, 1910 (Harris and Day), §§ 298 *et seq.* 478
§ 299 478
§ 300 .....478, 483
§ 302 480
§ 303 .....480, 493
§ 305 480
§§ 860 *et seq.* 158
Snyder's Compiled Laws, 1909
§ 4180 32

Porto Rico.
Civ. Code, 1902, § 1803 258, 259, 260
§ 1804 ..256, 257, 258, 259
§ 1869 .....254, 259, 260

South Dakota.
Rev. Codes, 1903, § 883 200
§ 885 200

Tennessee.
1820, Laws of 1820, c. 22, p. 30 6

(C.) TREATIES.

	PAGE
Great Britain.	
Most favored nation clause	398
Italy.	
1871, Feb. 26, Art. 24, 17 Stat. 845	398
Mexico.	
Guadalupe Hidalgo, May 30, 1848	21
Russia.	
1867, March 30, 15 Stat. 539	279
Indian.	
Cherokees, July 19, 1866, Art. 16, 14 Stat. 799	40
Choctaws and Chickasaws, Apr. 28, 1866, Art. 11, 14 Stat. 769	40
April 23, 1897, 30 Stat. 495	296
Creeks, June 14, 1866, 14 Stat. 785	40
Generally.	
White Slave Traffic arrangement of July 25, 1902, 35 Stat. 1979	30

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1914.

STATE OF NORTH CAROLINA *v.* STATE OF TENNESSEE.

IN EQUITY.

No. 4, Original. Argued October 15, 16, 1914.—Decided November 9, 1914.

Slick Rock Basin and Tellico Basin sections of the boundary line between North Carolina and Tennessee located and defined in accordance with the judgment of a commission appointed by both States in 1821 and ordered to be marked by commissioners to be appointed under decree in this case.

There being a question as to the exact location of this part of the boundary line and both States having in 1821 united in appointing a joint commission and having agreed to abide by its judgment, the question in this case is to determine what that judgment was.

Marks on numerous trees along the disputed line similar to marks on trees along the undisputed line given great weight in this case as evidence of location of the continuous line referred to in the judgment of the Commission.

When States enter into an agreement giving commissioners the power to exercise judgment as to exact location of the boundary between them, they must suppose that such judgment will be exercised as to disputed locations and that when exercised it shall be binding upon them both.

As the Cession Act of North Carolina of 1789 under which that State

ceded the western part of its territory to the United States and which was adopted by Congress was general in terms and necessarily demanded definition of the line both for purposes of private property and political jurisdiction of the States embodying such territory, an agreement made by the States to settle the exact line was in conformity with the act and did not require further consent of or sanction by Congress, nor was it in conflict with Article I, § 10, Clause 3 of the Federal Constitution prohibiting agreements between States without such consent.

THE facts, which involve the location of a part of the boundary line between the State of North Carolina and the State of Tennessee, are stated in the opinion.

Mr. Thomas W. Bickett, Attorney General of the State of North Carolina, and *Mr. F. A. Sondley*, with whom *Mr. Theodore F. Davidson* and *Mr. C. B. Matthews* were on the brief, for complainant.

Mr. Charles T. Cates, Jr., with whom *Mr. Frank M. Thompson*, Attorney General of the State of Tennessee, *Mr. T. E. H. McCroskey* and *Mr. Samuel G. Shields* were on the brief, for defendant.

By leave of court, *Mr. W. D. Spears* and *Mr. L. N. Spears* filed a brief in behalf of Theodore Cobb *et al.*

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit in equity instituted by the State of North Carolina, as complainant, against the State of Tennessee, as defendant, for the purpose of having settled and determined the true location of part of the boundary line between the two States.

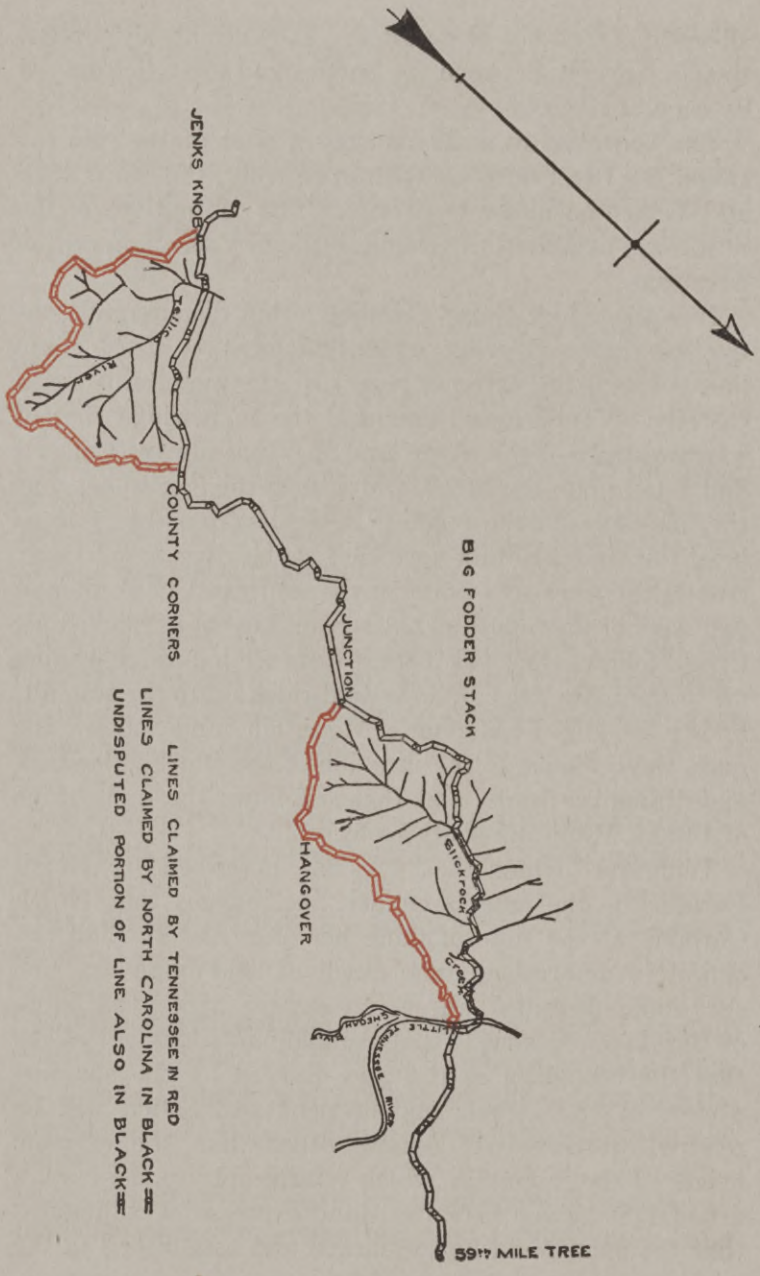
The pleadings consist of the original bill as amended, answer to the same, cross bill, and replication. Their

allegations need not be detailed. They accurately present the controversy between the parties and the relief prayed by each of them.

The controversy concerns only a part of the line between the two States called, respectively, the Slick Rock and Tellico basins or territories. The contentions of the States are exhibited in general outline by the map on the next page.

It is alleged by North Carolina "that dispute and controversy have arisen as to the true location of the State line between the extreme height of the mountain northeasterly of Tennessee River and the main ridge thereof southwesterly of the river" and she "has always believed and acted upon the belief, and alleges the fact to be, that the line between these points descends from the extreme height of the mountain northeast of the river to the river, crosses the river to a point in the southwest bank thereof just west of the mouth of the stream known as Slick Rock Creek, follows the creek a short distance to a ridge leading up to the main ridge, follows said ridge up to the summit, known as Big Fodderstack Mountain, and follows the main ridge thence to the junction of the Big Fodderstack and Hangover leads, and thence follows the main ridge of Unaka Mountain southwesterly."

Tennessee denies that the line described by North Carolina is the true boundary line, alleges that North Carolina at the time of filing her original bill "had not definitely determined how much of said boundary line she would dispute," alleges an extension of "the limits of the disputed zone," that complainant does not allege that the boundary as run and marked by the commissioners in 1821 (their appointment and action will be referred to hereafter) follows other than the extreme height of the mountain, which is agreeably to the cession act of 1789 (given hereafter), and expresses a willingness that the line should be so marked and established in the


JENKS KNOB
COUNTY CORNERS
JUNCTION
BIG FODDER STACK
HANGOVER
59¹⁷ MILE TREE
LINES CLAIMED BY TENNESSEE IN RED
LINES CLAIMED BY NORTH CAROLINA IN BLACK
UNDISPUTED PORTION OF LINE ALSO IN BLACK

orders of this court, and denies that it can be established agreeably to the cession act in any other place than along the extreme height of the mountain from the Tennessee River.

Further, Tennessee "denies that there is any uncertainty in regard to that part of the boundary line northeast of the river, and avers that said boundary line northeast of the river runs, and was so marked by the commissioners in 1821, down the crest of the main ridge of the mountain, which gradually lowers as it approaches the river, and on said line near to or on the bank of said river, about a half a mile above the mouth of Slick Rock Creek, a pine or hemlock tree was marked as a 'fore and aft tree,' which said tree is still standing, and is recognized as a 'fore and aft,' boundary line tree bearing the marks placed thereon by the commissioners in 1821, and described in the North Carolina Confirmatory Act and the report of said commissioners, hereafter shown." And avers "that said boundary line as described in said Cession Act of 1789, and run by said commissioners in 1821, crossed directly over the Tennessee River from said 'fore and aft tree' to the crest of the main ridge of the mountain, which is known as the Hangover ridge or lead—and which runs from the Stratton Bald northeasterly to the river, lowering somewhat as it approaches the river, where it ends or terminates in a bluff practically opposite said marked 'fore and aft tree,' thence along the crest of said Hangover ridge or lead to said Stratton Bald and the junction of Hangover with Fodderstack, the Fodderstack ridge, however, being several hundred feet lower than said main or Hangover ridge."

To these contentions the proof is directed, the record of which is voluminous. Besides other evidence, it is replete with the disputes of experts and of opposing deductions from their testimony. These, however, have their determination if not their reconciliation in certain dom-

inating elements upon which our judgment may be rested.

The territory constituting the State of Tennessee was ceded to the United States by North Carolina in 1789. In the act of cession the boundary line was, as described, from the French Broad River westerly as follows: "Thence along the highest ridge of the said mountain [Iron Mountain] to the place where it is called Great Iron Mountain or Smoky Mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of such mountain to the southern boundary of this State." A deed was made by North Carolina, in pursuance of the act of cession, in 1790 which followed the same description, as did also the act of Congress accepting the cession; also the constitution of the State of Tennessee.

In the year 1796 North Carolina passed an act appointing commissioners to settle the boundary line between the State and the State of Tennessee. The latter State also appointed commissioners with similar authority. In pursuance of the authority the commissioners appointed by the States settled the line from the east to a point on the Great Iron or Smoky Mountain west of the Pigeon River, marked by a stone set up on the north side of the Cataloochee Turnpike road, about due north from the present town of Waynesville, in Heywood county, North Carolina, and about six miles east of the point where the Tennessee River passes through the mountain range, leaving the line to the southern boundary of the States unmarked.

Subsequently each of the States (North Carolina in 1819, Tennessee in 1820) passed acts appointing commissioners, to meet with commissioners appointed by the other "and with them to settle, run and mark the boundary line between" the States "agreeably to the true in-

tent and meaning" of the cession act. In the act of North Carolina it was provided that "this State will at all times hereafter ratify and confirm all and whatsoever the said commissioners, or the majority of those of each State, shall do, in and touching the premises, and the same shall be binding on this State"; and Tennessee enacted "that whatsoever the said commissioners, or those appointed by each State, shall do in and touching the premises shall be binding on this State."

Three commissioners were appointed by each State, who met and proceeded to the execution of their duties and made report thereon to the respective States as follows:

"Having met at the town of New Port in the State of Tennessee on the 16th day of July A. D. 1821, to settle, run and mark the dividing line between the two States, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord, 1799, to the Southern Boundary of the said States, Respectfully Report, That we proceeded to ascertain, run and mark the said dividing line as designated in the XIth Article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of General Assembly of the State of North Carolina, entitled 'An act for the purpose of ceding to the United States of America certain Western lands' therein described, passed in 1789:—Which said dividing line as run by us, Begins at a stone set upon the north side of the Cataloochee Turnpike road, and marked on the West Side *of* Ten. 1821; and the East side N. C. 1821, running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian Town of Tellassee, crossing Porters gap at the distance of twenty-two miles from the beginning; passing Meig's boundary line at

thirty-one and a half miles:—the Equonettly path at fifty three miles;—and crossing Tennessee River at the distance of sixty five miles from the beginning. From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill Towns, near the head of the West fork of Tellico River, and at the distance of ninety three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up, marked Ten. on the West side and N. C. on the East side; and where a Hickory tree is also marked on the South side Ten. 101 m. and on the North side N. C. 101 m. being one hundred and one miles from our beginning. From thence a due course South two miles and two hundred and fifty two poles to a Spruce Pine on the North Bank of Highwassee River, below the mouth of Cane Creek; thence up the said River the same course about one mile, and crossing the same to a Maple marked W. D. and R. A. on the South bank of the River; Thence continuing the same course due south Eleven miles and two hundred and twenty three poles to the Southern Boundary line of the States of Tennessee and North Carolina; making in all one hundred and sixteen miles and two hundred and twenty three poles from our beginning; and striking the Southern Boundary line twenty three poles West of a tree in said line, marked 72 m.—Where we set up a square post marked on the West Side Ten. 1821; on the East Side N. C. 1821; and on the South Side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report, and which plats and

Report are certified by us in Duplicate, one for each of said States, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina."

Each State ratified the line located by the commissioners, following in their respective enactments the description of the report of the commissioners, and North Carolina "fully established, ratified and confirmed" it "as the boundary line between the States of North Carolina and Tennessee forever"; and Tennessee "ratified, confirmed and established" it "as the true boundary line between this State and the State of North Carolina."

The instructions to the commissioners were "to settle, run and mark ["re-mark" are the words of the Tennessee act] the boundary line" between the States. The commissioners executed the duty and reported "that we proceeded to ascertain, run and mark said dividing line." The report gives the beginning and end of the line and the intermediate courses and objects and concludes as follows: "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile-marked at the end of each mile; agreeably to the plats which accompanies this report; and which said plats and reports are certified by us in duplicate, one for each of said States, in the same words, marks and figures; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina."

Each State by its legislature confirmed the report and declared the line as settled and run the boundary line between them, and, it is to be presumed, after due consideration.

The immediate question, therefore, is, Where was the line run? And the answer would necessarily seem to be determined by the monuments, courses and distances, and, if these in any way conflict, by the line as marked

by the commissioners if it can be ascertained, and the plats which accompanied the report certified in duplicate.

On the report of the Commissioners no controversy was raised for years. It seemed to be certain, or rather was accepted as proof of what we may call for convenience the North Carolina contention. Tradition, supported, we think, by preponderating testimony, sustains it; and as early as 1836 it received some recognition from the legislature of Tennessee. In that year the State constituted a land district called the Ocoee District and provided for laying it out into townships, fractional townships, etc., and also provided for the entry and granting of the lands. The surveyor-general of the State, in accordance with the provisions of the legislation, surveyed and platted the lands and the plat shows that he made Slick Rock Creek the eastern boundary of the district. North Carolina surveyed the lands in the disputed territory in 1851 and made grants in 1853.

Upon an entry made in 1882 under laws passed by Tennessee and a grant from said State in 1892 the first judicial controversy arose over the boundary line and the contention of Tennessee was sustained. *Belding* v. *Hebard*, 103 Fed. Rep. 532.

The opinion in the case was delivered by the late Mr. Justice Lurton, then a judge of the Circuit Court of Appeals, and exhibits the usual care and ability of that learned Justice. He enumerates the contentions of the parties, the elements of the contentions, compares and weighs the evidence adduced for their support and concludes as follows (p. 546):—

"There has been, on the evidence in this record, no such long and continued recognition or acquiescence in the tentative line on Slick Rock creek as to justify this court in saying that it has been adopted as the actual line so long as to stand for a definition of the true and ancient boundary. The conclusions and findings of the

master upon the principal points in the case are not shown to have been so plainly erroneous as to justify us in overturning his conclusions as to the existence of the marked state-line trees on the Hangover, nor as to the fact that the Hangover was palpably the 'main ridge' called for in the commissioners' report and survey.

"The case, on the whole, is one not free from doubts engendered by the existence of the marked line on Slick Rock creek and its apparent recognition by the Tennessee surveyor general as the state line. The result reached by the special master, and confirmed by a most careful and conscientious trial judge, is a result which on the whole is most consonant with the calls in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts settling the boundary is not so conclusive as to require us to reverse the action of the circuit court. The decree will therefore be affirmed."

The antagonism of the evidence to the North Carolina contention is put with more emphasis in *Stevenson* v. *Fain*, 116 Fed. Rep. 147, where, considering the controversy as to Tellico territory, Mr. Justice Lurton, again speaking for the court, said (p. 156):—

"In *Belding* v. *Hebard*, 43 C. C. A. 296, 103 Fed. Rep. 532, we had occasion to ascertain a portion of this dividing line, a few miles northeast of the part now in dispute. In that case we had evidence of two different lines, both probably run and marked by the joint commission. The line called the 'Slick Creek' line was the better marked line, but was a plain departure from the call to follow the 'main ridge.' There was an old marked line on the 'main ridge,' and, though not so well marked, had the great advantage of being supported by the calls for course and the call for the extreme height of the 'main ridge.' Under the evidence, we held the latter to be the line 'run and marked' by the commission of 1821, and adopted by the

confirmatory acts of both States. In that case, as in this, we were confronted with the fact that the Tennessee Cherokee survey had stopped at the Slick Creek line, and in that way recognized that as the line. But upon the whole case we held that the evidence relied upon to pull the line away from the 'extreme height' of the 'main ridge' was insufficient. The marked difference between that case and this is, first, in the fact that the 'main ridge' called for in the confirmatory acts of 1821 was far more clearly ascertained than in the present case; and, secondly, there was in that case evidence that two lines had been run and marked and old state-line marks shown on both lines. The call for the 'main ridge' was, therefore, supplemented by the existence of artificial monuments, and this turned the scale over the other, although the more plainly marked line."

The "main ridge" and the "extreme height" thereof were considered by the court as dominant criteria and that the calls of the cession act and of the confirmatory acts of the State and the line run by the commissioners established Hangover to be the main ridge, and yet it was said, in estimate of opposing evidence, the case was not free from doubt. And in affirming the judgment, deference was expressed to the finding of the special master and Circuit Court.

We need not pause to weigh the evidence in that case. It is reproduced in this, but here there is further evidence which gives different probative quality to the circumstances which were considered controlling in that case. It may be true,—indeed, it is so alleged by complainant—that the boundary line between the two States may be generally described as following the main ridge or watershed of the Allegheny Mountain range, but it has many local names and the topography of the country made it far from indubitably clear where the boundary line of the States should be located. Commissioners were hence

appointed to locate it, and their appointment and the controversies and the litigation which have arisen demonstrate that there was room for a choice and judgment of location—to be specific, of ridges. The States, we have seen, agreed to abide by the judgment of the commissioners, and to ascertain their judgment then is, as we have said, the inquiry in the case.

The commissioners reported that they had distinctly marked the dividing line run by them in its whole length "with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report, and which said plats and Report are certified by us in Duplicate, one for each of said States, in the same words, marks and figures." These plats were not in the *Hebard Case.*

According to the report of the commissioners, the plat was certified in duplicate, one for each State. It may be that the one filed with North Carolina was lost or destroyed when the Capitol building of the State was destroyed in 1832; that filed with Tennessee was discovered in 1903 or 1904 by the State Archivist among papers supposed to be worthless. Its authenticity is not questioned.

In November, 1910, a book purporting to be the field notes of W. Davenport, the surveyor who accompanied the commissioners, was found by his grandson in an old desk or sideboard which belonged to Davenport in his lifetime. The first three pages of the book are in the handwriting of Davenport. Other pages of the book are not in his handwriting but in that of his wife, who often acted as his amanuensis. However, here and there are corrections by Davenport. The original book was exhibited at the argument and showed the following:

"W. Davenport's Field Book, July 18th, 1821.

"July 19th, 1821, began at the Catalucha track to run the line between the State of North Carolina and Tennes-

see. Marked a rock there on North Carolina side N. C. 1821 and on the other side T. E. N. 1821—and runs with the line that J. McDowell, M. Matthews and D. Vance run in the year 1799, and runs with said line about 2 miles and a half to where they stopped." Then follow the courses and distances, with trees by name of kind and other physical objects.

These documents are variously interpreted by the experts of the parties. To detail and compare these interpretations and the arguments in support of them would be a tedious task and would have to be very extensive to adequately represent their strength. We have estimated them, but consider that general comment rather than specific review is sufficient. The documents undoubtedly have inaccuracies and fault may be found with them, but allowing for it they have a direction and concurrent strength which cannot be resisted when combined with other testimony, and demonstrate that the commissioners did not locate the dividing line on the Hangover ridge but located it along Slick Rock Creek to Fodder Stack. Their report agrees with such line and the local topography justified its selection. The dividing line as run by them, they reported, began at "a stone set upon the North side of the Cataloochee Turnpike road, running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwesterly on the extreme height thereof to where it strikes Tennessee River . . . and crossing Tennessee River at the distance of Sixty-five miles from the beginning." Thus far there is no dispute or uncertainty. "The summit" of the mountain and its "extreme height" should determine the locality of the line and the Tennessee River at a distance of sixty-five miles from the beginning. The next call has no such certain and conspicuous witness. The river is crossed, and thence the line runs "to the main ridge" and then along

the "extreme height" of it. The words of the call suppose an interval between the river and the "main ridge" whose extreme height thereafter is to be followed,—to be definite, a course up Slick Rock Creek to Fodder Stack. But granting that it could be literally satisfied without supposing such an interval, that is, connecting immediately with Hangover ridge, we must resort to the evidence to resolve the conflict of suppositions. We find the first established by the evidence which we have referred to and the marks on the trees. And these marks have of themselves great strength of proof, irresistible strength when combined with the other testimonies. They are the same in character as those on the undisputed part of the line, made, therefore, to define the continuity of the line, and the report explicitly states that the line was so defined in continuity—marked "in its whole length." We certainly cannot consider that a few trees—two or three only—identified as "State-line trees," marked on Hangover ridge satisfy this statement or determine that a line along that ridge was the ultimate one selected and the other but tentative, notwithstanding there were found on it from the river to Fodder Stack twenty-seven marked trees and from the latter point to the junction about as many more. Conjecture against this we cannot indulge. Imagination is not proof, and, we repeat, whatever might be said of any particular piece of evidence standing by itself, their union and concurrence amount to demonstration. And, we repeat, it must have been supposed by the States when they constituted the commission that judgment would have to be exercised, and, when exercised, should be binding. The contention of North Carolina is, therefore, sustained by the proof as to Slick Rock basin.

But it is contended by Tennessee that if the commissioners located such line the location was a departure from the cession act and the act of Congress adopting it and that such line not having received the consent or sanction

of Congress is invalid and in conflict with Article I, § 10, Clause 3 of the Federal Constitution providing that "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State," etc. If the fact of such departure could be conceded the conclusion might be disputed. *Virginia* v. *Tennessee*, 148 U. S. 503. But the fact cannot be conceded. The cession act is very general and necessarily demanded definition to satisfy the requirements of a boundary line, a line not only necessary to mark private property but political jurisdiction. This was realized and commissioners were appointed to run and settle the line exactly. Their work as executed was confirmed by the States.

The considerations which determine decision upon the contentions of the States as to the Slick Rock basin apply to the Tellico territory. Indeed, they make more strongly against the Tennessee contention. Without the newly discovered evidence the judicial judgment was adverse to that contention. *Stevenson* v. *Fain, supra.* The judgment is fortified by the evidence in this case. The comments of the court in that case and the considerations which have been expressed in this are sufficient to disclose the grounds of deciding that North Carolina is also right in its contention as to the Tellico territory and in the relief sought by its bill.

A decree should be entered adjudging that the disputed part of the boundary line between the States of North Carolina and Tennessee which was run by the commissioners appointed by the respective States in 1821 and who made report thereof dated at Knoxville, Tennessee, August 31, 1821, descends from the extreme height of the mountain northeast of the Tennessee River, crosses the river at a distance of sixty-five miles from the beginning to a point on the southwest bank thereof just west of the mouth of the stream known as Slick Rock Creek, follows the creek a short distance to a ridge leading up

to the main ridge, follows said ridge up to the summit known as Big Fodderstack Mountain and follows the main ridge thence to the junction of the Big Fodderstack and Hangover leads, and thence follows the main ridge of the Unaka Mountain southwesterly, according to the plat exhibited with this opinion. And, further, that commissioners be appointed to permanently mark said line.

The cross bill of the State of Tennessee should be dismissed.

Counsel for the respective States are given forty days from the entry hereof to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the States.

MR. JUSTICE DAY took no part in the consideration and decision of this case.

LANE, SECRETARY OF THE INTERIOR, *v.* WATTS.

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

No. 889. Petition for rehearing distributed to Justices October 12, 1914.—Decided November 2, 1914.

Opinion in *Lane* v. *Watts*, 234 U. S. 525, explained and leave to file petition for rehearing denied.

Quære, whether the act of August 4, 1854, incorporating the territory acquired under the Gadsden Treaty with, and making it subject to,

the laws of the Territory of New Mexico, made the provisions of § 8 of the act of July 22, 1854, applicable thereto.

Statutory reservations of lands within territory acquired under treaty which are covered by claims of private parties may be subject to repeal; and so *held* as to reservations of Mexican lands under § 8 of the act of July 22, 1854. *Lockhart* v. *Johnson*, 181 U. S. 516. *Quære*, whether the act of June 21, 1860, did not repeal *pro tanto* the reservation provisions of § 8 of the act of July 22, 1854.

Where the lands involved have not been reserved, but are necessarily included within one or the other of two grants, they are not public lands nor subject to disposal by the Land Department.

The question of superior title of contesting claimants to lands within territory acquired under the Gadsden Treaty cannot be determined in an action between the Government and one of the claimants and to which the other claimant is not a party.

THE facts, which are the same as those involved in *Lane* v. *Watts*, 234 U. S. 525, are stated in the opinion.

Mr. Assistant Attorney General West and *Mr. C. Edward Wright*, for appellants in support of the petition:

The decision leaves open the question of the status of the conflicting Mexican grants—San Jose, Tumacacori, and Calabazas—and yet affirms a decree which enjoins the appellants from further action in respect to the Ohm homestead entry and other entries which are within the boundaries of these Mexican grants. The point made by the appellants was that in no event could the appellees take the lands embraced by these grants because the same were reserved and not subject to appropriation at the time of selection of Baca Float No. 3. If this be so, the appellants ought not to be enjoined as to entries within said grants.

The court leaves the point undetermined and says that it is not now concerned with such question; that if a controversy should arise it will properly be adjudicated in the courts where the lands are located.

If these lands were reserved under § 8 of the act of June 22, 1854, 10 Stat. 308, and if the Land Department,

notwithstanding that fact, did acts that culminated in an attempted transfer of the legal title to the heirs of Baca on April 9, 1864—a transfer of title to lands that embraced over 30,000 acres of land reserved by Congress from any form of disposition at that time—then the conveyance, at least so far as these conflicting Mexican claims are involved, was absolutely void. *Burfenning* v. *Railroad*, 163 U. S. 321; *Noble* v. *Union River Logging Co.*, 117 U. S. 165, 173.

The conveyance is absolutely void. Yet if void, under the decision of this court and by operation of the decree which it affirms, the appellants are perpetually enjoined from any action in respect to lands within these conflicting grants on the theory that title passed to the appellants in 1864—i. e., that the Commissioner passed a title that he had no power to pass.

The court may not enjoin the Land Department perpetually without first, at least, deciding that these Mexican claims were not reserved lands in 1863.

The claims as claims *in toto* cannot become the subject of controversy, because this court has already decided that the Tumacacori and Calabazas grants were invalid. *Faxon* v. *United States*, 171 U. S. 204.

Under the opinion of the court, the action of the Commissioner taken on April 9, 1864, when he ordered a survey, operated to pass the title. It is also held that a survey was necessary to segregate the lands from the public domain, but see *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669. In this case there was no definite location until a survey had been made.

In the western country mountains or prominent hills merge into foothills or rolling country. It is a matter purely of individual opinion as to where the "base" of a mountain may be said to be. A hundred different surveyors might have a hundred different ideas as to the location of the "base" as intended in the selection.

The Surveyor-General of Arizona, not the Surveyor-General of New Mexico, was the officer with jurisdiction. The latter had no jurisdiction, and his so-called approval of the selection was without force and effect. No surveyor-general of Arizona had acted in respect to this selection until 1905.

Mr. G. H. Brevillier, *Mr. James W. Vroom* and *Mr. Herbert Noble*, for appellees in opposition to the petition.

Mr. Justice McKenna delivered the opinion of the court.

Leave to file an application for rehearing is asked. We see no reason to grant it, but to avoid misunderstanding of the opinion we may add a few words.

The opinion is explicit as to the main elements of decision. It decides that the title to the lands involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in 1864 in pursuance of the act of June 21, 1860, c. 167, 12 Stat. 71, 72. A survey, it was said, was necessary to segregate the land from the public domain and the condition was satisfied by the Contzen survey. It follows, therefore, that the land was not subject to homestead or other entry under the public land laws, and the asserted jurisdiction of the Land Department over it for that purpose could be restrained.

It is suggested, however, by appellees that appellants urge that certain claimed Mexican grants conflict with the location and that the opinion leaves uncertain the effect of this and that therefore it may encourage or require further litigation. Appellants assert that the effect of the claimed Mexican grants is reserved from decision and yet the Land Department is enjoined from exercising any jurisdiction over the conflicting areas.

A few words of explanation will make certain the extent of our decision. In adjustment of the conflict between the Baca grant and the grant to the town of Las Vegas, the act of 1860 was passed. The quantity and the manner of location were defined. The land was to be located in square bodies and be "vacant land, not mineral, in the Territory of New Mexico," and it was made the duty of the Surveyor-General of New Mexico to survey and locate the lands when selected by the heirs of Baca. There were no other conditions, and these were fulfilled in 1864.

But it is said that portions of the tract as located were then embraced in two claimed Mexican grants, to-wit, the Tumacacori and Calabazas grant and the San Jose de Sonoita grant, and that by virtue of § 8 of the act of July 22, 1854, c. 103, 10 Stat. 308, 309, the lands covered by such claims were reserved from other disposal and therefore from location under the Baca float. That section made it the duty of the Surveyor-General of New Mexico, under such instructions as might be given by the Secretary of the Interior, to ascertain the character and extent of claims to such lands under the laws, usages and customs of Mexico and Spain and to make full report on all such claims as originated before the cession of the Territory to the United States by the Treaty of Guadalupe Hidalgo of 1848, and report the same to Congress for its consideration and action. It was provided that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

Subsequently, by the act of August 4, 1854, the territory acquired under the Gadsden Treaty was incorporated with the Territory of New Mexico and made subject to the laws of that Territory (c. 245, 10 Stat. 575). Assuming, not deciding, that this provision made § 8 applicable to lands acquired under the Gadsden Treaty, the reserva-

tion was statutory and subject to repeal. *Lockhart* v. *Johnson*, 181 U. S. 516. And there are grounds for a contention that the act of 1860 making a grant to the Baca heirs effected a repeal *pro tanto* of the reservation of the act of 1854. But there are answers more directly under § 8 of that act. The mere fact of a claimed Mexican grant did not reserve the lands covered by it. *Lockhart* v. *Johnson*, *supra*. It was only after their presentation to the Surveyor-General of New Mexico for his report thereon that the lands were reserved "until the final action of Congress." There was no reservation except by this statute and it related only to lands covered by a claim presented to the Surveyor-General. There is no language in the treaties which implies a reservation. *Lockhart* v. *Johnson*, at p. 523.

The Tumacacori and Calabazas grant was not presented to the Surveyor-General until June 9, 1864, and his report was not laid before Congress until May 24, 1880. A petition for confirmation of the San Jose de Sonoita grant was not presented to the Surveyor-General until December, 1879. It will be seen, therefore, that there was no disclosure of these claims until after the selection of the Baca grant and its location by the Land Department, the consummation of which was accomplished by the approval of the location April 9, 1864. Besides, the Tumacacori and Calabazas claim was held untenable and void by this court (*Faxon* v. *United States*, 171 U. S. 244), and the greater part of the San Jose de Sonoita claim was rejected in *Ely's Administrator* v. *United States*, 171 U. S. 220. And we may say that before the Contzen survey was made § 8 of the act of 1854 had been repealed. *Lockhart* v. *Johnson*, *supra*.

The contention that the lands covered by these claims were reserved by the act of 1854 being untenable, it results that the only conflict with the Baca float as located April 9, 1864, which requires consideration and decision

is the one arising from that part of the San Jose de Sonoita claim which has been confirmed as against the United States. And in any event the lands in that conflict are not public lands or subject to disposal by the Land Department. They belong either to the owners of the Baca float or to the owners of the confirmed portion of the San Jose de Sonoita grant. But which is the superior claim we cannot now consider or decide because the Sonoita claimants are not parties to this cause and because the question will more properly arise in the local courts and not in a proceeding in the District of Columbia against the Secretary of the Interior.

With this explanation of our former opinion, leave to file the petition for rehearing is denied.

PULLMAN COMPANY *v.* KNOTT, COMPTROLLER OF THE STATE OF FLORIDA.

SAME *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Nos. 383, 384. Argued October 21, 1914.—Decided November 2, 1914.

The constitution of the State is not taken up into the Fourteenth Amendment of the Constitution of the United States. *Burt* v. *Smith*, 203 U. S. 129.

A state tax will not be upset under the equal protection provision of the Fourteenth Amendment upon hypothetical or unreal possibilities if good upon facts as they are. *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224.

Quære, whether a classification of sleeping and parlor car companies excluding railroad companies operating their own sleeping and parlor

cars is so arbitrary as to be unconstitutional under the equal protection provision of the Fourteenth Amendment.

The provision in the statute involved in this case that the proper state officer fix the amount of gross receipts on which the tax shall be based in case the party subject to the tax shall fail to make a report of the actual gross receipts as required by the statute, *held* not a deprivation of property without due process of law under the Fourteenth Amendment as denying an opportunity to be heard.

The court in this case declines to overthrow a state taxing statute on the ground of its invalidity under the state constitution as the decisions of the state court sustaining similar statutes are apparently broad enough to cover this statute, even though there may be possible distinctions between it and the statutes involved in the other cases. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298.

The statutes of Florida of 1907 and 1913 imposing taxes on sleeping and parlor car companies held not unconstitutional under the Federal or the state constitution.

THE facts, which involve the constitutionality of a statute of Florida taxing sleeping car companies, are stated in the opinion.

Mr. Frank B. Kellogg, with whom *Mr. Gustavus S. Fernald* and *Mr. John E. Hartridge* were on the brief, for appellant:

The tax is not a capitation tax or a license tax provided for by § 5 of art. 9 of the Florida constitution.

The tax is not an *ad valorem* tax based upon a "just valuation of all property" and provided for by "a uniform and equal rate of taxation" throughout the State.

The statute and imposition of the tax thereunder deprives the appellant of its property without due process of law, and denies to appellant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

The case presented is within the cognizance of the equity jurisdiction of the Federal court.

Mr. Thomas F. West, Attorney General of the State of Florida, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are suits to prevent the collection of a tax on gross receipts for different years, derived from business done by the appellant in the State of Florida, and to have the laws under which the tax would be assessed, declared contrary to the Fourteenth Amendment. The bills are like those stated in 231 U. S. 571, and aver the following facts. Chapter 5597 of the laws of Florida for 1907, now § 44 of Chapter 6421 of the laws of 1913, imposes a license tax, which has been paid. Section 46 of Chapter 5596 of the laws of 1907 imposes a tax *ad valorem*, which also has been paid, with immaterial exceptions. Up to 1907 this property tax had not existed, but sleeping and parlor car companies had been required to make a return of gross receipts from business done between points within the State and to pay a percentage upon such returns, which it paid in lieu of all other taxes. But by § 47 of said Chapter 5596 (now § 45 of Chapter 6421 of the laws of 1913), the last mentioned tax was continued in force alongside of the new *ad valorem* tax of § 46, and the appellant contends that after the levying of a property tax the tax on gross returns became void. An application for a preliminary injunction was heard before three judges and was denied, whereupon this appeal was taken and a *supersedeas* was granted upon payment of the sum in dispute into court.

The cases come here upon an alleged infringement of the Constitution of the United States, but are argued mainly upon the constitution of the State. Of course the latter is not taken up into the Fourteenth Amendment. *Castillo* v. *McConnico*, 168 U. S. 674. *Burt* v. *Smith*, 203 U. S. 129, 135. It can be considered only because the cases come from the District Court upon the other ground. We will deal with the Federal question first. It is suggested that there is an arbitrary classifica-

tion because the tax is confined to sleeping and parlor car companies and does not fall upon railroads operating their own sleeping and parlor cars. If otherwise this were a valid objection, as to which we need express no opinion, it is enough to say that a tax is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are. *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224. It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the Attorney General of the State denies that such a case exists.

The other objection urged is that the tax payer is not given a hearing. The statute, as we have said, requires the companies to make a report and fixes a percentage ($1.50 per $100) to be paid. If the report is not made the Comptroller is to estimate the gross receipts and add ten per cent. of the amount of the taxes as a penalty. If the companies do as required there is nothing to be heard about. They fix the amount and the statute establishes the proportion to be paid over. *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232. The provision in case of their failure to report is not, as it seemed to be suggested in argument, an alternative left open for the companies to choose. It is a provision for their failure to do their duty. In that event their chance and right to be heard have gone by.

We do not feel called upon to discuss the objections under the constitution of the State at length. Starting with the conceded proposition that the tax to be valid must be either *ad valorem* or a license tax, the appellant argues that this cannot be a license tax, as was held by the Judges who refused the injunction, because the payment of it is not made a condition of the right to do business; because another tax is imposed in terms for a license; and because the history of the law shows that for years it took the place of a property tax. These considerations

undoubtedly are very strong. But as we are dealing with the validity of the law under the state constitution, a matter that must be decided finally by the state court, and as the state court has held other gross earning taxes to be license taxes, *Afro-American Industrial Benefit Ass'n* v. *Florida*, 61 Florida, 85, 89, we are of opinion that if this act is to be overthrown it should not be overthrown by us. It is true that there are possible distinctions between this case and the Florida decision cited, but it seems to us not improbable that the Supreme Court had in view a principle broad enough to cover the case at bar. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 305.

Decree affirmed.

UNITED STATES *v.* PORTALE.

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

No. 382. Argued October 22, 1914.—Decided November 2, 1914.

The provision of § 6 of the White Slave Act of June 25, 1910, requiring filing of statements in regard to the harboring of women brought into this country for purposes of prostitution, is not confined to persons who have had to do directly or indirectly with the bringing in or sending forth of such women.

As the statute on which the indictment is based was enacted in pursuance of an international agreement which requires every person to perform an act which may be assistance to the Governments, it is construed literally, as reading it otherwise would deprive the Government of such assistance to no good end.

Where, as in this case, the writ of error was taken by the Government under the Criminal Appeals Act of March 2, 1907, on a single ruling,

reversal of the judgment sustaining the demurrer is based on that ruling alone and is without prejudice to further action of the court below consistent with the opinion of this court.

THE facts, which involve the construction of § 6 of the White Slave Act of June 25, 1910, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States:

The review here is limited to the precise question decided below.

The statement provided by the statute is due from any "keeper," though not concerned in importation. The court below disregarded the literal reading of § 6 of the White Slave Act. Other provisions of the act confirm a literal reading of this section. The lower court's suggestions are without force and the consequences of its holding would be to nullify the act.

Similar language has previously been so read by this court as shown by the history of the acts.

The constitutionality of the section was not decided below, *Keller Case*, 213 U. S. 147, distinguished. A treaty obligation is here involved. The amendment here involved was enacted to obviate the force of the *Keller Case*.

The information required is essential to the proper regulation of commerce.

Such information may be secured by penalties. No right of a citizen is violated here. The provision is reasonably related to the end sought. Other instances of compulsory procurement of information will be found in statutes relating to internal revenue, immigration, bankruptcy, interstate commerce, and the census.

In support of these contentions see: *Balt. & Ohio R. R. Co.* v. *Int. Com. Comm.*, 221 U. S. 618; *Hackfeld* v. *United States*, 197 U. S. 442; *Hamilton* v. *Rathbone*, 175 U. S. 414, 420; *Int. Com. Comm.* v. *Goodrich*, 224 U. S. 194; *Kansas*

City Southern Ry. v. *United States*, 231 U. S. 423; *Keller* v. *United States*, 213 U. S. 139; *Kepner* v. *United States*, 195 U. S. 124; *Latimer* v. *United States*, 223 U. S. 501; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 315; *Mason* v. *Fearson*, 9 How. 248; *Texas Cement Co.* v. *McCord*, 233 U. S. 137; *The Abbotsford*, 98 U. S. 440; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Birdsall*, 233 U. S. 223; *United States* v. *Davin*, 189 Fed. Rep. 244; *United States* v. *Goldenberg*, 168 U. S. 95; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Lexington Mills Co.*, 232 U. S. 399; *United States* v. *Mescall*, 215 U. S. 31; *United States* v. *Mooney*, 116 U. S. 104; *United States* v. *Young*, 232 U. S. 155.

No appearance or brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment alleging that an alien woman entered the United States from Great Britain in 1913; that the defendants knowingly harbored her in Denver for the purpose of prostitution, and that they, so knowingly harboring her for that purpose, wilfully failed to file, within thirty days from the date of the commencement of such harboring, with the Commissioner General of Immigration, a statement in writing setting forth her name, the place where she was kept and the facts as to the date of her entry into the United States, the port through which she entered, her age, nationality and parentage, and concerning her procuration to come to this country within the knowledge of the defendants. The proceeding is under the act of June 25, 1910, c. 395, § 6, 36 Stat. 825, 827, which requires every person harboring an alien woman for the above purpose within three years after she shall have entered the United States from any country,

party to the arrangement for the suppression of the white slave traffic, adopted July 25, 1902, 35 Stat. 1979, to file a statement as aforesaid. A failure to do so is made a misdemeanor and is punished by fine or imprisonment or both. Great Britain is a party to the arrangement. There was a demurrer to the indictment and it was sustained, as appears by a bill of exceptions, upon the ground set forth in the opinion, that, as the court construed the statute, the above requirement was confined to 'persons who have had to do, directly or indirectly, with the bringing in or sending forth of such women or girls.'

We see no sufficient reason for the limitation thus read into the generality and literal meaning of the words of the act. It is true that persons who have had to do with bringing the alien into the country are more likely than others to know the facts to be stated, and it may be assumed that others are not required to know them at their peril. It is true that the immunity from prosecution under the laws of the United States for any fact truthfully reported which the section grants most obviously applies to those who have taken part in bringing the woman in. But others who have not taken part are very likely to know the facts or some of them, and their knowledge may be of a kind to raise suspicion of guilt under the act. The requirement is that 'every person' harboring a woman as above shall file the statement. It is, and purports to be in furtherance of the international agreement. That agreement, among other things, is 'to procure, within the limits of the laws, all information of a nature to discover a criminal traffic'; Art. 2, 35 Stat. 1982, although, perhaps, those words look more immediately to the points of departure and arrival and the journey. Taken literally the statute required the defendants to file a statement of any of the facts mentioned that were within their knowledge, and to read it otherwise would deprive the Government of a

considerable source of information, to no good end that we can perceive.

"We therefore reach the conclusion that the court erred in sustaining the demurrer to the . . . indictment, so far as that ruling is based upon the construction of the statute in question." *United States* v. *Stevenson*, 215 U. S. 190, 199. That is the only question brought up; *United States* v. *Keitel*, 211 U. S. 370, 398; and the reversal of the judgment is without prejudice to further action of the court below consistent with the opinion that we have expressed.

Judgment reversed.

OVERTON *v.* STATE OF OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 40. Submitted October 19, 1914.—Decided November 9, 1914.

The court having instructed the jury that if the shipment of liquor within the State was to complete an interstate shipment the local prohibition statute did not apply, the contention that § 4180, Snyder's Compiled Laws of Oklahoma, is repugnant to the commerce clause of the Federal Constitution, *held* too frivolous to support the jurisdiction of this court to review the judgment of the state court on writ of error.

The record in this case not justifying the assumption that the conclusion of guilt could only have been reached by disregarding proof, this court has no jurisdiction to review the judgment of the state court on writ of error on that ground; it is frivolous.

Writ of error to review 7 Oklahoma Cr. 203, dismissed.

THE facts are stated in the opinion.

Mr. Charles B. Stuart and *Mr. A. C. Cruce* for plaintiff in error.

Mr. Charles West, Attorney General of the State of Oklahoma, for defendant in error.

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

The verdict and sentence were on an indictment for illegally moving liquor (§ 4180, Snyder's Compiled Laws of Oklahoma, 1909). The defense was that the movement was to complete an interstate shipment from Missouri. The court instructed that the statute did not apply to such a shipment and hence if the movement was as asserted, there must be an acquittal. Under this situation the contention here made that the statute was repugnant to the commerce clause is too frivolous to support jurisdiction. And this is also true of the contention that there is jurisdiction because the facts establish that the conclusion of guilt could only have been reached by plainly disregarding the proof as to the character of the shipment, thus in fact applying the statute to interstate commerce,[1] since the record affords no justification for the assumption upon which the proposition rests.

Dismissed for want of jurisdiction.

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[1] *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *Portland Ry. Co.* v. *Oregon R. R. Com'n*, 229 U. S. 397, 411–412; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243–244; *Missouri, Kans. & Tex. Ry.* v. *West*, 232 U. S. 682, 691–692.

DEJONGE & COMPANY *v.* BREUKER & KESSLER COMPANY.

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

No. 18. Argued October 27, 28, 1914.—Decided November 9, 1914.

Under Rev. Stat., §§ 4952, 4970, as they were before the act of March 4, 1909, every reproduction of a copyrighted work must bear the statutory notice. One notice is not sufficient for several reproductions on the same sheet, even though the several reproductions make one harmonious whole.

Although a painting may be patentable as a design, if the owner elects to copyright he must protect his copyright by repeating the statutory notice on every reproduction thereof.

191 Fed. Rep. 35, affirmed.

THE facts, which involve the construction of the copyright law as to the statutory notice of copyright upon reproductions of paintings, are stated in the opinion.

Mr. Seward Davis, with whom *Mr. Walter F. Thompson* and *Mr. Charles E. Wilson* were on the brief, for appellant:

In an action in equity under Rev. Stat., § 4970, the provisions of Rev. Stat., § 4962, are to be liberally construed. See amendments by act of June 18, 1874, c. 301, 18 Stat. 78; *Amer. Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 291; *Bobbs-Merrill* v. *Straus*, 210 U. S. 337; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *Myers* v. *Callaghan*, 5 Fed. Rep. 726, 732; *S. C.*, affirmed, 128 U. S. 617; *Holmes* v. *Donohue*, 77 Fed. Rep. 179; *Werckmeister* v. *Amer. Lithographic Co.*, 142 Fed. Rep. 827; *S. C.*, aff'd, 146 Fed. Rep. 377; 207 U. S. 284; *Harper Bros* v. *Donohue*, 144 Fed. Rep. 491, 496; *Ford* v. *Blaney Co.*, 148 Fed. Rep. 642; *Dam* v. *Kirk La Shelle Co.*, 175 Fed. Rep. 902, 906.

See also *Bolles* v. *Outing Co.*, 175 U. S. 262; *Mifflin* v. *White & Co.*, 190 U. S. 260, 264; *Edison* v. *Lubin*, 119 Fed. Rep. 993; *S. C.*, 122 Fed. Rep. 240.

Rev. Stat., § 4962, when reasonably construed requires only substantial compliance as to notice. In this respect it differs from §§ 4964 and 4965. *Snow* v. *Mast*, 65 Fed. Rep. 995; *Bolles* v. *Outing Co.*, 175 U. S. 262; *Mifflin* v. *White & Co.*, 190 U. S. 260, at 264; *Callaghan* v. *Myers*, 128 U. S. 617; *Falk* v. *Schumacher*, 48 Fed. Rep. 222; *Blume* v. *Spear*, 30 Fed. Rep. 629; *Werckmeister* v. *Springer Litho. Co.*, 63 Fed. Rep. 808; *Falk* v. *Gast Litho. Co.*, 54 Fed. Rep. 890; *Hilles* v. *Austrich*, 120 Fed. Rep. 862; 7 Amer. & Eng. Ency. Law, 555.

Complainant's notice complied substantially with the statutory requirements. *Burrow-Giles Co.* v. *Sarony*, 111 U. S. 53, 55, 56; *Amer. Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 294.

Complainant's marking complies with the trade custom. *Knotts* v. *Va. Car Co.*, 204 Fed. Rep. 926.

The requirement of separate marking of each integer of complainant's multiple copy is literal and unreasonable, because it would render the reproduction valueless. See *Edison* v. *Lubin*, 122 Fed. Rep. 240, overruling *S. C.*, 119 Fed. Rep. 993.

In considering the requirement of the statute it should be construed having in view the character of the property intended to be protected. *Amer. Tobacco Co.* v. *Werckmeister*, 207 U. S. 284.

To require a marking that destroys is unreasonable. *In re Pingree-Tranny Co.*, 197 O. G. 997, Ewing Commr.; *Knotts* v. *Va. Car Co.*, *supra.*

If the copy be marked with the statutory notice by the proprietor, subsequent removal of the mark does not affect the copyright. *Falk* v. *Gast Litho. Co.*, 48 Fed. Rep. 262; *S. C.*, aff'd 54 Fed. Rep. 890; *Edison* v. *Lubin*, 122 Fed. Rep. 240.

The use to which the reproduction of a copyright may be put does not affect the copyright. *Falk* v. *Donaldson*, 57 Fed. Rep. 32, 36; *Yuengling* v. *Schile*, 12 Fed. Rep. 97; *Schumacher* v. *Schwencke*, 25 Fed. Rep. 466; *Bleistein* v. *Donaldson Litho. Co.*, 188 U. S. 239.

The copyright notice was sufficient. *Edison* v. *Lubin*, 119 Fed. Rep. 993, rev'd, 122 Fed. Rep. 240; *Harper* v. *Kalem Co.*, 169 Fed. Rep. 61; *America Mutoscope Co.* v. *Edison Mfg. Co.*, 137 Fed. Rep. 262, 266.

It is inequitable to hold a copyright invalid against one not claiming to have been deceived or misled. *Black* v. *Allen Co.*, 65 Fed. Rep. 764; *Hilles* v. *Hoover*, 136 Fed. Rep. 701; *Callaghan* v. *Myers*, 128 U. S. 617.

The painting was copyrightable as such. *Bleistein* v. *Donaldson Litho. Co.*, 188 U. S. 239.

Defendant has itself infringed. *Gorham Mfg. Co.* v. *White*, 14 Wall. 511; *Gross* v. *Seligman*, 212 Fed. Rep. 930; *Falk* v. *Donaldson*, 57 Fed. Rep. 32; *Encyclopedia Britannica Co.* v. *Amer. Newspaper Ass'n*, 130 Fed. Rep. 460, 464; *S. C.*, aff'd, 134 Fed. Rep. 831.

Where the court has found a fact upon contradictory evidence, its conclusion will rarely be disturbed. Foster's Fed. Prac., 4th ed., p. 2136, and cases cited.

Under the exceptional facts peculiar to this case, the court erred in dismissing the bill.

Mr. Frank S. Busser for appellee.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill to restrain an alleged infringement of a copyright under the law as it was before the act of March 4, 1909, c. 320, 35 Stat. 1075; *viz.* Rev. Stat., §§ 4952, 4970; act of June 18, 1874, c. 301, 18 Stat. 78. The work alleged to be infringed was described as a painting repre-

senting sprigs of holly, mistletoe and spruce, arranged in the form of an open cluster having substantially the outline of a square. It was exhibited in court, was a water color painting in fact, and no doubt might have been framed and used for the same purposes of pleasure as other more considerable works of art. But it was so designed that it could be reproduced in repetitions that fitted and continued one another side by side and above and below, and was reproduced in that way with twelve repetitions upon strips of paper having much the look of wall paper and intended to be used in covering or wrapping boxes during the holiday season. Each strip bore a single notice of copyright. The Circuit Court, assuming that infringement was established, was of opinion that the work was a painting capable of copyright and also a design patentable as such, but held that, as the appellant had elected to copyright, the notice must be repeated on each of the twelve squares, although they did not present themselves as separate squares on the continuous strip. 182 Fed. Rep. 150. The Circuit Court of Appeals, reserving its opinion as to whether the sphere of copyright and patent for design overlapped, agreed with the Circuit Court that, if this was a painting, every reproduction of it must bear the statutory notice, and affirmed the dismissal of the bill. 191 Fed. Rep. 35, 111 C. C. A. 567.

It seems to us that the case is disposed of by the statement. The thing protected and the only thing was the painting, the whole of which was reproduced in a single square. Every reproduction of a copyrighted work must bear the statutory notice. *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 294. It is suggested that it is overtechnical to require a repetition of the notice upon every square in a single sheet that makes a harmonious whole. This argument tacitly assumes that we can look to such larger unity as the sheet possesses. But that unity is only the unity of a design that is not patented.

The protected object does not gain more extensive privileges by being repeated several times upon one sheet of paper, as any one would recognize if it were the Gioconda. The appellant is claiming the same rights as if this work were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a holy family, or a scene of war.

Decree affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 25. Argued October 28, 29, 1914.—Decided November 9, 1914.

Whether the concession of lands in Indian Territory under § 9 of the Land Grant Act of July 25, 1866, c. 241, 19 Stat. 236, was a grant *in præsenti* or a covenant to convey, it was dependent upon fulfilment of the express conditions precedent that the Indian title be extinguished and when extinguished become public lands of the United States; and those conditions have not been fulfilled.

A statute granting public lands or Indian lands which may become public lands, will not be construed as including Indian lands afterwards allotted in severalty under a treaty made immediately before the enactment of the statute, as to do so would be to accuse the Government of bad faith with the Indian owners of the land.

Grants from the Government are to be strictly construed against the grantee.

47 Ct. Cls. 59, affirmed.

THE facts, which involve the construction of § 9 of the Land Grant Act of July 28, 1866, and the provisions therein contained for grants of lands in Indian Territory on the extinguishment of the Indian title, are stated in the opinion.

Mr. H. S. Priest and *Mr. Joseph M. Bryson*, with whom *Mr. A. B. Browne*, *Mr. C. L. Jackson*, *Mr. W. W. Brown* and *Mr. Alexander Britton* were on the brief, for appellant.

The Solicitor General and *Mr. Assistant Attorney General Thompson* for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This claim, as construed by the claimant and appellant is based upon covenants supposed to be imported by an act of Congress of July 25, 1866, c. 241, § 9. 14 Stat. 236. Upon demurrer it was dismissed by the Court of Claims. 47 C. Cl. 59. The largeness of the demand tends to induce a correspondingly voluminous statement, but the issue really is narrow and the material facts are few.

The United States had made land grants to the great roads running east and west but had not provided for a connection between those roads and the Gulf, through Kansas and the Indian Territory to the south. To that end, the act of July 25, 1866, after granting to Kansas, for the use of a road to be built through eastern Kansas from the eastern terminus of the Union Pacific between Kansas and Missouri, ten alternate sections per mile on each side of the road, § 1, authorized the company mentioned to extend its road from the southern boundary of Kansas south, through the Indian Territory to Red River, at or near Preston, in Texas, so as to connect with a road then being constructed from Galveston to that point. Section 8. The appellant also had been authorized by charter to build a road running southerly from a point on the Union Pacific to where the southern boundary of Kansas crosses the Neosho River, and had acquired a land grant; and the act of July 25, 1866, went on to provide that if the appellant, under its former name of Union

Pacific Railway, Southern Branch, first completed its road to the point of crossing the southern boundary of Kansas, it should be authorized to construct its line to the point near Preston, "with grants of land according to the provisions of this act." The right of way was granted in accordance with treaties with the Indians and is not in question here.

The appellant finished its road first, built the southern extension and acquired the rights to land under the act of 1866, and the question is what rights it has, in the event that has happened, under § 9. That section enacted "That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act; *Provided*, That said lands become a part of the public lands of the United States." This part of the Indian Territory was occupied by the five civilized tribes, and what has happened is that under acts of Congress the land concerned has been distributed in severalty to the members of those tribes or sold for their benefit.

Taken literally the grant or covenant of the United States was subject to two conditions precedent. 'Whenever the Indian title shall be extinguished' means when and not until that occurs, and contemplates it as something that may or may not come to pass. The proviso attaches the further condition that if the Indian title shall be extinguished it must be extinguished in such a way that the lands become a part of the public domain. It cannot be said that 'whenever' imports that sooner or later the Indian title will and shall be disposed of. The Indians had to be considered and it could not be assumed that they would be removed to another place, as they had been removed before. It cannot be said, either, that on the face of the clause the proviso adds nothing and means

only that on extinction of the Indian title the rights of the railroad shall attach as if the land were public land. The section taken by itself and on its face excludes the claimant's interpretation that the United States made an absolute promise or grant, and it excludes it none the less that certain services were to be rendered by the road to the United States as one of the terms of the grant of a right of way which the railroad got.—On this literal reading of the statute the conditions have not been fulfilled. The land has remained continuously appropriated to the use of the Indians or has been sold for their benefit. It never for a moment has become a part of the public domain in the ordinary sense. *Newhall* v. *Sanger,* 92 U. S. 761, 763. *Union Pacific R. R. Co.* v. *Harris,* 215 U. S. 386, 388. It is argued that the grant attached the moment that the tribal title ceased, whatever it was. But, still looking only at the face of the act and seeing the intent to respect the Indian rights, we cannot read it as preventing the United States from making the change from tribal to several possession or dealing with this land in any way deemed most beneficial for those whose rights were treated as paramount. The proviso that the land must become public land shows that a mere change from tribal title was not enough. Taken literally the grant only applied in case the Indians were removed or bought off the land.

The facts existing at the time confirm the literal interpretation of the act. Less than a week before the passage of the statute the United States had made a treaty with the Cherokees that contemplated the possible allotment of their share in this land to be held in severalty. Treaty of July 19, 1866, Art. 16, 14 Stat. 799, 804. On June 14, 1866, it had agreed with the Creeks that their lands should be forever set apart as a home for the Nation. 14 Stat. 785. And by a treaty of April 28, 1866, Art. 11, it had agreed with the Choctaws and Chickasaws that

they might have their lands surveyed and divided up, reciting that it was believed that the holding of the land in severalty would promote the general civilization of said Nation. 14 Stat. 769, 774. Whether or not, as the Government contends, the title of these tribes to the land in controversy was higher than the original possessory right, the United States, as the appellant must be taken to have known, just before its covenant with the railroad, had been holding out to the Indians the desirableness and possibility of dividing up their lands into individual holdings; and it would be to accuse the Government of bad faith to one party or the other to suggest that it forthwith agreed with the appellant that the moment such a division and allotment took place the appellant thereby should acquire a paramount title and render the allotment vain. See further *Kansas* v. *United States*, 204 U. S. 331, 341, 342.

The action of Congress in making the allotment to individuals shows in express terms that it did not suppose that the railroads would, or intend that they should, acquire any new rights. Act of March 1, 1901, c. 676, § 23; 31 Stat. 861, 867. July 1, 1902, c. 1362; 32 Stat. 641. July 1, 1902, c. 1375; 32 Stat. 716. April 26, 1906, c. 1876, § 27; 34 Stat. 137, 148. Our conclusion from the words of the statute and the circumstances seems to us too plain to require a reference to the rule of strict construction against the grantee of the Government in case of doubt, and seems to us unaffected by the argument that a grant *in præsenti* was made by § 9. It appears to us that the appellant's claim stands most strongly if based upon a covenant—but, covenant or grant, the concession of the United States was dependent upon conditions that have not been fulfilled.

Judgment affirmed.

TAYLOR *v.* PARKER.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 58. Submitted November 5, 1914.—Decided November 16, 1914.

In view of the evils sought to be prevented, and in aid of the expressed policy of the Indians and the United States, the prohibition on alienation by allottees under the Choctaw and Chickasaw agreement ratified by the act of July 1, 1902, c. 1362, 32 Stat. 641, should be construed as extending to devise by will.

While the act of April 28, 1904, putting in force the laws of Arkansas in the Indian Territory, enabled an Indian to dispose of his alienable property, it did not operate to remove existing statutory restrictions.

That it was the understanding of Congress that an act did not remove restrictions may be indicated by subsequent acts passed for the express purpose of removing such restrictions.

33 Oklahoma, 199, affirmed.

THE facts, which involve the application and construction of Acts of Congress imposing and affecting restrictions on alienation of lands allotted under the Choctaw and Chickasaw agreement ratified July 1, 1902, are stated in the opinion.

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

Mr. Cornelius Hardy, Mr. A. C. Cruce, Mr. W. I. Cruce and *Mr. W. R. Bleakmore* for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the heirs of Maggie Taylor, a member of the Chickasaw tribe of Indians, against the plaintiff in error, her husband and devisee, to recover her allotment, which she devised to him. The answer relied upon the

will, the plaintiffs demurred, and the courts of Oklahoma sustained the demurrer and gave judgment for the plaintiffs. 33 Oklahoma, 199. The question is whether the devise was invalid under the supplemental agreement with the Choctaws and Chickasaws ratified by the Act of Congress of July 1, 1902, c. 1362. 32 Stat. 641.

By § 12 of the above act "each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allotable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead." By § 16 all lands allotted to members of said tribes except homestead shall be alienable after issue of patent, one fourth in acreage in one year, one fourth in three years, and the rest in five years; but not for less than its appraised value before the expiration of the tribal governments. The plaintiff in error, in aid of the construction of §§ 12, 16, for which he contends, and to show that transactions *inter vivos* alone were aimed at by the word "inalienable," invokes § 15 which enacts that allotted lands "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."

The land in question was allotted to Maggie Taylor in 1903, including, it would seem, a homestead; patents were issued on December 20, 1904, and were approved by the Secretary of the Interior and delivered on December 28, 1904. She made her will on March 22, and died on March 25, 1905, so that if the foregoing prohibitions extend to a devise they include the one under which the plaintiff in error claims. Obviously they could be read in a narrower

sense, and whichever interpretation be adopted it would not be helped by long discussion. In view of the evils sought to be prevented and in aid of what we understand to have been the policy of the Indians and the United States in their agreement, we are of opinion that the Supreme Court of this State was right in extending the prohibition to wills. To the same effect is *Hayes* v. *Barringer*, 93 C. C. A. 507; 168 Fed. Rep. 221. See also *Jackson* v. *Thompson*, 38 Washington, 282.

A further and distinct argument is based upon the act to provide for additional judges, etc., of April 28, 1904, c. 1824, § 2, 33 Stat. 573, to the effect that all the laws of Arkansas theretofore put in force in the Indian Territory are extended to embrace all persons and estates in said territory, whether Indians, freedmen, or otherwise, and full jurisdiction is conferred upon the district courts in the settlement of all estates of decedents, and the guardianship of minors and incompetents, whether Indians, freedmen, or otherwise. The Arkansas law of wills was a part of the law that thus had been adopted for the Indian Territory before 1904, and it is contended that the result of the above extension was to free the Indians from the restrictions so specifically imposed upon them in 1902. Of course nothing of that sort was intended. As said below (33 Oklahoma, p. 201), the extension enabled "the Indian to devise all his alienable property by will made in accordance with the laws of the State of Arkansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by act of Congress." That this was the understanding of Congress is indicated by the acts of April 26, 1906, c. 1876, § 23, 34 Stat. 137, 145, and May 27, 1908, c. 199, 35 Stat. 312, giving Indians power to dispose of their allotments by will.

Judgment affirmed.

WILLOUGHBY *v.* CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 66. Motion to dismiss submitted November 6, 1914.—Decided November 16, 1914.

Where the constitutional question is obvious from the beginning and is not open in the Supreme Court of the State unless taken on the trial, it cannot be considered here unless it was so taken. *Hulbert* v. *Chicago*, 202 U. S. 275.

Where an assessment could have been levied for a past improvement against the original owners, purchasers take subject to the same liability, and such an assessment does not deprive them of their property without due process of law. *Seattle* v. *Kelleher*, 195 U. S. 351.

Whether a particular assessment could have been levied for past improvements if the property had not been sold depends upon the construction of state statutes, as to which this court follows the decisions of the state courts.

The overruling of its earlier decisions by the state court does not amount to deprivation of property without due process of law where no vested rights are interfered with. *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544, distinguished.

On writ of error based on the claim that there was no power to make the assessment, this court cannot inquire into the facts as found by the state court in regard to value of the land taken for, and the extent of the benefit conferred by, the improvement for which the land has been assessed.

Writ of error to review 249 Illinois, 249, dismissed.

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

Mr. William H. Sexton, *Mr. Philip J. McKenna* and *Mr. Howard F. Bishop* for defendant in error in support of the motion:

Special assessments are local matters. *Spencer* v. *Merchant*, 125 U. S. 345; Cooley, Taxation, 3d ed., p. 68.

This court does not interfere with revenue laws of the State. *French* v. *Barber Asphalt Co.*, 181 U. S. 324; *Witherspoon* v. *Duncan*, 4 Wall. 210, 217; *Williams* v. *Albany*, 122 U. S. 154, 164; *Shaefer* v. *Werling*, 188 U. S. 516, 517.

A special assessment is a species of taxation. *French* v. *Barber Asphalt Co.*, 181 U. S. 324, 343; *C. & A. R. R. Co.* v. *Joliet*, 153 Illinois, 649; *Adams County* v. *Quincy*, 130 Illinois, 566.

Special assessment proceedings are reviewed in this court only in exceptional cases. *Lombard* v. *West Chicago*, 181 U. S. 33; *Spencer* v. *Merchant*, 125 U. S. 345; Cooley, Taxation, 3d ed., p. 55; *Davidson* v. *New Orleans*, 96 U. S. 97; *Seattle* v. *Kelleher*, 195 U. S. 351, 359; Cooley, Taxation, 3d ed., p. 1280; *Williams* v. *Albany*, 122 U. S. 154.

The decision of the state court on question of fact is conclusive. *Spencer* v. *Merchant, supra; Building & Loan Ass'n* v. *Ebaugh*, 185 U. S. 114, 121; *Egan* v. *Hart*, 165 U. S. 188; *West. Un. Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 103; *Bement* v. *National Harrow Co.*, 186 U. S. 83.

This court accepts the conclusion of the state court as to the proper construction of a state statute. *Baltimore Traction Co.* v. *Baltimore Belt R. R. Co.*, 151 U. S. 137; *Green* v. *Neal*, 6 Pet. 291; *Davie* v. *Briggs*, 97 U. S. 628; *Louisville &c. Ry.* v. *Mississippi*, 133 U. S. 587, 590; *Chicago* v. *Mecartney*, 216 Illinois, 377; *In re Converse*, 137 U. S. 624, 631; *Turner* v. *Wilkes County*, 173 U. S. 461.

A change of view by the state court does not raise a Federal question under the contract clause of the Federal Constitution. *Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479; *Knox* v. *Exchange Bank*, 12 Wall. 379, 383; *St. Paul &c. Ry.* v. *Todd Co.*, 142 U. S. 282, 286; *New Orleans Water Co.* v. *Louisiana Sugar Refining Co.*, 125

U. S. 18, 30; *Railroad Co.* v. *Rock*, 4 Wall. 177, 181; *Bacon* v. *Texas*, 163 U. S. 207, 220; *Winona & St. Peter R. R.* v. *Plainview*, 143 U. S. 371, 393.

Plaintiffs in error have not been deprived of their property without due process of law. *Allen* v. *Georgia*, 166 U. S. 138; *McQuade* v. *Trenton*, 172 U. S. 636, 639; *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112.

No Federal question was decided by the Illinois Supreme Court, nor was any Federal question necessary to its decision. Therefore, the writ should be dismissed. *Marrow* v. *Brinkley*, 129 U. S. 178; *McQuade* v. *Trenton*, 172 U. S. 636; *Harrison* v. *Morton*, 171 U. S. 38; *Bacon* v. *Texas*, 163 U. S. 207; *Kreiger* v. *Shelby R. R. Co.*, 125 U. S. 39; *Desaussure* v. *Gaillard*, 127 U. S. 216; *Hale* v. *Akers*, 132 U. S. 554; *Hopkins* v. *McLure*, 133 U. S. 380, 386; *Eustis* v. *Bolles*, 150 U. S. 361; *Beauprè* v. *Noyes*, 138 U. S. 397, 401; *Rutland R. R.* v. *Central Vermont R. R.*, 159 U. S. 630; *Gillis* v. *Stinchfield*, 159 U. S. 658, 660; *Seneca Indians* v. *Christy*, 162 U. S. 283.

Mr. Charles R. Holden for plaintiffs in error in opposition to the motion:

Special assessments are statutory proceedings, and without a statutory warrant no special assessment can be levied, and this applies to new or supplemental assessments. *Chicago* v. *Race*, 256 Illinois, 209.

The special assessment in question, a supplemental one, is without any statutory warrant. Section 53, under which the proceeding was had, did not expressly provide for any supplemental assessment.

A new or supplemental assessment, even if originally warranted under said § 53, which is at least a doubtful question, was barred in five years after July 2, 1908, under the plainly worded statute—so plain as to scarcely bear construction.

If this be considered as a new or reassessment under § 46, the same could not be levied after the confirmation judgment of July 2, 1898. *McChesney* v. *Chicago*, 161 Illinois, 110; *People* v. *McWethy*, 165 Illinois, 222; *LeMoyne* v. *Chicago*, 175 Illinois, 356; *Rich* v. *Chicago*, 187 Illinois, 396; *City* v. *Nichols*, 192 Illinois, 489; *Doremus* v. *Chicago*, 212 Illinois, 513; *Holden* v. *Chicago*, 212 Illinois, 289; *Chicago* v. *Hulbert*, 205 Illinois, 346, 357; *Chicago* v. *Nodeck*, 202 Illinois, 257, 266; *Noonan* v. *Chicago*, 231 Illinois, 588; *Chicago* v. *Race*, 256 Illinois, 209.

These owners had purchased upon the faith of this long line of uniform and settled rulings of the Supreme Court of Illinois. And hence the judgment here, based upon a square reversal of these rulings is a taking without due process of law. *Muhlker* v. *Harlem R. R.*, 197 U. S. 544; *Great South. Hotel Co.* v. *Jones*, 193 U. S. 532.

The judgment upon its face is pure confiscation of property. The property of plaintiffs in error is taken upon the ground that it is a public necessity, and then they are assessed over $300 more than the awards for the property taken from them.

This is in its essence a taking without due process. *City of Bloomington* v. *Latham*, 142 Illinois, 462; *Norwood* v. *Baker*, 172 U. S. 269.

Mr. Justice Holmes delivered the opinion of the court.

In 1893 a portion of certain land now belonging to the plaintiffs in error was taken by Chicago for the widening of a street, and the damages to the owners were fixed by judgment in due form. Afterwards an assessment for betterments by reason of the change was laid upon certain lands in this neighborhood including the lots in question and was confirmed as to the other land. At the trial with regard to these lots it was contended by the owner and ruled in the lower court that the matter was concluded

by the first judgment. This ruling was reversed by the Supreme Court of the State, *Chicago* v. *Mecartney*, 216 Illinois, 377, but by the failure of the City to file the remanding order within two years the assessment upon these lots failed. In January, 1910, the City passed an ordinance for a new assessment, the object of which was to reach these lots, and a new petition was filed. The Supreme Court of the State held that the validity of the assessment did not depend on the validity of the ordinance; that the petition was warranted by the former proceedings, and that a judgment for the amount should be affirmed. 249 Illinois, 249.

The error assigned is that the property of the plaintiffs in error is taken without due process of law and that the obligation of their contracts is impaired (they having purchased before this supplementary proceeding was begun), contrary to the Fourteenth Amendment and Art. I, § 10 of the Constitution of the United States. There is a motion to dismiss upon which we must dispose of the case. The objection which is urged is that there was no statutory authority for this proceeding and that the assessment was imposed by mere judicial fiat that could not have been anticipated and that was without warrant of law. If there were anything in this objection it was obvious from the beginning and as it was not taken at the trial it was not open in the Supreme Court of the State and could not be considered here. *Hulbert* v. *Chicago*, 202 U. S. 275. It is obvious too that the State could have authorized the proceeding followed here, which ordinarily is the only question to be considered by this court. *Missouri* v. *Dockery*, 191 U. S. 165.

If the assessment could have been levied against the original owners of the land, purchasers took subject to the same liability. *Seattle* v. *Kelleher*, 195 U. S. 351. The question whether it could have been levied if the land had not been sold depended upon the construction of state

statutes, as to which, we follow the decision of the state court. Even if the court had overruled earlier decisions it would have interfered with no vested rights of the plaintiffs in error. *Knox* v. *Exchange Bank*, 12 Wall. 379, 383. *Sauer* v. *New York*, 206 U. S. 536. *Moore-Mansfield Construction Co.* v. *Electrical Installation Co.*, 234 U. S. 619, 626. But it does not appear to have done so, and although its decision may have been unexpected, there was plausible ground for it in the statutes. We go no further, because there is no question before us of the kind that was before the court in *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, and *Tampa Water Works Co.* v. *Tampa*, 199 U. S. 241, 243, and in circumstances like these it is not within our province to inquire whether the construction was right. It is objected that less was allowed for the land taken than was charged for the benefit, but it is quite possible that the benefit was greater than the loss, and we cannot inquire into the fact.

Writ of error dismissed.

CLEVELAND AND PITTSBURGH RAILROAD COMPANY *v.* CITY OF CLEVELAND, OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 95. Motion to dismiss or affirm submitted October 13, 1914.—Decided November 16, 1914.

In order to bring a case to this court under § 237, Judicial Code, the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court; nor can the contention made and passed upon by the state court be enlarged by assignments of error to bring the case to this court.

An impairment of the obligation of the contract within the meaning

of § 10, of Art. I of the Federal Constitution must be by subsequent legislation and not by mere change in judicial decision.

A certificate of the state court cannot bring an additional Federal question into the record, if the record does not otherwise show it to exist. *Marvin* v. *Trout*, 199 U. S. 212.

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

Mr. Newton D. Baker and *Mr. John N. Stockwell* for defendant in error in support of the motion:

No Federal question is presented by the assignment of errors, nor was any Federal question specifically set up in the Supreme Court of Ohio.

No change in decision has in fact taken place.

No Federal question was decided in the Supreme Court of Ohio, and the judgment rests upon independent grounds of purely state law sufficient to support it.

Mr. William B. Sanders and *Mr. Harold T. Clark* for plaintiffs in error in opposition to the motion:

The record clearly shows that the Supreme Court of Ohio did consider whether or not the effect of its decision would be to impair the obligation of the contract involved.

It was the contention of the railroads that under the contract of September 13, 1849, the city of Cleveland parted with its title to what was formerly known as Bath Street. In reliance upon the validity of this contract the railroad companies expended upwards of $1,000,000 in permanent improvements and betterments upon the property covered by the contract. It was the contention of the city that under the construction placed by the Supreme Court of Ohio in the cases mentioned upon the statutes of Ohio governing the making of contracts between municipalities and railroad companies as to the

occupancy of streets and public grounds—the act of 1852 being the act before the court in those cases—the railroads acquired under the contract of September 13, 1849, only the right to the use and occupancy of Bath Street in so far as it did not disturb the public use. The Ohio courts approved the position taken by the city, and, although recognizing the existence of the contract of September 13, 1849, sought so to limit it in its operation as to seriously impair its value.

In order that a contract may be impaired, it is not necessary that it should be wholly done away with.

Where it is claimed that a State by its subsequent legislative act as construed by the state courts has impaired the obligation of a prior contract, the Supreme Court of the United States has the right, even in a case which comes to it upon a writ of error to a state court, to construe the contract and to determine whether its obligation has been impaired.

In support of these contentions, see *Amory* v. *Amory*, 91 U. S. 356; *Bacon* v. *Texas*, 163 U. S. 207, 219; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Davies* v. *Corbin*, 113 U. S. 687; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Farrington* v. *Tennessee*, 95 U. S. 679, 683; 3 Foster's Fed. Prac., p. 2115; *Hecker* v. *Fowler*, 4 Miller, 381; *Houston & Tex. Cent. R. R. Co.* v. *Texas*, 177 U. S. 66, 77; *Louis. & Nash. R. R.* v. *Melton*, 218 U. S. 36, 49; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 696; *Minor* v. *Tillotson*, 1 How. 288; *Murdock* v. *Memphis*, 20 Wall. 590; *New Orleans* v. *Construction Co.*, 129 U. S. 45; *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416, 431; *Planters' Bank* v. *Sharp*, 6 How. 301; *Railroad Co.* v. *Maryland*, 20 Wall. 643; 2 Rose's Code Fed. Proc., §§ 2061b, 2062; *School District* v. *Hall*, 106 U. S. 429; *Sparrow* v. *Strong*, 3 Wall. 97, 105; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 552; *Walker* v. *Whitehead*, 16 Wall. 314, 318; *Whitney* v. *Cook*, 99 U. S. 607.

Memorandum opinion by MR. JUSTICE DAY, by direction of the court.

The original action was brought by the city of Cleveland, Ohio, to oust the railroad companies, now plaintiffs in error, from the exclusive possession of Bath Street, in that city. A number of defenses were set up by the railroad companies, but we are concerned only with the alleged deprivation of Federal right, resulting from the decision of the state court. In the court of original jurisdiction, the Common Pleas, judgment was rendered in favor of the city. Upon proceedings in error, that judgment was affirmed by the state Circuit Court, and in the Supreme Court of the State of Ohio the judgment of the Circuit Court was affirmed without opinion.

It is now undertaken to bring the case here, because of alleged violation of rights under the Federal Constitution arising by virtue of § 10 of Article I of that instrument, preventing the impairment of contract rights by subsequent legislation.

In order to bring a case here under § 237 of the Judicial Code (formerly § 709 of the Revised Statutes of the United States), it is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case to this court. This proposition is too well settled to need discussion. *National Bank* v. *Kentucky*, 9 Wall. 353; *Re Spies*, 123 U. S. 131; *Zadig* v. *Baldwin*, 166 U. S. 485; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Waters-Pierce Oil Company* v. *Texas*, 212 U. S. 112; *Mallers* v. *Commercial Loan & Trust Company*, 216 U. S. 613; *Appleby* v. *Buffalo*, 221 U. S. 524.

It is equally well settled that an impairment of the obligation of the contract, within the meaning of the

Federal Constitution, must be by subsequent legislation, and no mere change in judicial decision will amount to such deprivation. *Ross* v. *Oregon*, 227 U. S. 150, 161; *Moore-Mansfield Construction Company* v. *Electrical Installation Company*, 234 U. S. 619, 624; and cases cited on p. 625. An examination of the record shows that the Federal right set up in the Court of Common Pleas, and considered in the Circuit Court, the latter judgment being affirmed by the Supreme Court without opinion, concerned an alleged change of decision in the Supreme Court of Ohio, construing a statute concerning the contract upon which the railroad companies relied, the effect of which, it was alleged, would be to do violence to the contract clause of the Federal Constitution. It was not set up that subsequent legislation had impaired the obligation of the contract of the railroad companies. Therefore, in the light of the decisions of this court above quoted, no Federal right was alleged to be impaired within the meaning of the Constitution of the United States, and no such right was passed upon in the decisions of the courts.

The contention is made that the presence of the Federal right set up and denied as violative of this clause of the Constitution is shown by the certificate of the Supreme Court, contained in its journal entry affirming the judgment of the Circuit Court. An examination of the certificate, however, does not show that any contention that contract rights were impaired by subsequent state legislation, was passed upon adversely to the railroad companies, but shows only that the contention was that the claim of the city, in respect to the contract of September 13, 1849, sustained by the judgment of the Circuit Court, and affirmed by the Supreme Court, was in contravention of the defendants' rights under said contract, and impaired their rights under said contract, in violation of the Constitution of the United States, particularly the

tenth section of Article I thereof; "which said claims fully appear in the pleadings and record herein, and that such claims were considered by the court and decided adversely to said plaintiffs in error." The character of the claims thus made we have already described. Moreover, a mere certificate of this character cannot bring an additional question into the record, where the record does not otherwise show it to exist. *Marvin* v. *Trout*, 199 U. S. 212.

It follows that the writ of error must be dismissed.

MR. JUSTICE HOLMES took no part in the consideration and decision of this case.

UNITED STATES *v.* MAYER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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

No. 462. Argued October 22, 23, 1914.—Decided November 16, 1914.

While their jurisdiction is exclusively appellate, Circuit Courts of Appeals may issue writs which are properly auxiliary to their appellate power.

While this court may not be required through a certificate under § 239, Judicial Code, to pass upon questions of fact or mixed questions of law and fact, or to accept a transfer of the whole case, or to answer questions of objectionable generality, a definite question of law may be submitted even if decisive of the controversy.

The general principle obtains, in the absence of statute providing otherwise, that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered unless the proceeding for that purpose was begun during that term; and this case does not fall within the exceptions to that rule.

Whether a Federal court can grant a new trial after the end of the term is a question of power and not of procedure, and state statutes are not applicable.

When a writ of error has been issued to review a judgment of conviction of the District Court in a criminal cause, the Circuit Court of Appeals has jurisdiction to issue a writ of prohibition against the District Court entering an order for new trial after expiration of the term on newly discovered evidence.

When a writ of error has been issued to review its judgment of conviction in a criminal cause, the District Court has not jurisdiction, upon motion made after the term at which it was entered, to set the judgment aside and order a new trial on facts discovered after the end of the term and not appearing in the record.

When a District Court has itself raised the question of its jurisdiction to entertain a motion made after expiration of the term to vacate a judgment of conviction, the consent of the United States attorney to consider the case on the merits does not confer jurisdiction, nor debar the United States from raising the question of jurisdiction, to vacate the judgment.

THE facts stated in the certificate may be summarized as follows:

On March 14, 1913, one Albert Freeman with two other individuals, was convicted in the District Court, Southern District of New York, on five indictments for violation of the statutes relating to the use of the mails and for a conspiracy. On that day judgments of conviction were entered and sentences were imposed as to certain of these indictments, or counts therein, sentence being suspended as to others; and on March 24, 1913, the defendant Freeman sued out a writ of error from the Circuit Court of Appeals to review the judgments of conviction. Assignments of error were filed; and on May 13, 1913, the plaintiff in error was admitted to bail by the appellate court. No bill of exceptions has been settled or filed or argument had.

On January 12, 1914, the plaintiff in error gave notice of application in the District Court to set aside the judgments of conviction, and for the quashing of the indictments, or for a new trial. The grounds were, among

others, (1) that the defendant had been deprived of a fair trial by the misconduct of an assistant United States attorney and (2) that one juror when examined on his voir dire concealed a bias against the defendant. It is found as a fact by the District Judge, that neither the defendant nor his counsel had knowledge of the facts on which the motion was based until after the conclusion of the trial and the expiration of the term as to those counts upon which sentence had been imposed, and that these facts could not have been discovered earlier by reasonable diligence.

Upon the hearing of the application, District Judge Mayer raised the question of the jurisdiction of the District Court to entertain it, in view of the fact that the term had expired. Thereupon the United States attorney submitted a memorandum tendering his consent that the application be heard upon the merits. The application was heard and District Judge Mayer handed down his decision granting a new trial, "on the ground that defendant had not had a trial by an impartial jury for the reason that one of the jurors at the time of his selection entertained a bias against the defendant resulting from the juror's observations of the conduct of the defendant and other corporate officers in relation to the production of certain corporate records before a grand jury of which he had been a member, the juror having concealed his bias on his examination on the voir dire for the purpose of securing the jury fees and the events of the trial having been such as to strengthen and confirm this bias." The order vacating the judgments of conviction and granting a new trial has not yet been entered, the District Judge having filed a memorandum stating in substance that the question of jurisdiction was an important one and that the order would be withheld until the United States attorney had an opportunity to raise the question in a higher court.

Thereafter, and on April 6, 1914, the United States attorney procured an order in the Circuit Court of Appeals directing District Judge Mayer to show cause why a writ of prohibition should not be issued from that court forbidding the entry of an order vacating the judgments of conviction and granting a new trial upon the ground that the District Court was without jurisdiction to enter it. Certain of the facts upon which the motion for a new trial was granted do not appear in the record of the previous trial.

The questions certified are:

"QUESTION I.

"A. When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court and thereafter, upon a motion made in the District Court after the expiration of the term at which the judgment was entered, said District Court has indicated its intention to enter an order vacating the judgment and ordering a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial, has the Circuit Court of Appeals jurisdiction to issue a writ of prohibition against the entry of such order by the District Court, when, in the opinion of the Circuit Court of Appeals, the District Court is without jurisdiction to enter such order?

"B. Or has the Supreme Court of the United States sole jurisdiction to issue such writ of prohibition, under the circumstances above stated?

"In case question I A be answered in the affirmative, then—

"QUESTION II.

"When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after

the term at which judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?

"QUESTION III.

"Whether, when a District Court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of the term to vacate a judgment of conviction and the United States attorney thereupon tendered its consent to the hearing of the motion on the merits if the jurisdictional question raised by the court were dependent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the District Court to vacate said judgment?

The Solicitor General, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States:

The Circuit Court of Appeals has jurisdiction to issue the writ of prohibition in order to prevent threatened interference with its appellate jurisdiction by the District Court granting a new trial in a case in which a writ of error has been filed. The writ of prohibition is the appropriate remedy. *Zell* v. *Judges*, 149 Fed. Rep. 86, 91.

The Circuit Court of Appeals has jurisdiction of the main cause. *In re Chetwood*, 165 U. S. 443. Its jurisdiction attached upon the filing of the writ of error with the clerk of the District Court. *Brooks* v. *Norris*, 11 How. 203; *Burnham* v. *North Chicago Ry. Co.*, 87 Fed. Rep. 168.

If the Circuit Court of Appeals lacks jurisdiction to issue the writ, this court has sole jurisdiction to issue it.

In exceptional cases this court has granted the writ of certiorari, although neither appellate nor original jurisdiction existed. *McClellan* v. *Carland*, 217 U. S. 268; *Meeker* v. *Lehigh Valley R. R. Co.*, 234 U. S. 749; *Munsuri* v. *Lord*, 229 U. S. 618; *Whitney* v. *Dick*, 202 U. S. 132.

And so, by analogy, the writ of prohibition is available where, as here, it is the only remedy by which the usurpation of jurisdiction by an inferior Federal court can be prevented.

The District Court is without jurisdiction to set aside the judgment of conviction and order a new trial. The expiration of the term at which judgment was entered withdrew that judgment from the control of the District Court. *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Wetmore* v. *Karrick*, 205 U. S. 141.

The perfecting of the writ of error transferred exclusive jurisdiction of the cause to the Circuit Court of Appeals. *Keyser* v. *Farr*, 105 U. S. 265; *Morrin* v. *Lawler*, 91 Fed. Rep. 693, and cases cited in brief.

This rule obtains also in the matter of appeals in equity cases. *Ensminger* v. *Powers*, 108 U. S. 292; *Roemer* v. *Simon*, 91 U. S. 149.

The United States is not debarred from raising the question of the District Court's jurisdiction by the consent of the United States attorney to the hearing of the motion on its merits.

Jurisdiction of the subject-matter cannot be conferred by consent of the parties. *In re Winn*, 213 U. S. 458, 469; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 382.

The question is one of power; and that is a question which cannot be solved by consent of either party. *Bronson* v. *Schulten*, 104 U. S. 410.

Mr. Wilson B. Brice, with whom *Mr. Samuel Williston* was on the brief, for respondent:

Only questions arising in cases within the appellate jurisdiction of the Circuit Court of Appeals can be certified to the Supreme Court. *Maynard* v. *Hecht*, 151 U. S. 324; *Moran* v. *Hegeman*, 151 U. S. 329.

The jurisdiction of the Circuit Court of Appeals to issue the writ of prohibition is an original jurisdiction. Section 262, Judicial Code; *Farnsworth* v. *Montana*, 129 U. S. 104, 113; *Ex parte Tom Tong*, 108 U. S. 556; *McClellan* v. *Carland*, 217 U. S. 268; *In re Williams*, 123 Fed. Rep. 321, 322; *McClung* v. *Silliman*, 6 Wheat. 598; *Bath County* v. *Amy*, 13 Wall. 244, 249; *In re Massachusetts*, 197 U. S. 482, 488; *Covington Bridge Co.* v. *Hager*, 203 U. S. 109.

Congress has never intended to change the common-law nature of an application for a writ of prohibition.

The questions submitted do not appear to be of such nature as to call upon this court to answer them.

The whole case cannot be sent to this court by certificate of division of opinion.

This defect cannot be avoided by submitting the whole case in the form of separate questions.

It does not make any difference if the decision of the whole case turns upon matters of law only, nor will this court answer abstract, hypothetical or moot questions.

If an answer to one of the questions certified disposes of the case, this court will not answer the other questions. *United States* v. *Bailey*, 9 Pet. 267; *Adams* v. *Jones*, 12 Pet. 207; *White* v. *Turk*, 12 Pet. 238; *Webster* v. *Cooper*, 10 How. 54; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *United States* v. *Buzzo*, 18 Wall. 125; *United States* v. *Britton*, 108 U. S. 199, 207; *Jewell* v. *Knight*, 123 U. S. 426, 433; *United States* v. *Hall*, 131 U. S. 50; *Warner* v. *New Orleans*, 167 U. S. 467; *Cross* v. *Evans*, 167 U. S. 60; *Emsheimer* v. *New Orleans*, 186 U. S. 33; *C., B. & Q. Ry. Co.* v. *Williams*, 205 U. S. 444; *The Folmina*, 212 U. S. 354; *C., B. & Q. Ry. Co.* v. *Williams*, 214 U. S. 492.

No writ of error lies in favor of the Government in a criminal case. *United States* v. *Sanges*, 144 U. S. 310; *United States* v. *Zarafonitis*, 150 Fed. Rep. 97; *United States* v. *Ball*, 163 U. S. 662, 670; *Kepner* v. *United States*, 195 U. S. 100, 130.

If the right to a writ of error does exist in the Government, then it has another remedy in this case; and it is not entitled to the writ of prohibition because the issue of the writ would not be necessary to the exercise of the appellate jurisdiction of the Circuit Court of Appeals. See *United States* v. *Dickinson*, 213 U. S. 99.

Section 262, Judicial Code, does not confer an appellate jurisdiction which the Circuit Court of Appeals would not have without it. The statutes which it reënacts have been construed as meaning that the power of the Circuit Court to use extraordinary writs is confined to their use as ancillary remedies in cases where appellate jurisdiction already exists. *McClung* v. *Silliman*, 6 Wheat. 598; *Bath County* v. *Amy*, 13 Wall. 244, 249; *Covington Bridge Co.* v. *Hager*, 203 U. S. 109; *Re Massachusetts*, 197 U. S. 482, 488; *Ex parte Warmouth*, 17 Wall. 64; *United States* v. *Williams*, 67 Fed. Rep. 384; *In re Paquet*, 114 Fed. Rep. 437; *Zell* v. *Judges &c.*, 149 Fed. Rep. 86.

The Government has no legal right to any relief under the writ of error. *Latham* v. *United States*, 9 Wall. 145; *United States* v. *Minn. &c. Co.*, 18 How. 241; *United States* v. *Young*, 94 U. S. 258.

The Government cannot question the District Court's jurisdiction. *United States* v. *Perrin*, 131 U. S. 55, and see also *McLish* v. *Roff*, 141 U. S. 661, 668; *United States* v. *Jahn*, 155 U. S. 109; *Mexican Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429; *Re Huguley Mfg. Co.*, 184 U. S. 297, 302; *Nelson* v. *Meehan*, 155 Fed. Rep. 1, 3; *Manning* v. *German Life Ins. Co.*, 107 Fed. Rep. 52.

The consent given by the United States attorney deprived the Circuit Court of Appeals of any jurisdiction to issue the writ of prohibition, even if it would otherwise have had any.

Whether the Supreme Court of the United States has sole jurisdiction to issue the writ of prohibition under the

circumstances of this case, is not before the court, and an answer, if given, would be mere *obiter*.

There has been a gradual tendency to enlarge the exceptions to the general rule denying the power of a court to amend its judgments after the term. See essay by Luke O. Pike, 7 Harv. Law Rev. 266, 272.

Originally the difficulty of amendment seems to have existed whenever the term was past even though the suit was still pending. 3 Blackstone, 406; *Queen* v. *Tutchin*, 1 Salk. 51; *United States* v. *Moss*, 6 How. 31; *Bronson* v. *Schulten*, 104 U. S. 410; *Phillips* v. *Negley*, 117 U. S. 665; *Tubman* v. *Balt. & Ohio R. R.*, 190 U. S. 38; *In re Metropolitan Trust Co.*, 218 U. S. 312; *Public Schools* v. *Walker*, 9 Wall. 603; *Gagnon* v. *United States*, 193 U. S. 451.

As to the practice in regard to the writ of *Audita Querela*, see 3 Blackstone Comm. 406; *Stone* v. *Seaver*, 5 Vermont, 549; Fitz Herbert, Nat. Br. 238; *Folan* v. *Folan*, 59 Maine, 566; *Harmon* v. *Martin*, 52 Vermont, 255; *Avery* v. *United States*, 12 Wall. 304.

The writ was not available in criminal cases.

As to writ of error *coram nobis* or *coram vobis*, see *United States* v. *Plumer*, 3 Cliff. 28, 58. The writ is directed only to the court which rendered the judgment, not to a superior court, *Irwin* v. *Grey*, L. R., 2 H. L. 20, 26; *Land* v. *Williams*, 12 Sm. & M. 362, and is applicable to criminal cases. *United States* v. *Plumer*, 3 Cliff. 28, 59; *Adler* v. *State*, 35 Arkansas, 517; *Sanders* v. *State*, 85 Indiana, 318; *State* v. *Calhoun*, 50 Kansas, 523; Rolle's Abridgement, p. 749; *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144; *Gagnon* v. *United States*, 193 U. S. 451, 457; *Rex* v. *Wilkes*, 4 Burr. 2527, 2551; *Hydrick* v. *State*, 148 S. W. Rep. 541.

As to equitable procedure to affect a judgment after the expiration of the term in which it was rendered, see *Cummins* v. *Kennedy*, 4 J. J. Marsh, 642, 645; *Pickford* v. *Talbott*, 225 U. S. 651, 657; *Tovey* v. *Young*, Precedents in

Chancery, Case 157, p. 194; *Platt* v. *Threadgill*, 80 Fed. Rep. 192.

For statutes allowing petitions or motions for new trials after the end of the term in which judgment was rendered, see *Fuller* v. *United States*, 182 U. S. 562; *Hines* v. *Driver*, 89 Indiana, 339, 343; *Harvey* v. *Fink*, 111 Indiana, 249, 254; *Gottleib* v. *Jasper*, 27 Kansas, 770; *Ex parte Russell*, 13 Wall. 664, 669.

Even though the lapse of the term deprived the District Court of jurisdiction, the Government's consent to the hearing of the motion for a new trial restored that jurisdiction. *Gracie* v. *Palmer*, 8 Wheat. 699; *Taylor* v. *Longworth*, 14 Pet. 172, 174; *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127; *Tex. & Pac. Ry.* v. *Cox*, 145 U. S. 593; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *In re Moore*, 209 U. S. 490; *Western Loan Co.* v. *Butte Mining Co.*, 210 U. S. 368; *Martin's Admr.* v. *Balt. & Ohio R. Co.*, 151 U. S. 673.

Lapse of the term is not jurisdictional. *Gage* v. *Chicago*, 141 Illinois, 642; *Hewetson* v. *Chicago*, 172 Illinois, 112, 115; *Gager* v. *Doe*, 29 Alabama, 341; *Berry* v. *Nall*, 54 Alabama, 446; *Kidd* v. *McMillan*, 21 Alabama, 325; *Royal Trust Co.* v. *Exchange Bank*, 55 Nebraska, 663, 668; *Newman* v. *Newton*, 14 Fed. Rep. 634. See also *Wilson* v. *Vance*, 55 Indiana, 394; *National Home* v. *Overholser*, 64 Ohio St. 517; *Harrison* v. *Osborn*, 114 Pac. Rep. 331; *McHam* v. *Gentry*, 33 Texas, 441; *McCord-Collins Co.* v. *Stern*, 61 S. W. Rep. 341. *Little Rock* v. *Bullock*, 6 Arkansas, 282; *Anderson* v. *Thompson*, 7 Lea, 259, are opposed to principle, to practical convenience and to the weight of authority.

The Government is as fully bound by the assent given by the District Attorney who represented it as an ordinary litigant would be by the assent of authorized counsel. *Johnston* v. *Stimmel*, 89 N. Y. 117.

The pendency of a writ of error when the motion for a

new trial was made did not defeat the jurisdiction of the District Court.

Consent to the jurisdiction of the District Court involves consent to the discontinuance of the writ of error if the District Court grants a new trial, and, therefore, avoids any possible objection due to the pendency of the writ of error.

The motive of the Government in giving its consent is immaterial.

Failure to object to jurisdiction debars the right to the writ. *Re Huguley Mfg. Co.*, 184 U. S. 301; *In re Alix*, 166 U. S. 136; *In re Rice*, 155 U. S. 396; *Smith* v. *Whitney*, 116 U. S. 167, 173.

The Government is debarred from the writ because it has no standing in the Circuit Court of Appeals upon the writ of error.

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

Preliminarily, objection is raised to the authority of this court to answer the questions certified. Under § 239 of the Judicial Code, questions may be certified by the Circuit Court of Appeals "in any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight"; and § 128 provides that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Court," etc. The argument is that an application to a Circuit Court of Appeals for a writ of prohibition is an original proceeding. But the jurisdiction of the Circuit Courts of Appeals is exclusively appellate (Act of March 3, 1891, §§ 2, 6, c. 517, 26 Stat. 826, 828; Jud. Code, §§ 117, 128; *Whitney* v. *Dick*, 202 U. S. 132, 137, 138); and their authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power. Jud. Code,

§ 262; Rev. Stat., § 716; Act of March 3, 1891, c. 517, § 12, 26 Stat. 826, 829; *Whitney* v. *Dick, supra; McClellan* v. *Carland,* 217 U. S. 268, 279, 280. Section 128 defines the class of cases in which the Circuit Court of Appeals may exercise appellate jurisdiction, and, where a case falls within this class, a proceeding to procure the issue of a writ in aid of the exercise of that jurisdiction must be regarded as incidental thereto and hence as being embraced within the purview of § 239 authorizing the court to certify questions of law.

It is also objected that the certificate sends up the entire case. It is a familiar rule that this court can not be required through a certificate under § 239 to pass upon questions of fact, or mixed questions of law and fact; or to accept a transfer of the whole case; or to answer questions of objectionable generality—which instead of presenting distinct propositions of law cover unstated matters 'lurking in the record'—or questions that are hypothetical and speculative. *United States* v. *Bailey,* 9 Pet. 267, 273; *Webster* v. *Cooper,* 10 How. 54, 55; *Jewell* v. *Knight,* 123 U. S. 426, 432–435; *United States* v. *Hall,* 131 U. S. 50, 52; *Cross* v. *Evans,* 167 U. S. 60, 63; *United States* v. *Union Pacific Rwy. Co.,* 168 U. S. 505, 512; *Chicago, B. & Q. Rwy. Co.* v. *Williams,* 205 U. S. 444, 452, 453; 214 U. S. 492; *Hallowell* v. *United States,* 209 U. S. 101, 107; *The Folmina,* 212 U. S. 354, 363; *B. & O. R. R. Co.* v. *Interstate Com. Com.,* 215 U. S. 216, 221, 223. But, on the other hand, there is no objection to the submission of a definite and clean-cut question of law merely because the answer may be decisive of the controversy. The question propounded must always be such that the answer will aid the court in the determination of the case, and the importance, or the controlling character, of the question if suitably specific furnishes no ground for its disallowance. This is abundantly illustrated in the decisions. *United States* v. *Pridgeon,* 153 U. S. 48; *Helwig* v. *United States,* 188 U. S.

605; *United States* v. *Ju Toy*, 198 U. S. 253; *Hertz* v. *Woodman*, 218 U. S. 205, 211; *American Land Co.* v. *Zeiss*, 219 U. S. 47, 59; *Matter of Harris*, 221 U. S. 274, 279; *Hallowell* v. *United States*, 221 U. S. 317; *Beutler* v. *Grand Trunk Rwy. Co.*, 224 U. S. 85, 88; *Matter of Loving*, 224 U. S. 183, 186; *The Jason*, 225 U. S. 32; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187; *Jordan* v. *Roche*, 228 U. S. 436; *Texas Cement Co.* v. *McCord*, 233 U. S. 157; *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473. In the present case the certificate submits distinct and definite questions of law, which—save question I-B—are clearly pertinent.

Coming, then, to the matters thus submitted, we deem the following considerations to be controlling:

1. In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term. *Hudson* v. *Guestier*, 7 Cranch, 1; *Cameron* v. *M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald*, 12 Pet. 488, 492; *Bank of United States* v. *Moss*, 6 How. 31, 38; *Bronson* v. *Schulten*, 104 U. S. 410, 415–417; *Phillips* v. *Negley*, 117 U. S. 665, 673, 674; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Hume* v. *Bowie*, 148 U. S. 245, 255; *Tubman* v. *B. & O. R. R. Co.*, 190 U. S. 38; *Wetmore* v. *Karrick*, 205 U. S. 141, 149–152; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 321. There are certain exceptions. In the case of courts of common law—and we are not here concerned with the special grounds upon which courts of equity afford relief—the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors, and, in civil cases, to rectify such mistakes of fact as were reviewable on writs of error *coram nobis*, or *coram vobis*, for which the proceeding by motion is the modern substitute. *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144, 148; *Matheson's Adm'r* v. *Grant's Adm'r*, 2 How. 263, 281; *Bank of United States* v. *Moss, supra; Bronson* v.

Schulten, supra; Phillips v. *Negley, supra; In re Wight,* 134 U. S. 136; *Wetmore* v. *Karrick, supra.* These writs were available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment,—for, it was said, 'error in fact is not the error of the judges and reversing it is not reversing their own judgment.' So, if there were error in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal. But if the error were 'in the judgment itself, and not in the process,' a writ of error did not lie in the same court upon the judgment, but only in another and superior court. Tidd, 9th ed., 1136, 1137; Stephen on Pleading, 119; 1 Roll. Abr. 746, 747, 749. In criminal cases, however, error would lie in the King's Bench whether the error was in fact or law. Tidd, 1137; 3 Bac. Abr. (Bouv. ed.) "Error," 366; Chitty, Crim. L. 156, 749. See *United States* v. *Plumer,* 3 Cliff. 28, 59, 60. The errors of law which were thus subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied 'only to that very small number of legal questions' which concerned 'the regularity of the proceedings themselves.' See Report, Royal Commission on Criminal Code (1879), p. 37; 1 Stephen, Hist. Crim. L. 309, 310.

In view of the statutory and limited jurisdiction of the Federal District Courts, and of the specific provisions for the review of their judgments on writ of error, there would appear to be no basis for the conclusion that, after the term, these courts in common law actions, whether civil or

criminal, can set aside or modify their final judgments for errors of law; and even if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases—as an incident to their powers expressly granted—a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis* (See Bishop, New Crim. Pro., 2d ed., § 1369), as to which we express no opinion, that authority would not reach the present case. This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid. In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by a motion for a new trial (Jud. Code, § 269)—an application which is addressed to the sound discretion of the trial court, and, in accordance with the established principles which have been repeatedly set forth in the decisions of this court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered.

State statutes relating to the granting of new trials are not applicable. As was said by this court in *Bronson* v. *Schulten*, *supra*,—"The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts." See, also, *Ind. & St. L. R. R. Co.* v. *Horst*, 93

U. S. 291, 301; *Mo. Pac. Rwy. Co.* v. *C. & A. R. R. Co.*, 132 U. S. 191; *Fishburn* v. *C., M. & St. P. Ry. Co.*, 137 U. S. 60; *Fuller* v. *United States*, 182 U. S. 562, 575; *United States* v. *1621 Pounds of Fur Clippings*, 106 Fed. Rep. 161; *City of Manning* v. *German Ins. Co.*, 107 Fed. Rep. 52.

2. As the District Court was without power to entertain the application, the consent of the United States attorney was unavailing. *Cutler* v. *Rae*, 7 How. 729, 731; *Byers* v. *McAuley*, 149 U. S. 608, 618; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 382. It is argued, in substance, that while consent cannot give jurisdiction over the subject matter, restrictions as to place, time, etc., can be waived. *Gracie* v. *Palmer*, 8 Wheat. 699; *Toland* v. *Sprague*, 12 Pet. 300, 331; *Ayers* v. *Watson*, 113 U. S. 594, 598; *Martin's Adm'r* v. *B. & O. R. R. Co.*, 151 U. S. 673, 688; *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339, 344, 345. This consideration is without pertinency here, for there was no general jurisdiction over the subject matter, and it is not a question of the waiver of mere 'modal or formal' requirements, of mere private right or personal privilege. In a Federal court of competent jurisdiction, final judgment of conviction had been entered and sentence had been imposed. The judgment was subject to review in the appellate court, but so far as the trial court was concerned it was a finality; the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed. In these circumstances it would seem to be clear that the consent of the prosecuting officer could not alter the case; he was not a dispensing power to give or withhold jurisdiction. The established rule embodies the policy of the law that litigation be finally terminated, and when the matter is thus placed beyond the discretion of the court it is not confided to the discretion of the prosecutor.

3. We have no occasion to enter upon the broad in-

quiry suggested by the argument as to the authority of the Circuit Courts of Appeals to issue writs of prohibition. We have no doubt of the power to issue the writ in the case stated, and we need not discuss other cases supposed. Prior to the application for a new trial in the District Court, the defendant had sued out a writ of error and the appellate jurisdiction of the Circuit Court of Appeals had attached. *Brooks* v. *Norris*, 11 How. 204, 207; *In re Chetwood*, 165 U. S. 443, 456; *Mutual Life Ins. Co.* v. *Phinney*, 178 U. S. 327, 335; *Old Nick Williams Co.* v. *United States*, 215 U. S. 541, 543. Basing the argument upon the proposition that the Government had no right of review in the Circuit Court of Appeals in a criminal case, it is urged that the Government cannot be regarded as deprived of any relief which it is entitled to seek from that court, and hence that it cannot be said that the issue of the writ was necessary for the exercise of its jurisdiction. Jud. Code, § 262. But the case was actually pending in the Circuit Court of Appeals on the defendant's writ of error, and the Government had all the rights of a litigant in that court seeking to maintain a judgment assailed. It is said that the defendant could have procured the dismissal of his writ, but in fact the writ had not been dismissed. It is said, also, that the consent to the hearing by the District Court of the application for a new trial operated as a waiver of any rights the Government could have in the Circuit Court of Appeals. This conclusion is sought to be derived from the asserted efficacy of the consent in the lower court, and, as we have seen, it had no efficacy there, and it had no reference whatever to the proceedings in the higher court. The defendant was still insisting upon his rights as plaintiff in error in the Circuit Court of Appeals, and the United States, as the opposing party in that court, was entitled to its aid in order to preserve the integrity of the record and to prevent unauthorized action by the court below with respect to the judgment

under review. For this purpose, the writ of prohibition was the appropriate remedy.

We answer question I-A in the affirmative, and questions II and III in the negative. Question I-B involves an inquiry not raised by the case made and is not answered.

It is so ordered.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

UNITED STATES *v.* BARTLETT.

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

No. 251. Argued October 22, 1914.—Decided November 16, 1914.

The act of May 27, 1908, c. 199, 35 Stat. 312, extending to April 26, 1931, the period of restriction upon the alienation of certain Indian allotments, contained an excepting clause declaring that "nothing herein shall be construed as imposing restrictions removed by or under any prior law;" *held* that restrictions which had been terminated by lapse of time as contemplated by the law imposing them were "removed from the land by or under" a prior law within the meaning of the excepting clause.

203 Fed. Rep. 410, affirmed.

THE facts, which involve the construction of the act of May 27, 1908, extending restrictions on alienation of Indian allotments, are stated in the opinion.

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

By the act of May 27, 1908, Congress meant to provide against the alienation, prior to April 26, 1931, of any allotment then held by any member of any of the Five Civilized Tribes of full or three-quarters Indian blood,

excepting only such allotments as had been or as might thereafter be specifically relieved of restrictions, by the action of the Secretary of the Interior or of Congress itself.

The act of May 27, 1908, should be construed, *in pari materia* with other acts which will be cited, as the expression of a definite policy to abolish the divergencies and remedy the defects of the various agreements under which the allotments in the Five Civilized Tribes had been made, by classifying all the allotments, irrespective of tribe, according to the degree of the presumed natural competency of the allottees, standardized arbitrarily in accordance with their respective proportions of Indian blood; and by relieving the restraints altogether as to those thus classified as competent, and by forbidding conveyances by those thus classified as incompetent prior to April 26, 1931.

Both the spirit and the letter of the act of May 27, 1908, demand that all the lands of the three-quarter blood Indians be held restricted until April 26, 1931, irrespective of the prior restrictions.

That part of the first section of the act of May 27, 1908, which declares that the act shall not be construed "to impose restrictions removed from land by or under any law prior to the passage of this act," refers only to those cases in which restrictions have been removed by the direct action of Congress or by the Secretary of the Interior from particular allotments.

The opposite construction would render this clause repugnant to the plain terms classifying three-quarter bloods as incompetent in respect of all of their land and to the fundamental purpose of the statute to protect the incompetent Indians.

The clause may readily be construed in avoidance of this result and in harmony with the statute as a whole by confining it to the special cases above mentioned.

If doubt exists, this construction should be adopted as the more beneficial to the Indians.

Congress had power to place a new restriction upon the land in controversy, as was done by the act of May 27, 1908. *Tiger* v. *Western Investment Co.*, 221 U. S. 301.

The imposition of restrictions upon the alienation of Indian allotments is but a mode of exercising the power of guardianship still residing in the United States respecting the Indians. Until the guardianship shall have been renounced, Congress may modify its plans and correct its mistakes. If it has given the Indians a liberty too large for their own good, Congress may curtail it. The renewal of an expired restriction stands upon the same ground as the extension of one which has still some time to run. The power to extend existing restrictions and the power to impose new restrictions where none exist—one and the same in quality and purpose—are derived from the guardianship of the Federal Government over the Indians.

The power to reimpose restrictions is entirely consistent with the possession by the individual Indian of rights which are constitutionally protected from interference by Congress. He may not be arbitrarily deprived of any vested right of property. But the protection of his property is a legitimate and necessary exercise of the power of guardianship, subject to which his property is held, and the imposition of a restraint upon his liberty of disposition is a necessary and legitimate means of protecting his property.

The power to protect the property of an Indian ward, being a power of the General Government, is not to be diminished or impaired in its full usefulness by the circumstance that the property has been tentatively subjected to the taxing power of a State, but the right of the State of Oklahoma to continue taxing the land in controversy is not involved, and could not constitute a defense in the present case.

The power to reimpose restrictions is consistent with

the full protection of all rights in the land which may have become vested in third persons while the allottee was free to convey.

In support of these contentions, see *Bartlett* v. *United States*, 203 Fed. Rep. 410; *Bowling* v. *United States*, 233 U. S. 528; *Choate* v. *Trapp*, 224 U. S. 665; *Deming Invest. Co.* v. *United States*, 224 U. S. 473; *Franklin* v. *Lynch*, 233 U. S. 269; *Goat* v. *United States*, 224 U. S. 458; *Hallowell* v. *United States*, 221 U. S. 317; *Heckman* v. *United States*, 224 U. S. 413; *Matter of Heff*, 197 U. S. 488; *Jones* v. *Meehan*, 175 U. S. 1; *In re Lands of Five Civilized Tribes*, 199 Fed. Rep. 811; *Mullen* v. *United States*, 224 U. S. 448; *Perrin* v. *United States*, 232 U. S. 478; *Starr* v. *Long Jim*, 227 U. S. 613; *Tiger* v. *Western Invest. Co.*, 221 U. S. 301; *United States* v. *Allen*, 179 Fed. Rep. 13; *United States* v. *Celestine*, 215 U. S. 290; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Pelican*, 232 U. S. 442; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Shock*, 187 Fed. Rep. 870; *Ex parte Webb*, 225 U. S. 663; see also Act of February 28, 1887, 24 Stat. 388; Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; Act of July 1, 1902, 32 Stat. 641; Act of July 1, 1902, 32 Stat. 716; Act of March 3, 1903, 32 Stat. 1008; Act of April 21, 1904, 33 Stat. 189; Act of April 26, 1906, 34 Stat. 137; Act of May 8, 1906, 34 Stat. 182; Act of June 21, 1906, 34 Stat. 345; Act of May 27, 1908, 35 Stat. 312; Congressional Record, 60th Cong., 1st sess., vol. 42, pt. 7, p. 6781; Report of Secretary of the Interior, 1904, pt. 2, pp. 37 to 41.

Mr. George S. Ramsey, with whom *Mr. Edgar A. de Meules* was on the brief, for appellees:

The act of May 27, 1908, disclaimed intention to again restrict sale of any land from which restrictions had been removed.

As the constitutionality of the act of May 27, 1908, is in grave doubt, it should be construed so as to avoid constitutional question.

The title of the act is to remove restrictions, and in case of doubt as to construction the title of an act can be considered.

If the act is intended to declare all three-quarter bloods incompetent and to restrict the sale of any land then free, there was no reason for its operation to be suspended for sixty days.

The clause pertaining to restrictions on mixed-bloods of three-quarter or more Indian blood had a wide field for operation, excluding the Creek Nation.

The restrictions on Moses Wiley and all mixed-blood Creeks, irrespective of fractional quantum of Indian blood, were removed under a law, to-wit: § 16 of act of Congress approving Supplemental Creek Agreement.

If the construction of the act is in doubt—then the construction insisted on by the Government should be rejected, because it is unjust and infringes upon the State's right to tax the lands after the act, though they were subject to state taxation before.

If the act put restrictions on land then free it is unconstitutional. The Government abandoned its guardianship over unrestricted lands.

Personally, the Indians were granted statehood by the Oklahoma Enabling Act, and with respect to their persons and unrestricted lands and all other property are on an equality, civilly and politically, with all other citizens of the State, and have as citizens of the United States and Oklahoma the same exemptions from Federal control, enjoyed by citizens of any other State.

When Congress once permitted lands to become free from restrictions, the Indian being a full fledged citizen of the State, the guardianship over all the unrestricted property of that Indian ceased, whether that property

was acquired by gift, purchase, inheritance, or allotment—when once free, always free.

Congress having permitted the State's power to tax to vest, is conclusive evidence that Congress abandoned its guardianship over that land, and there is no power in the Federal Government to withdraw it from full dominion of the State. In support of these contentions, see act of May 27, 1908, 35 Stat. 312; Supplemental Creek Treaty, 32 Stat. 500; Cherokee Agreement, 32 Stat. 716; Supplemental Choctaw and Chickasaw Treaty, 32 Stat. 641. And see also *Allen* v. *Oliver*, 31 Oklahoma, 356; *Allgeyer* v. *State*, 165 U. S. 580; *Bahuand* v. *Biz*, 105 Fed. Rep. 485; *Barrett* v. *Kelley*, 31 Texas, 476; Black, Interp. of Law, p. 205; *Blanck* v. *Pausch*, 113 Illinois, 60; *Blue Jacket* v. *Commonwealth*, 5 Wall. 737; *Bowles* v. *Haberman*, 95 N. Y. 246; *Boyd* v. *Nebraska*, 143 U. S. 135; *In re Celestine*, 215 U. S. 278; *Civil Rights Cases*, 109 U. S. 22; *Choate* v. *Trapp*, 224 U. S. 665; *Collins* v. *Hadley*, 78 N. E. Rep. 353; *Cryer* v. *Andrews*, 11 Texas, 170; *Dick* v. *United States*, 208 U. S. 353; *Elks* v. *Wilkins*, 112 U. S. 101; Endlich, Stat. Interp., §§ 53 and 370; *Fellows* v. *Denniston*, 5 Wall. 761; *Gritts* v. *Fisher*, 224 U. S. 640; *In re Heff*, 197 U. S. 505; *Lochner* v. *New York*, 198 U. S. 45; *Lone Wolf* v. *Hitchcock*, 187 U. S. 565; *Minneapolis* v. *Beum*, 56 Fed. Rep. 576; *Mullen* v. *United States*, 224 U. S. 448; *O'Conner* v. *State*, 71 S. W. Rep. 409; *Osterman* v. *Baldwin*, 6 Wall. 116; *Pennock* v. *County Com.*, 103 U. S. 44; *People* v. *Barrett*, 67 N. E. Rep. 742; *People* v. *Washington*, 36 California, 658; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Redbird* v. *United States*, 203 U. S. 76; *Risley* v. *Village*, 64 Fed. Rep. 457; *Sheehan* v. *L. & R. Ry. Co.*, 101 S. W. Rep. 380; *Slaughter-House Cases*, 16 Wall. 73; *Smythe* v. *Fish*, 23 Wall. 374; *Stoddard* v. *Chambers*, 2 How. 284; 2 Sutherland Stat. Const., § 358; *Thomas* v. *Gay*, 169 U. S. 271; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *Truskett* v. *Closser*, 198 Fed. Rep. 835; *United States* v.

Fisher, 2 Cranch, 358; *United States* v. *Hall*, 171 Fed. Rep. 214; *United States* v. *Hallowell*, 221 U. S. 320; *United States* v. *Harris*, 106 U. S. 629; *United States* v. *Palmer*, 3 Wheat. 610; *United States* v. *Rickert*, 188 U. S. 433; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Shock*, 187 Fed. Rep. 871; *United States* v. *Sutton*, 215 U. S. 291; *United States* v. *Bennett*, 232 U. S. 303; *Yellow Beaver* v. *Board of Com.*, 5 Wall. 757.

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

This is a suit to cancel two deeds of land allotted to an enrolled citizen of the Creek tribe of Indians. The land is what is known as surplus, as distinguished from homestead, land, and the allottee is of three-fourths Indian blood. The allotment was made under the act of June 30, 1902, 32 Stat. 500, c. 1323, known as the Supplemental Creek Agreement, which provided in § 16 that the land should be inalienable by the allottee or his heirs for a period of five years, expiring as it is said in the briefs, August 8, 1907. In 1912 the allottee deeded the land to Bartlett, one of the appellees, and shortly thereafter Bartlett deeded it to Lashley, the other appellee. These are the deeds sought to be cancelled and the right to that relief is rested upon a provision in § 1 of the act of May 27, 1908, 35 Stat. 312, c. 199, declaring that "all allotted lands of . . . enrolled mixed-bloods of three-quarters or more Indian blood . . . shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one," etc. As the original restriction upon alienation expired several months before the passage of the act of 1908, and also long before the deed from the allottee to Bartlett, the important question in the case is whether Congress intended by the act of 1908 to re-

impose and extend that restriction in respect of allotments which theretofore had been entirely freed from it through the expiration of the period prescribed for its existence. The District Court, adhering to an opinion given in another case (187 Fed. Rep. 870, 873), answered the question in the affirmative, and the Circuit Court of Appeals, concluding that the answer should be the other way, directed that the bill be dismissed. 203 Fed. Rep. 410.

If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to embrace all allotments of the class described whether then subject to the original restriction or theretofore freed from it. But that language is not to be taken literally, for it is followed by a declaration that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act." That this declaration is intended to qualify or restrain what precedes it is conceded, but to what extent is the subject of opposing contentions.

Under prior legislation the lands of the Five Civilized Tribes, including those of the Creeks, had been allotted in severalty, all subject to restrictions upon alienation which were to be terminated by the lapse of varying periods of time. As to some of the lands these periods had expired, thereby lifting the restrictions. In some instances Congress had abrogated the restrictions in advance of the time fixed for their termination, and in still other instances they had been cancelled by the Secretary of the Interior in the exercise of authority conferred by law. But as to most of the lands the restrictions were still in force. It was in this situation that Congress, by the act of 1908, extended or enlarged the period of restriction in respect of "all allotted lands of . . . enrolled mixed-bloods of three-quarters or more Indian blood" and accompanied its action with an explanation that it was not intended to

impose restrictions theretofore "removed from any land by or under any law."

The real controversy is over the meaning of the word "removed." It is not questioned that it embraces the action of Congress and of the Secretary of the Interior in abrogating or cancelling restrictions in advance of the time fixed for their expiration, but it is insisted that it does not embrace their termination by the lapse of time. In short, the contention is that the word is used in a sense which comprehends only an affirmative act, such as a rescission or revocation while the statutory period was still running. Although having support in some definitions of the word, the contention is, in our opinion, untenable, for other parts of the same act, as also other acts dealing with the same subject, show that the word is employed in this legislation in a broad sense plainly including a termination of the restrictions through the expiration of the prescribed period. This is illustrated in §§ 4 and 5 of the act of 1908 and § 19 of the act of April 26, 1906, c. 1876, 34 Stat. 137, 144, and is recognized in *Choate* v. *Trapp*, 224 U. S. 665, 673, where, in dealing with some of these allotments, it was said that "restrictions on alienation were removed by lapse of time."

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MONAGAS *v.* ALBERTUCCI.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 44. Submitted October 29, 1914.—Decided November 30, 1914.

On an appeal from the Supreme Court of Porto Rico, the power of this court is confined to determining whether error of law was committed in admitting or rejecting evidence and whether the findings of fact are adequate to sustain the conclusions based on them. *Rosaly* v. *Graham*, 227 U. S. 584.

Although the appellate court held that the trial court erred in admitting over objection testimony offered to show that a contract of conditional sale was really a mortgage, as that court also considered the evidence and based the exclusion thereof on the ground of its character, and because it did not have probative force to accomplish the result, the testimony was weighed sufficiently for the purpose of finding that the instrument is what it purports to be, and the findings and conclusions of law to the effect that the instrument is one of conditional sale and not of mortgage are adequate to support the judgment.

17 Porto Rico, 684, affirmed.

THE facts, which involve the extent of the power of this court on appeal from the Supreme Court of Porto Rico and also the validity of a judgment of that court holding that a transfer of property was a conditional sale that had become absolute and was not a mortgage, are stated in the opinion.

Mr. N. B. K. Pettingill for appellants.

No appearance or brief filed for appellee.

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

Only that which is deemed necessary for the decision of the case is stated, bearing in mind that our power is con-

fined to determining whether error of law was committed in admitting or rejecting evidence and whether the findings of fact are adequate to sustain the conclusions based on them. *Rosaly* v. *Graham*, 227 U. S. 584, 590.

The appellants sued in August, 1909, to recover immovable property upon the ground that a contract of sale made by them of the property in September, 1906, subject to a right to redeem was not a sale subject to condition, but a mortgage, and, therefore, although the period for redemption had long expired without the exercise of that right, they were entitled to a decree for cancellation of the recorded sale on payment of the mortgage debt. Moreover, a right to recover rents and revenues was sought for the purpose of imputing the amount to the extinction of the mortgage debt. At the trial Juan A. Monagas, one of the plaintiffs, was tendered in their behalf as a witness and he was permitted to testify over objection made and exception reserved by the defendant. The court substantially awarded the relief prayed. The prayer, however, for an accounting was denied upon the ground that, although there was no agreement as to rate of interest, nevertheless it was contemplated that the lender should go into possession of the property, collect the rents and revenues and appropriate them in lieu of collecting interest on the debt. Both sides appealed.

On the appeal it developed in the argument that neither side had complied with the rules as to assigning errors. The case was heard and taken under advisement with leave to file assignments of errors within a time fixed. In its opinion the court came first to the appeal of the defendant below. Directing attention to the fact that the permission to file assignments had not been complied with, the court then considered what was open, and after referring to the exception concerning the testimony of the witness offered for the purpose of showing that the deed was not a sale but was a mortgage, treated the exception

as covering two considerations; first, Was parol evidence admissible, "under our Civil Code, to vary the terms of the sale?" and second, whether "An improper construction was put on the written contract entered into between the parties," evidently considering, therefore, that even if parol evidence was admissible, it was yet necessary as a result of the exception to determine whether the contract had been improperly construed by a wrongful effect given to the evidence admitted over objection.

The contention as to mere inadmissibility was at once disposed of by stating that the real question to be decided was not whether any testimony could have been received, but the character and probative force of that which was admissible. The court said (17 Porto Rico, 684, 686):

"The whole case really turns on the question whether the written instrument in controversy was a mortgage or a conditional sale. If it is the latter, it must be complied with according to its terms; if the former, the plaintiff must be allowed to repay the money received and take a reconveyance of the land. The real intention of the parties at the time the written instrument was made must govern in the interpretation given to it by the courts. This must be ascertained from the circumstances surrounding the transaction and from the language of the document itself. The correct test, where it can be applied, is the continued existence of a debt or liability between the parties. If such exists, the conveyance may be held to be merely a security for the debt or indemnity against the liability. On the contrary, if no debt or liability is found to exist, then the transaction is not a mortgage, but merely a sale with a contract of repurchase within a fixed time. While every case depends on its own special facts, certain circumstances are considered as important, and the courts regard them as throwing much light upon the real intent of the parties and upon the nature of such transactions. Such are the existence of a collateral agreement made by

the grantor for the payment of money to the grantee, his liability to pay interest, inadequacy of price paid for the conveyance, the grantor still remaining in possession of the land conveyed, and any negotiation or application for a loan made preceding or during the transaction resulting in the conveyance. The American doctrine on this subject does not differ materially from the principles set forth in our Civil Code. 3 Pomeroy's Equity Jurisprudence, paragraphs 1194 and 1195. Civil Code of Porto Rico, paragraphs 1248, 1249, 1250, 1348, 1410, and 1421."

Coming then presumably to analyze the testimony admitted over the objection for the purpose of ascertaining whether it was of a character to engender any probative force proper to be considered for the purpose of showing that the minds of the parties met not on a conditional sale but a mortgage, and therefore justified construing the written contract to be not what it purported to be, it was held that it did not, the court saying (p. 687): "In accordance with these principles, we must consider the conveyance in this case as a conditional sale, and that plaintiff has failed to comply therewith;" it being added, "We are further satisfied that the exception of the defendant was well taken and ought to have been sustained, and that the court consequently erred in its judgment." The decree was reversed with direction to dismiss the suit.

The court in subsequently making its findings of fact and stating its conclusions included therein the testimony of the witness which had been admitted at the trial over objection, that testimony being to the following effect:

"The witness then proceeded to testify in substance that he applied to the defendant for a loan and she made him an offer to make the negotiation, taking the house in question as security under the conditions stated in the written contract; that he had no intention of selling the house to the defendant, as he had other better offers; and that the contract was made in the form of a deed of sale

with option of return because she requested it and he had no objection."

As there is no contention that the findings if accepted do not support the conclusion which the court based on them, it is sufficient to give the following summary: The contract in question was notarial in form, on its face a sale transferring ownership and possession to the purchaser for a stipulated cash price, conditioned, however, on the right of the sellers to redeem within two years on paying a sum equal to the purchase price, no interest being provided for, with the right to extend the time to redeem for one year further if it was elected to do so before the expiration of the original time, and conferring on the purchaser the power of noting on the public records the fact of the failure to redeem, if it took place, and to convert the title if recorded into an unconditional one. The findings disclose that there was no evidence that the right to redeem had been exercised within the time fixed by the contract, that the purchaser inscribed that fact upon the records and that thereby she became apparently the indefeasible owner. The following facts, however, relating to this subject were found: (a) That shortly before the original redemption period elapsed, one of the sellers in behalf of all wrote a letter to the purchaser asking her to name a time when before a notary an agreement of extension could be signed in accordance with the original contract of repurchase, and that no answer appears to have been made to this letter, at all events that nothing was shown establishing that anything was done under it. (b) That after the original period had expired and the failure to avail of the condition had been noted on the public records, three several letters were written, one on October 17, 1908, one on December 24, 1908, and the last on May 5, 1909; the two first requesting the appointment of a day for the purpose of signing an extension of the original time because an agreement expressed in a letter

to give such extension had been made, and the last offering to pay the amount fixed in the condition of redemption on the ground that there was a right to do so because of an assent to an extension which had been previously given by letter, but, as we have said, the findings recite that nothing as to the existence of the letter referred to was shown in the record. All four of the letters in unequivocal terms treated the contract as having been one of sale and sought to enforce it accordingly and contained nothing in the slightest degree asserting the existence of a mortgage as now relied upon. Indeed, the findings fail to show anything directly or indirectly asserting that view of the contract prior to its being made the basis of this suit filed, as we have seen, in August, 1909.

The conclusions drawn from the findings were as follows:

"This Supreme Court disposed of the appeal by its judgment of June the 5th of the last year, reversing that rendered by the court below and ordering the dismissal of the complaint, not only upon the ground that the exception to which we have already referred was well taken and should have been sustained, but also because the agreement made by the parties was a conditional sale."

As we are bound by the conclusion as to the character of the contract if it is supported by the findings, and as there is no dispute that if the findings be accepted as legal they do support such conclusion, it follows that there must be an affirmance since the real question for decision is, Was the court right in holding that the contract in question was a conditional sale and not a mortgage? But it is insisted—and that is really the only issue in the case—that the findings cannot be accepted and treated as conclusive without previously determining the correctness of the ruling of the court on the exception to the testimony, since if that ruling be held to have been wrongful, it will follow either that there were no findings, or if there were such findings in

form, that they were legally inadequate because made from an incomplete and partial consideration of the evidence resulting from excluding from view the testimony which was wrongfully held to be inadmissible. Indeed, the argument is that this must be the case unless it be assumed that the court after excluding the testimony on the ground that it was inadmissible and hence wrong to consider it, proceeded at once to consider it for the purpose of making its findings. From this it is urged that there must be a reversal and remanding for a new trial or at least for the purpose of enabling the court below to make new findings and express new conclusions upon all the evidence including that which it should consider if it be found that it was wrong in holding that the evidence excluded was inadmissible.

But when the statement we have made of the case is considered, the proposition rests upon the plainest misconception of the action of the court below since, as we have seen, its conclusion that error had been committed by the trial court in holding that the contract of sale was one of mortgage did not arise from a ruling that there was a want of power to admit any testimony for such purpose, but from the fact that the particular testimony which was offered and received over objection was found, after considering and weighing it, to bear no legal relation to such purpose and hence not to afford any probative force tending to support the varying of the contract. This clearly is made manifest by the excerpt from the opinion of the court which we have quoted and becomes indisputable when it is observed that the authorities which the court cited and relied upon as sustaining its action expressly recognized that testimony was admissible for the purpose of showing that a contract of conditional sale was one of mortgage, but pointed out the nature and character of the testimony and the force of the proof required to accomplish such result. The error of the contention, hence,

consists in assuming that testimony was not considered and weighed for the purpose of the findings, when in fact on the face of the record it is apparent that all the testimony offered was considered and weighed. When this is borne in mind, it results that the contention at last reduces itself to the proposition that the decree below should be reversed and the case remanded because of an error never committed; that is, to enable a duty to be legally performed which the record discloses had already been completely and lawfully discharged.

Affirmed.

L. E. WATERMAN COMPANY *v.* MODERN PEN COMPANY.

MODERN PEN COMPANY *v.* L. E. WATERMAN COMPANY.

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

Nos. 54, 72. Argued November 10, 1914.—Decided November 30, 1914.

When the use of his own name upon his goods by a later competitor will and does lead the public to understand that such goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to, and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake. *Herring-Hall-Marvin Co.* v. *Hall's Safe Co.*, 208 U. S. 554.

There is no distinction between corporations and natural persons in the above principle, which is one to prevent a fraud.

All the protection which a manufacturer is entitled to get against a later person of the same name manufacturing similar goods is to require the later person to so use his name in marking his goods that they cannot be confused with the earlier manufacturer, and this

though one of the motives of the later person was to obtain an advantage by the use of his own name.

While the transfer of a person's name without any business may not be enough to entitle the transferee to prevent others from using the name, it still is a license that may be sufficient to put the licensee on the footing of the licensor against another party of the same name.

Two courts below having upheld arrangements as effective in giving a licensee of the right to use a name the same protection which the licensor would have had as against another party of the same name, this court will not go into any consideration of the facts on which such arrangement was based.

197 Fed. Rep. 534, 536, affirmed on cross appeals with costs equally divided between both parties.

THE facts, which involve the use of the name Waterman in connection with the manufacture and sale of fountain pens, are stated in the opinion.

Mr. Walter B. Raymond and *Mr. Oliver Mitchell*, with whom *Mr. Victor C. Cormier* and *Mr. Mortimer W. Byers* were on the brief, for the L. E. Waterman Co.:

The burden of proof is upon the defendant company to prove the affirmative defense set up by the answer, namely, that the defendant, Modern Pen Company, is selling pens made by a partnership rightfully doing business under the name "A. A. Waterman & Co." and rightly making and marking the same with the firm name. *Jacobs* v. *Beecham*, 221 U. S. 263.

The only evidence in support of its affirmative defense is a paper unsupported by any evidence that it was ever followed by any acts constituting partnership action. This is not sufficient to prove a partnership. *Gray* v. *Gibson*, 6 Michigan, 300; *Davis* v. *Key*, 123 U. S. 79.

The testimony of A. A. Waterman taken in the plaintiff's *prima facie* case shows that the alleged firm was to do nothing, that it had no function, that it was a paper firm, that the Modern Pen Company while ostensibly the selling agent for a manufacturing firm of A. A. Waterman & Co.,

actually conducted the entire business; that A. A. Waterman, as a member of the alleged firm, had no management, had no functions and under the firm was a salesman for the Modern Pen Company. The defendant did not produce any evidence to show that the alleged firm ever manufactured or did anything. Under these circumstances the rule is applicable that where proof would be easy, if it existed, and it is not made, the presumption is that rebutting proof cannot be made. *Kirby* v. *Tallmadge*, 160 U. S. 379; *Pac. S. S. Co.* v. *Bancroft*, 94 Fed. Rep. 180; *Penn. R. R. Co.* v. *Anoka Bank*, 108 Fed. Rep. 482.

The alleged partnership agreement is a fraud and a sham and a mere colorable device to enable the defendant to place the name "Waterman" on its pens. *R. Heinisch's Sons Co.* v. *Boker*, 86 Fed. Rep. 765; *Abel Morrall, Ltd.*, v. *Hessin & Co.*, 20 R. P. C. 429.

The Chapman-Waterman aggregation did not take over any going business. Waterman had no good-will to grant and no going business to which any good-will could be appurtenant. As to the alleged grant of a right to use Waterman's personal name, such a right cannot be granted in gross. *Thorneloe* v. *Hill*, 11 R. P. C. 61–1894 (Ch. Div.); *Burrow* v. *Marceau*, 124 A. D. (N. Y.) 665.

This case rests upon the proposition of whether or not a man has the right to cede by contract the use of his name to strangers to that name for the purpose of competition with an already established business. *R. Heinisch's Sons Co.* v. *Boker*, 86 Fed. Rep. 765; *Abel Morrall, Ltd.*, v. *Hessin & Co.*, 20 R. P. C. 429; *International Silver Co.* v. *Rogers*, 118 Fed. Rep. 133; *National Distilling Co.* v. *Century Co.*, 183 Fed. Rep. 206; *Royal Baking Powder Co.* v. *Royal*, 122 Fed. Rep. 343; *Garrett* v. *Garrett*, 78 Fed. Rep. 472.

The question of the right of Arthur A. Waterman to use his personal name in the conduct of his business is in no way raised by this proceeding.

The question for decision is as to the right of a corporation to use a personal name in the selling of goods.

The defendant has encouraged the use of the name "Waterman" by its dealers and agents and has sought to unfairly profit by the resulting confusion in the trade.

The defendant having failed to sustain the burden of proving its affirmative defense that it is the selling agent of a valid existing partnership actually manufacturing the pens sold by it and rightfully marking the same with the name "A. A. Waterman & Co.," should be absolutely enjoined from using the name "Waterman."

Mr. Alexander S. Bacon for the Modern Pen Company:

A. A. Waterman had been in the fountain pen business since before 1898, when under a decree in an action between the L. E. Waterman Company and himself and another, he was expressly permitted to do business under the firm name of A. A. Waterman & Co., but was prevented from doing business under the corporate name of the A. A. Waterman Pen Company. Since that date he has been continuously in the fountain pen business. On the reorganization in 1905, of an old firm of A. A. Waterman & Co. in which he was interested, a new firm was organized consisting of himself and the Messrs. Chapman. Under the copartnership agreement he retired from the eastern field and took over the western field in 1906, assigning his good will and the use of his name to his partners, the present firm of A. A. Waterman & Co., of which the Modern Pen Company is the sole selling agent.

A trade-mark or trade-name is assignable. *Burden* v. *Stratton*, 12 Fed. Rep. 696; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

There is no confusion except that slight confusion which arises from the similarity of names, against which courts will grant no relief. *Meneeley* v. *Meneeley*, 62 N. Y. 432.

The court below required the use of the firm name,

Arthur A. Waterman & Co. together with a suffix "Not connected with the L. E. Waterman Company." The suffix is much longer than the name, is inartistic and obnoxious to all parties. There are now at least twelve firms in the silverware business bearing the name of Rogers. If a man named John Doe Rogers should now start in the silverware business, he might be required in all his advertisements and on all his wares to use in addition to his own name of John Doe Rogers, thirteen separate and distinct suffixes "Not connected with the J. Rogers Silverware Company," "Not connected with the William Rogers Manufacturing Company," etc. This extreme example shows the impropriety of such a suffix.

A. A. Waterman was properly so named before the L. E. Waterman Company was organized. He had a right to use his own name, notwithstanding the fact that some one else had organized a corporation before he went into business. The plaintiff brought the trouble upon itself by selecting a family name for a corporate name. Such a suffix is unprecedented and unwarranted. Arthur A. Waterman & Co. is not sufficiently like L. E. Waterman Company to lead to confusion.

The elements of simulation, or inferior goods, or recent entry into the field, do not enter into this question. The defendant is not accused of simulating the plaintiff's wares. The A. A. Waterman fountain pen is the best that modern art can produce, and A. A. Waterman & Co. manufacture everything connected with their own pens while the plaintiff does not. It merely assembles the parts bought from others.

A. A. Waterman has been in business under his own name for many years and assigned his trade name to his partners on retiring from the firm. In these circumstances the new firm of A. A. Waterman & Co. has an absolute right at common law and by statute to the use of their trade-name, unfettered by any suffix. *Tussaud* v. *Tus-*

saud, L. R. 44 Chanc. Div. 678; *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554; *Rathbone, Sard & Co.* v. *Champion Steel Range Co.*, 189 Fed. Rep. 26.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought by the L. E. Waterman Company to enjoin the Modern Pen Company from using in connection with the manufacture and sale of fountain pens, other than those of the plaintiff's make, the name A. A. Waterman or any name containing the word Waterman in any form, and for an account. The decision of the Circuit Court of Appeals upon an order for a preliminary injunction is reported, 183 Fed. Rep. 118; 105 C. C. A. 408; that of the District Court upon the merits, 193 Fed. Rep. 242; and that of the Circuit Court of Appeals, 197 Fed. Rep. 534; 197 Fed. Rep. 536; 117 C. C. A. 30; 117 C. C. A. 32. The final decree, in the parts material here, restricted the defendant to using the name Arthur A. Waterman & Co. instead of A. A. Waterman & Co., and required the words 'not connected with the L. E. Waterman Co.' to be juxtaposed in equally large and conspicuous letters when the permitted name was marked upon any part of the fountain pen sold by the defendant or upon boxes containing such pens, and whenever the name was used by way of advertisement or otherwise to denote any fountain pens made or sold by the defendant, or to denote that it was the maker or seller of such pens. 183 Fed. Rep. 118. 193 Fed. Rep. 242, 248. 197 Fed. Rep. 534, 535, 536. See further *L. E. Waterman Co.* v. *Standard Drug Co.*, 202 Fed. Rep. 167, 171. 120 C. C. A. 455, 459. The bill besides alleging diversity of citizenship and unfair competition seemingly relied upon the registration of 'Waterman's' and 'Waterman's Ideal Fountain Pen, N. Y.' as trade-marks under the Act of Congress of March 3, 1881, c. 138, 21 Stat. 502, as a ground of juris-

diction. *Jacobs* v. *Beecham*, 221 U. S. 263, 274. Both parties appeal.

The defendant's appeal is from the requirements that it use the name Arthur A. Waterman & Co. instead of A. A. Waterman & Co. and that it juxtapose the words 'not connected with the L. E. Waterman Co.' After the finding of two courts and upon the evidence it must be assumed that the defendant had used the name Waterman in such a way as to mislead the public and to interfere with the plaintiff's rights unless the defendant had the right to use the name as matter of law because it was the selling agent of a firm calling itself A. A. Waterman & Co. and deriving its name from a man who started in business long after the plaintiff had acquired whatever rights it has. In support of this proposition the defendant lays hold of language in *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140, and in other books, to the effect that courts will not interfere with the use of a party's own name 'where the only confusion, if any, results from a similarity of the names and not from the manner of the use.' But, whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake. *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 559. There is no distinction between corporations and natural persons in the principle, which is to prevent a fraud. *Ibid. Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 136. *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273. In the *Howe Scale Co. Case* it was stated upon the same page

with the passage quoted that 'defendant's name and trade-mark were not intended or likely to deceive.'

The only other ground for the defendant's appeal that needs a word after the findings below is a decree of the Supreme Court of New York in a suit by the plaintiff against Arthur A. Waterman and Edward L. Gibson, partners doing business as the A. A. Waterman Pen Company of New York and Boston. The defendant alleges that it has succeeded to A. A. Waterman's rights. The decision found in the strongest terms that the name was used with fraudulent intent and the decree in some detail enjoined the defendant from using that or any corporate name containing the word 'Waterman,' and from using in connection with the business of making or selling fountain pens the word Waterman alone or with others in such collocation with the word pen as to indicate that such pens were a variety of Waterman's fountain pens. This rather damaging decree is thought to give some help because of a following sentence to the effect that the defendants were not prohibited from indicating that their pens were made or sold for or by Arthur A. Waterman & Co. or A. A. Waterman & Co. But that sentence was subject to the previous prohibition and consistent with it. The present defendant still not only may indicate the source of its pens in undeceptive ways but may mark them Arthur A. Waterman & Co. if only it add words that prevent the fraud that it insists upon the right to effect. It is unnecessary to go into other considerations presented by the record to show that the defendant's appeal cannot be maintained.

The plaintiff's appeal is from the failure of the decree to prohibit the use of the name Arthur A. Waterman & Co. even with the suffix required by the court. The ground upon which it claims this broader relief is that the agreement with A. A. Waterman by which he purported to become a partner in the firm of A. A. Waterman & Co.

was a sham, that the firm does not make the pens sold by the defendant, and that all the arrangements between Waterman the firm and the defendant were merely colorable devices to enable the defendant to get the name upon its pens. If we were to adopt this view of the facts the nature of the parties' rights and powers perhaps might need a more careful discussion than, so far as we are aware, it has received as yet. Under the decree in its present form the plaintiff gets all the protection to which it is entitled as against another Waterman who has established himself in the business, even though one of his motives for going into it was the hope of some residual advantages from the use of his own name. If with the warning that the law decrees sufficient to prevent a fraud a second Waterman could go into the business and give it his name, the question occurs whether a man might not change his name to Waterman and do the same thing, and, if so, whether the nature of the defendant's title to the name is any concern of the plaintiffs—whether in short the protection now granted is limited by reason of a personal privilege or is the measure of the plaintiff's rights as against the world. We express no opinion upon the point beyond saying that it would have to be considered before the plaintiff could obtain a broader decree. For the purposes of decision we give the plaintiff the benefit of the doubt.

Whatever view may be taken of the agreements, there is no question that they were intended, with A. A. Waterman's assent, to authorize the use of his name in a business that he had pecuniary reasons for wishing to see succeed. He purported to transfer to the partnership the good will attaching to his name. While it very well may be true that the transfer of a name without a business is not enough to entitle the transferee to prevent others from using it, it still is a license that may be sufficient to put the licensee on the footing of the licensor as against the plaintiff. Moreover two courts have upheld the arrangements

as effective to give the defendant the protection of such rights as A. A. Waterman would have had in establishing a business after the plaintiff, and therefore we shall not go into any consideration of the facts.

It cannot be said the partnership agreement was ineffectual for the present purpose as matter of law. The object is pretty plain, but it is none the worse for that. The leading features are as follows: A partnership is formed under the name A. A. Waterman & Co. Contributions of capital are to be deemed loans and bear interest. The two partners other than Waterman have the management of the business and alone can sign negotiable paper and contracts. The business is to make, buy and sell fountain pens, and the defendant corporation is to be formed, (the parties to be interested in it) and is to be the sole selling agent of the firm. Waterman grants to the firm the exclusive use of his own and the firm names in connection with the business, and all the good will attaching to either. The Continent is divided into two defined districts, and Waterman has the exclusive right to do business under the name A. A. Waterman & Co. in the Western District, if he begins it before July 1, 1906, and the remaining members the exclusive right to the Eastern District. In any event Waterman leaves the present firm at that date. Each party has the free use of all patents, trade-marks and trade-names within their territories that either party has or may acquire. Eastern Territory goods are to be marked 'A. A. Waterman & Co., New York' and those made in the Western, 'A. A. Waterman & Co., (or some similar name) Chicago.' Waterman covenants not to compete for thirty-six years, or to use or allow the use of his name except as provided. Finally if Waterman does not go into independent business he is to have the exclusive agency for the Western Territory for the thirty-six years, and his commissions are fixed in detail and with care.

As we have said we do not reopen the matters of fact that must be taken to have been found by the two courts. So we assume that there was nothing to hinder Waterman from making this agreement and that the defendant was organized and acted under it. Whether he had more or less good will to convey perhaps is not very material. We are not prepared to say as matter of law that a man who for years has been trying to do business, may not join a partnership for a long time enough to start it with his name and whatever good will he has, and provide that thereafter he will divide territory as above stated or become a selling agent, at his choice. The obvious motive is met by the protection given in the decree, but does not deprive him of all rights in his name. A sufficient interest is disclosed to sustain the transfer as against the plaintiff and to free the defendant from a greater liability than would have fallen on A. A. Waterman had he gone on alone.

Decree affirmed.

MR. JUSTICE PITNEY:

In No. 72, the appeal of the Modern Pen Company, I concur in the result.

In No. 54, the appeal of the L. E. Waterman Company, I dissent from the conclusion reached by the court. It seems to me that the alleged partnership agreement of June 12, 1905, made between Arthur A. Waterman and others, pursuant to which the Modern Pen Company was organized and under which it claims the right to use the name of "A. A. Waterman" and "A. A. Waterman & Co.," appears upon its face to be a mere sham and a fraudulent device, and is demonstrated to be such by the other evidence. The case presents no question respecting the right of an individual to the *bona fide* use of his name, but rather the question whether a partnership or a corporation can,

by purchase or otherwise, obtain the right to use the name of a third party for the very purpose of employing it in unfair competition with the established business of still another party. The case in its circumstances closely resembles *International Silver Company* v. *Rogers Corporation*, 67 N. J. Eq. 646, and, for reasons sufficiently indicated by a reference to that case, I think the Modern Pen Company should be unqualifiedly enjoined from using the name "Waterman."

SAGE *v.* HAMPE.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 82. Argued November 12, 13, 1914.—Decided November 30, 1914.

Where plaintiff in error was defendant in the state court in a suit upon a contract to convey Indian allottee lands and relied as a defense upon an act of Congress making the conveyance invalid, he is entitled to come to this court. *Nutt* v. *Knut*, 200 U. S. 12.

While one may contract that a future event shall come to pass over which he has no, or only a limited, power, *Globe Refining Co.* v. *Landa Cotton Co.*, 190 U. S. 540, he is not liable for non-performance of, nor can he be compelled to perform, a contract that on its face requires an illegal act either of himself or of a third party.

A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55.

A contract tending to bring to bear improper influence upon an officer of the United States and to induce attempts to mislead him is contrary to public policy and non-enforceable.

The protection of the Indians in their title to allotments is the policy of the United States and one that the States cannot regard or disregard at will.

Where a contract affecting Indian lands might be held unenforceable as a matter of common law, but this court construes a Federal statute

broadly so as to include such a contract within its prohibitions, this court has jurisdiction to review under § 237, Judicial Code.

The United States can make its prohibitions on alienation of Indian allotments binding upon others than Indians to the extent necessary to carry out its policy of protecting the Indians in retaining title to the land allotted to them.

87 Kansas, 536, reversed.

THE facts, which involve the validity of a contract for sale of allotted Indian lands during the period of restriction on alienation, are stated in the opinion.

Mr. Lee Monroe, with whom *Mr. Edwin A. Austin*, *Mr. W. S. Roark* and *Mr. Carr W. Taylor* were on the brief, for plaintiff in error:

A losing party to a suit who insists that the judgment therein cannot be rendered against him consistently with a given statute of the United States should be held, within the meaning of § 237, Judicial Code, to claim such a right and immunity under such statute, as to confer jurisdiction upon this court to review an adverse final judgment of the highest state court in such suit. *Nutt* v. *Knut*, 200 U. S. 12, 19; *Ill. Central R. R. Co.* v. *McKendree*, 203 U. S. 514, 525; *Eau Claire Nat. Bank* v. *Jackman*, 204 U. S. 522, 532; *Straus* v. *Am. Publishers Assn.*, 231 U. S. 222, 233; *Anderson* v. *Carkins*, 135 U. S. 483; *Logan Bank* v. *Townsend*, 139 U. S. 67, 73; *McNulta* v. *Lockridge*, 141 U. S. 327, 331; *McCormick* v. *Market Bank*, 165 U. S. 538, 546; *Hammond* v. *Whittredge*, 204 U. S. 538, 547; *St. L. & Iron Mt. Ry. Co.* v. *Taylor*, 210 U. S. 281, 293; *Kansas City Ry.* v. *Albers Com'n Co.*, 223 U. S. 573, 591; *St. L. & Iron Mt. Ry. Co.* v. *McWhirter*, 229 U. S. 265; *Monson* v. *Simonson*, 231 U. S. 341, 345.

A contract to convey Indian lands prior to the removal of the statutory restrictions upon their alienation is void and no recovery can be had thereon by either party. *Hampe* v. *Sage*, 87 Kansas, 536, 546 (Dissenting Opinion);

Goat v. *United States*, 224 U. S. 458, 470, 23 Cyc. 341; *Lamb* v. *James*, 87 Texas, 485; *Franklin* v. *Lynch*, 233 U. S. 269, 273; *Starr* v. *Long Jim*, 227 U. S. 613, 625; *Bledsoe* v. *Wortman*, 35 Oklahoma, 261; *Bowling* v. *United States*, 233 U. S. 528; Clark on Contracts, 2d ed., p. 134; Bishop on Contracts, § 471; *Larson* v. *First Nat. Nank*, 62 Nebraska, 303; *Williams* v. *Steinmetz*, 16 Oklahoma, 104; *Kelly* v. *Harper*, 7 Ind. Ter. 541; *Sayer* v. *Brown*, 7 Ind. Ter. 675; *Dupas* v. *Wassell*, Fed. Cas. No. 4182; *Mayes* v. *Live Stock Assn.*, 58 Kansas, 712; *Light* v. *Conover*, 10 Oklahoma, 732; *Muskogee Land Co.* v. *Mullins*, 165 Fed. Rep. 179; *Beck* v. *Flournoy Co.*, 65 Fed. Rep. 30.

The restrictions upon the alienation of the Indian lands involved herein had not been removed at the date of the contract for the sale thereof. *Monson* v. *Simonson*, 231 U. S. 341, 346; *Trist* v. *Child*, 21 Wall. 448, 452; *Meguire* v. *Corwine*, 101 U. S. 108; *McNutten* v. *Hoffman*, 174 U. S. 639, 654.

The description of the lands in question contained in the contract sued on was insufficient to relieve it from the operation of the statute of frauds, and the reception of parol evidence to supply such description denied the effect of the Indian Allotment Act. *Williams* v. *Morris*, 95 U. S. 444; *Bayne* v. *Wiggins*, 139 U. S. 210; *Hampe* v. *Sage*, 82 Kansas, 728, 733; *Halsell* v. *Renfro*, 14 Oklahoma, 674; *Price* v. *Hays*, 144 Kentucky, 535; *Schreck* v. *Moyse*, 94 Mississippi, 259; Benjamin on Sales, 6th Am. ed., p. 209, note; 20 Cyc. 278; *Johnson* v. *Buck*, 35 N. J. L. 338; *Walker* v. *Fleming*, 37 Kansas, 171.

Mr. A. M. Harvey, with whom *Mr. J. B. Larimer*, *Mr. J. E. Addington* and *Mr. W. H. Thompson* were on the brief, for defendant in error:

This court is without jurisdiction to consider or determine the questions sought to be raised by him on such appeal, and no Federal question is presented by the tran-

script of the record for the consideration of this court. A decision as to the validity and application of the Federal statute sought to be invoked was not necessary to a determination of the cause. *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Schuyler Bank* v. *Bollong*, 150 U. S. 85; *Eustis* v. *Bolles*, 150 U. S. 361; *Gillis* v. *Stinchfield*, 159 U. S. 658; *Mo. Pac. Ry.* v. *Fitzgerald*, 160 U. S. 556; *Seneca Nations* v. *Christy*, 162 U. S. 283; *Dibble* v. *Bellingham Bay Co.*, 163 U. S. 63; *Harrison* v. *Morton*, 171 U. S. 38; *Pierce* v. *Somerset*, 171 U. S. 641; *McQuade* v. *Trenton*, 172 U. S. 636; *Seeberger* v. *McCormick*, 175 U. S. 274; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477.

The opinion of the Supreme Court of Kansas shows that the judgment appealed from was expressly rendered upon considerations other than of the Federal statutes sought to be invoked as the basis for this appeal. *Hampe* v. *Sage*, 87 Kansas, 536, 543; *Trust Co.* v. *McIntosh*, 68 Kansas, 452, 462; *Maddux* v. *Simonson*, 83 Kansas, 325, 327; *Krhut* v. *Phares*, 80 Kansas, 515; *Robertson* v. *Talley*, 84 Kansas, 817; 29 Am. & Eng. Encyc., 2d ed. 667.

The admission and declaration of plaintiff in error that this land had been sold prior to the expiration of 25 years from the date of the allotment, is conclusive that the restrictions had been removed, as provided by the acts of Congress. 28 Stat. 286, 295; 1 Kapp L. & T. 520; Indian Land Laws, § 184, p. 239; 31 Stat. 221, 248; 1 Kapp L. & T. 701; Bledsoe on Indian Laws, § 164, p. 240.

Under the issues raised by the answer of the defendant there was no allegation in the answer, nor any proof offered, that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later Acts of Congress, and such objection was not entertained by the Supreme Court of Kansas, and cannot now be entertained in this court. Gen. Stat., Kansas, 1909, par. 5724; 4 Wigmore, par. 2573; *Oliver* v. *State*,

4 L. R. A. 39; *State* v. *Herold*, 9 Kansas, 194, 201; 16 Cyc. 889.

The sufficiency of the terms of the contract as to the description of the lands therein referred to, presents a question of general commercial law which has been finally and conclusively determined by the judgment of the Supreme Court of Kansas in numerous decisions, and such question is not open for consideration by this court. *Bacon* v. *Leslie*, 50 Kansas, 494; *Cummins* v. *Riordon*, 84 Kansas, 791, 795.

This is the general rule. 20 Cyc. 271; 36 Cyc. 593; 29 Am. & Eng. Encyc. 866; *Hurley* v. *Brown*, 98 Massachusetts, 545; *Waring* v. *Ayres*, 40 N. Y. 357; *White* v. *Breen*, 106 Alabama, 159; *Howison* v. *Bartlett*, 147 Alabama, 408; *Bates* v. *Harris*, 144 Kentucky, 399; Wood on Statute of Frauds, § 353; *Mead* v. *Parker*, 115 Massachusetts, 413; *Hayden* v. *Perkins*, 119 Kentucky, 188; 83 S. W. Rep. 128; 26 Law Rep. 1099; *Eisleben* v. *Brooks*, 179 Fed. Rep. 86; *Gray* v. *Smith*, 76 Fed. Rep. 517, 533; *Towle* v. *Coal Co.*, 99 California, 397; *Wilcox* v. *Souka*, 119 S. W. Rep. 445; *Flegel* v. *Dowling* (Or., 1909), 102 Pac. Rep. 178.

It must be presumed that the contract was legal. *Craft* v. *Bent*, 8 Kansas, 328; *McBratney* v. *Chandler*, 22 Kansas, 692.

Plaintiff in error did not offer proof sufficient to establish a defence under the acts of Congress and plaintiff in error is not an Indian, and even if the lands in question were not subject to sale, which was not shown and is not a fact, he is liable to the defendant in error. 9 Cyc. 551, 554, 570; 16 Cyc. 889; 4 Wigmore on Evidence, par. 2573; *Oliver* v. *Alabama*, 4 L. R. A. 33n.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the defendant in error (Hampe) to recover damages for breach of a contract to

purchase certain land and to convey to the plaintiff certain other land of greater value. The answer alleges that the land to be conveyed by the defendant, (Sage) was Indian land not belonging to him but allotted and patented to members of the Pottawatomie Tribe, under the Act of Congress of February 8, 1887, c. 119. 24 Stat. 388. By § 5 of that act any conveyance or contract touching such land within twenty-five years from the date of the allotment and trust patent was made null and void, and it is alleged that the period had not expired and had not been abrogated at the date of the contract. Evidence was offered to prove the facts alleged but was excluded subject to exception. It is unnecessary to set forth the contract more particularly, because, whatever doubts might be felt whether it was or could be shown to be a contract for specific land, the case was tried on the footing that it was such a contract, and the breach and the damages, so far as we can judge, both depended on that view. The Supreme Court of Kansas was of the same opinion and held that notwithstanding the character of the land contracted for and the statute, the defendant, being a stranger to the allotment, was bound by his contract so far as to be liable in damages at law. 87 Kansas, 536.

The defendant relied upon the Act of Congress as a defence and is entitled to come to this court. *Nutt* v. *Knut*, 200 U. S. 12. With regard to that defence no doubt it is true that a man may contract that a future event shall come to pass over which he has no, or only a limited power. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, 545. And we assume in accordance with the decision of the Kansas courts that the principle applies to contracts for the conveyance of land that the contractor does not own. But that principle is not enough to dispose of the case, even if, subject to what we have to say hereafter, the universality of the invalidating language of the statute ('any contract') be confined to

contracts by the owners of the land. A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for non-performance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 63. And more broadly it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. *Providence Tool Co.* v. *Norris*, 2 Wall. 45; *Trist* v. *Child*, 21 Wall. 441; *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261; *Fuller* v. *Dame*, 18 Pick. 472. It appears to us that this is a contract of that class. It called for an act that could not be done at the time and it tended to lead the defendant to induce the Indian owner to attempt what the law for his own good forbade. Such contracts if upheld might be made by parties nearly connected with the Indian and strongly tend by indirection to induce him to deprive himself of rights that the law seeks to protect.

It is true that later statutes in force when the contract was made allowed a conveyance with the approval of the Secretary of the Interior. Act of August 15, 1894, c. 290; 28 Stat. 286, 295. Act of May 31, 1900, c. 598, § 7; 31 Stat. 221, 247. The Kansas court laid these statutes on one side, and in our view also they do not affect the case. The purpose of the law still is to protect the Indian interest and a contract that tends to bring to bear improper influence upon the Secretary of the Interior and to induce attempts to mislead him as to what the welfare of the Indian requires are as contrary to the policy of the law as others that have been condemned by the courts. *Kelly* v. *Harper*, 7 Ind. Terr. 541. See *Larson* v. *First National Bank*, 62 Nebraska, 303, 308.

The only doubt open in the present position of the case is whether the ground upon which we hold the contract unenforceable is not a matter of common law, which we may think that the Kansas courts ought to apply but which is not open to review here. The case at first sight seems like those in which a State decides to enforce or not to enforce a domestic contract notwithstanding or because of its tendency to cause a breach of the law of some other State. *Graves* v. *Johnson*, 179 Massachusetts, 53, 156 Massachusetts, 211. But the policy involved here is the policy of the United States. It is not a matter that the States can regard or disregard at their will. There can be no question that the United States can make its prohibitions binding upon others than Indians to the extent necessary effectively to carry its policy out, and therefore, as on the grounds that we have indicated the contract contravenes the policy of the law, there is no reason why the law should not be read, if necessary, as broad enough to embrace it in terms.

Judgment reversed.

MAGRUDER *v.* DRURY AND MADDOX, TRUSTEES.

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

No. 17. Argued October 27, 1914.—Decided November 30, 1914.

On appeals from the Court of Appeals of the District of Columbia taken under the statutes in force before the adoption of the Judicial Code, this court reviews only the decree of that court, and objections in the lower courts not brought forward in the Court of Appeals cannot be considered here.

On an appeal from the Court of Appeals of the District of Columbia

alleged errors not of a fundamental or jurisdictional character which were not presented to that court for consideration or which were waived expressly or by implication cannot be regarded as before this court.

An allowance of commissions to trustees of an estate in the District of Columbia made by the auditor and affirmed by both of the courts of the District will not be disturbed by this court. *Barney* v. *Saunders*, 16 How. 535.

The decree of the court which has acquired jurisdiction of an estate and settled an account cannot be collaterally attacked; and so *held* in a case where the will was probated in Massachusetts and the executors accounted but turned over the assets to trustees appointed in the District of Columbia after a finding that testator was not a resident of Massachusetts.

Where an account has been verified by oath and duly presented to, examined by, and passed on, by the court, the decree cannot be regarded as one based only on consent and attacked collaterally in the courts of another jurisdiction under the rule that a trustee's consent cannot work to the prejudice of the beneficiaries.

A trustee can make no profit out of his trust, and even though the estate is not a loser, and the commissions no more than the services are worth, a trustee may not participate in commissions of his own firm on transactions with the estate.

37 App. D. C. 519, affirmed in part and reversed in part.

THE facts, which involve the rights and duties of trustees of an estate, are stated in the opinion.

Mr. Nathaniel Wilson for appellants:

The trustees' failure to account fully in this cause, and the futility of their attempt to diminish their accountability by obtaining the Massachusetts probate decree of April 25, 1899, was not cured by acquiescence.

The trustees are accountable for diminishing the estate.

The allowance of the probate account concluded nothing except the executors' discharge in Massachusetts.

The failure to account is important; the transactions were numerous.

The trustees failed to account in this cause for the specific fund of $18,800, which they withdrew from the

trust funds, and then procured to be allowed to the executors by the Massachusetts probate decree of April 25, 1899.

The trustees are accountable for the profits realized by Mr. Drury from sales of notes to the trust estate.

The appellees seek to separate the profits from the dealings with the trust estate.

It is not clear that the trust estate lost nothing.

The performance of the trust imposed upon the trustees by the decree of their appointment is not completed, because the "Eliza C. Magruder trust" remains unexecuted, and the trust property remains in the possession of the trustees.

The allowance of compensation to the trustees was erroneous.

The services were not of a character to merit the amount allowed.

The proportion or percentage of compensation was arbitrary and not based upon any evidence.

The trustees are entitled to no compensation whatever because of the maladministration of the trust.

In support of these contentions, see *Barney* v. *Saunders*, 16 How. 535; *Bay State Gas Co.* v. *Rogers*, 147 Fed. Rep. 557; *Blake* v. *Pegram*, 109 Massachusetts, 541; *Findly* v. *Pertz*, 66 Fed. Rep. 427; *Dallinger* v. *Richardson*, 176 Massachusetts, 77; *Jackson* v. *Reynolds*, 39 N. J. Eq. 313; *Jarrett* v. *Johnson*, 216 Illinois, 212; *Mallory* v. *Clark*, 9 Abb. Pr. R. (N. Y.) 358; *Mallery* v. *Quinn*, 88 Maryland, 38; *Matthews* v. *Murchison*, 17 Fed. Rep. 760; *Michoud* v. *Girod*, 4 How. 503; *Miller* v. *Holcombe's Ex.*, 9 Grat. (Va.) 665; *Pence* v. *Langdon*, 99 U. S. 578; *Plumb* v. *Bateman*, 2 App. D. C. 156; *United States* v. *Carter*, 217 U. S. 286; *White* v. *Sherman*, 168 Illinois, 589.

Mr. J. J. Darlington for appellees:

The Massachusetts order, allowing executors' accounts and compensation, is not open to collateral attack.

The executors' compensation, as claimed and stated, was proper.

The Massachusetts decree was properly treated as conclusive here.

The auditor's refusal to reopen the executors' accounts in Massachusetts or former audits in the District of Columbia, was proper.

The allowance of five per cent on principal and ten per cent on increase was proper.

No question of alleged maladministration, as ground for denial of all compensation, is in the record or raised in the court below. The record shows that one of the trustees was more concerned for interests of a friend than for those of his *cestui que trust.* There was no combination by the trustees and the guardian to control and use the trust estate. There was no diminution of the estate by the trustees.

In support of these contentions, see *Abbott* v. *Bradstreet,* 85 Massachusetts (3 Allen), 587; *Barney* v. *Saunders,* 16 How. 535, 541, 542; *Boone* v. *Chiles,* 10 Pet. 171; *Carneal* v. *Banks,* 10 Wheat. 181; *Commonwealth* v. *Cain,* 80 Kentucky, 318; *Connor* v. *Ogle,* 4 Md. Ch. 425, 448, 449; *Courtney* v. *Pradt,* 135 Fed. Rep. 218; *S. C.,* 160 Fed. Rep. 561; *Dallinger* v. *Richardson,* 176 Massachusetts, 81; *Dexter* v. *Arnold,* 2 Sum. 108; *Dunn* v. *Railroad Co.,* 32 Fed. Rep. 185; *Foster* v. *Goddard,* 1 Black, 518; *Green* v. *Bishop,* 1 Cliff. 186, 191; *Goodrich* v. *Thompson,* 4 Day, 215; *Higgens* v. *Rider,* 77 Illinois, 363; *Iverson* v. *Loberg,* 26 Illinois, 180; *Jennison* v. *Hapgood,* 7 Pick. 1; *Jones* v. *Herbert,* 2 D. C. App. 485, 496; *Lewis* v. *Parrish,* 115 Fed. Rep. 285; *Magruder* v. *Drury,* 37 D. C. App. 519, 537; *Paine* v. *Stone,* 10 Pick. 75; *Reynolds* v. *Jackson,* 31 N. J. Eq. 515; *Richardson* v. *Van Auken,* 5 D. C. App. 209; *Railroad Co.* v. *Gordon,* 151 U. S. 285, 290; *State* v. *Cheston,* 51 Maryland, 377; *State* v. *Roland,* 23 Missouri, 95; *Seegar* v. *State,* 6 H. & J. 165, 166; *Story* v. *Livingston,* 13 Pet. 359,

366; *Thompson* v. *Maxwell*, 95 U. S. 391, 398; *U. S. Trust Co.* v. *National Savings Co.*, 37 App. D. C. 296, 299; *Vaughan* v. *Northup*, 15 Pet. 1; *Walsh* v. *Walsh*, 116 Massachusetts, 377; *Whitney* v. *Everard*, 42 N. J. Eq. 640; Abert's Compilation, p. 29, § 125.

Mr. Justice Day delivered the opinion of the court.

William A. Richardson, for some years before his death Chief Justice of the Court of Claims of the United States, died at Washington, D. C., October 19, 1896. By his last will and testament, dated August 9, 1895, he described himself as "Chief Justice of the Court of Claims at Washington, a citizen and inhabitant of Cambridge, in the County of Middlesex and Commonwealth of Massachusetts, and having property in said County." By his will he appointed his brother George F. Richardson, of Lowell, Massachusetts, and Samuel A. Drury, of Washington, D. C., as executors and trustees. The will was probated in the Probate Court of Middlesex County, Massachusetts, on October 28, 1896. It appears in the record that the deceased had a little real estate in Massachusetts, but the main portion of his estate was, and always had been, in the City of Washington. The probate of the will in Massachusetts seems to have been in deference to the expression in the will as to his place of residence. Subsequently, and upon certain proceedings being instituted to enforce taxation in Massachusetts of the estate in the hands of the executors, the Supreme Judicial Court of Massachusetts held that the actual residence of Mr. Richardson could be inquired into in that proceeding, and upon the facts shown it was in the District of Columbia. *Dallinger* v. *Richardson*, 176 Massachusetts, 77. That case grew out of the imposition of personal taxes amounting to seven thousand five hundred dollars annually on the assets of the estate. As this would have nearly exhausted the income of the

estate and cut off the support of the beneficiaries under the will, a bill for injunction was filed in this case in the Supreme Court of the District by the father in behalf of the present appellants, who were the beneficiaries under the will. An amended bill was subsequently filed, having for its object an injunction against the executors from paying out of the estate any taxes in the State of Massachusetts, it being stated that, notwithstanding the recitals of the will, William A. Richardson's place of residence and last domicile was in the District of Columbia, where the assets and personal securities of the estate were in the keeping of Samuel A. Drury, also a resident of the District of Columbia. In addition to the injunction, the bill prayed an account of the property of the estate which had come into the hands of the executors under the will, and that they might be required to file an account from time to time. Mr. George F. Richardson, one of the executors, being a resident of the State of Massachusetts, and declining to submit to the local jurisdiction, the amended bill was filed against Samuel A. Drury alone. The answer of Drury stated that he had the custody and control of the assets and personal securities, and expressed his willingness to account in the court or in any other jurisdiction in that behalf for the moneys received by him as executor and trustee. Such proceedings were had that, on April 1, 1899, a decree was made continuing the restraining order theretofore made in the case, and finding that the late William A. Richardson was last domiciled in the District of Columbia, where the beneficiaries lived, and it was ordered and decreed that Samuel A. Drury and Samuel Maddox, both of the District of Columbia, be appointed trustees to perform the trusts created in the will, and they were "authorized and empowered to receive from the executors named in said will all the property whereof the deceased died seized and possessed, provided, nevertheless, that the said Samuel A. Drury and Samuel Maddox shall first give

separate bonds in the penal sum of Twenty-five thousand dollars, each, with one or more securities to be approved by this Court, conditioned for the faithful discharge of their duties as such trustees." Some five reports were made by the auditor to whom the matter was referred to take accounts, and various proceedings were had, which are fully set out in the opinion of the Court of Appeals in this case (37 D. C. App. 519). It is enough for our purposes to state that the proceedings resulted in an order of reference to the auditor to state the account of the trustees. This order was made on January 17, 1909. The auditor named having died, a further order of reference was made to another auditor to "state the final account of the trustees and the distribution of the trust estate in their hands, and report such commission or compensation to the trustees as may be appropriate and proper." To this report certain exceptions were filed by the present appellants. Upon final hearing, a decree was entered by which these exceptions were overruled, and the Court of Appeals sustained this action of the Supreme Court (37 D. C. App. *supra*). Hence this appeal.

The argument has taken a wide range, and questions are discussed which are not embraced in the exceptions filed to the auditor's report which was the basis of action in the courts below, and in the Court of Appeals that court dealt with only three exceptions, stating that a number of exceptions were entered to the report, and that those relied upon in that court related to the allowance of a five per cent. commission on principal and ten per cent. on income; to the $18,800 item allowed by the Massachusetts court; and to alleged profits made by the trustees in the purchase of notes for reinvestment.

Under the statute in force at the time of this appeal, owing to the amount involved, the decision of the Court of Appeals might be brought by appeal in review before this court. This court therefore sits as an appellate court

for the purpose of reviewing the decree of the Court of Appeals, and that is the extent of the jurisdiction here. Original objections to the auditor's report and the decree of the Supreme Court, not brought forward in the Court of Appeals, cannot be made here. Alleged errors not of a fundamental or jurisdictional character, which were not presented to the appellate court for consideration, and which were waived, either expressly or by implication, will not be regarded as before this court. *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351; *Gila Valley Railway Co.* v. *Hall*, 232 U. S. 94, 98; *Grant Bros.* v. *United States*, 232 U. S. 647, 660. We shall then consider the assignments of error which were brought to the attention of the District Court of Appeals.

First, as to the allowance to the trustees of five per cent. commission on the principal, and ten per cent. on the income. As to this allowance, the auditor made a lengthy finding of fact, setting forth in detail the services rendered by the trustees over a period of ten years, finding, as to the character of the estate, that the great bulk thereof was second trust notes of small amounts, as to which the auditor says that the transactions were almost innumerable, the total number of notes approximating three thousand, and he sets forth in detail other services involving care of the real estate, looking after the repairs of the property, acquiring parcels of real estate, and the sale thereof, and saying in conclusion that he had no hesitancy in finding that the trustees were well entitled to the commissions allowed. This allowance met with the approval of both the District Supreme Court and the Court of Appeals, and seems to have the sanction of an earlier decision of this court, where it was said that such allowances were customary in Maryland and the District of Columbia. *Barney* v. *Saunders*, 16 How. 535, 542. We are not therefore prepared to disturb the decree of the courts below in this respect.

The next exception involves the allowance of the item of $18,800.00 in the Probate Court of Massachusetts, and charging the trustees with the balance of the estate after that allowance had been made. It appears that the executors Richardson and Drury appeared on April 4, 1899, in the Massachusetts Probate Court and by petition set forth that they had been appointed and had given bond and due notice of their appointment as executors of the will of William A. Richardson; that there was not at the time of the grants of the letters testamentary, and had not been since, property belonging to the testator in the Commonwealth of Massachusetts; that since the granting of letters testamentary Isabel Magruder, the only surviving child and heir at law of the said testator had deceased, and that under and by the terms and provisions of said will it was provided that upon her decease the property of the testator should be held by the executors of said will for the benefit of the two minor children surviving the said daughter, namely, Alexander Richardson Magruder, of the age of sixteen years, and Isabel Richardson Magruder, of the age of about thirteen years; that these children who were interested as beneficiaries in the trusts created by the will, at the time of the probate thereof and ever since had resided at Washington, in the District of Columbia; that Samuel Maddox and Samuel A. Drury had been appointed by the Supreme Court of the District of Columbia trustees for said minors, to carry out the provisions of said will in behalf of the said minors, and that Alexander F. Magruder had been appointed guardian of said minors; and they further represented to the court that William A. Richardson was not at the time of his decease a resident of Massachusetts, but of the District of Columbia, and that all the parties in interest under the will, at the time of the probate thereof, lived in Washington, as they had since and did then. They represented that the will should have been probated

at Washington, in the District of Columbia, but either by accident or mistake, probate in the Probate Court of Middlesex County, Massachusetts, was had, and they asked an order that they be authorized to pay over the trust funds to the trustees appointed by the Supreme Court of the District of Columbia, and that upon the payment of such funds to such trustees they be discharged from further liability.

A decree was entered in the Probate Court of Massachusetts on April 11, 1899, wherein it was found that by the decree of the Supreme Court of the District of Columbia, dated April 1, 1899, Samuel Maddox and Samuel A. Drury had been duly appointed trustees to perform the trusts of the will, and that the beneficiaries were residents of Washington, and that the guardian of the minors had signified his consent to the granting of the petition, and that the laws of the District of Columbia secured the performance of the trusts, and Richardson and Drury as executors, were authorized to pay over the trust funds to Maddox and Drury, as trustees. On April 25, 1899, in the same Probate Court, Richardson and Drury, as executors, filed their first and final account, in which they charged themselves with property in the aggregate of $415,458.37, and asked to be allowed sundry payments and charges. This account was endorsed with a request for its allowance, signed by Alexander R. Magruder and Isabel R. Magruder, by their guardian, Alexander F. Magruder, and by Maddox and Drury, as trustees. On April 25, the Probate Court made the following order: "The foregoing account having been presented for allowance, and verified by the oath of the accountant, and all persons interested having consented thereto in writing, and no objection being made thereto, and the same having been examined and considered by the court: it is decreed that said account be allowed." The schedules attached show the property and the payments, charges, losses and

distributions, among others the item of $18,800.00, to which exception is made. This item states: "Expense of administration, including care of property, the payment of debts, the making of final account, the collection of notes amounting to $226,607.54, the investment in trust notes of $166,958.21, the collection from interest and other sources of $58,168.94, the payment of about $50,000 for repairs on real estate, the taking up of prior mortgages, taxes, etc., including also the payment of moneys to Isabel Magruder and to Alexander F. Magruder, the guardian of their minor children, counsel fees incurred in the defense of suits for taxes in Massachusetts and for counsel fees in Washington, etc., . . . $18,800.00."

The auditor held that he had no authority to disregard or change this item of credit; that the same had been included in the reports of his predecessors and confirmed by the court; and that the allowance, having been made in the Probate Court of Massachusetts, was not open to review.

The Court of Appeals of the District of Columbia, in the course of its opinion in this case, states that the appellants contended that there was no jurisdiction in the Probate Court of Massachusetts to probate the will, a position which counsel for the appellant in this case disclaims in his brief filed herein, and says that the contention is that the order and decree in Massachusetts was not intended to be operative to diminish the accountability of the executors and trustees to the District of Columbia court. But we do not so interpret the proceedings. The account was filed in the Massachusetts court; and, the record recites, was examined and considered by the court and duly allowed. This order, read in connection with the rules of the Massachusetts court set out at the head of the account, stating the authority of the court to allow reasonable expenses and compensation, shows that it was the intention of the Probate Court to make an

allowance including such expenses and compensation. Apart from the concession of the jurisdiction here made, we have no doubt that the Massachusetts court, on the presentation of the will, had the right to determine its jurisdiction to receive and probate the same, and upon ordering the property turned over to the trustees appointed in the District of Columbia, to settle the account and fix the compensation of the executors and order the balance turned over to the trustees. True, the Massachusetts court held, in the case of *Dallinger* v. *Richardson*, 176 Massachusetts, 77, *supra*, that Richardson was not a resident of Massachusetts. In the course of the opinion in that case, the court points out that, for the purpose of the tax question, the matter of residence was not foreclosed by the adjudication of the Probate Court, whether in accordance with the truth or not.

It is well settled that the decree of the court which has acquired jurisdiction of an estate and settled an account cannot be collaterally attacked, *Jenison* v. *Hapgood*, 7 Pickering 1, 7. In that case it was held that what assets came into the executor's hands, what debts he had paid, and so of every matter properly done or cognizable in the Probate Court, the judgment of that court is conclusive. See also *Abbott* v. *Bradstreet*, 3 Allen, 587. There was no attempt to probate the will in the District of Columbia, in which event the finding of the fact of domicile in the proceedings in Massachusetts would not have been conclusive here. *Overby* v. *Gordon*, 177 U. S. 214. The trustees were authorized to receive the assets from the executors. The Probate Court in Massachusetts, and no other court, had authority to settle the executors' accounts and determine their compensation. *Vaughan* v. *Northup*, 15 Pet. 1. We cannot agree with counsel for the appellant that the order of the Probate Court was based upon consent only, and that this is a case for the application of the rule that the trustees' consent to such a decree

cannot work to the prejudice of the beneficiaries of the trust. Whether the guardian might give such consent, we do not find it necessary to decide, for the decree shows that the account was presented, verified by the oath of the accountants, and that it was examined and considered by the court.

The next exception involves the allowance of commissions on the notes purchased from Mr. Drury's firm. The contention before the auditor was that one trustee had received compensation in connection with the handling of these investments, and that that should be taken into account. As to this exception, the auditor finds that "the fact clearly appears from the testimony that Arms & Drury as real estate brokers, made loans on trust notes, upon which loans they were paid by the borrowers a commission ranging from one to two per cent., according to the circumstances of the case, many being building loans; that subsequently as notes of the trust estate were paid off Mr. Drury would reinvest the monies of the estate in trust notes held by Arms & Drury, paying the face value and accrued interest on the notes so purchased." As a matter of law, the auditor concluded: "No profit was made by the firm of Arms & Drury on the sales of the notes to the trustees. . . . The transactions of Arms & Drury with the trustees were in the regular course of their business, in which they had their own monies invested. They cost the estate not a penny more than if the transactions had been with some other firm or individual. If the firm of Arms & Drury, out of their own monies, made loans on promissory notes, upon which loans were paid by the borrower the customary brokerages, those were profits on their own funds, in which this estate could have no interest, and in which it could acquire no interest by reason of the subsequent purchase of those notes by the trustees for their real value, any more than could any of the purchasers of such notes from Arms & Drury claim such an

interest. No charge of malfeasance or misfeasance is made against the trustees or that by reason of these transactions the trustees benefited in any manner out of the money of this estate. On the contrary, the relation of the firm of Arms & Drury to Drury and Maddox, trustees, benefited the estate, by enabling the trustees at all times to make immediate re-investment of its funds, without loss of income, and by enabling the trustees to at all times readily procure re-investments without payment of brokerage, a brokerage not uncommonly charged the lender for placing his money, as well as the borrower for procuring his loan in times of stringency. The application of the well known rule in equity should rather, therefore, be in favor of the trustees than against them with respect to these transactions. The objection narrows itself to a claim that Drury by reason of his position as trustee, should in addition to the benefit of his valuable services, commercial knowledge, and business acumen, make the estate a gift of profits on his individual monies, to which the estate is in no wise entitled, and to which it could not make a semblance of reasonable claim, had the trustees been other than Drury or the agents of the estate been other than Arms and Drury." This view seems to have met with the approval of the Supreme Court, and a like view was taken by the Court of Appeals of the District of Columbia, (37 D. C. App. 519, *supra*).

It is a well settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity. "It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another,

and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells." *Michoud* v. *Girod*, 4 How. 503, 555.

It makes no difference that the estate was not a loser in the transaction or that the commission was no more than the services were reasonably worth. It is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself. The findings show that the firm of which Mr. Drury was a member, in making the loans evidenced by these notes, was allowed a commission of one to two per cent. This profit was in fact realized when the notes were turned over to the estate at face value and accrued interest. The value of the notes when they were turned over depended on the responsibility and security back of them. When the notes were sold to the estate it took the risk of payment without loss. While no wrong was intended, and none was in fact done to the estate, we think nevertheless that upon the principles governing the duty of a trustee, the contention that this profit could not be taken by Mr. Drury owing to his relation to the estate, should have been sustained.

We find no other error in the proceedings of the Court of Appeals, but for the reason last stated, its decision must be reversed, and the cause remanded to that court with directions to remand the cause to the Supreme Court of the District of Columbia for further proceedings in accordance with this opinion.

Reversed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* CITY OF OMAHA.

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

No. 47. Argued November 4, 1914.—Decided November 30, 1914.

A railway company may be required by the State, or by a municipality acting under the authority of the State, to construct overhead crossings or viaducts over its tracks at its own expense; the consequent expense is *damnum absque injuria* or compensated by the public benefit in which the company shares and is not a taking of property without due process of law.

In the exercising of the police power, the means to be employed to promote the public safety are primarily in the judgment of the legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished and does not arbitrarily interfere with private rights.

If the state court has held that a municipality has power to pass ordinances requiring railway companies to build viaducts, this court can only declare such an ordinance unconstitutional under the Fourteenth Amendment as an arbitrary abuse of power in a clear and unmistakable case.

A municipal ordinance requiring a railroad company to construct a viaduct over crowded streets and which is otherwise valid is not unconstitutional as depriving the company of its property without due process of law because it requires the company to construct the work at its own expense, or because it requires the viaduct to be erected in a manner involving greater expense than though erected in a different and possibly adequate manner, or because the viaduct is only to carry a part of the traffic of the street.

In determining whether a municipal ordinance is or is not an unconstitutional abuse of power, this court will not disturb the conclusions of two courts upon the facts regarding the object and necessity for the work and the sufficiency of the plans and specifications.

Where an ordinance requiring work to be done is otherwise valid, this court will not, at the instance of a party affected thereby and in advance of compliance therewith, declare it unconstitutional as depriving that party of its property without due process of law because

sufficient time is not allowed to commence work. A court of equity has power to relieve a party from the infliction of unwarranted penalties for non-compliance with such an ordinance if compliance within the period fixed is physically impossible.

The ordinance of Omaha, Nebraska, of March, 1910, requiring the Missouri Pacific Railway Company to construct a viaduct over its railway at Dodge Street is not unconstitutional as an arbitrary exercise of power and deprivation of property of the railway company without due process of law.

197 Fed. Rep. 516, affirmed.

THE facts, which involve the constitutionality under the due process provision of the Fourteenth Amendment of an ordinance of the City of Omaha requiring the construction of a viaduct by a railroad company, are stated in the opinion.

Mr. J. A. C. Kennedy, with whom *Mr. B. P. Waggener*, *Mr. T. L. Philips* and *Mr. Martin L. Clardy* were on the brief, for appellant:

The city had no power to compel the construction of the viaduct for the benefit of the street railway company.

The city had no power to require the building of the viaduct across the proposed boulevard.

The city had no power to compel the building of the viaduct without closing the grade crossing.

The ordinance was void for uncertainty and for impossibility of compliance with its requirements.

It was error to dismiss the bill in full for alleged want of equity.

In support of these contentions see *In re Anderson*, 69 Nebraska, 686, 689; *Bonnett* v. *Vallier*, 136 Wisconsin, 193; *Briden* v. *N. Y., N. H. & H. R. Co.*, 27 R. I. 569, 65 Atl. Rep. 315; *Chicago, B. & Q. R. Co.* v. *Nebraska*, 47 Nebraska, 549; *S. C.*, 170 U. S. 57; *Chicago* v. *Rogers Park Water Co.*, 214 Illinois, 212; *Carolina Cent. R. R. Co.* v. *Wilmington Ry. Co.*, 120 Nor. Car. 520; *Conshohocken R. R. Co.* v. *Pa. R. Co.*, 15 Pa. Co. Ct. 445; *Calder* v. *Bull*, 3

Dall. 386; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Belleville* v. *St. Clair Co.*, 234 Illinois, 428; *Curran Bill Posting Co.* v. *Denver*, 47 Colorado, 221; *Chicago* v. *Gunning System*, 214 Illinois, 628; *Champer* v. *Greencastle*, 138 Indiana, 339; *Cotting* v. *Kansas City R. R. Co.*, 183 U. S. 79; *Detroit R. R. Co.* v. *Osborn*, 189 U. S. 383; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Ford* v. *Standard Oil Co.*, 32 N. Y. App. 596; *Halter* v. *State*, 75 Nebraska, 757; *Hawes* v. *Chicago*, 158 Illinois, 653; *Iler* v. *Ross*, 64 Nebraska, 710; *Lincoln St. Ry. Co.* v. *Lincoln*, 61 Nebraska, 109; *Landberg* v. *Chicago*, 237 Illinois, 112; *Le Feber* v. *N. W. Light Co.*, 119 Wisconsin, 608; *Mo. Pac. R. R. Co.* v. *Nebraska*, 164 U. S. 403; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556; *Newark & H. R. Co.* v. *N. J. Traction Co.*, 33 Atl. Rep. 475; *Passaic* v. *Bill Posting Co.*, 72 N. J. Law, 285; *People* v. *Adams*, 88 Hun, 122, aff'd. 147 N. Y. 722; *Penna. R. R. Co.* v. *Greensburg Co.*, 176 Pa. St. 559; *Peterson* v. *State*, 79 Nebraska, 132; *Railway Co.* v. *Crown Point*, 146 Indiana, 421; *Railway Co.* v. *Connersville*, 147 Indiana, 277; *Water Co.* v. *Fergus*, 178 Illinois, 571; *S. C.*, 180 U. S. 624; *Saginaw* v. *Electric Co.*, 113 Michigan, 660; *Schnaier* v. *Hotel Co.*, 182 N. Y. 83; *State* v. *Frost*, 78 Nebraska, 325; *State* v. *Walker*, 48 Washington, 8; *Smiley* v. *McDonald*, 42 Nebraska, 5; *State* v. *Un. Pac. R. Co.*, 143 N. W. Rep. 918; *State* v. *Jersey City*, 47 N. J. L. 286; *Shelbyville* v. *R. R. Co.*, 146 Indiana, 66; *St. Louis* v. *Weber*, 44 Missouri, 547; *Toledo R. R. Co.* v. *Jacksonville*, 67 Illinois, 37; *Un. Pac. R. R. Co.* v. *State*, 88 Nebraska, 247; *West Jersey R. R. Co.* v. *Atlantic City R. R. Co.*, 65 N. J. Eq. 613; *Wenham* v. *State*, 65 Nebraska, 394; *Wice* v. *Railroad Co.*, 193 Illinois, 351; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Ex parte Young*, 208 U. S. 123.

Mr. John A. Rine and *Mr. William C. Lambert*, with whom *Mr. B. S. Baker* and *Mr. L. J. Te Poel* were on the brief, for appellee:

The legislature of Nebraska possesses ample and plenary power to require railroad companies in this State, intersecting public streets and highways with their roads, and at the cost of such companies or any one of them, to bridge or viaduct or otherwise render and keep safe, that part of the public street or road intersected and made dangerous by their roads, as to all ordinary travel on and over such public streets, including that of ordinary travel on street railways rightfully thereon. *Chi., B. & Q. Ry. Co.* v. *State of Illinois*, 200 U. S. 561; *Health Department* v. *Trinity Church*, 145 N. Y. 32; *C., B. & Q. Ry. Co.* v. *Nebraska*, 47 Nebraska, 549; *S. C.*, 170 U. S. 57; *Minneapolis* v. *St. Paul, M. & M. Ry. Co.*, 98 Minnesota, 380; aff'd 214 U. S. 498; *C., B. & Q. Ry. Co.* v. *City of Chicago*, 166 U. S. 226; *N. P. Ry. Co.* v. *Duluth*, 208 U. S. 583; *Cincinnati Ry. Co.* v. *Connersville*, 218 U. S. 336; *Phœnix Life Ins. Co.* v. *Lincoln*, 91 Nebraska, 150; *Omaha* v. *U. P. R. R. Co.*, 143 N. W. Rep. 918; *C., B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226; *C., B. & Q. Ry. Co.* v. *Steele, Receiver*, 47 Nebraska, 741; *N. Y., N. H. & H. R. Co.* v. *Bridgeport Traction Co.*, 32 Atl. Rep. 953; *Chicago &c. R. R. Co.* v. *Whiting R. R. Co.*, 139 Indiana, 297; *Du Bois R. R. Co.* v. *Buffalo R. R. Co.*, 149 Pa. St. 1; *C., B. & Q. Ry. Co.* v. *West Chicago R. R. Co.*, 156 Illinois, 255; *Atchison, T. & S. F. Ry. Co.* v. *General Electric R. Co.*, 112 Fed. Rep. 689; *Southern Ry. Co.* v. *Atlanta Transit Co.*, 111 Georgia, 679; *General Elec. Co.* v. *Chicago Ry. Co.*, 98 Fed. Rep. 907; *S. C.*, 107 Fed. Rep. 771; *Elizabethtown R. R. Co.* v. *Ashland Ry. Co.*, 96 Kentucky, 347; *Tex. & Pac. Ry. Co.* v. *Rosedale St. Ry. Co.*, 64 Texas, 80; *Mo. Pac. Ry. Co.* v. *Omaha*, 197 Fed. Rep. 516; *Southeast & St. L. R. R. Co.* v. *Evansville R. R. Co.*, 169 Indiana, 339.

The Nebraska legislature had delegated to the governing authorities of the City of Omaha ample power and authority to require appellant to construct at its own cost the viaduct in question, of sufficient strength, width, capacity

and grades to carry and safeguard all travel and traffic on Dodge Street at the intersecting point, including that carried by The Omaha & Council Bluffs Street Railway Company. *State* v. *Redmon*, 134 Wisconsin, 89; *Detroit &c. Ry. Co.* v. *Osborn*, 189 U. S. 383; *C., B. & Q. Ry. Co.* v. *Nebraska*, 170 U. S. 57; *Chicago* v. *Chicago Elev. Ry. Co.*, 95 N. E. Rep. 456; *Louis. & Nash. R. R. Co.* v. *Hopkins County*, 156 S. W. Rep. 379; *Omaha* v. *Un. Pac. R. R. Co.*, 143 N. W. Rep. 918; *Water Co.* v. *Fergus*, 178 Illinois, 751; *S. C.*, 180 U. S. 624; *Chicago* v. *Rogers Park Water Co.*, 214 Illinois, 212; *Mo. Pac. Ry. Co.* v. *Omaha*, 179 Fed. Rep. 516; *C., B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561; *Phœnix Life Ins. Co.* v. *Lincoln*, 91 Nebraska, 150; *Olney* v. *Omaha &c. Railway Co.*, 78 Nebraska, 767; *Briden* v. *Railway Co.*, 27 R. I. 569; *People* v. *Adams*, 88 Hun, 122; *Carolina Central R. R. Co.* v. *Wilmington St. Ry. Co.*, 120 Nor. Car. 520.

The circumstances and situations surrounding and attending the construction of a viaduct at the point mentioned were and are such as to require such length of viaduct as was ordered by the alternate plans.

Even if the requirements of the city as to the added length to the end of said viaduct were to protect a proposed boulevard, constructed sewer lines and sewer pipes crossing Dodge Street under such boulevard or its abutments, we think the city had the authority rightfully to require it. *C., B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561; *New Orleans Gas Co.* v. *Drainage Commissioners*, 197 U. S. 453; *Phœnix Life Ins. Co.* v. *Lincoln*, 91 Nebraska, 150; *Burritt* v. *New Haven*, 42 Connecticut, 174; *Omaha* v. *Un. Pac. R. R. Co.*, 143 N. W. Rep. 918; *Krittenbrink* v. *Withnell*, 91 Nebraska, 101; *State* v. *Redmon*, 134 Wisconsin, 89; *Chi., M. & St. P. Ry. Co.* v. *Minneapolis*, 115 Minnesota, 460; *C. I. & W. Ry. Co.* v. *Connersville*, 218 U. S. 336; *Twin City Separator Co.* v. *Chicago, M. & St. P. Ry. Co.*, 118 Minnesota, 491; *State* v. *United States Express Co.*, 145 N. W. Rep. 451.

The city is not required to close a street to public travel over which a viaduct is ordered to be built by the railroad. *Omaha* v. *Un. Pac. R. R. Co.*, 143 N. W. Rep. 918; *People* v. *Un. Pac. Ry. Co.*, 20 Colorado, 186.

The ordinance, the proceedings of the city council and the plans and specifications were sufficiently definite and certain as to enable easy compliance therewith. The requirements of the statute in these respects were substantially complied with.

Mr. Justice Day delivered the opinion of the court.

This suit was originally instituted in the Circuit Court of the United States for the District of Nebraska. Its object was to enjoin the City of Omaha from requiring the Missouri Pacific Railway Company, by virtue of a certain ordinance of the City, to construct a viaduct over and across its line of railway and along Dodge Street, in said City. The Circuit Court dismissed the bill and the decree was affirmed in the Circuit Court of Appeals, 197 Fed. Rep. 516. The ordinance, passed March 29, 1910, ordered the appellant to erect, construct and complete the viaduct and approaches on Dodge Street, of the width, height, strength, and of the material and manner of construction required by the City Engineer of the City of Omaha, and according to the plans and specifications prepared by him. The ordinance required that the company commence the erection and construction of the viaduct by May 1, 1910, and complete the same on or before January 1, 1911.

Dodge Street is a well-known thoroughfare of the city for the passage of foot passengers and vehicles of all sorts, and it is also used by the tracks of a street railway company. There is testimony in the record tending to show that the viaduct as ordered to be constructed, is of a width and strength sufficient to sustain the street railway system theretofore laid upon Dodge Street, and crossing thereon the tracks of the railway company. It is con-

tended, and there is testimony tending to show that a viaduct sufficient to carry the ordinary traffic of the street, other than that of the street railroad, could be constructed at a cost of about $30,000, whereas the viaduct ordered to be built would cost approximately $80,000, the increase being largely due to the requirements of the street railway traffic. This requirement on the part of the City is alleged to be a confiscation of the property of the railway company to the extent of this increased cost, and a taking of its property without compensation for the benefit of another, and therefore without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

That a railway company may be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. *Chicago &c. Railroad* v. *Nebraska*, 170 U. S. 57; *Chicago &c. Railway* v. *Drainage Commissioners*, 200 U. S. 561; *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583; *Cincinnati, Indianapolis & Western Railway* v. *Connersville*, 218 U. S. 336; *Chicago, Mil. & St. Paul Railway* v. *Minneapolis*, 232 U. S. 430, 438.

This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. *Chicago, Burlington & Quincy Railway*

v. *Drainage Commissioners, supra; McLean* v. *Arkansas*, 211 U. S. 539; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548. That the City of Omaha had power to pass an ordinance of this character in execution of the authority conferred upon it by the legislature of the State, has been determined by the highest court of the State of Nebraska, considering Chapter 12-a, § 128, Compiled Statutes of Nebraska, 1911.[1] *State* v. *Union Pacific Railroad Company*, 143 N. W. Rep. 918. In that case the state Supreme Court declares (p. 919) the "power to require railway companies to construct above their tracks at street cross-

[1] To require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches of such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. . . . The width, height and strength of any such viaducts and approaches thereto, the material therefor, and the manner of construction thereof, shall be as required by the city engineer, and approved by the mayor and council. When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction of any such company or companies shall be fined one hundred dollars, and each day such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, reconstruct or repair any viaduct as may be required by ordinance as herein provided.

ings such viaducts 'as may be deemed and declared by the mayor and council necessary for the safety and protection of the public' is in direct terms conferred by the legislature upon the City of Omaha." As this is a question of state law (*Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548), we need not dwell upon it further. Indeed, such authority seems to be admitted in the brief of appellant, and the argument is addressed to an alleged abuse of the power conferred. To maintain this position, it is first insisted that the construction of the viaduct in such manner as to carry the tracks of the street railway company will entail additional expense of about $50,000, over the cost of a viaduct providing only for the transportation of other kinds of traffic. It may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have made such division of expenses. *Detroit &c. Railway* v. *Osborn*, 189 U. S. 383, 389. But there is nothing in the statute requiring the municipality to divide the expense of such improvement among those responsible for the dangerous condition of the street crossing. Where a number of railroads have contributed to the condition which necessitates such improvement in the interest of public safety, it is not an unconstitutional exercise of authority, as this court has held, to require one of the companies interested to perform such work at its own expense. *Chicago &c. Railroad Company* v. *Nebraska*, 170 U. S. 57, 76. The broad authority to require any railroad company to make such improvement, in the interest of public safety, is conferred by the legislature upon the city. The safety of the travelling public is the primary consideration, and this is accomplished by the construction of the viaduct which is used by many people who travel across the viaduct every day. The public when being

transported by the street railway company was exposed to the dangers of a grade crossing, which it was within the authority of the State to authorize the municipality to discontinue. Under competent legislation the city has undertaken to do this. In placing the expense entirely upon the railroad company, whose locomotives and trains are principally responsible for the resulting danger to the public, we do not find such abuse of the recognized authority of the State as has justified the courts in some cases in enjoining the enforcement of state and municipal legislation. Examples of such arbitrary and oppressive action with which the courts may interfere are found in such cases as *Yick Wo* v. *Hopkins*, 118 U. S. 356, and *Dobbins* v. *Los Angeles*, 195 U. S. 223.

The Constitution of the United States requiring that no State shall deprive any person of life, liberty or property without due process of law, has not undertaken to equalize all the inequalities which may result from the exercise of recognized state authority. In the exercise of the police power, it may happen, as it often does, that inequality results which the law is powerless to redress. It is only in those clear and unmistakable cases of abuse of legislative authority that the court is authorized, under sanction of the Federal Constitution, to enjoin the exercise of legislative power. As we have said, we do not think this case presents that character of abuse because the street railway company is not required to share in the expense of the erection of this viaduct.

It is next urged that there is an abuse of authority shown which should justify an injunction against the enforcement of this ordinance, because a viaduct about 600 feet long would be sufficient to carry the traffic of Dodge Street over the railroad crossing, including the traffic of the street railway company, yet by this ordinance it is sought to compel the railroad company to construct a viaduct 810 feet long, the extension being made neces-

sary it is said for the purpose of carrying the Dodge Street traffic, including that of the street railway company, over a proposed boulevard, which the city might thereafter decide to lay out and establish across Dodge Street, which boulevard is alleged to be about 350 feet east of, and parallel to the line of the railroad. But there is testimony in the record tending to show that this extension of the original plan of the viaduct was for the purpose of making better grades in crossing thereon, and both courts below have rejected the contention of the railroad company that it was intended thereby to make a crossing for a proposed boulevard thereafter to be laid out. We are not prepared to disturb this conclusion of two courts upon the facts.

It is next insisted that the ordinance in question is unconstitutional and void, because the railroad company is required to construct a viaduct along the south side of Dodge Street only, leaving some portion of the street,—that upon the north side,—still open to public traffic; in other words, the argument is that the viaduct would be made to carry a part of the traffic, still leaving some portion of the street open. We are unable to find force in this contention. The necessity of the viaduct, and the manner of its construction, were primarily vested in the discretion of the city authorities, and that they have found cause to leave some part of the street still open to traffic does not afford any reason why the principal part of the traffic, including that of the street railway company, might not in the interest of the public safety be required to be carried by the overhead structure. The local authorities are presumed to have knowledge of local conditions, and to have been induced by competent reasons to take the action which they did. That the City had authority to require a viaduct to be constructed over tracks without entirely closing the street was held by the Supreme Court of Nebraska. *State* v. *Union Pacific Railroad Company*, 143 N. W. Rep. *supra*.

It is further contended that the ordinance is void for uncertainty, and that the plans are confused and uncertain, and not sufficient to indicate the width, height, and manner of construction of the proposed viaduct, and that the plans and specifications existing are not capable of being followed in such manner as to comply with the ordinance. This contention was also rejected by the courts below upon the facts shown, and we are not prepared to disturb the conclusion that the plans and specifications were sufficient to enable the railroad company to know what it had to do, and to make the structure required of it.

The last objection is that the railroad company was required to begin construction within twenty-six days after the passing of the ordinance, a time so short as to render it physically impossible to comply with the ordinance, and that upon lack of such compliance, the ordinance imposes penalties upon the railroad company, the collection of which penalties it is also sought to enjoin. It is to be noted that the enforcement of this ordinance has been entirely prevented by the injunction issued in this case, and kept in force since, and we have no doubt that should an attempt be made hereafter to require compliance with the terms of the ordinance as to the beginning of construction, they would be given a reasonable interpretation so as to permit of preparation before the beginning of the work, and if any oppression should result in this respect, there is no doubt as to the power of a court of equity to relieve the railroad company from the infliction of unwarranted penalties if it should turn out to be physically impossible, as the company insists, to comply with the ordinance in this respect.

We find no error in the decree of the Circuit Court of Appeals affirming the decree of the Circuit Court, and it is accordingly

Affirmed.

UNITED STATES *v.* REYNOLDS.

UNITED STATES *v.* BROUGHTON.

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

Nos. 478, 479. Argued October 23, 1914.—Decided November 30, 1914.

Congress passed §§ 1990 and 5526, Rev. Stat., and § 269, Criminal Code, abolishing and prohibiting peonage under the authority conferred by § 2 of the Thirteenth Amendment to enforce § 1 of that amendment, thereby undertaking to strike down all laws, regulations and usages in the States and Territories which attempted to maintain and enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons in the liquidation of any debt or obligation.

Peonage is a condition of compulsory service based upon the indebtedness of the peon to the master. The basal fact is indebtedness. *Clyatt* v. *United States*, 197 U. S. 207.

Where a person charged with crime has, after confession, been sentenced to pay a fine and costs and then been released on the payment of a fine by a surety with whom he has made an agreement to work continuously for a specified period for the specified amount so paid for the fine and costs, as provided by the laws of Alabama, and he is liable to separate punishment if he fails to carry out the contract, the relation established between that person and the surety is that of peonage and falls within the prohibition of the Thirteenth Amendment and the laws enacted to enforce it.

Constant fear of punishment under the criminal law renders work compulsory. *Bailey* v. *Alabama*, 219 U. S. 219.

While this court follows the decisions of the state court in determining the constitutionality of state statutes under the state constitution, and ordinarily follows the construction given to such statutes by the state court, where such a decision really determines the legal effect of a state statute in a case involving the Constitution and laws of the United States, this court determines for itself whether that statute does or does not violate the Constitution of the United States and the laws passed in pursuance thereof.

The validity of a system of state law will be adjudged by its operation and effect upon rights secured by the Federal Constitution and offenses punished by Federal statutes.
213 Fed. Rep. 345, 352, reversed.

THE facts, which involve the construction of certain penal statutes of Alabama and their constitutionality under the Thirteenth Amendment to the Constitution, and also of the Peonage Laws of the United States, are stated in the opinion.

The Solicitor General for the United States:

The indictments charge an offense within the meaning of the Federal peonage act.

The peonage act of March 2, 1867, Rev. Stat., §§ 1990, 5526; Criminal Code, § 269, is a valid exercise of congressional power under the Thirteenth Amendment. *Bailey* v. *Alabama*, 219 U. S. 219; *Clyatt* v. *United States*, 197 U. S. 207.

Section 6846, Code, Alabama, 1907, is unconstitutional as in conflict with the Thirteenth Amendment and with the legislation authorized by it and enacted by Congress, the Alabama decisions notwithstanding. *Ex parte Davis*, 95 Alabama, 9; *Lee* v. *State*, 75 Alabama, 29; *Peonage Cases*, 123 Fed. Rep. 671; *Shepherd* v. *State*, 110 Alabama, 104; *Simmons* v. *State*, 139 Alabama, 149; *Smith* v. *State*, 82 Alabama, 40.

No sentence of involuntary servitude ever was or ever could have been imposed by the State and therefore the State had no right in the labor of these convicts, nor could it transfer such right to anyone.

Under the Alabama statutes it is only where the fine and costs are not presently paid, or secured by confession of judgment, with proper sureties, that any sentence to hard labor can be enforced for their satisfaction. *Bailey* v. *State*, 87 Alabama, 44, but see *S. C.*, 219 U. S. 219; *Bowen* v. *State*, 98 Alabama, 83; *In re Newton*, 94 Alabama, 431.

Therefore the confession of judgment on the part of the convicts operated to discharge them, and the State had no right or power to further restrain their liberty.

The indebtedness for the satisfaction of which the labor is to be performed is an indebtedness to the surety and not to the State—a private debt, not a public penalty.

There is no correlation between the penalties which the State might have imposed for non-payment in the first instance and those fixed by these labor contracts.

See also *Buckalew* v. *Tenn. Coal & Iron Co.*, 112 Alabama, 146; *State* v. *Allen*, 71 Alabama, 543; *State* v. *Etowah Lumber Co.*, 153 Alabama, 77; *State* v. *Stanley*, 52 Arkansas, 178; *Winslow* v. *State*, 97 Alabama, 68.

Mr. William L. Martin, with whom *Mr. Robert C. Brickell*, Attorney General of the State of Alabama, was on the brief, for defendants in error:

There is but one point in these cases: The offense of peonage does not exist by virtue of the operation of §§ 7632, 6846 of the Alabama Code.

The offense of peonage, which was sought to be abolished by § 1990, Rev. Stat., and for the commission of which punishment was prescribed by § 5526, Rev. Stat., Crim. Code, § 269, has been defined by this and other courts as a status or condition of compulsory service based upon the indebtedness of the peon to the master. The basal fact is indebtedness. *Jaremillo* v. *Romero*, 1 N. Mex. 190, 194; *Peonage Cases*, 123 Fed. Rep. 671, 673 (Ala.); *United States* v. *McClellan*, 127 Fed. Rep. 971; *Peonage Cases*, 136 Fed. Rep. 707; *In re Peonage Charge*, 138 Fed. Rep. 686; *United States* v. *Cole*, 153 Fed. Rep. 801; *United States* v. *Clement*, 171 Fed. Rep. 974; *Clyatt* v. *United States*, 197 U. S. 207, 215; *Hodges* v. *United States*, 203 U. S. 1, 33; *Bailey* v. *State*, 219 U. S. 219, 242.

Those provisions apply only to actions based on contracts, express or implied, and do not extend to actions

originating in tort. *Ex parte Hardy*, 68 Alabama, 303, 316.

The sentence of a convict to additional imprisonment for embezzlement in lieu of his restoring to the injured party the amount embezzled is not regarded as imprisonment for debt. See Act of July 1, 1902, 32 Stat. 691.

The sentence and judgment violated the statute providing that no person shall be imprisoned for debt. *Freeman* v. *United States*, 217 U. S. 539, 544.

The inhibition is limited to contract liabilities, and is not applicable to fines, forfeitures, mulcts, damages for wrong and tort. *Hanson* v. *Fowle*, 1 Sawyer, 497, 506; *United States* v. *Walsh*, Deady, 281, 286; *Carr* v. *State*, 106 Alabama, 35, note.

Though the convict may pay the fine and costs due the State and thereby gain his release, such cannot be regarded as a debt. *Nelson* v. *State*, 46 Alabama, 186, 189; *Caldwell* v. *State*, 55 Alabama, 133, 135; *Lee* v. *State*, 75 Alabama, 29, 30; *Smith* v. *State*, 82 Alabama, 40, 41; *Ex parte King*, 102 Alabama, 182, 183; *Carr* v. *State*, 106 Alabama, 35; *Brown* v. *State*, 115 Alabama, 74, 79; *United States* v. *Walsh*, 1 Abb. (U. S.) 66, 71; *Stroheim* v. *Deimel*, 73 Fed. Rep. 430; *Freeman* v. *United States*, 217 U. S. 539, 544.

By the confession of judgment the nature of the convict's obligation is not changed so far as he is concerned; the State chooses, with his consent, to substitute for his labor and service, and imprisonment, a civil liability on the part of the surety. *Smith* v. *State*, 82 Alabama, 40; *Shepherd* v. *State*, 110 Alabama, 104, 105; *Simmons* v. *State*, 139 Alabama, 149, 150.

After confession of judgment and execution of contract a convict cannot obtain his release from his surety by the payment of a sum of money.

Under the provisions of § 6846, the defendant may be prosecuted, not for any debt he owes his surety, for none exists, but as a punishment for a violation of the contract

which has been approved by the court and in which his labor for his surety has been substituted for hard labor for the State or county. *Ward* v. *State*, 88 Alabama, 202; *Smith* v. *State*, 82 Alabama, 40; Code, § 6846; *Shepherd* v. *State*, 110 Alabama, 104.

If the contract provides for advances, it is void and its performance cannot be enforced. *Smith* v. *State*, 82 Alabama, 40; *Ex parte Davis*, 95 Alabama, 9, 16; *Winslow* v. *State*, 97 Alabama, 68; *Elston* v. *State*, 154 Alabama, 62. See also *Salter* v. *State*, 117 Alabama, 135, 137; *Wade* v. *State*, 94 Alabama, 109; *Wynn* v. *State*, 82 Alabama, 55, 57; *McQueen* v. *State*, 138 Alabama, 63, 67.

The State retains control of the convict. It does not lose control over him when judgment has been confessed, but still retains authority to sentence the convict to punishment. *Bailey* v. *State*, 87 Alabama, 44, 46.

In interpreting the Alabama statutes on this point, this court will follow the decisions of the highest court of that State. *Shelby* v. *Guy*, 11 Wheat. 361, 367; *Nesmith* v. *Sheldon*, 7 How. 812, 818; *Van Rensselaer* v. *Kearney*, 11 How. 297, 318; *Webster* v. *Cooper*, 14 How. 488, 504; *Leffingwell* v. *Warren*, 2 Black. 599; *Haver* v. *District No. 108*, 111 U. S. 701; *Detroit* v. *Osborne*, 135 U. S. 492, 498; *Irrigation District* v. *Bradley*, 164 U. S. 112, 154; *Hooker* v. *Los Angeles*, 188 U. S. 314, 320; *Hairston* v. *Danville & Western Ry.*, 208 U. S. 598; *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175, 191; *Trimble* v. *Seattle*, 233 U. S. 218, 219.

State v. *Etowah Lumber Co.*, 153 Alabama, 77, 78, distinguished, as in that case the convict was taken from the custody of his surety by virtue of a warrant issued for the commission of another offense than that for which he was then serving.

A single decision of a state court which departs from the whole course of the decisions of that State will not be followed. *Gibson* v. *Lyon*, 115 U. S. 439, 446; *Hardin* v. *Jordan*, 140 U. S. 371, 387.

The statute is a humane one. If the convict does his duty according to his contract there is no reminder of his convict-state, save at the end of each month when his wage is withheld. He is practically a free man and the law delights in the liberty and the happiness of the citizen. *Peonage Cases*, 123 Fed. Rep. 671, 676.

The Thirteenth Amendment does not contain authority for Congress to withhold from a State the right to make its own laws for punishing those duly convicted of crime. If Congress has authority to legislate regarding a State leasing its convicts out to work, there is nothing to prevent its prescribing the kind of work to be performed, the working hours and the food and clothing furnished. See debates in Congressional Globe on adoption of Thirteenth Amendment in 1863–4, Part 2, pp. 1313–25, 1364–70, 1419–24, 1437–46, 1456–65, 1479–90.

The Thirteenth Amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional. *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *Clyatt* v. *United States*, 197 U. S. 207, 216.

The court cannot read into the Thirteenth Amendment exceptions which do not appear and refuse to give life to the one exception which does appear therein, to-wit: conviction for crime.

Mr. Justice Day delivered the opinion of the court.

These cases were argued and considered together, and may be disposed of in a single opinion. They come here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, as involving the construction of the statutes of the United States which have for their object the prohibition and punishment of peonage. Case No. 478, *United States* v. *Reynolds*, was decided upon demurrer and objections to a plea filed to the indictment. The case

against Broughton, No. 479, was decided upon demurrer to the indictment. In both cases the District Court held that no offense was charged. 213 Fed. Rep. 345, 352. Both indictments for holding certain persons in a state of peonage were found under § 1990 of the Revised Statutes of the United States, as follows:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void," and § 269 of the Criminal Code (§ 5526, Rev. Stat.), which provides that—

"Whoever holds, arrests, returns, or causes to be held, arrested or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

The facts to be gathered from the indictments and pleas, upon which the court below decided the cases and determined that no offense was charged against the statutes of the United States as above set forth, are substantially these: In No. 478, one Ed Rivers, having been convicted in a court of Alabama of the offense of petit larceny, was fined $15, and costs $43.75. The defendant Reynolds appeared as surety for Rivers, and a judgment by confession was entered up against him for the amount of the fine and costs, which Reynolds afterwards paid to the State. On May 4, 1910, Rivers, the convict, entered into a written contract with Reynolds to work for him as a

farm-hand for the term of nine months and twenty-four days, at the rate of six dollars per month, to pay the amount of fine and costs. The indictment charges that he entered into the service of Reynolds, and under threats of arrest and imprisonment if he ceased to perform such work and labor, he worked until the sixth day of June, when he refused to labor. Thereupon he was arrested upon a warrant issued at the instance of Reynolds from the County Court of Alabama, on the charge of violating the contract of service. He was convicted and fined the sum of one cent for violating this contract, and additional costs in the amount of $87.05, for which he again confessed judgment with G. W. Broughton as surety, and entered into a similar contract with Broughton to work for him as a farm-hand at the same rate, for a term of fourteen months and fifteen days.

In No. 479, the case against Broughton, E. W. Fields, having been convicted in an Alabama state court, at the July, 1910, term, of the offense of selling mortgaged property, was fined fifty dollars and costs, in the additional sum of $69.70. Thereupon Broughton, as surety for Fields, confessed judgment for the sum of fine and costs, and afterwards paid the same to the State. On the eighth day of July, 1910, a contract was entered into, by which Fields agreed to work for Broughton as a farm and logging hand for the term of nineteen months and twenty-nine days, at the rate of six dollars per month, to pay the fine and costs. He entered into the service of Broughton, and, it was alleged, under threats of arrest and imprisonment if he ceased to labor, he continued so to do until the fourteenth day of September, 1910, when he refused to labor further. Thereupon Broughton caused the arrest of Fields upon a charge of violating his contract, and upon a warrant issued upon this charge, Fields was again arrested.

The rulings in the court below upon the plea and demurrers, were that there was no violation of the Federal

statutes, properly construed, and also held that the conduct of the defendants was justified by the provisions of the Alabama Code, upon which they relied. These provisions are as follows:

"7632. Confession of Judgment by Defendant for Fine and Costs.—When a fine is assessed, the court may allow the defendant to confess judgment, with good and sufficient sureties, for the fine and costs.

"7633. Execution Issues as in Civil Cases.—Execution may issue for the fine and costs, or any portion thereof remaining unpaid, as in civil cases.

"7634. On Default in Payment of Fine and Costs, Imprisonment or Hard Labor Imposed.—If the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county as follows: If the fine does not exceed twenty dollars, ten days; if it exceeds twenty and does not exceed fifty dollars, twenty days; if it exceeds fifty and does not exceed one hundred dollars, thirty days; if it exceeds one hundred and does not exceed one hundred and fifty dollars, fifty days; if it exceeds one hundred and fifty and does not exceed two hundred dollars, seventy days; if it exceeds two hundred and does not exceed three hundred dollars, ninety days; and for every additional one hundred dollars, or fractional part thereof, twenty-five days.

"7635. When Additional Hard Labor Imposed for Costs; Rules in Reference to.—If on conviction judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, as provided by law, then the court may impose additional hard labor for the county for such period, not to exceed ten months, as may be sufficient to pay the costs, at the rate of seventy-five cents per day, and the court must determine the time required

to work out such costs at that rate; and such convict must be discharged from the sentence against him for costs on the payment thereof, or any balance due thereon, by the hire of such convict, or otherwise; and the certificate of the judge or clerk of the court in which the conviction was had, that the costs, or the residue thereof, after deducting the amount realized from the hire of the convict, have been paid, or that the hire or labor of the convict, as the case may be, amounts to a sum sufficient to pay the costs, shall be sufficient evidence to authorize such discharge.

"6846. Failure of Defendant to Perform Contract with Surety Confessing Judgment for Fine and Costs.—Any defendant, on whom a fine is imposed on conviction for a misdemeanor, who in open court signs a written contract, approved in writing by the judge of the court in which the conviction is had, whereby, in consideration of another becoming his surety on a confession of judgment for the fine and costs, agrees to do any act, or perform any service for such person, and who, after being released on such confession of judgment, fails or refuses without good and sufficient excuse, to be determined by the jury, to do the act, or perform the service, which in such contract he promised or agreed to do or perform, must, on conviction, be fined not less than the amount of the damages which the party contracting with him has suffered by such failure or refusal, and not more than five hundred dollars; and the jury shall assess the amount of such damages; but no conviction shall be had under this section, unless it is shown on the trial that such contract was filed for record in the office of the judge of probate of the county in which the confession of judgment was had, within ten days after the day of the execution thereof.

"6848. Damages Paid to Injured Party out of Fine Imposed.—From the fine imposed under the two preceding sections, when collected, the damages sustained by

the party contracting with such defendant must be paid to such person by the officer collecting the same."

The defendants having justified under this system of law, the question for consideration is, Were the defendants well charged with violating the provisions of the Federal statutes, to which we have referred, notwithstanding they undertook to act under the Alabama laws, particularly under the provisions of § 6846 of the Alabama Code, authorizing sureties to appear and confess judgment and enter into contracts such as those we have described?

The Thirteenth Amendment to the Constitution of the United States provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

It was under the authority herein conferred, to enforce the provisions of this amendment by appropriate legislation, that Congress passed the sections of the Revised Statutes here under consideration. *Clyatt* v. *United States*, 197 U. S. 207; *Bailey* v. *Alabama*, 219 U. S. 219.

By these enactments Congress undertook to strike down all laws, regulations and usages in the States and Territories which attempted to maintain and enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in the liquidation of any debt or obligation. To determine whether the conduct of the defendants charged in the indictments amounted to holding the persons named in a state of peonage, it is essential to understand what Congress meant in the use of that term prohibiting and punishing those guilty of maintaining it. Extended discussion of this subject is rendered unnecessary in view of the full consideration thereof in the prior adjudications of this

court. *Clyatt* v. *United States, supra; Bailey* v. *Alabama, supra.*

Peonage is "a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . One fact existed universally; all were indebted to their masters. . . . Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case, the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." *Clyatt* v. *United States,* 197 U. S. 207, 215.

Applying this definition to the facts here shown, we must determine whether the convict was in reality working for a debt which he owed the surety, and whether the labor was performed under such coercion as to become a compulsory service for the discharge of a debt. If so, it amounts to peonage, within the prohibition of the Federal statutes. The actual situation is this: The convict instead of being committed to work and labor as the statute provides for the State, when his fines and costs are unpaid, comes into court with a surety, and confesses judgment in the amount of fine and costs, and agrees

with the surety, in consideration of the payment of that fine and costs, to perform service for the surety after he is released because of the confession of judgment. The form of the contract, said to be the usual one entered into in such cases, is given in the record, and reads:

"LABOR CONTRACT.

"The State of Alabama, Monroe County:

"Whereas, at the May term, 1910, of the county court, held in and for said county, I, Ed. Rivers, was convicted in said court of the offense of petit larceny and fined the sum of fifteen dollars, and judgment has been rendered against me for the amount of said fine, and also in the further and additional sum of forty-three and 75/100 dollars, cost in said case, and whereas J. A. Reynolds, together with A. C. Hixon, have confessed judgment with me in said court for said fine and cost. Now, in consideration of the premises, I, the said Ed. Rivers, agree to work and labor for him, the said J. A. Reynolds, on his plantation in Monroe County, Alabama, and under his direction as a farm hand to pay fine and cost for the term 9 months and 24 days, at the rate of $6.00 per month, together with my board, lodging, and clothing during the said time of hire, said time of hire commencing on the 4 day of May, 1910, and ending on the 28 day of Feby., 1911, provided said work is not dangerous in its character.

"Witness our hands this 4 day of May, 1910.

"ED (his x mark) RIVERS.

"J. A. REYNOLDS.

"Witness:

"JOHN M. COXWELL."

It also stands admitted in this record, that the sureties in fact paid the judgment confessed. Looking then to the substance of things, and through the mere form which they have taken, we are to decide the question whether the labor of the convict, thus contracted for, amounted to

involuntary service for the liquidation of a debt to the surety, which character of service it was the intention of the acts of Congress to prevent and punish. When thus at labor, the convict is working under a contract which he has made with his surety. He is to work until the amount which the surety has paid for him—the sum of the fine and costs—is paid. The surety has paid the State and the service is rendered to reimburse him. This is the real substance of the transaction. The terms of that contract are agreed upon by the contracting parties, as the result of their own negotiations. The statute of the State does not prescribe them. It leaves the making of contract to the parties concerned, and this fact is not changed because of the requirement that the judge shall approve of the contract. When the convict goes to work under this agreement, he is under the direction and control of the surety, and is in fact working for him. If he keeps his agreement with the surety, he is discharged from its obligations without any further action by the State. This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done. *Bailey* v. *Alabama*, 219 U. S. 219, 244; *Ex parte Hollman*, 60 S. E. Rep. 19, 24.

Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken, may be again prosecuted, and the convict is thus kept chained to an ever-

turning wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the State or paid money in his behalf. The re-arrest of which we have spoken is not because of his failure to pay his fine and costs originally assessed against him by the State. He is arrested at the instance of the surety, and because the law punishes the violation of the contract which the convict has made with him.

Nor is the labor for the surety by any means tantamount to that which the State imposes if no such contract has been entered into, as these cases afford adequate illustration. In the case against Reynolds, Rivers was sentenced to pay $15 fine and $43.75 costs. Under the Alabama Code, he might have been sentenced to hard labor for the county for ten days for the non-payment of the fine, and assuming that he could be sentenced for non-payment of costs under § 7635 of the Alabama Code, he could have worked it out at the rate of seventy-five cents per day, an additional 58 days might have been added, making 68 days as his maximum sentence at hard labor. Under the contract now before us, he was required to labor for nine months and twenty-four days, thus being required to perform a much more onerous service than if he had been sentenced under the statute, and committed to hard labor. Failing to perform the service he may be again re-arrested, as he was in fact in this case, and another judgment confessed to pay a fine of one cent and $87.75 costs, for which the convict was bound to work for another surety for the term of fourteen months and seventeen days. In the case against Broughton, Fields was fined $50 and $69.70 costs. Under the law he might have been condemned to hard labor for less than four months. By the contract described, he was required to work for Broughton for a period of nineteen months and twenty-nine days.

We are cited to a series of Alabama cases, in which it is

held that the confessed judgment and the contract do not satisfy the law nor pay the penalty imposed, but the hirer becomes the transferee of the right of the State to compel the payment of the fine and costs, and by this exaction of involuntary servitude the convict has only changed masters, and that under the Alabama constitution the law is constitutional, and that the convict is not being imprisoned for indebtedness. It is to be observed that the same learned court, in one of its later deliverances (*State* v. *Etowah Lumber Company*, 153 Alabama, 77, 78), has said in speaking of this contract, "the State was in no sense a party to the contract by which the company acquired the custody of Falkner [the convict in that case]. It is true it [the State] permitted the making of the contract, and provided a punishment for its breach." Here is a direct utterance of that court that the State was not a party to the surety's agreement, but its connection with it was to permit it, and provide the punishment for its breach.

True it is that this court follows the decisions of the state courts, in determining the constitutionality of statutes under the constitutions of the States; and in considering the constitutionality of statutes ordinarily accepts their meaning as construed by the state courts. The Alabama decisions, to which we have been referred, are more strictly speaking determinations of the legal effect of these statutes than interpretation of any doubtful meaning which may be found within their terms. Moreover, we are here dealing with a case which involves the Constitution and statutes of the United States, as to which this court, by force of the Constitution, and the several Judiciary Acts which have been enacted by Congress, is the ultimate arbiter. In such cases this court must determine for itself whether a given enactment violates the Constitution of the United States or the statutes passed in pursuance thereof. The validity of this system of state law must be judged by its operation and effect upon rights

secured by the Constitution of the United States and offenses punished by the Federal statutes. If such state statutes, upon their face, or in the manner of their administration, have the effect to deny rights secured by the Federal Constitution or to nullify statutes passed in pursuance thereto, they must fail. *Bailey* v. *Alabama*, 219 U. S. 219, 244; *Henderson* v. *Mayor*, 92 U. S. 259, 268.

Nor do we think this case is controlled by *Freeman* v. *United States*, 217 U. S. 539, cited by counsel for defendants in error. In that case it was held that a money penalty imposed for embezzlement which went to the creditor, and not into the Treasury, under the Penal Code of the Philippine Islands, did not make imprisonment for the non-payment of such penalty equivalent to imprisonment for debt. In that case, although the penalty affixed went to the creditor, it was part of the sentence imposed by the law as a punishment for the crime. In the present case, the contract under which the convict serves for the surety, is made between the parties concerned, who determine and fix its terms, and is not fixed by the State as the punishment for the commission of an offense.

There can be no doubt that the State has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the Thirteenth Amendment, and such punishment expressly excepted from its terms. Of course, the State may impose fines and penalties which must be worked out for the benefit of the State, and in such manner as the State may legitimately prescribe. See *Clyatt* v. *United States, supra*, and *Bailey* v. *Alabama, supra*. But here the State has taken the obligation of another for the fine and costs, imposed upon one convicted for the violation of the laws of the State. It has accepted the obligation of the surety, and, in the present case, it is recited in the record that the money has been in fact paid by the surety. The surety and convict have made a new contract for service, in regard to the terms of which the

State has not been consulted. The convict must work it out to satisfy the surety for whom he has contracted to work. This contract must be kept, under pain of re-arrest, and another similar proceeding for its violation, and perhaps another and another. Thus, under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer.

In our opinion, this system is in violation of rights intended to be secured by the Thirteenth Amendment, as well as in violation of the statutes to which we have referred, which the Congress has enacted for the purpose of making that amendment effective.

It follows that the judgment of the District Court must be reversed.

Judgment accordingly.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MR. JUSTICE HOLMES concurring.

There seems to me nothing in the Thirteenth Amendment or the Revised Statutes that prevents a State from making a breach of contract, as well a reasonable contract for labor as for other matters, a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain even though it will cause greater trouble by and by. The successive contracts, each for a longer term than the last, are the inevitable, and must be taken to have been the contemplated outcome of the Alabama laws. On this ground I am inclined to agree that the statutes in question disclose the attempt to maintain service that the Revised Statutes forbid.

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

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

No. 15. Argued October 26, 1914.—Decided November 30, 1914.

Under the Enabling Act the State of Oklahoma was admitted to the Union on an equal footing with the original States, and has the same authority to enact public legislation not in conflict with the Federal Constitution as other States may enact. *Coyle* v. *Oklahoma*, 221 U. S. 559.

It is not an infraction of the Fourteenth Amendment for a State to require separate, but equal, accommodations for the white and African races. *Plessy* v. *Ferguson*, 163 U. S. 537.

While a state statute, although fair on its face, may be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself, *Yick Wo* v. *Hopkins*, 118 U. S. 356, no discriminations unauthorized by the statute appear to have been practiced in this case under state authority.

The Oklahoma statute, requiring separate, but equal, accommodations for the white and African races, must, in the absence of a different construction by the state court, be construed as applying exclusively to intrastate commerce; and, as so construed, it does not contravene the commerce clause of the Federal Constitution.

The essence of the constitutional right to equal protection of the law is that it is a personal one and does not depend upon the number of persons affected; and any individual who is denied by a common carrier, under authority of the State, a facility or convenience which is furnished to another under substantially the same circumstances may properly complain that his constitutional privilege has been invaded.

The Oklahoma Separate Coach Law does discriminate against persons of the African race in permitting carriers to provide sleeping cars, dining cars and chair cars to be used exclusively by persons of the white race; this provision none the less offends against the Fourteenth Amendment even if there is a limited demand for such accommodations by the African race as compared with the white race.

In order to justify the granting of an injunction complainants must

show a personal need of it, and absence of adequate remedy at law. The fact that someone else, although of the same class as complainant, may be injured does not justify granting the remedy.

In an action, brought in the Federal court by several persons of the African race before the Separate Coach Law of Oklahoma went into effect, to enjoin the enforcement thereof on the ground that it contravened the Fourteenth Amendment, *held* that the allegations in the bill were too vague and indefinite to warrant the relief sought by complainants; that none of the complainants had personally been refused accommodations equal to those afforded to others or had been notified that he would be so refused when the act went into effect; that it did not appear that in such event he would not have an adequate remedy at law, and that the action could not be maintained. 186 Fed. Rep. 966, affirmed.

THE facts, which involve the constitutionality of the Separate Coach Law of Oklahoma, are stated in the opinion.

Mr. William Harrison, with whom *Mr. Edwin O. Tyler* and *Mr. Ethelbert T. Barbour* were on the brief, for appellants:

The court erred in holding that the Oklahoma statute does not operate and deprive those of African descent of the equal protection of the laws within the meaning of the Constitution, which implies not merely equal accessibility to the court for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind.

The police power cannot be interposed to support a statute having no possible tendency to protect the community or for the preservation of the public safety, but which arbitrarily deprives the owner of liberty or property. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *Holden* v. *Hardy*, 169 U. S. 366, 398; *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; Freund, Police Power, 525.

State police legislation may be invalid because it trenches on the sphere of the National Government under the Federal Constitution. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

So also as to police legislation which purports to deal with subjects beyond territorial jurisdiction. *Morgan's Steamship Co.* v. *Louisiana*, 118 U. S. 455, 464; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Missouri &c. Ry. Co.* v. *Haber*, 169 U. S. 618; *Reid* v. *Colorado*, 187 U. S. 137; *New York &c. R. Co.* v. *New York*, 165 U. S. 628; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

A law not enacted in good faith for the promotion of the public good but passed from the sinister motive of annoying or oppressing a particular person or class is invalid. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The Oklahoma Act is violative of the commerce clause of the Constitution. *Henderson* v. *New York*, 92 U. S. 259; *Welton* v. *Missouri*, 91 U. S. 275; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557.

The act does restrict and affect interstate, to the same extent as intrastate, commerce; and in this respect the act is so plain and unambiguous as to leave no room for interpretation. *Houghton* v. *Payne*, 194 U. S. 88.

The doctrine of contemporaneous practical construction does not apply to statutes which are explicit and free from any ambiguity. *Swift* v. *United States*, 105 U. S. 695; *United States* v. *Graham*, 110 U. S. 219; *Merrit* v. *Cameron*, 137 U. S. 542, aff'g 102 Fed. Rep. 947; *Franklin Sugar Co.* v. *United States*, 153 Fed. Rep. 653.

The term negro as used in the act includes every person of African descent as defined by the Constitution.

Passengers coming into Oklahoma, and going out and going through Oklahoma, upon their failure to go to the coach or compartment designated for the race to which they belong have been ejected, arrested and confined in the common jails.

Commerce among the commonwealths is traffic, transportation and intercourse between two points situated in different States. *Wabash R. R. Co.* v. *Illinois*, 118 U. S. 557; *Louisville Ry. Co.* v. *Mississippi*, 133 U. S. 587, 592; *Ches. & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 395; *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, 156 Fed. Rep. 1, 19. *Pacific Express Co.* v. *Siebert*, 142 U. S. 339, distinguished.

The statute is not separable as to interstate and intrastate commerce, and, therefore, the whole act is unconstitutional. *United States* v. *Reese*, 92 U. S. 214; *Trade Mark Cases*, 100 U. S. 82; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Pollock* v. *Farmers Trust Co.*, 158 U. S. 636. See also Cooley's Const. Lim., p. 209; *State* v. *Denny*, 21 N. E. Rep. 275; *State* v. *Perry County Commissioners*, 5 Ohio, 497; *Island* v. *Louisiana*, 103 U. S. 80; *Spraigue* v. *Thompson*, 118 U. S. 90, 94; *Chi., Mil. & St. P. Ry. Co.* v. *Westby*, 178 Fed. Rep. 619, 632.

The very fact that the act subjects every passenger to the provisions of the law and makes no distinction or exception as to interstate passengers, raises a conclusive legal presumption that the legislature intended to make no distinctions and exceptions, and the act is not subject to judicial construction. To so do would be unjustifiable judicial legislation. The rule is that which is not denied is granted. *Hall* v. *DeCuir*, 95 U. S. 485; *Union Central Ins. Co.* v. *Champlin*, 116 Fed. Rep. 858, 860; *Wrightman* v. *Boone County*, 88 Fed. Rep. 435, 437; *Madden* v. *Lanchester Co.*, 65 Fed. Rep. 188, 194; *Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *Cella Commission Co.* v. *Bohlinger*, 147 Fed. Rep. 419, 425; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465, 488.

The statute is so formed and applied that its application and operation can be used to discriminate against one class of citizens. *Yick Wo* v. *Hopkins*, 118 U. S. 356;

Chy Lung v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370, 374; *Soon Hing* v. *Crowley*, 113 U. S. 703.

The sleeping and parlor car proviso is an evasion as against prior existing rights and is a law without a remedy. The carriers operate under this law unevenly and oppressively to those of African descent.

The constitutional rights of citizens are not dependent upon considerations nor upon the varying conditions and circumstances. Citizens of African descent have no adequate remedy at law as the act provides no penalty for the failure or the refusal to provide equal accommodations, or chair cars, dining cars and sleeping cars, and said law is unconstitutional and void.

The act violates §§ 22 and 25 of the Enabling Act under which Oklahoma was admitted into the Union.

Race distinction in the law is any requirement by statute, constitutional, provisional or judicial legislation, that a person act differently if he is a member of one or another of the races in the United States. Congress intended that the only exception to the equality provision of the Enabling Act is that the State may establish and maintain separate schools for the white and colored children.

The State, after having accepted irrevocably the terms and all of the terms of the Enabling Act, cannot thereafter be heard to complain or to repudiate any or all of such terms. *Frantz* v. *Autry*, 91 Pac. Rep. 193.

The act conflicts with the Fourteenth Amendment. It is discriminatory. It was not passed for the health, safety and comfort of its citizens, but as a subterfuge under the guise of police power and police protection. The danger does not justify the degree of restraint imposed, but the act is wholly racial and based upon race and color as such.

An act that permits and even authorizes and directs the excluding of one class of persons, and in this case the

negroes, from privileges and immunities enjoyed by everybody else similarly situated, and excluding the negro, and leaving him without remedy, from the comforts and conveniences of chair cars, dining cars, sleeping cars, such as are enjoyed by all other men; which deprives the negro of the privileges and comforts which he enjoyed prior to the passage of such act; which now imposes a fine upon the negro if he attempts to exercise the rights which he enjoyed before the passage of such act, must defeat the purpose, defy the spirit, and violate the express provision of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Strauder* v. *West Virginia*, 100 U. S. 303, 306.

Mr. S. T. Bledsoe, *Mr. Charles West*, Attorney General of the State of Oklahoma, *Mr. J. R. Cottingham*, *Mr. C. O. Blake*, *Mr. Clifford L. Jackson*, *Mr. R. A. Kleinschmidt* and *Mr. C. E. Warner*, for appellees, submitted:

This court has not jurisdiction to entertain the appeal.

The Oklahoma Separate Coach Law is not violative of the commerce clause of the Constitution of the United States.

There is no charge that the railway companies are applying the state statute to interstate passengers.

The constitutionality of the Separate Coach Act is not affected by the Enabling Act, nor does that law conflict with the Fourteenth Amendment.

The statute is not divisible. *Abbott* v. *Hicks*, 44 La. Ann. 74; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Atch., Top. & Santa Fe Ry. Co.* v. *State*, 124 Pac. Rep. 56; *Bonin* v. *Gulf Co.*, 198 U. S. 115; *Bolln* v. *Nebraska*, 176 U. S. 83; *Butler Brothers* v. *U. S. Rubber Co.*, 156 Fed. Rep. 18; *Ches. & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388; *Chiles* v. *Ches. & Ohio Ry. Co.*, 218 U. S. 71; *Oklahoma* v. *Atch., Top. & S. F. Ry. Co.*, 25 I. C. C. Rep. 120; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688; *Florida Central Co.* v. *Bell*, 176 U. S. 321; *Hanford* v. *Davies*, 163 U. S. 274; *Louisville*

&c. R. R. Co. v. *State*, 6 So. Rep. 203; *Louisville &c. R. R. Co.* v. *Mississippi*, 133 U. S. 587; *McCabe* v. *Railway Co.*, 186 Fed. Rep. 966; *Ohio Valley Ry.* v. *Lander*, 47 S. W. Rep. 344; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339; *Permoli* v. *First Municipality*, 3 How. 589, 609; *Plessy* v. *Ferguson*, 163 U. S. 537; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505; *Shulthis* v. *McDougal*, 225 U. S. 561; *So. Ry. Co.* v. *King*, 217 U. S. 524; *Thompkins* v. *M., K. & T. Ry. Co.*, 211 Fed. Rep. 391; *Ward* v. *Race Horse*, 163 U. S. 504; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1.

The purpose of the case is to prevent separation of races, but the prayer only objects to distinction.

The proceeding cannot be one for mandatory injunction for equal facilities, nor is the action one for damages.

The state statute requires equal comforts. Neither the common law nor the Interstate Commerce Act gives a right of action enforceable in a Federal court before any application to the Interstate Commerce Commission as to interstate traffic.

The right of action cannot arise out of state law for want of jurisdiction in the lower court, nor can any right of action arise out of the Enabling Act or of the Constitution of the United States.

The plaintiffs do not allege lack of comforts under such circumstances as are sufficient to compel their furnishing, nor is any injury shown. *Atlantic Coast Line* v. *Mazurky*, 216 U. S. 122; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Coyle* v. *Smith*, 221 U. S. 559; *Covington* v. *Hagar*, 203 U. S. 109; *C., M. & St. P.* v. *Solon*, 169 U. S. 133; *Giles* v. *Harris*, 189 U. S. 475; *Int. Com. Com.* v. *Balt. & Ohio*, 145 U. S. 263; *Int. Com. Com.* v. *Ala. Co.*, 168 U. S. 165; *Int. Com. Com.* v. *Louisville Co.*, 73 Fed. Rep. 409; *M. & O. G.* v. *State*, 29 Oklahoma, 640, 653; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *St. L. & St. Co.* v. *Sutton*, 29 Oklahoma, 553; *Taft* v. *So. Ry. Co.*, 123 Fed. Rep. 792; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*,

204 U. S. 426; *United States* v. *L. S. & M. S. Ry.*, 197 U. S. 540; *United States* v. *Norfolk Ry. Co.*, 109 Fed. Rep. 831; *United States* v. *B. & O. R. R. Co.*, 145 U. S. 263; *United States* v. *Hanley*, 71 Fed. Rep. 673; *United States* v. *Sayward*, 160 U. S. 493; Compiled Laws of Oklahoma, 1910; 25 Stat. 862; 24 Stat. 24, 377.

MR. JUSTICE HUGHES delivered the opinion of the court.

The legislature of the State of Oklahoma passed an act, approved December 18, 1907 (Rev. Laws, Okla., 1910, §§ 860 *et seq.*), known as the 'Separate Coach Law.' It provided that 'every railway company . . . doing business in this State, as a common carrier of passengers for hire' should 'provide separate coaches or compartments, for the accommodation of the white and negro races, which separate coaches or cars' should 'be equal in all points of comfort and convenience' (§ 1); that at passenger depots, there should be maintained 'separate waiting rooms,' likewise with equal facilities (§ 2); that the term negro, as used in the act, should include every person of African descent, as defined by the state constitution (§ 3); and that each compartment of a railway coach 'divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach' within the meaning of the statute (§ 4).

It was further provided that nothing contained in the act should be construed to prevent railway companies 'from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly' (§ 7).

Other sections prescribed penalties both for carriers, and for passengers, failing to observe the law (§§ 5, 6). The act was to take effect sixty days after its approval (§ 12).

On February 15, 1908, just before the time when the statute, by its terms, was to become effective, five negro

citizens of the State of Oklahoma (four of whom are appellants here) brought this suit in equity against The Atchison, Topeka & Santa Fe Railway Company, The St. Louis & San Francisco Railroad Company, The Missouri, Kansas & Texas Railway Company, The Chicago, Rock Island & Pacific Railway Company and The Fort Smith & Western Railroad Company, to restrain these companies from making any distinction in service on account of race. On February 26, 1908,—after the act had been in operation for a few days—an amended bill was filed seeking specifically to enjoin compliance with the provisions of the statute for the reasons that it was repugnant (a) to the commerce clause of the Federal Constitution, (b) to the Enabling Act under which the State of Oklahoma was admitted to the Union (act of June 16, 1906, c. 3335, § 3, 34 Stat. 267, 269), and (c) to the Fourteenth Amendment. The railroad companies severally demurred to the amended bill, asserting that it failed to state a case entitling the complainants to relief in equity. The Circuit Court sustained the demurrers and, as the complainants elected to stand upon their bill, final decree dismissing the bill was entered. This decree was affirmed by the Court Circuit of Appeals (186 Fed. Rep. 966), and the present appeal has been brought.

The conclusions of the court below as stated in its opinion were, in substance:

1. That under the Enabling Act, the State of Oklahoma was admitted to the Union 'on an equal footing with the original States' and with respect to the matter in question had authority to enact such laws, not in conflict with the Federal Constitution, as other States could enact; citing, *Permoli* v. *First Municipality*, 3 How. 589, 609; *Escanaba Company* v. *Chicago*, 107 U. S. 678, 688; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Ward* v. *Race-Horse*, 163 U. S. 504; *Bolln* v. *Nebraska*, 176 U. S. 83. See also *Coyle* v. *Oklahoma*, 221 U. S. 559, 573.

2. That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a State to require separate, but equal, accommodations for the two races. *Plessy* v. *Ferguson*, 163 U. S. 537.

3. That the provision of § 7, above quoted, relating to sleeping cars, dining cars and chair cars did not offend against the Fourteenth Amendment as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other.

4. That in determining the validity of the statute the doctrine that an act although 'fair on its face' might be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 373) was not applicable, as there was no basis in the present case for holding that any discriminations by carriers which were unauthorized by the statute were practised under state authority.

5. That the act, in the absence of a different construction by the state court, must be construed as applying to transportation exclusively intrastate and hence did not contravene the commerce clause of the Federal Constitution. *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 590; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 391; *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 218 U. S. 71.

6. That with respect to the existence of discriminations the allegations of the bill were too vague and uncertain to entitle the complainants to a decree.

In view of the decisions of this court above cited, there is no reason to doubt the correctness of the first, second, fourth and fifth of these conclusions.

With the third, relating to § 7 of the statute, we are

unable to agree. It is not questioned that the meaning of this clause is that the carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodations for negroes. The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the Attorney General of the State, in the brief filed by him in support of the law, urges that "the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or, sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility." And in the brief of counsel for the appellees, it is stated that the members of the legislature "were undoubtedly familiar with the character and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel" in that State.

This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to

the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect and this amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be 'a multiplicity of suits,' there being at least 'fifty thousand persons of the negro race in the State of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. *Williams* v. *Hagood*, 98 U. S. 72, 74, 75; *Virginia Coupon Cases*, 114 U. S. 325, 328, 329; *Tyler* v. *Judges*, 179 U. S. 405, 406; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Davis & Farnum* v. *Los Angeles*, 189 U. S. 207, 220; *Hooker* v. *Burr*, 194 U. S. 415, 419; *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 197; *Collins* v. *Texas*, 223 U. S. 288, 295, 296.

The allegations of the amended bill, so far as they pur-

port to show discriminations in the conduct of these carriers, are these:

"That notwithstanding the terms of said Act of Congress and of the Constitution of the State of Oklahoma, the said above named defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the State of Oklahoma, in this, to wit: that equal comforts, conveniences and accommodations will not be provided for your orators and other persons of the negro race; that said passenger coaches are not constructed or maintained so as to enable persons of the negro race to be provided with separate and equal toilet and waiting rooms for male and female passengers of said negro race, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars and dining car accommodations by providing for your orators and other persons of the negro race who may become passengers on said railroad, that separate waiting rooms with equal comforts and conveniences have been or are bound to be constructed by said defendants and each of them for your orators and other persons of the negro race desiring to become passengers on said railroad, and that said orators are not being and will not be provided with equal accommodations with the white race under the provisions of said act."

We agree with the court below that these allegations are altogether too vague and indefinite to warrant the relief sought by these complainants. It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; or that any one of the complainants has ever requested that accommodations be furnished to him in any sleeping cars, dining cars or chair cars; or that any of these five companies has ever notified any one of

these complainants that such accommodations would not be furnished to him, when furnished to others, upon reasonable request and payment of the customary charge. Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.

Decree affirmed.

MR. CHIEF JUSTICE WHITE, MR. JUSTICE HOLMES, MR. JUSTICE LAMAR and MR. JUSTICE MCREYNOLDS concur in the result.

LOUISIANA RAILWAY & NAVIGATION COMPANY *v.* BEHRMAN, MAYOR OF THE CITY OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 49. Argued November 4, 5, 1914.—Decided November 30, 1914.

While the jurisdiction of this court under § 237, Judicial Code, may not attach where the state court gave no effect to the state enactment claimed to have impaired the obligation of a contract, where the State does give effect to later legislation which does impair the obligation of a contract, if one exists, this court has jurisdiction to, and must, determine for itself whether there is an existing contract, even though the state court may have put its decision upon the ground

that the contract was not made, was invalid, or had become inoperative.

In determining whether effect has been given to later legislation, this court is not limited to mere consideration of the language of the opinion of the state court.

This court has jurisdiction under § 237, Judicial Code, to determine whether there is a contractual obligation which plaintiff in error is entitled to enforce without its being impaired by the operation of subsequent legislation enacted by or under the authority of the State.

While courts should give them a fair and reasonable interpretation, public grants are not to be extended by implication beyond their clear intent.

As the ordinance on which the contract claimed to have been impaired was based, was intended to confer rights exclusively with reference to an existing plan of construction, and as that plan proved abortive because of legal obstacles to its fulfillment, no rights were conferred thereby, and a later ordinance on the same subject cannot be deemed invalid under the impairment of obligation clause of the Federal Constitution.

An ordinance of the City of New Orleans regarding construction of the Belt Railroad, *held* not unconstitutional because it impaired the obligation of a contract based on a former ordinance, as such contract was subject to a suspensive condition, and the event in which the obligation was to arise had not happened.

127 Louisiana, 775, affirmed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, and also the constitutionality under the impairment of obligation provision of the Federal Constitution of an ordinance of the City of New Orleans relating to the construction and operation of a belt railroad within the city, are stated in the opinion.

Mr. R. E. Milling, with whom *Mr. M. J. Foster* was on the brief, for plaintiff in error.

Mr. I. D. Moore for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error seeks to review the judgment of the state court upon the ground that it denied a Federal right

asserted under the contract clause of the Constitution. Art. 1, § 10.

The suit was brought by the Mayor of the City of New Orleans, in his official capacity, to restrain the Louisiana Railway & Navigation Company from proceeding under a municipal ordinance—No. 1997, New Council Series, dated September 4, 1903—to construct and operate tracks over a public belt railroad reservation, and from operating cars, etc., over public belt railroad tracks, and to have the ordinance, so far as it granted to that Company such privileges of construction and operation, declared null and void. The facts, so far as it is necessary to state them, are these:

The authorities of the City of New Orleans devised the plan of establishing a public belt railroad along the river front. On March 1, 1899, the City adopted an ordinance (No. 15,080, C. S.) under which, in consideration of certain concessions, the Illinois Central Railroad Company built about two miles of the projected system, that is, from the upper limit of the City to the upper boundary of Audubon Park. This was followed by ordinance No. 147, N. C. S., adopted August 7, 1900, which created a Belt Railroad Board, composed of the Mayor and certain city officials, to construct, control and operate the belt railroad for the benefit of the City; and on August 12, 1902, the Board of Commissioners of the Port of New Orleans, called the 'Dock Board,'—a body exercising state authority over a part of the area to be traversed by the proposed road—approved the dedication for the purpose stated. This approval was to remain in force only so long as the belt railroad was 'operated and controlled by a public commission' in accordance with the provisions of ordinance No. 147.

On February 10, 1903, a further ordinance was adopted —No. 1615, N. C. S.—which, among other things, granted to the New Orleans & San Francisco Railroad Company

a right of way over the belt line and reservation from the upper limit of the City to Henderson Street. The condition was that the company, at its own expense, should construct and dedicate to perpetual public use the tracks as projected from the end of the line already built, on the upper side of Audubon Park, to Henderson Street (a distance of about five miles), the construction to be completed before July 1, 1904. Other provisions looked to still further construction through contributions from other railroads. The validity of this ordinance was at once challenged in a suit brought by the Mayor, on behalf of the City, which resulted in favor of the Railroad Company. *Capdevielle, Mayor,* v. *New Orleans R. R. Co.,* 110 Louisiana, 904. The terms of the ordinance, however, did not conform to the conditions upon which the Dock Board had consented to the building of the belt road, and, in a suit brought by that Board against the Railroad Company, the carrying out of ordinance No. 1615 was restrained so far as it authorized the construction of the railroad upon the property subject to the Board's jurisdiction. *Board of Commissioners* v. *New Orleans & San Francisco R. R. Co.,* 112 Louisiana, 1011. Following this decision, it appears that the New Orleans & San Francisco Railroad Company abandoned the building of the belt line contemplated by the ordinance; no part of it was constructed thereunder.

On September 4, 1903, while the suit of the Dock Board was pending, and after the final decision in the Capdevielle suit, the City adopted ordinance No. 1997, N. C. S.,—the ordinance here in question (127 Louisiana, pp. 784–792). Without passing now upon points in controversy, it may be said that this ordinance, reciting that under ordinance No. 1615 there had already been granted to the New Orleans & San Francisco Railroad Company the right to construct the belt line over the reservation from the place at which the rails then terminated to Henderson Street,

granted to the Louisiana Railway & Navigation Company—the plaintiff in error—a right of way over 'the double track belt line and reservation' to that point, upon stated terms and conditions, among which may be noted the following: That when the plaintiff in error had operated its equipment over the described belt tracks for thirty days, it should pay to the City the sum of $50,000; that in case the New Orleans & San Francisco Railroad Company failed 'without legal excuse' to build the described line to Henderson Street, as provided in ordinance No. 1615, the plaintiff in error should build that line in place of the first-mentioned company—this construction to be in lieu of the payment of $50,000 and the belt tracks so built, as soon as completed to Henderson Street, to be 'turned over to the immediate ownership of the City of New Orleans' and to be under 'the control and management of the Public Belt authority'; and, further, that in case the New Orleans & San Francisco Railroad Company should from any cause complete only a portion of the described tracks, the plaintiff in error should have the right to use so much of the described belt line as had been built, on payment of a proportionate part of the specified sum. This ordinance the plaintiff in error formally accepted on September 17, 1903.

The suit brought by the Dock Board against the New Orleans & San Francisco Railroad Company was decided by the Supreme Court of the State in May, 1904, and, in the October following, the City adopted ordinance No. 2683, N. C. S., which made comprehensive provision for municipal construction and operation of the belt line system. All conflicting ordinances were repealed, and it cannot be doubted that this ordinance, if enforced, would make it impossible for the plaintiff in error to exercise the rights it might otherwise have under ordinance No. 1997. The belt board was reorganized by the establishment of a new Public Belt Railroad Commission, com-

posed of the Mayor and sixteen 'citizen tax payers,' to whom was confided the necessary administrative authority for carrying out the municipal scheme. This ordinance received the approval of the Dock Board on stated conditions, and, on July 1, 1905, the new undertaking was formally inaugurated. On November 10, 1905, the plaintiff in error deposited with a trust company, which was one of the fiscal agents of the City, $50,000 in securities in alleged compliance with its contract under ordinance No. 1997. The City, however, went on with its own plan, arranging for bank credits to enable it to carry on the work under ordinance No. 2683, and when, in May, 1906, the plaintiff in error attempted to begin construction under the earlier ordinance it was stopped by the City authorities. Soon after, the present suit was instituted.

The petition of the Mayor, alleging upon various grounds the invalidity of ordinance No. 1997, also averred the adoption of ordinance No. 2683, the irrevocable dedication thereby for the reservation of the public belt railroad, and the undertaking by the City under that ordinance of the work of construction. The plaintiff in error, in its answer, set up the unconstitutionality of the later ordinance as one impairing contractual obligations. At the beginning of the suit a preliminary injunction was granted, in accordance with the City's prayer, and the City proceeded with the construction of the public belt railroad, which has since been put in operation. In the court of first instance, judgment went 'in favor of the plaintiff, Martin Behrman, in his official capacity of Mayor of the City of New Orleans, and as ex-officio president of the Public Belt Railroad Commission of the City,' declaring ordinance No. 1997, so far as it purported to grant the privileges in dispute, to be 'illegal, void and of no effect' and making the injunction permanent. This judgment was affirmed by the Supreme Court of the State upon the ground that the contract was 'subject to a suspensive

condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken.' 127 Louisiana, 775, 795, 796.

The defendant in error moves to dismiss, invoking the established rule that, where the state court gives no effect to the subsequent enactment, the jurisdiction of this court does not attach. *Knox* v. *Exchange Bank*, 12 Wall. 379, 383; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392; *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38, 39; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111; *Bacon* v. *Texas*, 163 U. S. 207, 216, 219; *Fisher* v. *New Orleans*, 218 U. S. 438, 440; *Missouri & Kansas Interurban Rwy.* v. *Olathe*, 222 U. S. 187, 190; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632, 639. We are of the opinion that the present case is not within this rule. It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 442, 443; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144, 145; *University* v. *People*, 99 U. S. 309, 321; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 556; *Russell* v. *Sebastian*, 233

U. S. 195, 202. And, in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court. *McCullough* v. *Virginia*, 172 U. S. 102, 116; *Houston & Texas Central Railroad* v. *Texas*, 177 U. S. 66, 76, 77; *Hubert* v. *New Orleans*, 215 U. S. 170, 175; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 376. In the present case, it is apparent that the whole object of the suit was to establish the right of the City to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privileges therein described. It was, as appears from the petition itself, to accomplish the purpose of the later enactment, and the building of the belt line thereunder, that the City asked the aid of the court's injunction in this suit; and it was through this protection that the municipal scheme of construction under the later ordinance was actually carried out. The final judgment completed and made permanent this protection, with respect to operation as well as construction, as against the claim of contract right. It must follow that this court has jurisdiction to determine whether that claim is well-founded, that is, whether there is a contractual obligation which the plaintiff in error is entitled to enforce without its being impaired by the operation of the subsequent provision having, by virtue of state authority, the force of state law.

It is the contention of the plaintiff in error that although the proposed belt road to Henderson Street was not built by the New Orleans & San Francisco Railroad Company, and although it be assumed that the failure of that company to build was legally excusable and hence that the obligation of the plaintiff in error to build in its stead did not arise, still there was an effective grant under ordinance No. 1997 and the plaintiff in error is entitled to

the use of the belt in the manner therein described upon the payment of $50,000.

We agree with the state court that this is not a proper interpretation of the ordinance.[1] Provision had already

[1] "This ordinance, so far as it is material with respect to this question, is as follows:

"SECTION 3. Be it further ordained, etc., That, whereas, under Ordinance No. 1615, N. C. S., the New Orleans & San Francisco Railroad Company, its successors or assigns, have been granted the right to construct, at their own cost and expense, the double track Belt line over the Belt reservation on the river front, from the present end of the Public Belt on the upper side of Audubon Park to Henderson Street, and under said ordinance the Company dedicates said tracks to perpetual public use, therefore, under the belt provisions of said Ordinance No. 1615, N. C. S., 'and with the limitations therein which recognize and preserve the present and future rights of the City of New Orleans over the projected Public Belt Railroad,' the Louisiana Railway & Navigation Company is hereby granted a right of way over the double track Belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions:

"(a) That, when said Louisiana Railway & Navigation Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, the said Company shall pay to the City of New Orleans the sum of Fifty Thousand Dollars ($50,000), . . . and when said Company shall be ready to begin to operate its engines, trains and cars as above provided, the said Company shall deliver to the Fiscal Agent of the City of New Orleans, bonds or other securities, satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said Company with the foregoing obligation, and to be returned to said Company when said Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said Fiscal Agent. . . .

"(b) That in consideration of the payment of the above sum, the Louisiana Railway & Navigation Company shall have the right to operate its own locomotives, cars and equipment over the said Public Belt from the upper city limits to Henderson Street. . . .

"(c) That in the event of the New Orleans & San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to

been made for construction to the designated point by the New Orleans & San Francisco Railroad Company. Ordinance No. 1997 prefaced its grant by a recital of the right of construction which had been given to that com-

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build said Belt tracks from the upper side of Audubon Park to Henderson Street, on or before July 1, 1904, the Louisiana Railway & Navigation Company shall build the same from the upper side of Audubon Park to Henderson Street, under the terms and conditions of Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway & Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway & Navigation Company assuming the obligation of the New Orleans & San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans & San Francisco Railroad Company, its successors or assigns, under said Paragraph 10 of Section 2 of said Ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson Street to be in lieu of the payment of $50,000, referred to in Paragraph (a) of this section; provided, that said Louisiana Railway & Navigation Company shall complete the said tracks to Henderson Street within one year from the time the City shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway & Navigation Company assumes all the obligations of the New Orleans & San Francisco Railroad Company under Paragraph 10 of Section 2 of said Ordinance No. 1615, N. C. S.; and provided that, as soon as said Belt tracks shall be completed to Henderson Street, the same shall be turned over to the immediate ownership of the City of New Orleans and to be under the control and management of the Public Belt authority; and provided, further, that said Louisiana Railway & Navigation Company shall, on July 1, 1904, deposit with the Fiscal Agent of the City of New Orleans, bonds or other securities satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said Company with the foregoing obligation and to be returned to said Company when said Company shall have built and completed said Belt tracks from the upper side of Audubon Park to Henderson Street; and provided, further, that in case said Company shall be prevented from building said Belt tracks, or any portion of the same, on account of the City

pany and it was expressly stated that the grant to the plaintiff in error was made 'under the belt provisions of said ordinance No. 1615.' It had been provided in the last-mentioned ordinance that the public authorities might give to other railroad companies the right to use the road thus to be constructed, on their making contributions which should go into a special fund for the further extension of the belt line system. It is manifest that the intent was to give to the plaintiff in error the described right to use the tracks thus to be laid. But it was also contem-

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not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said Fiscal Agent. . . .

"(d) That in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, shall, from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway & Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway & Navigation Company bear to the whole length of the tracks from upper city limits to Henderson Street.

* * * * * * * *

"(f) That all controversies between the Louisiana Railway & Navigation Company on the one side, and the Public Belt authority, or any other Company or Companies to which the City or her Public Belt authority may grant the use of said tracks and appurtenances on the other side, relative to the use of said tracks and appurtenances or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover shall be submitted to the arbitration of three disinterested persons, one to be selected by said Louisiana Railway & Navigation Company, the second by the Public Belt authority, or such other Company or Companies, as the case may be, and the third by the two thus chosen; and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition. . . ."

plated that the New Orleans & San Francisco Railroad Company might fail to build and that this failure might be 'without legal excuse.' In that event, it was agreed that the plaintiff in error should step into the place of the other company and assume the burden of construction 'under the terms and conditions' of ordinance No. 1615, such construction to take the place of the pecuniary consideration for the use of the tracks. It was further apparent that the fulfillment of the plan of ordinance No. 1615 might be legally impossible and hence that the failure of the New Orleans & San Francisco Railroad Company might be legally excused. In this event, the plaintiff in error did not undertake to build and no right of construction was given to it. We cannot imply such a right. While we are to give to public grants a fair and reasonable interpretation (*United States* v. *Denver &c. Rwy. Co.*, 150 U. S. 1, 14; *Russell* v. *Sebastian*, 233 U. S. 195, 205), they are not to be extended by implication beyond their clear intent. The right of construction was given to the plaintiff in error in a particular contingency, and not otherwise; and the explicit provision for construction negatives an intention to bind the City to permit it in a case not specified. There was abundant reason for both expression and omission. The suit of the Dock Board was pending and whether the New Orleans & San Francisco Railroad Company would be able to build, as provided in ordinance No. 1615, was undecided. If that Company did build, the City was prepared to give, and, in that event did give, to the plaintiff in error the right of way upon the agreed payment; and if that Company failed to build 'without legal excuse' the City was ready to provide, and in that event did provide, that the plaintiff in error should build in its stead. But if there were legal excuse for a failure of the New Orleans & San Francisco Railroad Company to build, it was plainly desirable that neither party should be bound. In that case, as the terms

of the ordinance show, the plaintiff in error was unwilling to assume the burden of construction, and the City by not binding itself in that contingency preserved its freedom to deal as it might seem best with the exigency that would thus arise. Ordinance No. 1997 did not obligate the City to build the belt road or any part of it; it did not bind the City to cause the road to be built by others. As we read the ordinance, it was intended to confer rights exclusively with reference to an existing plan of construction, and if that plan proved abortive, because of legal obstacles to its fulfillment, no right was conferred upon the plaintiff in error.

It is urged that the provisions of Ordinance No. 1997 [§ 3, par. (c)] that the belt tracks to be constructed by the plaintiff in error, as soon as they were completed to Henderson Street, should be turned over to the 'immediate ownership of the city' and should be under the 'control and management' of the public belt authority, obviated the objection raised by the Dock Board with respect to Ordinance No. 1615. But an examination of other provisions of the ordinance shows that this 'control and management' was intended to be subject to certain limitations. Thus, it was provided in paragraph (f) that all controversies between the plaintiff in error and the public belt authority, or any other company or companies to which the use of the tracks might be granted, relating to the movement and handling of cars, trains and traffic thereon, should be submitted to three arbitrators, one to be selected by the plaintiff in error, the second by the public belt authority, or by such other company or companies, as the case might be, and the third by the two thus chosen, and that the decision of any two of these arbitrators was to have the effect of an 'amicable composition.' We find no reason to doubt the correctness of the conclusion that the conditions, subject to which the Dock Board approved the dedication for belt road purposes of

the portion of the proposed route under its jurisdiction, would have been violated under the plan of Ordinance No. 1997 as well as under that of Ordinance No. 1615. And, further, it is clear that the proviso in paragraph (c) which related to tracks to be constructed by the plaintiff in error, did not change the event in which alone the plaintiff in error was entitled to construct them, and this was in case the New Orleans & San Francisco Railroad Company should fail to build 'without legal excuse.'

Thus far we have assumed that the New Orleans & San Francisco Railroad Company was legally excused from building. But it is insisted by the plaintiff in error that this is not the case. That is, it is said that the grant of the right to construct was divisible and that, so far as the City was competent to provide for such construction, the New Orleans & San Francisco Railroad Company was bound to build the belt road and, therefore, that its failure to build to this extent was 'without legal excuse' within the meaning of paragraph (c). But Ordinance No. 1615 negatives this view. It explicitly provided for construction 'from the end of the rails on the upper side of Audubon Park to Henderson Street,' and that the city should furnish 'a clear legal right of way for the construction of said tracks.' We think that there is no basis whatever for the contention that the New Orleans & San Francisco Railroad Company was bound to construct a part of the belt road specified if, by reason of the successful opposition of the Dock Board, it was without power to build the remainder. And when the Dock Board prevailed in its suit, that Company was entitled to abandon, as it did abandon, the undertaking. This was the event which was carefully excluded by Ordinance No. 1997 in defining the contingency in which the plaintiff in error should build. The provision in paragraph (c) for the return of the securities, which were to be deposited by the plaintiff in error as security for the performance of its obligation, in case

it should be prevented 'from building said belt tracks or any portion of the same on account of the city not furnishing the right of way,' or 'by causes beyond its control,' tends to support, rather than to oppose, the view that the undertaking was regarded as an entirety; for all the securities were to be returned although the prevention related to a portion of the route only. We are also referred to the provision [§ 3, par. (d)] that in the event that the New Orleans & San Francisco Railroad Company should, from any cause, complete 'only a portion of the tracks' described, the plaintiff in error should have the right 'to operate its own locomotives, cars,' etc. 'over such portion of the tracks' as had already been built, and as might be built by the first-mentioned Company, for a proportionate part of the agreed payment. This clause, in view of the existing situation of the parties, was held by the state court to have reference to a contingency in which, the opposition of the Dock Board not having been successful, the Railroad Company had proceeded with its undertaking and, having built a part of the tracks, had failed to complete them; and this construction is in harmony with the other provisions of the ordinance. But, in fact, the event described in paragraph (d) did not happen, as no part of the road was built; and this clause in no way aids the contention that the New Orleans & San Francisco Railroad Company was under legal obligation to undertake a partial construction if it became legally impossible to carry out its undertaking as a whole.

We conclude that the contract upon which the plaintiff in error relies was subject, in any aspect, to a suspensive condition (Civil Code, La., Art. 2021), that the event in which the obligation was to arise did not happen, and hence that the subsequent enactment was not open to the objection raised.

Judgment affirmed.

NEW YORK ELECTRIC LINES COMPANY *v.* EMPIRE CITY SUBWAY COMPANY.

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

No. 63. Argued November 5, 6, 1914.—Decided November 30, 1914.

If it sufficiently appears that plaintiff in error raised the question of constitutionality of later legislation repealing that on which its contract rested, as impairing the obligation of that contract, and that the state court gave effect to the repealing legislation, the case is properly here under § 237, Judicial Code.

Under such conditions, it is the duty of this court to determine for itself whether a contract existed and whether its obligation has been impaired.

A street franchise which becomes operative upon the grant of the consent of the city is a property right. The grant is not a nude pact, but rests upon an obligation, expressly or impliedly assumed, to carry on the undertaking to which the grant relates. Such grants are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance.

Grants of franchises are subject to the tacit condition that they may be lost by non-user or mis-user. The condition thus implied is a condition subsequent.

A franchise is given in order that it may be exercised for the public good, and failure to exercise as contemplated is ground for revocation and withdrawal.

An indefeasible interest only becomes vested under a franchise which has not only been duly granted, but has also been exercised in conformity with the grant.

Whether the authorities shall proceed in case of forfeiture of franchise for non-user or mis-user by *quo warranto* or, as in this case, by ordinance of repeal, the propriety of which can be adjudicated in a subsequent legal proceeding, is entirely a matter of state law.

In this case, *held* that as the right to use the streets was to be used within a reasonable time or lost, and as it never had been used, an ordinance of the City of New York of May 11, 1906, revoking the right of the plaintiff in error to lay wires in, and otherwise to use, the

streets of New York under a permission granted in 1878 did not contravene the impairment of obligation clause of the Federal Constitution.

Judgment based on 201 N. Y. 329, affirmed.

THE facts, which involve rights and obligations of a corporation licensed by municipal ordinance to maintain electric wires, and the validity under the impairment of obligation clause of the Federal Constitution of a subsequent revocation of the license by the municipality owing to mis-user and non-user, are stated in the opinion.

Mr. Alton B. Parker and *Mr. J. Aspinwall Hodge*, with whom *Mr. Henry A. Gildersleeve* was on the brief, for plaintiff in error:

Relator's permit of 1883 was an irrevocable contract.

Performance was unnecessary for the creation of this property right; there was, however, performance which would have been complete but for the acts of the State and city. Acts of 1848, ch. 265; 1853, ch. 471; 1873, ch. 335; 1881, ch. 483; 1884, ch. 534; 1885, ch. 499; 1887, ch. 716; 1891, ch. 231; *Africa* v. *Mayor*, 70 Fed. Rep. 729; *Mayor* v. *Telephone Co.*, 115 Fed. Rep. 304; *Capital City Co.* v. *Tallahassee*, 186 U. S. 401; *Louisville* v. *Cumberland Tel. & Tel. Co.*, 224 U. S. 649; *New York* v. *Bryan*, 196 N. Y. 158; *Rochester* v. *Rochester Ry. Co.*, 182 N. Y. 99; *Detroit* v. *Detroit &c. Ry. Co.*, 64 Fed. Rep. 628; *S. C.*, 184 U. S. 368; *Ghee* v. *Northern Gas Co.*, 158 N. Y. 510; *Re Brooklyn El. R. R.*, 125 N. Y. 434; *Mayor* v. *Africa*, 77 Fed. Rep. 501; *Milhan* v. *Shape*, 27 N. Y. 611; *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58; *Pearsall* v. *Great Northern Ry.*, 73 Fed. Rep. 933; *S. C.*, 161 U. S. 646; *People* v. *O'Brien*, 111 N. Y. 1; *People* v. *Sturtevant*, 9 N. Y. 273; *N. Y. Edison Co.* v. *Willcox*, 207 N. Y. 86; *Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528; *S. R. T. Co.* v. *New York*, 128 N. Y. 510; *Trustees* v. *Jessup*, 162 N. Y. 122; *Wright* v. *Nagle*, 101 U. S. 791.

This appeal necessarily involves a Federal question.

That the Federal question was raised and decided appears from the record and the opinion of the state court.

The Federal question was necessarily decided by the state court.

The relator accepted and acted upon its franchise.

The relator's franchise includes the right to lay wires in the streets for telephonic purposes, and to either use them or to lease them to others for such purposes.

By reversing its own construction of the relator's contract, the State of New York has impaired the obligation of the contract of the relator with the city and with the State.

The relator completed its formal acceptance of its franchise from the city by duly filing the map which the ordinance called for.

The relator has wholly complied with ch. 263 of the Laws of 1892 and no issue of non-compliance has ever been raised, nor can it be.

The relator is the real party in interest.

The application for the writ of mandamus was made in good faith.

The relator has lost no rights by alleged laches and no statute of limitations is involved herein.

The relator has never assigned its franchise.

The city is estopped to question the relator's franchise by the acceptance of taxes.

In support of these contentions see cases *supra* and *Adams Co.* v. *B. & M. R. Co.*, 39 Iowa, 507; *American Emigrant Co.* v. *Iowa Land Co.*, 52 Iowa, 323; *Atty. Gen'l* v. *P. & R. R.*, 6 Iredell, 456; *Audubon Co.* v. *American Emigrant Co.*, 40 Iowa, 460; *Brandriff* v. *Harrison*, 50 Iowa, 164; *Central &c. Co.* v. *Averrill*, 199 N. Y. 128; *Chambers* v. *Baltimore and Ohio R. Co.*, 207 U. S. 142; *Commercial Power Co.* v. *Tacoma*, 17 Washington, 670; *Curran* v. *Arkansas*, 15 How. 302; *Dorr* v. *Esders*, 112

App. Div. 897; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Eichner* v. *Met. St. R. R.*, 114 App. Div. 247; *Franchise Tax Cases*, 174 N. Y. 417; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Gumbes* v. *Hicks*, 116 App. Div. 120; *Hess* v. *N. Y. Underground Telegraph Co.*, N. Y. Register, Jan. 25, 1887; *James* v. *Signell*, 60 App. Div. 75; *Jersey City Ry. Co.* v. *Passaic*, 68 N. J. L. 110; *In re Long Acre Co.*, 51 Misc. 407; *S. C.*, 188 N. Y. 361; *Los Angeles* v. *Water Works Co.*, 177 U. S. 570, 576; *Louisiana* v. *Pillsbury*, 105 U. S. 278, 294; *McCullagh* v. *Reby*, 9 N. Y. Supp. 361; *Muhlker* v. *N. Y. & H. R. R.*, 197 U. S. 544, 570; *Murdock* v. *City of Memphis*, 20 Wall. 590; *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482; *Peck* v. *Burr*, 10 N. Y. 294; *Lodes* v. *Health Dept.*, 189 N. Y. 187; *N. Y. Electric Lines* v. *Ellison*, 115 App. Div. 254; *S. C.*, 188 N. Y. 531; *N. Y. Electric Lines* v. *Squire*, 14 Daly, 184; *S. C.*, 107 N. Y. 593; *S. C.*, 145 U. S. 175; *People* v. *W. & D. R. R.*, 128 N. Y. 240; *Philadelphia Fire Ass'n* v. *New York*, 119 U. S. 110, 116; *Pollitz* v. *Wabash R. R.*, 207 N. Y. 113; *Roby* v. *Colehour*, 146 U. S. 153; *Water Co.* v. *Rochester*, 176 N. Y. 36; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92; *Sauer* v. *New York*, 206 N. Y. 536; *Simplot* v. *Dubuque*, 49 Iowa, 630; *Sullivan* v. *Texas*, 207 U. S. 416, 423; *Traction Co.* v. *North Arlington*, 67 N. J. L. 162; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; Laws of 1892, ch. 263; Laws of 1899, ch. 712; Transportation Law, § 140.

Mr. Edmund L. Mooney, with whom *Mr. Charles T. Russell* and *Mr. Frederick A. Card* were on the brief, for defendant in error:

The appeal should be dismissed as not involving a Federal question.

No Federal question was raised or decided.

If any Federal question was raised, its decision was not necessary to judgment.

Non-user and abandonment is a non-Federal question.

There is no existing demand, occupation is not assured, public interests do not require construction; all these are non-Federal questions.

This proceeding is solely to enable relator to promote a telephone business, which was beyond the scope of the permission granted.

Relator was incorporated to conduct a subway conduit business, not a telephone business.

Declarations and disclaimers in previous litigations and acts of the parties furnish practical construction of the franchise.

The permission granted to relator by resolution of Common Council of April 10, 1883, was not accepted and acted upon in fact, and is no longer in force.

The attempted transfer of the franchise to the Great Eastern Co. was a breach of condition contained in the resolution of permission.

The permission or the secondary franchise was lost by non-user and abandonment.

Assuming that a formal acceptance would have been sufficient, the acceptance in writing of the permission was not a complete formal acceptance, in the absence of the filing of a *bona fide* map, specifying amount and position of spaces.

The decision of the Federal question, if such be properly raised, does not control the whole case. Other points warrant affirmance.

A party applying for a peremptory writ of mandamus admits the truth of the allegations in the opposing affidavits.

The relator is not the real party in interest.

The application is not made in good faith.

The relator lost whatever right it had by laches.

In support of these contentions, see cases cited by plaintiff in error which can be distinguished and *In re Bingham-*

ton Bridge, 3 Wall. 51; *Boise Artesian Co.* v. *Boise City*, 230 U. S. 84; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Castillo* v. *McConnico*, 168 U. S. 674; *Chicago City Ry. Co.* v. *Storey*, 73 Illinois, 541; *New York* v. *N. Y. Refrigerating Co.*, 146 N. Y. 210; *City Ry. Co.* v. *Citizens St. Ry. Co.*, 166 U. S. 557; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Delaware, L. & W. R. R. Co.* v. *Oswego*, 92 N. Y. App. Div. 551; *Dewey* v. *Des Moines*, 173 U. S. 193; *Endowment Assn.* v. *Kansas*, 120 U. S. 103; *Eustis* v. *Bolles*, 150 U. S. 361; *City Ry. Co.* v. *Galveston City St. Ry.*, 63 Texas, 529; *Harshman* v. *Bates County*, 92 U. S. 569; *Hulbert* v. *Chicago*, 202 U. S. 275; *Insurance Co.* v. *Dutcher*, 95 U. S. 269; *Johnson* v. *N. Y. &c. Co.*, 187 U. S. 491; *Layton* v. *Missouri*, 187 U. S. 356; *Leathe* v. *Thomas*, 207 U. S. 93; *Louisville Trust Co.* v. *City of Cincinnati*, 76 Fed. Rep. 296; *Matter of Taylor*, 117 N. Y. App. Div. 248; *Moore* v. *Mississippi*, 21 Wall. 636; *New York Cent. R. R.* v. *New York*, 186 U. S. 269; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Nicoll* v. *Sands*, 131 N. Y. 19; *Otis* v. *Oregon S. S. Co.*, 116 U. S. 548; *People* v. *Adirondack Ry.*, 160 N. Y. 225; *People* v. *Collis*, 6 N. Y. App. Div. 467; *People* v. *French*, 31 Hun (N. Y.), 617; *People* v. *Rome, Watertown &c. Co.*, 103 N. Y. 95; *Althause* v. *Giroux &c. Co.*, 122 App. Div. 617; *Connolly* v. *Board of Education*, 114 App. Div. 1, aff'd 187 N. Y. 535; *Durant* v. *Jeroloman*, 139 N. Y. 14; *Hunter* v. *National Park Bank*, 122 App. Div. 635; *Lehmaier* v. *Interurban St. Ry. Co.*, 85 App. Div. 407; *McMackin* v. *Board of Police*, 46 Hun, 296; *Millard* v. *Chapin*, 104 N. Y. 96; *Nelson* v. *Marsh*, 82 App. Div. 571, aff'd 178 N. Y. 618; *Phelps* v. *Delaware Common Pleas*, 2 Wend. 257; *Pumpyansky* v. *Keating*, 168 N. Y. 390; *Sherwood* v. *Board of Canvassers*, 129 N. Y. 360; *Postal Tel. Co.* v. *Baltimore*, 156 U. S. 210; *Seeberger* v. *McCormack*, 175 U. S. 274; *Seymour* v. *Warren*, 179 N. Y. 1; *State* v. *Board of Liquidation*, 98 U. S. 140; *Telluride*

Power Co. v. *Rio Grande R. R. Co.*, 187 U. S. 569; *The Victory*, 6 Wall. 382; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Winona &c. R. Co.* v. *Plainview*, 143 U. S. 371; *Woolsey* v. *Funke*, 121 N. Y. 87; *Yazoo & M. R. Co.* v. *Adams*, 180 U. S. 41; *Zadig* v. *Baldwin*, 166 U. S. 485.

By leave of court *Mr. Alfred B. Cruikshank* filed a brief as *amicus curiæ*, on behalf of Clifford L. Middleton.

Mr. Justice Hughes delivered the opinion of the court.

This is a writ of error to review the denial by the state court of an application for a writ of peremptory mandamus directing the Empire City Subway Company (Limited) to lease space in its conduits in the City of New York to the plaintiff in error.

In the year 1884, the legislature of the State of New York required that 'all telegraph, telephonic and electric light wires' in certain cities—New York and Brooklyn—should be placed under the surface of the streets (Laws of 1884, chap. 534). Under the authority of a statute passed in the next year (Laws of 1885, chap. 499, amended by Laws of 1886, chap. 503), the Board of Commissioners of Electric Subways adopted a plan by which the City of New York should enter into a contract with a company to construct the necessary subways, etc., which other companies operating electrical wires should be compelled to use, paying therefor a reasonable rent. Under contracts, made accordingly and ratified by the legislature (Laws of 1887, chap. 716), subways, etc., were constructed by the Consolidated Telegraph & Electrical Subway Company. The board first-mentioned was succeeded by the Board of Electrical Control (Laws of 1887, chap. 716); and, in 1890, the subways, conduits and ducts for low tension conductors, which had been thus provided, were transferred to the Empire City Subway Company (Limited), the de-

fendant in error. The latter company, by contract with the Board and the City, made in 1891 under legislative authority (Laws of 1891, chap. 231), agreed to build, maintain and operate subways, etc., as specified—it being provided that spaces therein, upon application, should be leased 'to any company or corporation having lawful power to operate telegraph or telephone conductors in any street' in the City of New York.

The plaintiff in error, The New York Electric Lines Company, claiming to be entitled to space in these subways, made application therefor on or about June 10, 1910. The request was refused and the present proceeding for a peremptory mandamus was brought. The assertion of right rested upon a permission granted by the City of New York, through its Common Council, to the plaintiff in error, on April 10, 1883, to lay electrical conductors in the City's streets. This permission, the City by its Board of Estimate and Apportionment, which had succeeded to the powers of the former Common Council in the matter, had formally revoked by a resolution adopted on May 11, 1906, reciting that whatever rights the company had secured under the permission in question had long since been forfeited by non-user. The Court of Appeals of the State, holding that the Board of Estimate and Apportionment had this power of revocation, and had duly exercised it, affirmed an order refusing the writ of mandamus. *Matter of New York Electric Lines Co.*, 201 N. Y. 321. The plaintiff in error insists that the resolution thus sustained was an unconstitutional impairment of the obligation of its contract with the City.

We think that it sufficiently appears that this question was raised in the state court, and as the state court gave effect to the repealing resolution the case is properly here. It is therefore the duty of this court to determine for itself whether a contract existed and whether its obligation has been impaired. *Douglas* v. *Kentucky*, 168 U. S. 488, 502;

St. Paul Gas Light Co. v. *St. Paul*, 181 U. S. 142, 148; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544, 551; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 556; *Louisiana Railway & Navigation Co.* v. *New Orleans*, decided this day, *ante*, p. 164.

The plaintiff in error was incorporated in the year 1882, under a general law of the State of New York (Laws of 1848, chap. 265, as amended by Laws of 1853, chap. 471). Its certificate of incorporation stated, among other things, that it was incorporated for the purpose of 'owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements of the streets . . . of the Cities of New York and Brooklyn' and 'for the purpose of owning franchises for laying and operating the said lines of electric conductors.' Chapter 483 of the Laws of 1881 had authorized any company so incorporated 'to construct and lay lines of electrical conductors underground in any city,' provided that it 'first obtain from the common council' of such city the 'permission to use the streets' for the purposes set forth. The permission in question, which as already stated, was granted by the Common Council of the City of New York, on April 10, 1883, was (omitting parts not here material) as follows:

"*Resolved*, that permission be and hereby is granted to the New York Electric Lines Company, to lay wires or other conductors of electricity in and through the streets, avenues and highways of New York City and to make connections of such wires or conductors underground by means of the necessary vaults, test boxes and distributing conduits, and thence above ground with points of electric illuminations or of telegraphic or telephonic signals in accordance with the provisions of an ordinance . . . approved . . . December 14, 1878."

It was also resolved that the Company should not

'transfer or dispose of the franchise hereby granted without the further authority of the Common Council.'

On April 24, 1883, the plaintiff in error presented to the Common Council, and the latter spread upon its minutes, a formal acceptance of the permission, which after the recitals states:

"Now, therefore, the said New York Electric Lines Company by these presents accepts the said franchise as contained in the ordinance and resolutions adopted by the Honorable the Board of Aldermen, April 10, 1883, and agrees to, assumes and obligates itself in the observance of all the requirements, provisions, restrictions, conditions and limitations contained in the said last mentioned ordinance as adopted April 10, 1883, as well also as to the provisions, conditions and obligations of the said general ordinance approved by the Mayor December 14, 1878."

The ordinance of 1878, referred to, regulated the method of laying wires under the streets, and provided that within six months after the grant of permission, grantees should file with the County Clerk 'maps, diagrams and tabular statements indicating the amount and position of the spaces proposed to be occupied by them.' In May, 1883, the plaintiff in error, in asserted compliance with the ordinance, filed a map, diagrams and statement. It is alleged in the affidavits presented on the application for mandamus that the plaintiff in error secured inventions and patent rights, that it had an office and factory, that it prosecuted experimental work in relation to its project, and expended in this way large sums of money. But, in the actual construction of conduits or laying of wires, nothing was done prior to the legislation of 1885 and 1886, which as we have seen provided for a comprehensive plan for the building of subways in which electrical conductors should be placed.

Section 3 of the act of 1885 expressly made it obligatory upon any company 'operating or intending to operate elec-

trical conductors,' and desiring or being required to place its conductors underground, to file with the board of commissioners a 'map or maps, made to scale,' showing the proposed plan of construction of its underground electrical system and 'to obtain the approval by said board of said plan' before any underground conduits should be constructed. The plaintiff in error did not submit a plan to the board as required by the statute. In July, 1886, it applied to the Commissioner of Public Works for a permit to make the necessary excavations in the streets for the purpose of laying conductors, and, on the application being denied petitioned for a writ of peremptory mandamus to direct the Commissioner to grant it. It was insisted in its petition in that proceeding that it had 'never operated or intended to operate electrical conductors,' its intention having always been 'to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any' of them; that the acts of 1885 and 1886 (above mentioned), relating to the construction of subways, did not apply to the plaintiff in error; and that, if they were applicable, they violated the Federal Constitution being an impairment of its contract with the City and operating to deprive the plaintiff in error of its property without due process of law. The state court held that the statutes in question were applicable to the plaintiff in error, and were constitutional, and refused the mandamus. *People, ex rel. New York Electric Lines Co.* v. *Squire*, 107 N. Y. 593.

This court affirmed the judgment (*id.*, 145 U. S. 175), saying (pp. 187, 188):

"In no sense of the term do we think it can be safely averred that the acts of 1885 and 1886 are not applicable to the relator. . . . Neither can it be said that the acts of 1885 and 1886 have a retroactive effect, at least so far as the relator is concerned, since whatever rights it obtained under the ordinance of 1883, which it accepted

as the basis of the contract it claims to have entered into, were expressly subject to regulation, in their use, by the highest legislative power in the State acting for the benefit of all interests affected by those rights and for the benefit of the public generally, so long as the relator's essential rights were not impaired or invaded. *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650; *Stein* v. *Bienville Water Supply Company*, 141 U. S. 67."

And conceding for the purpose of the discussion, but 'without deciding,' that the plaintiff in error had a contract with the City 'for the laying of its wires, and the construction of its underground electrical system,' this court reached the conclusion that its rights had in no way been impaired by the legislation under review.

This decision was rendered in May, 1892. Meanwhile, pursuant to the statutes above mentioned, a plan of construction had been adopted by the board charged with that duty, subways had been built, and the defendant in error had entered into its contract to maintain and operate them for low tension conductors, as specified, including telegraph and telephone conductors. But for fifteen years after the final decision in the case cited no application was made by the plaintiff in error for space in these subways. The first application for such space was made in June, 1907, and was not granted.

Nor, during this long period, was any attempt made by the plaintiff in error either to build conduits or to place wires under the City's streets, save that in December, 1905, it applied to the Commissioner of Water Supply, Gas and Electricity for a permit to open the streets for that purpose and, on its being denied, a proceeding was begun to obtain a peremptory writ of mandamus. This was refused, and the order to that effect was affirmed by the Court of Appeals of the State. *People, ex rel. New York Electric Lines Co.* v. *Ellison*, 188 N. Y. 523. The pertinent legislation and the subway contracts were reviewed and

the requirement that electrical conductors should be placed in conduits constructed in accordance with the adopted plan, instead of the plaintiff in error being permitted to build its own subways for such conductors, was sustained. In arriving at this result, it was again assumed that the plaintiff in error had a continuing right under the City's permission, but this question was expressly reserved (*id.*, p. 527). A writ of error sued out from this court was dismissed on motion of the plaintiff in error. 214 U. S. 529.

It was about the time when the last-mentioned proceeding was instituted that the City's permission was revoked (May 11, 1906); and the state court, in its opinion in the present case, said that the question 'remaining to be determined' was whether 'the relator, under the resolution of the common council of April, 1883, has the right, as a matter of law, to have its wires inserted in the ducts of the Empire City Subway Company, notwithstanding the revocation of such resolution.' Did a 'bare acceptance' of the permission operate to vest an irrevocable franchise? 201 N. Y. pp. 321, 329. This question was answered in the negative in the view that such a permission is 'a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed,' as contemplated by the permission, 'sufficient to create a right of property and thus form a consideration for the contract.'

The plaintiff in error challenges this view, insisting that by virtue of the City's permission it is the grantee of an irrevocable franchise in the City's streets; that this franchise was derived from the State; that when the consent of the City was given, as provided in the statute, the grant became immediately operative and could not thereafter be revoked or impaired by municipal resolution or ordinance; that the granted right, however named, is property,—and, as such, is inviolable; and that this position is

supported by numerous decisions both of the state court and of this court, which are cited in the margin.[1] Thus in *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513, referring to the legal effect of the consent of the municipal authorities under a statute empowering the corporation to lay gas conduits in streets, on such consent, the court said: "It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise." And in *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 659, where a corporation was authorized to erect poles, etc., over the streets with the consent of the General Council of the City, it was held that the charter franchises became 'fully operative' when the City's consent was obtained. "Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property." 224 U. S., p. 661. Again, in the recent case of *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65, it was said: "That an

[1] *Milhau* v. *Sharp*, 27 N. Y. 611, 620; *People* v. *O'Brien*, 111 N. Y. 1, 38; *Suburban Rapid Transit Co.* v. *The Mayor*, 128 N. Y. 510, 520; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 532; *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513; *City of Rochester* v. *Rochester Railway Co.*, 182 N. Y. 99, 119; *City of New York* v. *Bryan*, 196 N. Y. 158, 164, 165; *New Orleans Gas Light Co.* v. *Louisiana Light &c. Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 680, 681; *Walla Walla* v. *Walla Walla Co.*, 172 U. S. 1, 9; *Detroit* v. *Detroit &c. Ry. Co.*, 184 U. S. 368, 394; *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 658, 663; *Grand Trunk Railway Co.* v. *South Bend*, 227 U. S. 544, 552; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 90, 91; *Russell* v. *Sebastian*, 233 U. S. 195, 204.

ordinance granting the right to place and maintain upon the streets of the city poles and wires of such a company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases." See also *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 91. These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfil the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities,—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made and there was nothing but a license which might be withdrawn at pleasure. Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See *The Binghamton Bridge*, 3 Wall. 51, 74; *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance. The case of *Capital City Light & Fuel Co.* v. *Tallahassee*, 186 U. S. 401, to which the defendant in error refers, is not opposed. There the complainant, upon the ground of an exclusive privilege, sought to enjoin a municipality from operating its own electric light plant; although ten years had elapsed since the complainant's grant, the complainant had done nothing whatever to establish an electric light business and under the

express terms of the statute the exclusive privilege had not attached (186 U. S. 410).

But, while the grant becomes effective when made and accepted in accordance with the statute and the grantee is thus protected in starting the enterprise, it has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent or that the grantee is duly proceeding to perform. And when it is said that there is vested an *indefeasible* interest, easement, or contract right, it is plainly meant to refer to a franchise not only granted but exercised in conformity with the grant. (See cases cited *supra.*) It is a tacit condition annexed to grants of franchises that they may be lost by mis-user or non-user. *Terrett* v. *Taylor,* 9 Cranch, 43, 51; *Chicago Life Insurance Co.* v. *Needles,* 113 U. S. 574, 580; *Given* v. *Wright,* 117 U. S. 648, 656. The condition thus implied is, of course, a condition subsequent. The same principle is applicable when a municipality under legislative authority gives the permission which brings the franchise into being; there is necessarily implied the condition of user. The conception of the permission as giving rise to a right of property in no way involves the notion that the exercise of the franchise may be held in abeyance for an indefinite time, and that the right may thus be treated as a permanent lien upon the public streets, to be enforced for the advantage of the owner at any time, however distant. Although the franchise is property, 'it is subject to defeasance or forfeiture by failure to exercise it (*People* v. *Broadway R. R. Co. of Brooklyn,* 126 N. Y. 29), or by subsequent abandonment after it has been exercised (*People* v. *Albany & Vermont R. R. Co.,* 24 N. Y. 261).' If 'no time is prescribed, the

franchise must be exercised within a reasonable time.' *City of New York* v. *Bryan*, 196 N. Y. 158, 164.

It follows that where the franchise has not been exercised within a reasonable time in accordance with the condition which inheres in the nature of the grant, its revocation upon this ground cannot be regarded as an impairment of contractual obligation. The privileges conferred may be withdrawn by such methods of procedure as are consistent with established legal principles. This rule, frequently recognized in cases where franchises have been abused or misemployed (see *Chicago Life Insurance Co.* v. *Needles, supra; Farmers Loan & Trust Co.* v. *Galesburg*, 133 U. S. 156, 179; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 347; *Columbus* v. *Mercantile Trust &c. Co. of Baltimore*, 218 U. S. 645, 663; Dillon, Munic. Corp., 5th ed., § 1311), must also be applicable where they have been neglected, that is, have not been used in due time. Whether in such cases, where there has been a municipal permission for use of streets, the State shall proceed directly by *quo warranto*, or whether it shall authorize the municipality to pass a resolution or ordinance of repeal or revocation leaving the propriety of its course to be determined in an appropriate legal proceeding in which the default of the grantee may be adjudicated, is a question of state law with which we are not concerned. The resolution in such case serves to define the attitude of the public authorities, and to revoke the permission where sufficient ground exists for such revocation. Whether there has been such a mis-use or non-exercise of the franchise as to warrant its withdrawal is a matter for judicial consideration.

In the present case, the plaintiff in error, insisting upon its continuing right, despite the resolution of revocation, applied for a peremptory writ of mandamus to compel the Subway Company—a quasi-public instrumentality—to furnish the desired space in its conduits. It had been

held by the state court that this was an available remedy where a company had 'lawful power' to operate its conductors in the City's streets and had been denied the space which the Subway Company by its contract with the City had agreed to give. *Matter of Longacre El. L. & P. Co.*, 188 N. Y. 361. The question of 'lawful power' of the plaintiff in error was considered and the application refused. It is true that it was stated that there was a license only which by reason of non-performance had not ripened into a contract right, but it is equally true that the non-performance shown was available to defeat that right, assuming it to have been created at the time of the grant, and to make the resolution of revocation—which the state court has held was adopted under state authority—entirely proper.

For a long period of years after the final determination of the validity of the statutes authorizing a comprehensive scheme of subway construction, and after the contract with the Subway Company had been made, the plaintiff in error made no attempt to secure space and to exercise the franchise now claimed. It treated that right as susceptible of practically indefinite retention unused. In the circumstances disclosed, its excuses are unavailing. The right conferred, assuming it to be a contract right, was to be used within a reasonable time or lost. In view of the state of the case as to non-exercise, it cannot be said that its constitutional right has been infringed.

Judgment affirmed.

SIOUX REMEDY COMPANY *v.* COPE.

ERROR TO THE CIRCUIT COURT OF TURNER COUNTY, STATE OF SOUTH DAKOTA.

No. 37. Submitted March 13, 1914.—Decided November 30, 1914.

When the writ of error from this court is not allowed until after the record has been sent back by the state appellate court to the trial court, the writ is directed to that court.

It is within the province of the highest court of a State in construing a state statute to depart from prior decisions upon the subject if deemed untenable and in such event this court upon a writ of error to that court accepts the latest construction and confines its attention to determining whether the statute, as so construed, violates the Federal Constitution.

While a State may adopt a reasonable police measure, even though interstate commerce be incidentally or indirectly affected, it has no power to exclude from its limits foreign corporations or others engaged in interstate commerce or to impose such conditions as will fetter their right to carry on such commerce, or subject them in respect to their transactions therein to unreasonable requirements.

The right to demand and enforce payment for goods sold in interstate commerce is directly connected with, and essential to, such commerce, and the imposition of unreasonable conditions on such right operates as a burden and restraint upon interstate commerce.

While a State may restrict the right of foreign corporations to sue in its courts and to engage in business within its limits, its power in this respect, like all other state powers, can only be exerted within the limitations placed on state action by the Federal Constitution.

A corporation, authorized by the State of its creation to engage in interstate commerce, may not be prevented from coming into the limits of another State for all legitimate purposes of such commerce.

A State may require a foreign corporation seeking to enforce rights in its courts to conform to prevailing modes of procedure and usual rules respecting costs, security therefor and the like, but it may not impose conditions such as filing its certificate, paying recording fees and appointing a resident agent which have no bearing on mere questions of

procedure or costs. Such conditions by their necessary operations are burdens on interstate commerce.

A requirement that a foreign corporation appoint a resident agent on whom process may be served in an action against it, as a condition precedent to suing in the courts of the State to collect a claim arising out of interstate commerce transactions, is a burden on interstate commerce because it necessarily operates to thwart the purpose of the Constitution to secure and maintain the freedom of such commerce by whomsoever conducted.

The South Dakota statute, §§ 883–885, Rev. Codes 1903, as the same has been construed by the state courts, requiring foreign corporations before bringing suit on claims arising in interstate commerce in the courts of the State, to file certificate of incorporation and other papers and pay recording fees and also to appoint resident agents on whom process can be served, is an unconstitutional burden on interstate commerce.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a statute of South Dakota regarding the right of foreign corporations to sue in the courts of the State and prescribing conditions to be performed in regard thereto, are stated in the opinion.

Mr. Joe Kirby, Mr. C. E. Moore and *Mr. A. W. Bulkley* for plaintiff in error.

Mr. Charles O. Bailey, Mr. John H. Voorhees, Mr. Alan Bogue, Jr., Mr. Andrew S. Bogue, Mr. Peter G. Honegger and *Mr. Theodore M. Bailey* for defendants in error:

The statute is constitutional though it may affect interstate commerce. *Allen* v. *Alleghany Company*, 196 U. S. 458; *Ashley* v. *Ryan*, 153 U. S. 436; *Blake* v. *McClung*, 172 U. S. 239; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142; *Mobile County* v. *Kimball*, 102 U. S. 691; *Lupton's Sons* v. *Automobile Club*, 225 U. S. 489; *Diamond Glue Co.* v. *U. S. Glue Co.*, 187 U. S. 611; *Flint & Walling Company* v. *McDonald*, 21 S. Dak. 526; *Hall* v. *DeCuir*, 95 U. S. 485; *Hooper* v. *California*, 155 U. S. 648; *Johnson* v. *New York*

Breweries Co., Ltd., 178 Fed. Rep. 513; *Mahar* v. *Harrington Park*, 204 N. Y. 231; *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *U. S. Fidelity Co.* v. *Kentucky*, 231 U. S. 394.

The following cases cited by plaintiff in error can be distinguished: *Atchison &c. Railway Co.* v. *O'Connor*, 223 U. S. 280; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205; *Caldwell* v. *North Carolina*, 187 U. S. 622; *International Textbook Co.* v. *Lynch*, 218 U. S. 664; *Same* v. *Peterson*, 218 U. S. 664; *Same* v. *Pigg*, 217 U. S. 91; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Southern R. Co.* v. *Greene*, 216 U. S. 400; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Wilson-Moline Buggy Co.* v. *Hawkins*, 223 U. S. 713.

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

This is an action by an Iowa corporation to enforce payment of the purchase price, amounting to $80, of merchandise sold in interstate commerce under a written contract which was made in South Dakota and required that the merchandise be shipped by the plaintiff from its place of business in Iowa to the defendants at their place of business and residence in South Dakota. The action was brought in a court of the latter State and the defendants interposed a plea to the effect that the action could not be maintained because, as was the fact, the plaintiff had not complied with a South Dakota statute prescribing conditions upon which corporations of other States would be permitted to sue in the courts of that State. The plea was sustained and the action dismissed. An appeal to the Supreme Court of the State resulted in a judgment of

affirmance,[1] from which one member of the court dissented. 28 S. Dak. 397.

In that court it was contended that the statute upon which the plea was grounded is, when applied in a case like this, repugnant to the commerce clause of the Constitution of the United States.

The statute (Rev. Codes 1903) declares (§ 883) that no corporation created under the laws of any other State or Territory, for other than religious and charitable purposes, "shall transact any business within this State, or acquire, hold and dispose of property, real, personal or mixed, within this State, or sue or maintain any action at law or otherwise, in any of the courts of this State," until it shall have filed in the office of the Secretary of State an authenticated copy of its charter or articles of incorporation, and also (§ 885) that "no action shall be commenced or maintained in any of the courts of this State by such corporation on any contract, agreement or transaction made or entered into in this State, by such corporation," unless it shall have appointed a resident agent upon whom process may be served in any action to which it may be a party and shall have filed an authenticated copy of such appointment in the office of the Secretary of State and of the register of deeds of the county where the agent resides. The corporation is also required to pay the fees, amounting to about $25, for filing and recording these instruments.

The Supreme Court of the State construed the statute as requiring a foreign corporation to subject itself to the jurisdiction of all the courts of the State as a condition to invoking the aid of any one of them, and as embracing

[1] At the time of the allowance of the present writ of error the record had been sent to the Circuit Court of Turner County, and so the writ was directed to that court. See *Gelston* v. *Hoyt*, 3 Wheat. 246, 304; *Atherton* v. *Fowler*, 91 U. S. 143, 146–149; *Polleys* v. *Black River Co.*, 113 U. S. 81; *Lee* v. *Johnson*, 116 U. S. 48.

actions to enforce contracts directly arising out of and connected with interstate commerce equally with actions having no relation to such commerce; and after so construing the statute, the court held it to be a reasonable exercise of the police power of the State and in no wise repugnant to the commerce clause of the Constitution of the United States. In two earlier cases the court had taken a different view of the statute (*Rex Buggy Co.* v. *Dinneen*, 23 S. Dak. 474; *Sioux Remedy Co.* v. *Lindgren*, 27 S. Dak. 123), but in the opinion rendered in this case they were disapproved.

Recognizing that it was within the province of the Supreme Court of the State to construe the statute and to depart from prior decisions upon the subject, if deemed untenable, we accept the construction applied in this case, and confine our attention to the Federal question, whether, as so construed, the statute, by its necessary operation, materially or directly burdens interstate commerce.

Through a long series of decisions dealing with the scope and effect of the commerce clause it has come to be well settled that a State, while possessing power to adopt reasonable measures to promote and protect the health, safety, morals and welfare of its people, even though interstate commerce be incidentally or indirectly affected, has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or by the imposition of conditions to fetter their right to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection. *Crutcher* v. *Kentucky*, 141 U. S. 47; *Minnesota Rate Cases*, 230 U. S. 352, 401, 402, 410, and cases cited; *Adams Express Co.* v. *New York*, 232 U. S. 14, 31, and cases cited. And so the solution of the question here presented lies within narrow lines.

The contract and sale out of which the action arose

were transactions in interstate commerce, and entirely legitimate notwithstanding the plaintiff's non-compliance with the state statute. *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Bucks Stove Co.* v. *Vickers*, 226 U. S. 205; *Flint & Walling Mfg. Co.* v. *McDonald*, 21 S. Dak. 526. After delivery of the merchandise according to the contract, the plaintiff was lawfully entitled to the purchase price. The defendants were likewise obligated to pay it. And by reason of their refusal the plaintiff had a right of action on the contract. Thus much was recognized by the Supreme Court of the State and is now conceded by counsel for the defendants. But it was held by that court, and is here contended, that while the State could not make non-compliance with the statute a ground for forbidding or invalidating sales in interstate commerce, it could make such non-compliance a ground for preventing the maintenance of any action in the courts of the State based upon such a sale; in other words, that the State, although unable to condition the right to make the sale or its validity upon a compliance with the statute, could so condition the right to sue for the purchase price in the courts of the State.

The argument advanced in support of this position is, first, that the right to demand and enforce payment for merchandise sold in interstate commerce is no part of such commerce, and therefore may be encumbered without burdening the latter; second, that a State may impose such conditions as it deems appropriate upon the right of foreign corporations to sue in its courts, and, third, that in any event the conditions imposed by the statute are not unreasonable or burdensome. The Supreme Court of the State sustained the second and third points and passed the other without comment.

Of the first point it is enough to say that the right to demand and enforce payment for goods sold in interstate commerce, if not a part of such commerce, is so directly

connected with it and is so essential to its existence and continuance that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden upon interstate commerce. The form or mode of imposing the conditions is not nearly so important as their necessary and practical operation, for, as was said in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27: "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

It may be conceded in a general way that a State may restrict the right of a foreign corporation to sue in its courts. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589–591; *Anglo American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373. And in the same general way it may be conceded that a State may restrict the right of such corporations to engage in business within its limits. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648. But the power so to deal with these subjects, like all other state powers, can only be exerted within the limitations which the Constitution of the United States places upon state action. *Missouri* v. *Lewis*, 101 U. S. 22, 30; *Blake* v. *McClung*, 172 U. S. 239, 256; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 33; *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 413. One of these limitations is that before indicated arising from the commerce clause, whose operation, as this court has said, is such that a corporation authorized by the State of its creation to engage in interstate commerce "may not be prevented by another State from coming into its limits for all the legitimate

purposes of such commerce." *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27. We think that when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the State cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled.

We are thus brought to the question whether the particular conditions imposed by this statute can be sustained when applied to rights of action like that disclosed in the present case. Without doubt a foreign corporation seeking to enforce such a right in the courts of a State may be required to conform to the prevailing modes of proceeding in those courts and to submit to the usual rules respecting costs, the giving of security therefor (see *Blake* v. *McClung*, 172 U. S. 239, 256), and the like. But incidents of this character commonly attending litigation may be put out of view, for it is with something quite different that we are here concerned. The conditions which the statute imposes are: First, that the company shall file in the office of the Secretary of State an authenticated copy of its charter or articles of incorporation; second, that it shall appoint a resident agent upon whom process may be served in any action against it and shall file a copy of such appointment in the office of the Secretary of State and of the register of deeds of the county where the agent resides; and, third, that it shall pay the fees incident to filing and recording these instruments, approximating $25. It will be perceived that these are the conditions upon which many of the States permit foreign corporations to engage in busi-

ness within their limits when no constitutional limitation is involved, that is, when the character of the business is such that the State is free to exclude such corporations or to admit them upon terms acceptable to it. But here the conditions are sought to be applied in a different way and to a different situation falling within the reach of the commerce clause. Out of this arises the question of their validity. We think the mere statement of the conditions shows that they have no natural or reasonable relation to the right to sue which they are intended to restrict. They have no bearing upon the merits or any question of procedure or costs, are not directed against any abusive use of judicial process, and are plainly onerous. The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the State has said, it requires the corporation to subject itself to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there. If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause.

These views require that the judgment be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

SKELTON *v.* DILL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 56. Submitted November 5, 1914.—Decided November 30, 1914.

Restrictions upon alienation of allotments to Creek Indians made under the act of March 1, 1901, c. 676, 31 Stat. 861, supplemented by the act of June 30, 1902, c. 1323, 32 Stat. 500, apply only to allotments made to living citizens in their own right and do not apply to those made on behalf of deceased members of the tribe. *Mullen* v. *United States*, 224 U. S. 448.

Quære, who are the true heirs under the above statutes of a Creek Indian child of mixed parentage who was born prior to May 28, 1901, and died before receiving his allotment.

30 Oklahoma, 278, reversed.

THE facts, which involve the construction of the Creek Indian allotment statutes and the effect of the provisions regarding restrictions on alienation of allotments and their applicability to allotments made to deceased members of the tribe, are stated in the opinion.

Mr. Charles J. Kappler and *Mr. Charles H. Merillat* for plaintiff in error.

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

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

Whether an allotment of lands in the Creek Nation which was made on behalf of Archie Hamby, a Creek child then deceased, passed the lands to his heirs free from restrictions upon alienation is the Federal question in this case. The facts out of which the question arises are these: Archie Hamby was born in February, 1900, and died in

July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such in 1895, and his father was a white man not entitled to enrollment. Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this by operation of law vested the title in his heirs. In September, 1905, after the allotment was made, his parents, acting through an attorney in fact appointed a few days before, executed and delivered to L. S. Skelton a warranty deed for the lands, and in July, 1906, the parents, apparently ignoring the deed to Skelton, executed and delivered to S. M. Wilson a similar deed. Whatever rights Wilson acquired under his deed subsequently passed to William H. Dill.

The action in the court of first instance was in ejectment, and was brought by Dill against Skelton, who had gone into possession under his deed. Dill prevailed and the judgment was affirmed by the Supreme Court of the State, which held that when the deed to Skelton was made the lands were subject to restrictions upon alienation which rendered the deed void, and that at the time of the deed to Wilson, under which Dill was claiming, the restrictions had been removed, thereby rendering that deed valid. 30 Oklahoma, 278.

The allotment was made under the act of March 1, 1901, c. 676, 31 Stat. 861, as modified and supplemented by the act of June 30, 1902, c. 1323, 32 Stat. 500. These acts embodied and adopted a plan for allotting and distributing the lands and funds of the Creek Nation in severalty among its citizens, and to that end required that an enrollment be made by the Commission to the Five Civilized Tribes of all citizens who were entitled to participate in the allotment and distribution. It being necessary to fix a date

as of which the enrollment should be made, the original act provided, in § 28, that the enrollment should embrace all qualified citizens who were living on April 1, 1899, and all children born to such citizens up to and including July 1, 1900, and living on that date. The supplemental act changed the latter date by declaring, in §§ 7 and 8, that the enrollment should include all children born up to and including May 25, 1901. Evidently anticipating that participation in the allotment and distribution might in some instances be cut off by death, Congress made provision for such a contingency. Thus the original act declared, in § 28: "And if any such citizen has died since that time (April 1, 1899), or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs . . . and be allotted and distributed to them accordingly." And the supplemental act provided, in §§ 7 and 8: "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Both parties are claiming under deeds from the father and mother, so we pass the question of who were the true heirs of the deceased child, observing only that under § 6 of the supplemental act, in the circumstances before stated, the mother was and the father was not a lawful heir.

In immediate connection with the provisions respecting allotments to living citizens in their own right, the original act contained a provision (§ 7) imposing various restrictions upon the alienation of the allotted lands. But aside from its relation to other parts of the act that provision need not be noticed, for it was superseded by § 16 of the supplemental act, which reads as follows:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Whether these restrictions were intended to apply only to allotments made to living citizens in their own right or to apply as well to allotments made on behalf of deceased members is the question for decision. The Supreme Court of the State when passing upon this case held

them applicable to both classes of allotments, but in the later case of *Rentie* v. *McCoy*, 35 Oklahoma, 77, reached the other conclusion, as did also the District Court for the Eastern District of Oklahoma in *Reed* v. *Welty*, 197 Fed. Rep. 419. We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of § 16 of the supplemental act lend themselves to that view, but in those sections of both acts which deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate and reflects a corresponding difference in purpose. In *Mullen* v. *United States*, 224 U. S. 448, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right but not to allotments on behalf of members then deceased. We do not perceive anything in the acts relating to the Creek lands which calls for a different conclusion.

The judgment must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY *v.* UNITED STATES.

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

No. 19. Argued October 29, 30, 1914.—Decided November 30, 1914.

Under the policy of the Government to encourage the building of railroads in the western States, Congress has in some cases granted land to aid in construction and has also provided the means by which those companies not having such grants can, under reasonable conditions, acquire rights of way over public lands.

While the right of way statute only applies to public lands and, therefore, does not apply to lands segregated from the public domain by homestead entries, settlers may, under § 2288, Rev. Stat., grant rights of way over land before final proof.

Nothing in the Reclamation Act of June 17, 1902, 32 Stat. 388, affects the provision of § 2288, Rev. Stat., permitting a homesteader without patent, but in lawful possession, to grant to a railroad company a right of way across his claim.

The privileges for granting to railroad companies rights of way over homesteaders' land under entry were renewed and extended by the act of March 3, 1905, c. 1424, 33 Stat. 991.

In this case, *held* that the various acts of Congress in effect operated to give the consent of the United States to the construction of a railroad as an instrumentality of commerce across the lands of those homesteaders within the limits of the Minidoka Irrigation Project in Idaho who gave deeds for the right of way to the railroad company.

190 Fed. Rep. 491, reversed, and 176 Fed. Rep. 762, affirmed.

THE facts, which involve the construction of acts of Congress regarding railroad rights of way and the right of entrymen within the reclamation projects to deed rights of way for railroads, are stated in the opinion.

Mr. Henry W. Clark and *Mr. A. A. Hoehling, Jr.*, with whom *Mr. P. L. Williams* was on the brief, for appellants:

The authority to convey a right of way for railroad pur-

poses expressly given to homestead settlers by § 2288, Rev. Stat., is not impaired by the provisions of the Reclamation Act.

The lands in question were not public lands and there was no authority under the general right of way act of 1875 for the filing or approval of a map of definite location affecting them.

The right of way granted by the homestead settlers under the authority of § 2288 is complete and perfect. The statute itself operates as the consent of the Government to subject its interest in the land to the right of way during the life of the homestead entry and also after forfeiture of the homestead.

The dictum of the Circuit Court of Appeals that the general right of way act requires the filing of a profile of the road rather than a map of alignment or definite location is contrary to the practice of nearly forty years.

In support of these contentions see *Alexander* v. *Kansas City R. R. Co.*, 138 Missouri, 464; *Bardon* v. *Nor. Pac. R. R. Co.*, 145 U. S. 535; *Barker* v. *Harvey*, 181 U. S. 481; *Dakota Cent. R. R. Co.* v. *Downey*, 8 L. D. 115; *Jamestown &c. R. R. Co.* v. *Jones*, 7 No. Dak. 619; *S. C.*, 177 U. S. 125; *Kern Valley Water Co.*, 15 L. D. 577; *Montana Cent. R. R. Co.*, 25 L. D. 250; *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190; *Regulations under General Right of Way Act*, 33 L. D. 481; *Santa Fe &c. R. R. Co.*, 22 L. D. 685; *Stalker* v. *Oregon Short Line*, 225 U. S. 142; *Un. Pac. R. R. Co.* v. *Harris*, 215 U. S. 386; *United States* v. *Buchanan*, 232 U. S. 72.

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

The right to build and operate a railroad through a reclamation project without consulting the Government

should not be adjudged to exist unless plainly conferred by some act of Congress.

The act of March 3, 1873, as amended, does not empower the entrymen to authorize the construction of a railroad through a reclamation project without the consent of the Secretary of the Interior.

The act merely authorizes the settler to relinquish in part the privileges which he enjoys under the settlement law, not to convey the title or to impair in any way the interest of the Government.

As to lands which, like the lands of reclamation projects, are affected by a special public interest, the act of March 3, 1873, if applicable at all, should be construed as a means of securing the consent of the settler to the uses mentioned, but not to permit those uses in the absence of governmental approval.

Construed *in pari materia* with the Reclamation Act, the act of March 3, 1873, as amended, can be deemed operative only in so far as consistent with the proper management and welfare of such projects. This necessarily implies that the transfers of the settlers must remain ineffectual if not approved or if objected to by the Government through the Secretary of the Interior.

Under the statute no vested right arises against the Government until a map showing the railroad location has been filed with and approved by the Secretary of the Interior.

The withdrawn lands were excluded from the operation of the statute by the terms of the statute itself.

Independently of its own express provisions, which require approval by the Secretary and exclude lands specially reserved, the act of 1875, when construed *in pari materia* with the Reclamation Act, does not authorize railroad construction in reclamation projects against the objection of the Secretary of the Interior.

In support of these contentions see *Anderson* v. *Carkins*,

135 U. S. 483; *Buxton* v. *Traver*, 130 U. S. 232; *Cascade Corporation* v. *Railsback*, 59 Washington, 376; *Commonwealth* v. *Davis*, 12 Bush (Ky.), 240; *Dakota Cent. R. R. Co.* v. *Downey*, 8 L. D. 115; *Davis* v. *Foreman*, 14 L. D. 146; *Eimer* v. *Wellsand*, 93 Minnesota, 444; *Enoch* v. *Spokane Falls & N. Ry. Co.*, 6 Washington, 393; *Five Per Cent Cases*, 110 U. S. 471; *Frisbie* v. *Whitney*, 9 Wall. 187; *Hall* v. *Russell*, 101 U. S. 503; *Hutchings* v. *Low*, 15 Wall. 77; *Jamestown & N. R. R. Co.* v. *Jones*, 177 U. S. 125; *Knight* v. *Land Ass'n*, 142 U. S. 161; *Larsen* v. *Navigation Co.*, 19 Oregon, 240; *Little* v. *Williams*, 231 U. S. 335; *McCune* v. *Essig*, 118 Fed. Rep. 273; *Minneapolis, &c. Ry. Co.* v. *Doughty*, 208 U. S. 251; *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *Phœnix &c. R. R. Co.* v. *Arizona R. R. Co.*, 9 Arizona, 434; *Picard* v. *McCormick*, 11 Michigan, 68; *Railway Co.* v. *Sture*, 32 Minnesota, 95; *Schenck* v. *Saunders*, 13 Gray, 37; *Scott* v. *Carew*, 196 U. S. 100; *Shepley* v. *Cowan*, 91 U. S. 330; *Smith* v. *Townsend*, 148 U. S. 490; *Spokane Falls Ry. Co.* v. *Ziegler*, 167 U. S. 65; *Stalker* v. *Oregon Short Line*, 225 U. S. 142; *Swigart* v. *Baker*, 229 U. S. 187; *Union Pac. R. R. Co.* v. *Harris*, 215 U. S. 386; *United States* v. *Blendaur*, 128 Fed. Rep. 910; *United States* v. *Minidoka & S. W. R. R. Co.*, 176 Fed. Rep. 762; *S. C.*, 190 Fed. Rep. 491; *United States* v. *Rickey Land Co.*, 164 Fed. Rep. 496; *Washington &c. R. R. Co.* v. *Osborn*, 160 U. S. 103; *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380; *Wilcox* v. *Jackson*, 13 Pet. 496; *Williamson* v. *Berry*, 8 How. 495; Act of March 3, 1873, 17 Stat. 602; Act of March 3, 1875, 18 Stat. 482; Act of March 3, 1877, 19 Stat. 377; Act of June 3, 1878, 20 Stat. 89; Act of March 3, 1891, 26 Stat. 1097; Act of June 17, 1902, 32 Stat. 388; Act of March 3, 1905, 33 Stat. 991; Rev. Stat., §§ 2257, 2288, 2289–2291, 2353–2379.

See also Bouvier's Law Dict. 943; Rapalje & Lawrence Law Dict. 1144; Regulations under Act of March 3, 1875, 12 L. D. 423; 14 L. D. 338.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Minidoka & Southwestern Railroad Company was authorized by its charter to build its road along a line which ran through the Minidoka Irrigation Project in the State of Idaho. Homesteaders, without patents but lawfully in possession of irrigable land within the reclamation area, granted rights of way over their settlements to the Railroad Company.

When the Company began to build the United States sought to enjoin the work on the ground that a railroad could not be built across lands within a reclamation area without the consent of the Government. It was also claimed that the necessary embankments, excavations, bridges and culverts would interfere with the success of the irrigation works. The Company answered and relied on the conveyances from the homesteaders. After a hearing the District Court denied the injunction but made provision that the culverts should be so built as not to interfere with the flow of water through the canals and ditches (176 Fed. Rep. 762). This decree was reversed by the Circuit Court of Appeals (190 Fed. Rep. 491) on the ground that the lands in the reclamation area, though in possession of settlers, were public lands within the meaning of the Right of Way Act (March 3, 1875, c. 152, 18 Stat. 482) and that before its road could be built through the Minidoka Irrigation works the Company must obtain the consent of the Secretary of the Interior. From that decree an appeal was taken to this court.

It has always been the policy of the Government to encourage the building of railroads in the Western States, and many land grants have been made by it to aid in their construction. Congress has also provided a means by which those companies having no such grants could acquire rights of way over any portion of the public land by filing a map of definite location and securing its approval

by the Secretary of the Interior (18 Stat. 482). This law, however, by its very terms applies only to "public lands" and hence cannot be construed to empower the Secretary to authorize the building of roads across lands which had been segregated from the public domain by the entry and possession of homesteaders or preëmptors. *Bardon* v. *Northern Pac.*, 145 U. S. 535, 538; *United States* v. *Buchanan*, 232 U. S. 72, 76, and cases cited. On the other hand, settlers, without patent, were not in a position to make deeds to rights of way, not only because they had no title but also because they were prohibited from alienating such land before final proofs. Rev. Stat., § 2291. The consequence was that neither the Government nor the homesteaders could make such grants, and as the Company could not build without an assured title to its right of way, it was practically impossible to construct railroads through territory which consisted partly of public lands and partly of that which was in the possession of settlers. But it was greatly to their interest and to that of the Government that such a highway should be constructed and in order to meet the difficulty, Congress, on March 3, 1873, c. 266, 17 Stat. 602 (Rev. Stat., § 2288), passed an act providing that any *bona fide* settler might convey by warranty against his own act any part of his claim "for church, cemetery, or school purposes or for the right of way of railroads." Under this act the appellant could have constructed its road along the strip conveyed to it by the homesteaders unless, as claimed by the Government, the provisions of Rev. Stat., § 2288 as amended (March 3, 1905, c. 1424, 33 Stat. 991) have been repealed as to lands within irrigation projects and the completed Minidoka Irrigation Works.

Counsel for the United States contend that the Reclamation Act (June 17, 1902, c. 1093, 32 Stat. 388) requires that when an irrigation project is undertaken the Secretary of the Interior shall define its limits and withdraw all the

irrigable land therein from the public domain and from the operation of the general land laws: It is argued that when thus withdrawn the irrigation area constitutes a unit in which the United States has such a special interest as to require that it shall be subject to the supervision of the Secretary—he, in order to secure the success of the undertaking, having it in his power to decide whether a railroad should be built, and if so, along what line and across what lots it should be constructed. It is also argued that settlers having no patents ought not to be in a position to grant a right of way over lands which they do not own and may never acquire and thereby impose a burden upon the claim if it should afterwards come into the hands of other homesteaders.

These considerations, however, have not induced Congress to change its policy of encouraging the construction of railroads along routes designated by charters and over land in the possession of settlers. Neither have they induced Congress to confer upon the Secretary the power to grant rights of way through irrigation lands in the possession of homesteaders.

It is true that the Reclamation Act of June 17, 1902 (c. 1093, 32 Stat. 388), provides that when the Secretary of the Interior determines upon an irrigation project he must define its limits and "withdraw the irrigable lands therein from all forms of settlement, except under the homestead law," and all settlements therein shall be "subject to the limitations, charges, terms, and conditions provided in the Reclamation Act." And it is further true that the provisions of this statute do, in several important respects, modify the homestead law. The Secretary can limit the size of the homestead to ten acres, instead of the 160 acres permitted by the general law. The settler, instead of being entitled to receive a patent at the end of 5 years on compliance with the statutory conditions (Rev. Stat., §§ 2289–2291), is not permitted to make final proof and

receive a patent until he has reclaimed one-half of the irrigable area for agricultural purposes, and has also paid his proportionate share of the cost of the irrigation system in instalments,—the last of which may not mature for ten years after entry.

There are, possibly, other provisions to meet the special conditions of lands constituting an irrigation plant. But except as modified by the specific terms of the Reclamation Act, such lands are distinctly made subject to entry under the provisions of the homestead law, and all of the homesteaders' rights therein are the same as if the settlement had been located outside of the limits of irrigation works. One of the privileges, not affected by the Reclamation Act, is that which permits the homesteader, without patent, but in lawful possession, to grant to a railroad company a right of way across his claim; and whatever reason there was for conferring this right upon those who entered land in a sparsely settled section is doubly operative as to land located within the more thickly populated reclamation areas. Manifestly this is true as to so much as may be needed for churches and school houses. It is equally so as to rights of way for railroads and other public utilities needed by the numerous residents living within the irrigation areas.

An act passed since the Reclamation Act of 1902 serves, if possible, to make clearer the fact that Congress did not intend to deprive settlers on these or any other class of lands from granting railroad rights of way. For on March 3, 1905 (33 Stat. 991), after the establishment of the Minidoka Project, Congress amended Rev. Stat., § 2288 so as to provide that "any *bona fide* settler under the preemption, homestead, *or other settlement law* shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephone, canals, reservoirs, or ditches. . . ." These

privileges were renewed and extended by this act because of the public benefits to be derived from such utilities. When, therefore, the Minidoka & Southwestern Railroad Company, in 1909, secured grants to the continuous strip through the reclamation area, the Company, by virtue of these public statutes and the private grants, was authorized to construct its road not only across the agricultural lands, but over the intervening ditches and canals. For, while the latter formed a part of the irrigation unit, they were also particularly appurtenant to the lands through and along which they ran.

These various acts of Congress operated to give its consent, in advance, to the construction of such a highway and instrumentality of commerce, notwithstanding any interest the United States may have had in the lands described in the deeds from the homesteaders to the Railroad Company.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court for the District of Idaho is affirmed.

HENRY *v.* HENKEL, UNITED STATES MARSHAL.

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

No. 216. Argued February 24, 25, 1914.—Decided November 30, 1914.

No hard and fast rule has as yet been announced as to how far the court will go in passing upon questions raised in *habeas corpus* proceedings.

Barring exceptional cases, the general rule is that on applications for *habeas corpus*, the hearing is confined to the single question of jurisdiction, and even that will not be decided in every case.

The hearing on *habeas corpus* is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court.

This rule applies equally whether the petitioner is committed for trial within the district or held under warrant of removal to another State. *Ex parte Royall*, 117 U. S. 241.

A citizen cannot be held for custody or removed for trial where there is no provision of common law or statute making an offense of the acts charged, as in such case the committing court would have no jurisdiction as the prisoner would be in custody without warrant of law.

Every act of Congress is presumptively valid and a committing magistrate cannot properly treat as invalid a statutory declaration of what should constitute an offense except where the act is palpably void.

Whether Congress has power to compel a witness in a congressional inquiry to make material and non-criminatory disclosures, and whether the district judge has jurisdiction to commit on the ground that the statute punishing the witness for refusal to disclose is unconstitutional, are questions for the determination of the trial court and not on a proceeding in *habeas corpus*.

207 Fed. Rep. 805, affirmed.

THE facts, which involve the jurisdiction of courts on *habeas corpus* proceedings and to what extent the court will pass upon questions of jurisdiction and the merits of the case before the trial, are stated in the opinion.

Mr. John C. Spooner, with whom *Mr. Paul D. Cravath*, *Mr. John D. Lindsay* and *Mr. Stuart McNamara* were on the brief, for appellant:

The petitioner was not a wilfully recalcitrant witness.

Even though the language of the statute were susceptible of a construction broad enough to cover the case at bar, it should not be so construed because such a construction was not within the intention of Congress.

Such a construction would be repugnant to the representative character of the American government.

That there was an intention on the part of Congress that the act should not apply to inquiries in aid of legislation is implied in the title.

This is made plain by a consideration of the act as a whole. It contains no provision for the judicial deter-

mination of the pertinency or relevancy of questions, which is usual in statutes authorizing inquiries in aid of legislation, before proceeding to imprison the witness for his refusal to answer. The first section refers only to those matters in respect of which Congress may competently take definitive action; the presence of the word "pertinent" is inconsistent with any other view; the second or immunity clause demonstrates the purpose of so limiting the operation of the act. This intent is confirmed by the language of the third section.

For the situation as it existed at the time the act was passed and as it was pressed upon the attention of Congress, see the *Simonton Case* and report of the select committee and introduction of the bill.

The history of the period is shown by the debates. Cong. Globe, 34th Cong., 3d Sess., pp. 275 *et seq.*

This is the first occasion on which an attempt has been made to have the statute construed as applying to inquiries in aid of legislation. See Cases of *Wolcott* in 1858; of *Kilbourn* in 1876; of *Chapman* in 1894.

If the statute is to be so construed as to make it applicable to inquiries in aid of legislation it is unconstitutional.

Any forcible intrusion into and compulsory exposure of the private affairs of the individual except when the general good requires it, is violative of the Fourth and Fifth Amendments.

The power to invade the right of privacy can be justified only on the ground of necessity; such a power is not necessary for the exercise by Congress of its function of legislation. This question was raised but not decided in *Kilbourn* v. *Thompson*, 103 U. S. 168. It was expressly decided in the negative by the Privy Council in *Kielley* v. *Carson*, 4 Moore, P. C. 63, a decision which this court has treated with high respect.

The decisions holding that state legislatures possess

the power are not conclusive here as Congress has not always thought it had the power; nor is the practice of recent years evidence of the constitutionality of the practice.

The questions which the appellant refused to answer were not pertinent to the question under inquiry nor was the information which they sought to elicit necessary or material.

If the committee had known the names of the national bank officers which the appellant refused to disclose, they would not have been able to examine, through such officers, or otherwise, into the transactions or affairs of the banks themselves.

In support of these contentions, see *Matter of Barnes*, 204 N. Y. 108; *Boyd* v. *United States*, 116 U. S. 616; *Briggs* v. *Mackellar*, 2 Abb. Pr. (N. Y.) 30; *Burnham* v. *Morrissey*, 14 Gray, 226; *Chapman Case*, Smith's Digest, 583; *In re Chapman*, 166 U. S. 661; *Cooper's Case*, 32 Vermont, 253; *Matter of Davies*, 168 N. Y. 89; *Doyle* v. *Falconer*, L. R., 1 P. C. 328; *In re Falvey*, 7 Wisconsin, 630; *Fenton* v. *Hampton*, 11 Moore, P. C. 347; *Guthrie* v. *Harkness*, 199 U. S. 148; *Harriman* v. *Int. Com. Comm.*, 211 U. S. 407; *Heike* v. *United States*, 227 U. S. 131; *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447; *Kielley* v. *Carson*, 4 Moore, P. C. 63; *Kilbourn Case*, Smith's Digest, 536; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Loan Association* v. *Topeka*, 20 Wall. 655; *McLean* v. *United States*, 226 U. S. 374; *Muskrat* v. *United States*, 219 U. S. 346; *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320; *Omaha Street Ry.* v. *Int. Com. Comm.*, 230 U. S. 324; *In re Pacific Ry. Comm.*, 32 Fed. Rep. 241; *McDonald* v. *Keeler*, 99 N. Y. 463; *Ex parte Robinson*, 19 Wall. 505; *Robinson* v. *Phil. & R. R. Co.*, 28 Fed. Rep. 340; *Simonton Case*, Smith's Digest, 85; *Slaughter House Cases*, 16 Wall. 36; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Stockdale* v. *Hansard*, 9 Ad. & E. 1; *United States* v. *Press Publishing*

Co., 219 U. S. 1; *United States* v. *Trans-Missouri Assn.*, 166 U. S. 290; *Wertheim* v. *Continental R. & T. Co.*, 15 Fed. Rep. 716; *Wolcott Case*, Smith's Digest, 201.

The Solicitor General, with whom *Mr. W. C. Herron* was on the brief, for the United States:

The points attempted to be made by appellant are not open in this proceeding. *Beavers* v. *Henkel*, 194 U. S. 73; *Benson* v. *Henkel*, 198 U. S. 1; *Glasgow* v. *Moyer*, 225 U. S. 420; *Greene* v. *Henkel*, 183 U. S. 249; *Hyde* v. *Shine*, 199 U. S. 62; *In re Chapman*, 156 U. S. 211; *Johnson* v. *Hoy*, 227 U. S. 245; *Riggins* v. *United States*, 199 U. S. 547; *Tinsley* v. *Treat*, 205 U. S. 20.

Revised Statutes, § 102, covers an investigation of the character undertaken in the case at bar. *In re Chapman*, 166 U. S. 661.

Revised Statutes, §§ 102 *et seq.*, are constitutional. *In re Chapman*, 166 U. S. 661; *Kilbourn* v. *Thompson*, 103 U. S. 168.

For state court decisions upholding the power of a legislative body to summon witnesses and to compel them to answer questions on inquiry in aid of legislation, see *Briggs* v. *Mackellar*, 2 Abb. Pr. (N. Y.) 30; *Burnham* v. *Morrissey*, 14 Gray, 226; *McDonald* v. *Keeler*, 99 N. Y. 463; *Wickelhausen* v. *Willett*, 10 Abb. Pr. (N. Y.) 164 (aff'd *Wilckens* v. *Willet*, 1 Keyes, 521).

The questions were pertinent to the inquiry.

In support of these contentions, see *Beavers* v. *Henkel*, 194 U. S. 73; *Benson* v. *Henkel*, 198 U. S. 1; *Briggs* v. *Mackellar*, 2 Abb. Pr. (N. Y.) 30; *Burnham* v. *Morrissey*, 14 Gray, 226; *Doyle* v. *Falconer*, L. R. 1 P. C. 328; *Fenton* v. *Hampton*, 11 Moore, P. C. 347; *Glasgow* v. *Moyer*, 225 U. S. 420; *Grant* v. *United States*, 227 U. S. 74; *Greene* v. *Henkel*, 183 U. S. 249; *Hyde* v. *Shine*, 199 U. S. 62; *Hyde* v. *United States*, 225 U. S. 347; *In re Chapman*, 156 U. S. 211; *In re Chapman*, 166 U. S. 661; *In re Falvey*, 7 Wisconsin,

630; *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447; *Johnson* v. *Hoy*, 227 U. S. 245; *Kielley* v. *Carson*, 4 Moore, P. C. 63; *Kilbourn* v. *Thompson*, 103 U. S. 168; *McDonald* v. *Keeler*, 99 N. Y. 463; *Riggins* v. *United States*, 199 U. S. 547; *Tinsley* v. *Treat*, 205 U. S. 20; *Wickelhausen* v. *Willett*, 10 Abb. Pr. (N. Y.) 164 (aff'd in *Wilckens* v. *Willet*, 1 Keyes, 521).

Mr. Justice Lamar delivered the opinion of the court.

In the 62nd Congress, the House of Representatives (H. R. 429, 504) adopted a resolution authorizing the members of the Committee on Banking and Currency to investigate and make a report as to the financial affairs and activities of National Banks, interstate corporations and groups of financiers as a basis for remedial and other legislative purposes. To that end the Committee was authorized to send for persons and papers and to swear witnesses.

Among those summoned and sworn was the appellant, George G. Henry, who was examined at length as to many matters relating to the formation of syndicates and the flotation of stock. He testified that he was a member of the firm of Salamon & Co., bankers in New York, who were accustomed to form syndicates for the acquisition and sale of blocks of stock and to grant participation therein to trust companies and national banks—their directors and corporate officers also being frequently members of the same syndicate. In reference to one of these transactions he testified that Salamon & Co. had agreed to pay $8,215,262 for $22,500,000 preferred and common stock in a California oil company; thereupon Salamon & Co., Lewisohn Bros., Hallgarten & Co., bankers in New York, together with a fourth banking firm (whose name witness did not disclose) had then formed a syndicate for acquiring and disposing of this

$22,500,000 of oil stock. He testified how the shares were allotted, and that 12½ per cent. went to the unnamed persons in the banking group; that in the subsequent disposition of the stock a number of shares were acquired by 15 individuals, some of whom were officers of National Banks located in New York, Chicago and Detroit. Other shares were allotted to those who were officers in Trust Companies in New York and Chicago. Letters were written offering to allot part of this oil stock to the New York syndicate, but before acceptance of the allotment all of the stock had been sold at a profit of nearly $500,000, a part of which went to the members of the New York syndicate (officers of banks), even though they had not previously accepted the allotment. They thus, in effect, received a present of their share of the profits. He was asked to give the names of those composing the New York syndicate, but claimed to have the right under the Constitution to decline to answer the question, saying also that he "did not want to disclose the names of the participants in the New York syndicate, although he understood it to be the wish of the subcommittee that he should, for the reason that he would consider it dishonorable to reveal the names of his customers unless compelled to do so."

The Committee ordered the fact of his refusal to answer to be reported to the House for action—majority and minority reports being made. After discussion, the House of Representatives directed that the facts should be laid before the Grand Jury of the District of Columbia. That body returned an indictment against Henry charging him with refusing to answer questions propounded by the Committee. Rev. Stat., §§ 101–104. A warrant issued and Henry was arrested in New York and when taken before the Commissioner demanded an examination.

On the hearing and before the introduction of any testimony, he moved for his discharge on the ground that

the Commissioner was without jurisdiction, since it appeared on the face of the complaint that petitioner was not charged with any offense against the United States.

The motion was denied and, it having been admitted that Henry was the person described in the indictment, the Government introduced the bench warrant and a certified copy of the indictment as sufficient proof of probable cause.

The petitioner then offered in evidence the Resolution defining the scope of the inquiry, with a transcript of his testimony before the Committee—including the question which he refused to answer and his reasons therefor. Copies of the majority and minority Reports to the House were also incorporated in the record. After argument the Commissioner ordered Henry to be held in custody until the District Judge could issue a warrant for his removal to the District of Columbia under the provisions of Section 1014, Revised Statutes.

Thereupon Henry applied to the District Judge for a writ of *habeas corpus*, and on the hearing introduced all of the testimony that had been submitted to the Commissioner, and asked for his discharge on grounds similar to those which had been presented to the committing magistrate.

After argument the District Judge discharged the writ, and an appeal was entered to this court where petitioner's counsel, renewing the objections made in the District Court, insist that the Resolution did not authorize an inquiry as to the matter about which Henry refused to testify; that the facts charged do not constitute an offense under the statute; or, if so, that the statute is void. On the authority of *In re Chapman*, 166 U. S. 661, 668; *Kilbourn* v. *Thompson*, 103 U. S. 168, and other cases, they insist that in the trial of contested elections, in cases involving the expulsion of members, or other quasi-judicial proceedings, the House or Senate may, like any other

court, compel material and non-criminatory disclosures. But they argue that, in view of the provisions of the Fourth Amendment to the Constitution, neither House can compel a citizen to disclose his private affairs as a basis for legislation—particularly where, as in the present case, the witness was not contumacious, but had fully and freely answered all material questions; had disclosed the fact that National Banks and their officers were often members of the same syndicate, and had only refused to give the names of certain bank officials when the names themselves could not by any possibility be of assistance in shaping legislation. They, therefore, contend that the papers show on their face that there was no jurisdiction to issue the warrant on which he was held and that Henry should not be subjected to the hardship of being removed to the District of Columbia to stand trial upon an indictment which affirmatively shows that no crime has been committed.

The Government, on the other hand, insists that Rev. Stat., § 104, is constitutional and that Congress may provide for the punishment of witnesses who, in answer to a question propounded by its authority, fail to make non-criminatory disclosures and furnish information deemed necessary as a basis for legislation.

These important and far-reaching questions, though elaborately argued, should not be decided on this record, in view of the rule, relied on by the Government, that such issues must primarily be determined by the trial court.

The petitioner, however, relying spécially on *Greene* v. *Henkel*, 183 U. S. 249, 261; *Beavers* v. *Henkel*, 194 U. S. 73; *Tinsley* v. *Treat*, 205 U. S. 20, claims that as this is a removal case, with the special hardships attendant thereon, it is to be distinguished from those in which the foregoing rule has been announced.

When a person under arrest applies for discharge on

writ of *habeas corpus* the issue presented is whether he is unlawfully restrained of his liberty. Rev. Stat., § 752. But there is no unlawful restraint where he is held under a valid order of commitment, so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ and of the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised in *habeas corpus* proceedings. In cases which involve a conflict of jurisdiction between state and Federal authorities, or where the treaty rights and obligations of the United States are involved, and in that class of cases pointed out in *Ex parte Royall*, 117 U. S. 241; *Ex parte Lange*, 18 Wall. 163; *New York* v. *Eno*, 155 U. S. 89; *In re Loney*, 134 U. S. 372, the court hearing the application will carefully inquire into any matter involving the legality of the detention and remand or discharge as the facts may require. But, barring such exceptional cases, the general rule is that, on such applications, the hearing should be confined to the single question of jurisdiction, and even that will not be decided in every case in which it is raised. For otherwise the "*habeas corpus* courts could thereby draw to themselves, in the first instance, the control of all prosecutions in state and Federal courts." To establish a general rule that the courts on *habeas corpus*, and in advance of trial, should determine every jurisdictional question would interfere with the administration of the criminal law and afford a means by which, with the existing right of appeal, delay could be secured when the Constitution contemplates that there shall be a speedy trial, both in the interest of the public, and as a right to the defendant.

The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after

conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, state or Federal, on which the charge was based. In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant State for trial upon an indictment alleged to be void.

But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on *habeas corpus* is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted he has his right of review. *Kaizo* v. *Henry*, 211 U. S. 146, 148. The rule is the same whether he is committed for trial in a court within the district or held under a warrant of removal to another State. He cannot, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction and demanding a ruling thereon in *habeas corpus* proceedings. *Glasgow* v. *Moyer*, 225 U. S. 420; *In re Gregory*, 219 U. S. 210; *Ex parte Simon*, 208 U. S. 144; *Johnson* v. *Hoy*, 227 U. S. 245; *Urquhart* v. *Brown*, 205 U. S. 179; *Hyde* v. *Shine*, 199 U. S. 62; *Beavers* v. *Henkel*, 194 U. S. 73; *Riggins* v. *United States*, 199 U. S. 547, 551; *Ex parte Royall*, 117 U. S. 241.

The last of these decisions is particularly in point not only because of the applicability of its reasoning to the

present case, but because of the fact that the writ was there denied even though the statute, on which the charge was based, was ultimately held to be void. *Royall* v. *Virginia*, 116 U. S. 572, 579, 583; *Same* v. *Same*, 121 U. S. 102, 104; *In re Royall*, 125 U. S. 696.

The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute making an offense of the acts charged. In such case the committing court would have no jurisdiction, the prisoner would be in custody without warrant of law and therefore entitled to his discharge. *Greene* v. *Henkel*, 183 U. S. 249, 261. But the presumption is in favor of the validity of every act of Congress and it would not be proper for the committing magistrate to treat as invalid a statutory declaration of what should constitute an offense, except in those rare and extreme cases in which the act was plainly and palpably void.

Neither the issue nor the basis of the decision is changed when the person held under the warrant applies to a District Judge for discharge on writ of *habeas corpus*. So likewise the same issue and the same rule of decision must govern when the case is here on appeal from the order of the *habeas corpus* tribunal. It follows therefore that this court should not on this record pass on the jurisdictional questions presented. They like all other controverted issues in the case are for the determination of the courts of the District of Columbia when the defendant is therein put to his trial.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

UNITED STATES *v.* NIXON, BIDDLE, AND WEST, RECEIVERS OF THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

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

No. 427. Argued October 22, 1914.—Decided November 30, 1914.

A receiver of a corporation is not a corporation and not within the terms of the penal statute regulating corporations involved in this action. *United States* v. *Harris*, 177 U. S. 305.

In so far as a receiver of a railroad company transports passengers and property he is a common carrier with rights and responsibilities as such, and while operating a railroad he is subject to the penal provisions of a statute regulating the actions of common carriers in regard to transportation.

Prior to the amendment of March 4, 1913, extending the Quarantine Act of March 3, 1905, c. 1496, 33 Stat. 1264, prohibiting the transportation of cattle from a quarantined State to any other State, so as to make it apply to any common carrier, §§ 2 and 4 of that act did not apply to receivers of railroad companies.

Entries in the caption and on the back of the indictment are convenient means of reference, and in cases of doubt might be of assistance in determining what statute has been violated, *Williams* v. *United States*, 168 U. S. 382, but they form no part of the indictment itself.

The statute on which the indictment is founded must be determined as matter of law from the facts therein charged; and the facts as pleaded may bring the offense charged within an existing statute although the same is not mentioned in the indictment and another statute is referred to in the entries on the back and in the caption.

Under the Criminal Appeals Act of 1913, the statute on which as matter of law the indictment is based may be misconstrued not only by misinterpretation but by failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms.

An indictment must set out the facts and not the law.

The right of the Government to an appeal under the Criminal Appeals Act of 1907 cannot be defeated by entering a general order of dismissal without referring to the statute involved or giving the reasons on which the decision was based.

An error on the part of the trial judge dismissing the indictment in construing the statute in its original form as not including the offense charged, cannot be cured, nor can his decision be sustained, because the amendment by which the statute was made to include the offense had not been called to his attention.

THE facts, which involve the jurisdiction of this court under the Criminal Appeals Act of 1907 and the construction of the Cattle Quarantine Act of 1905 and its application to receivers of common carriers under the Amendment of 1913, are stated in the opinion.

Mr. Assistant Attorney General Underwood for the United States.

Mr. W. F. Evans and *Mr. W. S. Cowherd* for defendants in error, submitted.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Grand Jury for the Western Division of the Western District of Missouri returned an indictment against the St. Louis & San Francisco Railroad Company and its Receivers, charging that on August 16, 1913, Nixon, Biddle and West, as Receivers of said Company, were operating the property and business of said corporation as a common carrier of freight, and unlawfully transported cattle from a quarantine district in Oklahoma to Kansas City, Missouri, without compliance with the rules and regulations established by the Secretary of Agriculture.

Both the indorsement and caption to this indictment described it as being for "violation of secs. 2 and 4 of the act of March 3, 1905, 33 Stat. 1264." Those sections of that act provide that "no railroad company . . . shall transport from any quarantine State . . . to any other State any cattle . . ." except "in com-

pliance with regulations promulgated by the Secretary of Agriculture."

The defendants demurred on the ground "that the indictment does not charge any offense for which Receivers herein can be held." The court treated the indictment as founded on the act of 1905 imposing a penalty upon railroad companies and after argument sustained the demurrer—filing a memorandum in which he held that, under the ruling in *United States* v. *Harris*, 177 U. S. 305, the statute did not create an offense for which Receivers could be punished.

The case is here under the Criminal Appeals Act (34 Stat., 1246) on a writ of error in which the Government excepts generally to the quashing of the indictment and specially to the court's construction of this act of 1905.

In view of the decision in *United States* v. *Harris*, the judgment of the court below would necessarily have to be affirmed if the case was to be determined solely by the provisions of the Quarantine Act of 1905, which imposes a penalty for the transportation of cattle by a railroad company. But a Receiver is not a corporation, and, therefore, not within the terms of a statute applicable to railroad companies, even though cattle from an infected district transported by him would be as likely to transmit disease as if they had been shipped over the same line while it was being operated by the company itself. And, no doubt in recognition of this fact, and in order to make the remedy as broad as the evil sought to be cured, Congress, by the act of March 4, 1913, c. 145, 37 Stat. 828, 831, made all of the provisions of the original quarantine act of 1905 "*apply to any railroad company or other common carrier, whose road or line forms any part of a route over which cattle or other live stock are transported in the course of shipment" from a quarantine State to any other State.*

The statute, as thus amended, applied to transportation of live stock over short lines belonging to private individ-

uals or to lumber companies hauling freight for hire; to roads operated by Trustees under power contained in a mortgage; and also to the more common case where a railroad was being operated by a Receiver acting under judicial appointment. For in so far as he transports passengers and property he is a common carrier with rights and civil responsibility as such (*Eddy* v. *Lafayette*, 163 U. S. 456, 464; Hutchison on Carriers, § 77). And there is no reason suggested why a Receiver, operating a railroad, should not also be subject to the penal provisions of a statute prohibiting any common carrier from transporting live stock by rail from a quarantine district into another State. *Erb* v. *Morasch*, 177 U. S. 584; *United States* v. *Ramsey*, 197 Fed. Rep. 144.

But it is said that the Amendment, buried in the Agricultural Appropriation Act of 1913, was unknown to the Grand Jury when the indictment was found and was not construed in deciding the motion to quash. And it is contended that, inasmuch as the Criminal Appeals Act only authorizes a review of a decision in so far as it was "based upon the . . . construction of the statute upon which the indictment is founded" (March 2, 1907, c. 2564, 34 Stat. 1246),—the correct ruling that Receivers are not within the act of 1905 ought not to be reversed because it now appears that they are within the terms of the act of 1913 which was not brought to the attention of the District Judge and was not therefore construed by him in fact. It is pointed out that while there is a general assignment that the court erred in quashing the indictment, yet the Government itself specifically complains of the court's construction of the act of 1905—not the act of 1913. And to emphasize the fact that the indictment was not founded on the Amendment, attention is called to the fact that entries on the back and in the caption of the indictment describe it as being for "violation of Secs. 2 and 4 of the Act of March 3, 1905, 33 Stat.

1264," which apply to railroad companies and not to Receivers.

These entries are useful and convenient means of reference and in case of doubt might possibly be of some assistance in determining what statute was alleged to have been violated. But these entries form no part of the indictment (*Williams* v. *United States*, 168 U. S. 382, 389) and neither add to nor take from the legal effect of the charge that the Receivers, while operating the business of the corporation as a common carrier, transported cattle "contrary to the form of the statute in such cases made and provided." What was that statute and on what statute the indictment was founded was to be determined as a matter of law from the facts therein charged.

There is no claim that it was quashed because of any defect in matter of pleading, and that being true, the ruling on the demurrer that "the indictment does not charge any offense for which the Receivers can be held," necessarily involved a decision of the question as to whether there was any statute which punished the acts therein set out. In determining that question it was necessary that the indictment should be referred, not merely to the Act mentioned in argument, but to any statute which prohibited the transportation of cattle by the persons, in the manner, and on the date charged in that indictment. For the reasons already pointed out it was a misconstruction of the Act of 1913, to which the indictment was thus legally referred, to hold that Receivers acting as common carriers were not within its terms.

Nor can a reversal be avoided by the claim that the act of 1913, though applicable to the facts charged in the indictment, had not been construed by the court. For within the meaning of the Criminal Appeals Act (34 Stat. 1246) the statute on which, as matter of law, an indictment is founded, may be misconstrued not only by misinter-

preting its language, but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms. It is "a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it." *United States* v. *Patten*, 226 U. S. 525, 535. It would, of course, be fairer to the trial judge to call his attention to the existence of the act on which the indictment was based (*United States* v. *George*, 228 U. S. 14, 18). Yet an indictment must set out facts and not the law; and when he sustained the demurrer on the ground that the shipment therein stated did not constitute a crime of which the Receivers could be convicted, he in legal effect held that they were not liable to prosecution if while operating a road as common carrier they hauled live stock from a quarantine State to another. In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the Criminal Appeals Act (34 Stat. 1246). If that were not so the right of the Government could in any case be defeated by entering a general order of dismissal, without referring to the statute which was involved or without giving the reasons on which the decision was based.

The error can no more be cured by the fact that the existence of the statute was not called to the attention of the court than the Receivers, on the trial before the jury, could excuse themselves by proof that they did not know of the passage of the amendment which made it unlawful for them to transport cattle by rail from a quarantine State in interstate commerce.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

UNITED STATES *v.* SALEN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 506. Argued October 23, 1914.—Decided November 30, 1914.

The suppression clause in the declaration required to be made by agent-consignees of imported goods by sub-section 6 of § 28 of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 95, relates to the omission of matter proper to be included in the invoice and account attached, and not to independent facts.

In construing a provision of the Tariff Act relating to entry of merchandise, courts should consider the purpose of such provision in the light of the customs regulations applicable to such entry; and in this case this court will not say that one of a number of acts required to be done related to undefined extraneous general matter when all of the other acts related to particular defined subjects connected with the importation.

The meaning of words is affected by their context; and words used in a highly penal statute will be interpreted in a narrower sense as referring to things of the same nature as those described in an enumerated list, although standing alone they might have a wider meaning.

This limited interpretation given to sub-section 6 of § 28 of the Tariff Act of 1909 does not mean that Congress has deprived the collector of means of obtaining extraneous information, as there are other statutory provisions for examinations of the owner, consignee or agent for that purpose.

A statute such as the suppression clause,—sub-section 6 of § 28 of the Tariff Act of 1909,—will not be so interpreted as to spread a net that might catch the unwary as well as the guilty, or in a manner contrary to the fixed rules of interpretation, by making it relate to unenumerated matters as well as those enumerated, thus fixing no standard by which to draw the line between innocent silence and felonious concealment.

SALEN was indicted for making false statements in the sworn declaration required of Consignees by the Tariff Act of 1909. August 5, 1909, c. 6, 36 Stat. 11, 93. The first five counts charged that in entering laces in February,

1910, and January and February, 1913, he had falsely sworn that the Consular invoices attached were the only invoices covering the shipments, when he well knew that there were others in existence. The court overruled the demurrer to these counts and they are not involved in this case.

The sixth count related to a Declaration made by Salen on March 17, 1913, in making an entry of foreign laces covered by Consular Invoice No. 7893. Salen was therein charged with having fraudulently concealed from the Collector the existence of certain material facts and thereby had falsified the required statement in the sworn declaration "that nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods." This count sets out at great length and in narrative form certain evidentiary facts which may be thus summarized:

Salen was the New York agent and primary consignee of Goetz, a French exporter, who, for eight years, had been shipping laces to Salen for sale and delivery to Robinson, the purchaser and ultimate consignee.

When the last consignment arrived in New York, Salen presented the declaration to the Collector, attaching thereto, as required by law, the bill of lading; a list or entry account of the goods; and the consular invoice No. 7893. He paid the duty assessed on the basis of the foreign values as given in the invoice, and thereupon removed the goods and delivered them to Robinson the purchaser. This count of the indictment further charged that Salen knew that the foreign values had been falsely and fraudulently stated in the previous invoices; that such foreign values named in those invoices was uniformly greatly below the prices at which the laces were sold in the United States; that in making the Declaration as to the shipment represented by Consular Invoice No. 7893,

Salen concealed the fact that it was one of the series of shipments in which Goetz and Robinson had fraudulently concealed the great and uniform discrepancy between the foreign values named in the invoices and the prices at which the lace was sold in the United States.

It was charged that this concealment was the suppression of a fact by which the United States may have been defrauded of its lawful duty, for if Salen had communicated the facts the Collector would have called for a reappraisement of the laces and their undervaluation would have been disclosed.

The defendant demurred on the ground that there was no positive averment that the goods were undervalued but only an argumentative statement of facts the existence of which did not raise the legal conclusion that there was any undervaluation and that the count failed to charge facts sufficient to constitute an offense under sub-section 6 of § 28 of the act of August 5, 1909, c. 6, 36 Stat. 11, 95, or any other statute of the United States. The demurrer was sustained on the ground that the facts stated did not constitute an offense under the statute, and the case was then brought here by the Government under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat., 1246.

Mr. Assistant Attorney General Warren for the United States:

The case is properly before this court under the Criminal Appeals Act.

The penalties imposed by customs law are intended for the prevention of fraud, the protection of the revenue, and the protection of honest importers. The act should be so construed as to give effect to this intention in general and to the evident intent of Congress in particular to require of the importer, by means of the provisions of sub-section 5, the observance of the highest degree of good faith toward the Government.

The words "nothing has been concealed or suppressed," as used in sub-section 5, do not mean nothing has been concealed or suppressed in the entry and invoice. The history of the statute shows that Congress had intended to make the scope of the declaration a wide one, and to impose an obligation not to suppress or conceal anything (whether in the entry and invoice or not), which might tend to defraud the United States of duties.

One knowing certain facts which would have influenced any ordinary reasonable man acting as collector, in investigating or ordering an investigation or appraisement or reappraisement of values, and concealing such knowledge on his part, certainly conceals "something" and swears falsely when he makes oath that "nothing has been concealed or suppressed by him."

The importer's duty of disclosure to the Government is an obligation *uberrimæ fidei* as broad as that imposed upon the insured in marine insurance.

Whether a knowledge of prior fraudulent shipments constitutes a suppression of "nothing" may be tested by considering whether the party could have been examined under oath regarding such knowledge, on a summons under sub-section 15 of the act which gives the appraiser and collector a power to examine "touching any matter or thing which they may deem material."

It may also be tested by considering whether evidence that such party knew of prior frauds in undervaluation would be admissible if he should be indicted for perjury in swearing to the present declaration that the invoice produced by him exhibits the actual market value, etc.

It is not necessary to allege in the indictment or to prove that the United States was actually defrauded of duties. It is only necessary to allege facts calculated to deprive, or of a character which might deprive, the United States of such duties.

Proof of an intent to defraud is not required by subsections 5 and 6 to be alleged or proved. All that is necessary is (a) a false statement, (b) knowingly made—*i. e.*, made with knowledge of its falsity.

The statement in the declaration was "material thereto," *i. e.*, material to the declaration.

In support of these contentions see *Bollinger's Champagne*, 3 Wall. 560, 564; *Cliquot's Champagne*, 3 Wall. 114, 145; *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 507, 516; *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 509; *Taylor* v. *United States*, 3 How. 197, 207; *United States* v. *Biggs*, 211 U. S. 507, 518; *United States* v. *Birdsall*, 233 U. S. 223; *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Campbell*, 10 Fed. Rep. 816; *United States* v. *Cargo of Sugar*, 3 Sawyer, 50, 51; *United States* v. *Carter*, 231 U. S. 492; *United States* v. *Doherty*, 27 Fed. Rep. 730, 733–735; *United States* v. *Corbett*, 215 U. S. 233, 237; *United States* v. *De Rivera*, 73 Fed. Rep. 679; *United States* v. *Fawcett*, 86 Fed. Rep. 900; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Heinze*, No. 2, 218 U. S. 547; *United States* v. *Keitel*, 211 U. S. 370, 385; *United States* v. *Kissel*, 218 U. S. 601, 606; *United States* v. *Leng*, 18 Fed. Rep. 15; *United States* v. *Mason*, 213 U. S. 115, 122; *United States* v. *Mescall*, 215 U. S. 26, 31; *United States* v. *Miller*, 223 U. S. 579, 602; *United States* v. *19 Bales of Tobacco*, 112 Fed. Rep. 779; *United States* v. *99 Diamonds*, 139 Fed. Rep. 961; *United States* v. *One Bag of Wheat*, 166 Fed. Rep. 562; *United States* v. *Pullen*, 226 U. S. 525, 535; *United States* v. *66 Cases of Cheese*, 163 Fed. Rep. 367; *United States* v. *Stevenson*, 215 U. S. 190, 195; *United States* v. *20 Boxes of Cheese*, 163 Fed. Rep. 369; *United States* v. *26 Bales of Boots*, 3 Ware, 205, 210; *United States* v. *Wood*, 14 Pet. 430; and see also 1 Stat. 627, 657; 3 Stat. 729, 730; 12 Stat. 737; 18 Stat. 190; 22 Stat. 488; 26 Stat. 407; 34 Stat. 1246; 36 Stat. 11, 92; Rev. Stat., §§ 2841, 2864.

Mr. Marion Erwin, with whom *Mr. Frederick M. Czaki* was on the brief, for defendant in error:

Sub-section 6 is either a perjury statute, or, at least, one in the nature of a perjury statute. It is highly penal. See act of March 1, 1823, § 4; Rev. Stat., § 2841; *United States* v. *Auffmordt*, 122 U. S. 197, 204; Customs' Administration Acts of June 10, 1890, 26 Stat. 132; August 5, 1900, 36 Stat. 94.

The suppression referred to relates wholly to things concealed or suppressed in the written entry and invoice. It obviously means things relating to the character, quantity, quality or cost of the goods, or other facts concealed or suppressed which should have been fairly stated in the invoice or written entry constituting the representation, and by the acceptance of which the collector might be deceived, and thus the United States might be defrauded. *United States* v. *Wood*, 14 Pet. 430.

Rev. Stat., § 2839, was repealed by the Customs Administrative Act of June 10, 1890. In its place was substituted sub-section 6 which prescribed punishment or forfeiture for making "any" false statement in the declaration material thereto.

The indictment in the case at bar does not charge that the goods entered were manufacturer's goods. But if it did, there was no requirement that the selling price in this country should be disclosed. Notwithstanding these changes in the statute, the Auffmordt decision is as pertinent now as it was then on the point, that a disclosure of things relating to values at other times and places not provided to be disclosed by the forms prescribed—such as the value or selling price in this country—are not within the purview of the statute, and hence cannot be made the basis of forfeiture much less of criminal prosecution for suppression. They are not "material" to the declaration. *United States* v. *Cargo of Sugar*, 3 Sawyer, 46.

The things alleged to have been suppressed were not

material to the declaration within the meaning of the statute; nor is there any averment that defendant had been called upon under sub-sections 15 or 11 to make disclosures of the facts charged to have been suppressed. *United States* v. *Doherty*, 27 Fed. Rep. 731; *United States* v. *Calhoun*, 184 Fed. Rep. 499, 504; *Gulbenkian* v. *United States*, 153 Fed. Rep. 858.

The importer is not guilty of a criminal offense under sub-section 9 even though the entry is based upon invoices in which the consignor has falsely and fraudulently misstated the cost or values, unless the importer knows or believes that they are so false and fraudulent, and even though the use of such false entry and invoice should result in depriving the United States of a portion of its duties. *United States* v. *1150½ Pounds of Celluloid*, 82 Fed. Rep. 627, 633; *581 Diamonds* v. *United States*, 119 Fed. Rep. 556, 560; *United States* v. *Bishop*, 125 Fed. Rep. 181; *United States* v. *99 Diamonds*, 139 Fed. Rep. 961; *United States* v. *75 Bales Tobacco*, 147 Fed. Rep. 127; *United States* v. *One Silk Rug*, 158 Fed. Rep. 974; *United States* v. *9 Bales Tobacco*, 112 Fed. Rep. 779; *Markham* v. *United States*, 160 U. S. 325.

Suppression by which the United States may be defrauded is limited to things within the scope of the disclosures required to be made in the stereotyped form of declaration and papers attached, constituting the representation.

There can be no fraud without a representation, express or implied, where there is a duty or obligation imposed upon the party to speak. For definition of "fraud" see Black's Law Dict.; 20 Cyc. 10; 19 Cyc. 403.

This court will not give the statute a construction which would place declarants in such an unfair situation, and make the statutory forms prescribed a snare to entrap those who rely upon their sufficiency. *Hawaii* v. *Mankichi*, 190 U. S. 197, 214.

Words used in a statute by which they are not defined are given the same meaning as at common law. *Swearingen* v. *United States*, 161 U. S. 446, 451; *Keck* v. *United States*, 172 U. S. 434, 446. And see *Mutual Life Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, distinguished; 3 Cooley, Briefs on Insurance, 2011; *Mercantile Ins. Co.* v. *Folsom*, 18 Wall. 237, 253.

The omission, in the suppression clauses in forms (1) and (2) of sub-section 5, of the words "in the said entry or invoice," was not intended to enlarge the scope of those clauses beyond the meaning of the suppression clause of forms (3) and (4). *Lawrence* v. *Allen*, 7 How. 793; *Brown* v. *Duchesne*, 19 How. 183; *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. 272; *Pollard* v. *Bailey*, 20 Wall. 520; *Petri* v. *Commercial Bank*, 142 U. S. 644; *McKee* v. *United States*, 164 U. S. 287, 293; *Smith* v. *The People*, 47 N. Y. 330. See also Endlich on Interpretation, § 378, p. 528; *Morris* v. *Mellin*, 6 B. & C. 446; *Bennett* v. *Daniel*, 10 B. & C. 500; *Bryan* v. *Child*, 1 L. M. P. 429; *Myser* v. *Veitch*, L. R. 4 Q. B. 649; *R.* v. *Tone*, 1 B. & Ad. 561.

Charges of suppression of a belief in the happening of a future event are argumentative, uncertain, hypothetical and duplicitous and surplusage. *United States* v. *Carll*, 105 U. S. 611; 19 Cyc., p. 394; *United States* v. *Keitel*, 211 U. S. 370, 397; *United States* v. *Kissel*, 218 U. S. 601, 606.

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

This writ of error raises the question as to whether the suppression clause in the declaration, required to be made by agent consignees of imported goods (36 Stat. 95), relates to the omission of matter proper to be included in the invoice and account attached;—or to independent facts which, if brought to the attention of the Collector,

would have excited his suspicion and induced him to institute a special inquiry as to the value of the merchandise mentioned in the account and invoice.

No case directly in point has been cited; but counsel have traced the history of the clause from the act of 1799, which required only one form of declaration from all importers, through the subsequent statutes, which, like the Tariff Act of 1909, provide for slightly different forms, according as the entry is made by owner, manufacturer, consignee, or agent. (1 Stat. 627, 656; 3 Stat. 729, 730; 22 Stat. 488, 524; 26 Stat. 131, 132; 36 Stat. 11, 93.) Under the act of 1799 every importer had to attach the consular invoice and entry account and swear that he "had not in the said entry or invoice concealed or suppressed anything" whereby the Government might be defrauded of its duty. This clause is still retained in the form required to be signed by owner and manufacturer. Where the goods are entered by an agent consignee he makes Declaration that "nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise." Much of the argument was addressed to the effect of this difference in the language in the respective forms of the several declarations. 36 Stat. 93–95.

Counsel for Salen insist that this difference is due to the fact that the suppression clause in the consignee's declaration was included in a sentence all the terms of which related to invoice and entry. The declaration to be signed by owner and manufacturer (36 Stat. 94, 95) was in two sentences, and as the last of the two contained the suppression clause, it was necessary, from a grammatical point of view, to mention invoice and account as antecedents. It is argued that the owner's statement conveyed the same meaning as was otherwise expressed in

the suppression clause of the consignee's declaration. On the other hand the Government contends that the difference in phraseology indicated an intent to require the consignee to disclose matters as to which no requirement was made where the goods were entered by owner or manufacturer.

Congress, of course, could have legislated in the same statute so as to make a distinction between consignor and consignee. But no satisfactory reason is given why Congress should have imposed no penalty upon an owner for concealing a great and uniform difference between invoice values and selling prices, while at the same time making the agent guilty of a felony for suppressing exactly the same fact. The moral quality of the act was the same whether the concealment was by owner or agent; the result to the Government was the same, and all doubtful or ambiguous language, in a statute covering the same subject, should be construed on the natural supposition that Congress required identity of disclosures and provided identity of punishment for identity of concealment.

In arriving at the meaning of the clause on which this indictment is founded it may be helpful to consider the purpose of the statute, in the light of the Customs Regulations applicable to the entry of foreign merchandise at a domestic port.

Foreign value is the basis on which *ad valorem* duties are imposed (36 Stat. 101, § 18), and Congress has made various provisions to enable collectors and appraisers to obtain information as to such foreign values. To that end it authorizes them to examine all importers or consignees under oath so as to secure from them a statement of any facts which might shed light on the amount of duty to be paid. Any false statement made on such examination subjects them to indictment and punishment as for a felony (June 10, 1890, c. 407, 26 Stat. 131, 139, §§ 16, 17).

But the Documents attached to the Declaration are the primary source of information as to value. They consist of a Consular Invoice, [prepared by the consignor, showing a list of the goods and their foreign value at the date of exportation]; an Entry or Account, [prepared by the consignee, showing marks, numbers, contents, quantity, invoice value, dutiable value, and the rate of duty of the goods, Customs Regulations, 217] and also the Bill of Lading, [prepared by the Master of the vessel]. If these three papers, prepared by three different persons, have been truly and correctly made they contain all the information needed to assess the duties. In view therefore of the importance of these Documents the statute makes specific provisions by which they are to be verified, and as will appear from an analysis of the declaration (36 Stat. 93), the consignee states in the first sentence [1] of the Declaration;

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[1] Declaration of Consignee, Importer, or Agent, where Merchandise has been actually Purchased.

I, ———— ————, do solemnly and truly declare that I am the consignee, importer, or agent of the merchandise described in the annexed entry and invoice; that the invoice and bill of lading now presented by me to the collector of ———— are the true and only invoice and bill of lading *by me received of all* the goods, wares, and merchandise imported in the ————, whereof ———— is master, from ————, for account of any person whomsoever for whom I am authorized to enter the same; that the said invoice and bill of lading *are in the state in which they were actually* received by me, and that I do not know or believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise, according to the said invoice and bill of lading; that nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purport to have been made; and that if at any time hereafter

"(1) That he is the consignee of the merchandise described in the annexed *entry and invoice;*

(2) that the *invoice* and *bill of lading* are the true and only *invoice* and *bill of lading;*

(3) that they are in the state in which they were actually received by him;

(4) that he does not know or believe in the existence of any other *invoice* or *bill of lading;*

(5) that the *entry* delivered to the Collector contains a just and true account of the merchandise according to the *invoices;*

(6) that nothing has been suppressed by him or to his knowledge on the part of any other person whereby the United States may be defrauded of any part of the duty lawfully due on the merchandise;

(7) that the *said invoice* and the declaration therein are in all respects true and were made by the person by whom they purport to have been made;

(8) that if at any time he discovers any error in the

I discover any error in the said invoice, or in the account now rendered of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly declare that to the best of my knowledge and belief (insert the name and residence of the owner or owners) is (or are) the owner (or owners) of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits *the actual cost* at the time of exportation to the United States in the principal markets of the country from whence imported of the said goods, wares, and merchandise, and includes and specifies the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, which are not otherwise specially subject to duty under any paragraph of the tariff act, and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition, packed ready for shipment to the United States, and no other or different discount, bounty, or drawback but such as has been actually allowed on the same.

said invoice, or in the account *now rendered*, he will immediately make the same known to the Collector, . . ."

It will be seen that the Declaration was not only intended to secure an affirmative statement as to the genuineness of the documents and of the correctness of what was actually therein set out, but the consignee was also required to make a negative averment that nothing had been suppressed or concealed by himself or, so far as he knew, by any one else—that is, nothing had been suppressed or concealed in the Account [prepared by the consignee]; in the Consular Invoice [prepared by the exporter]; or in the Bill of Lading [prepared by the Master of the vessel]. Seven of the eight clauses distinctly related to Documents. To say that the sixth clause in this enumeration was intended to embrace undefined extraneous matter, would be to suddenly depart from the particular to the general and back again from the general to the particular;—from the particular subject of Documents, to which the attention of the affiant had been specially directed by the first five clauses, into a general field of wide and indefinite scope and—in the seventh clause—again to return to the particular subject of Documents. Such an interpretation would give an exceedingly liberal construction to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which standing alone might have a wide and comprehensive import will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class. *Cf. Virginia* v. *Tennessee*, 148 U. S. 503, 519; *United States* v. *Chase*, 135 U. S. 255, 258; *Neal* v. *Clark*, 95 U. S. 704, 708.

The fact that under this rule the general language of the suppression clause is to be restricted to the Documents to which all the other clauses in the sentence refer,

does not, of course, mean that Congress has deprived the Collector of the means of obtaining information as to extraneous facts that might assist him in passing upon questions of value or in determining whether there had been any violation of the tariff law.

But the method by which that information is to be obtained is the examination of the owner, consignee or agent under oath, 26 Stat. 139; 36 Stat. 100, §§ 15, 16; Customs Regulations, 1908, § 865. The very fact that provision is made for such examination is itself a clear indication that there may be material matter, not proper for inclusion in the declaration, but which might still be important in the assessment of the duty. But to say that in signing the statutory form of declaration consignee should in effect answer specific questions and at the same time be required on peril of committing a felony to disclose extraneous evidentiary facts as to which no direct question was asked and to which his attention was not directed is to make the declaration serve a purpose for which it was not intended and spread a net that might catch the unwary as well as the fraudulent consignee. *United States* v. *Reese*, 92 U. S. 214, 221. For, under the contention of the plaintiff in error, it is not necessary that Salen should have intended to defraud or that the Government should have been actually defrauded. The crime was committed if the United States "may have been defrauded." So that even if the foreign value on which the duty was assessed had been truly stated in the declaration, the consignee would yet be guilty of a felony if he failed to call attention to facts which would have excited the Collector's suspicion and induced him to demand a reappraisement. Such an interpretation of the statute is not only contrary to the rule which restricts the operation of the suppression clause to the particular matters enumerated in all other parts of the printed declaration, but would fix no standard by which to draw

the line between innocent silence and felonious concealment.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

PEOPLE OF PORTO RICO *v.* EMMANUEL, BARON DU LAURENS D'OISELAY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 4. Argued October 23, 1914.—Decided November 30, 1914.

Under § 35 of the Foraker Act of April 12, 1900, the jurisdiction of this court on appeals from the District Court of the United States for Porto Rico is confined to determining whether the facts found by that court support its judgment and whether there was material and prejudicial error in the admission or rejection of evidence manifested by exceptions properly certified.

In such a case, in the absence of a bill of exceptions, questions of admissibility of evidence are excluded and the review is confined to what appears upon the face of the pleadings and the findings. *Rosaly* v. *Graham*, 225 U. S. 584.

Under the Territorial Practice Act of 1874 which governed appeals to this court from Porto Rico taken under § 35 of the Foraker Act, proceedings for review in this court in actions at law as well as in equitable actions are by appeal and not by writ of error unless there was a jury trial.

The government of Porto Rico is of such a nature as to come within the general rule exempting a government, sovereign in its attributes, from being sued without its consent, *Porto Rico* v. *Rosaly*, 227 U. S. 270; but in this case, *quære* whether Porto Rico fairly raised the question of immunity or whether it did not consent to litigate the case on the merits.

An action against the government of Porto Rico for the wrongful act of

the Treasurer in registering private property as part of the public domain and preventing the collection of rents by the owner, is an action for fault or for negligence mentioned in § 1803, Civil Code, and the one year period of prescription obtains under § 1869, Civil Code of Porto Rico.

Quære, whether the period of prescription under § 1869, Civil Code of Porto Rico, begins to run from the time of knowledge of the wrongful act or from the time of knowledge of the damage consequent thereon.

5 Porto Rico Fed. Rep. 89, 362, reversed.

THE facts, which involve the jurisdiction of this court on appeals from the District Court of the United States for Porto Rico and the right to sue Porto Rico, and the construction and application of the statute of limitations of Porto Rico, are stated in the opinion.

Mr. Samuel T. Ansell, with whom *Mr. Felix Frankfurter*, *Mr. Foster V. Brown*, Attorney General of Porto Rico, and *Mr. Paul Charlton* were on the brief, for appellant.

Mr. Frederico Degetau for appellee, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was commenced July 23, 1908, in the United States District Court for Porto Rico by Pierre Emmanuel, Baron du Laurens d'Oiselay, a citizen of the Republic of France and a resident thereof, against the People of Porto Rico. His complaint alleged that he was the owner of an estate composed of 4133 cuerdas of land situate in the Municipality of Lares, acquired by him as a legacy from the Duchess de Mahon Crillon, who died in France in April, 1899; that until the year of her death the Duchess had been paying the taxes and receiving from her colonists a considerable annual income; that on September 4, 1900, the defendant, through the Treasurer of Porto Rico, decided that said property belonged to the Treasury of Porto Rico, and ordered among other things that the Duchess

be immediately eliminated from the assessment of the property, that the "terratenientes" (landholders or colonists) be made to appear in the assessments instead of the Duchess, and "that they proceed to deliver the deeds or titles of concessions that they might possess which gave them the right to the use and fruits of the land to be sent to the Treasury"; and that by these means defendant "wrongfully deprived your plaintiff of his ownership over said property and its rents, the said property having been recorded in the registry of the property in the name of the People of Porto Rico, the defendant herein, without having heard your petitioner, or even summoned him to be heard;" that in view of this action plaintiff, after having vainly tried to obtain satisfaction from defendant, was obliged to establish the validity of his titles before the courts; that he instituted a suit in the District Court of San Juan on January 30, 1901, against the defendant, and that court on August 1, 1902, decided that the lands referred to were the property of plaintiff, and ordered that the inscription made in the Registry in the name of the People of Porto Rico be canceled; that the People took an appeal to the Supreme Court of Porto Rico, and that court affirmed the decisions and confirmed the findings of the District Court by its opinion of May 23, 1904 (2 Castro P. R. Dec. 103; 7 P. R. 216); that after the question of title was decided, the People of Porto Rico did nothing to put plaintiff in possession of the property, the colonists were not willing to again pay rents to him, and he was obliged to resort to the courts to be put in possession of the lands; that by such litigation he did obtain possession, but that he was entitled to recover from defendant the fruits of which he had been deprived by defendant's action from the time he was unjustly deprived of his ownership until his property was delivered back to him; the period mentioned being from September, 1900, to December, 1905.

By demurrer and answer the People of Porto Rico interposed a number of defenses, and, among others, that the action was prescribed by virtue of the provisions of § 1869 of the Civil Code.

The cause came on for trial on the merits before the court without a jury, pursuant to a stipulation of the parties, with the result that judgment was rendered in favor of plaintiff for $7,450. (5 P. R. Fed. Rep. 89.) A motion for a new trial was denied (5 P. R. Fed. Rep. 362), and defendant appealed to this court.

In view of appellee's motion to dismiss, we may begin by saying that at the time the appeal was taken the act of April 12, 1900, known as the Foraker Act, was in force (c. 191, 31 Stat. 77, 85), by § 35 of which it was enacted that "Writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States," etc. Writs of error and appeals from the Supreme Courts of the Territories were regulated by the act of April 7, 1874 (c. 80, 18 Stat. 27), by the first section of which the separate exercise of the common-law and chancery jurisdictions in the territorial courts was dispensed with, and the several codes and rules of practice adopted in the Territories respectively, in so far as they authorized a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, were confirmed; and by the second section it was enacted: "That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have pre-

scribed or may hereafter prescribe: *Provided*, that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree."

Under this system (since superseded by § 244 of the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087, 1157), our jurisdiction was, and in the present case is, confined to determining whether the facts found by the Supreme Court of Porto Rico support its judgment, and whether there was material and prejudicial error in the admission or rejection of evidence manifested by exceptions properly certified. In the absence of a bill of exceptions, questions respecting the admissibility of evidence are of course excluded from our consideration, and the review is confined to what appears upon the face of the pleadings and the findings. *Rosaly* v. *Graham*, 227 U. S. 584, 590, and cases cited.

The motion to dismiss is in part based upon the ground that the bill of exceptions herein was not settled and signed until after the expiration of the term in which the new trial was denied, and that certain orders of the court relied upon by appellant as extending the time for settling the exceptions have no legal validity. We have examined the grounds upon which this contention rests, and have reached the conclusion that it must be overruled. We spend no further time upon it, since, in the view we take of the merits, the rulings on evidence shown by the bill of exceptions may be disregarded.

The motion to dismiss is based upon the further ground that the case, being an action at law, should have been brought to this court by writ of error, and not by appeal. But the provisions of the act of 1874, above mentioned,

render it clear that in legal as well as in equitable actions the proceedings for review must be by appeal, unless there was a trial by jury. The motion to dismiss is therefore denied.

Coming to the merits, the facts certified are as follows: In the year 1900, shortly after the American occupation of Porto Rico, the then Treasurer of the Island, Mr. J. H. Hollander, reached the conclusion that the land in question did not belong to plaintiff, who claimed to have inherited it from the Duchess de Mahon Crillon of France, but was public property, and he therefore, as Treasurer, caused the tenants living upon the land to be so notified and the property to be registered in the Registry of Property as belonging to the People of Porto Rico. Plaintiff protested vigorously against this, but without immediate result. In a short time, however, he produced such evidence of title to Mr. Hollander that the latter wrote him that he had better begin a suit against the People of Porto Rico and have the matter judicially determined. Plaintiff did file such a suit in the District Court at San Juan. The Attorney General of the Island and his assistant appeared and contested the action, but the decision was for the plaintiff. The Attorney General, on the part of the People, took an appeal to the Supreme Court of the Island, and that court in June, 1904, decided in favor of the plaintiff, affirming the decision of the lower court. (2 Castro P. R. Dec. 103; 7 P. R. 216.) From the time Mr. Hollander registered the property in the name of the People of Porto Rico until plaintiff was again put in possession of the land in the latter part of the year 1905 the tenants refused to pay rent to plaintiff, and the entire sum was lost to him except a few hundred pesos which he managed to collect after much expensive litigation against the tenants. The court found that Mr. Hollander was a special agent of the State for the purpose of the transactions in question, within the meaning of § 1804 of the

Civil Code of 1902; and further that his action was ratified by the Government of Porto Rico by refusing to restore plaintiff's land to him, by requesting and obliging him to bring a suit to establish his rights, and then by defending this suit to final judgment and appealing from that judgment to the Supreme Court of the Island. That the Government of the Island never actually received any rent, profit, or usufruct from the land or any portion of it; but that it injured plaintiff by depriving him of the right to the use and enjoyment of his property for about five years, in consequence of the deliberate but unauthorized registry of the land in the name of the People of Porto Rico, and by that action inducing his tenants to thereafter desist and refuse, as they did, from paying him his usual rents. The court found that the insular authorities caused damage to the plaintiff in at least the sum of $7,450, and for this amount judgment was entered, as already mentioned. It will be observed that there is nothing to show that the Government of Porto Rico, through its officers or otherwise, was at any time in possession of any part of the lands in question, and there is a distinct finding that the Government itself never actually received any rent, profit, or usufruct from the land or any portion of it.

We have recently decided that the Government of Porto Rico is of such nature as to come within the general rule exempting a government, sovereign in its attributes, from being sued without its consent (*Porto Rico* v. *Rosaly*, 227 U. S. 270). Upon the face of the present record it may be doubtful whether defendant fairly raised in the pleadings the question of its general immunity from action, or whether, on the other hand, its pleadings, construed as a whole, did not rather amount to a consent to litigate the merits. But upon the facts as pleaded and found we think the learned judge of the District Court very properly held that if plaintiff can legally recover, it must be by virtue of § 1804 of the Civil Code, which is cited also

as manifesting the Government's consent to be sued. The section must be read together with § 1803, with which it is inseparably connected. Both are set forth in the margin.[1]

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[1] "SECTION 1803. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

"SECTION 1804. The obligation imposed by the preceding section is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

"The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

"Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

"Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employés in the service of the branches in which the latter may be employed or on account of their duties.

"The State is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding section shall be applicable.

"Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

"The liability referred to in this section shall cease when the persons mentioned therein prove that they employed all the diligence of a good father or [*sic*] a family to avoid the damage."

These sections are taken from Articles 1902 and 1903 of the Spanish Code of 1889, where the clause respecting the responsibility of the State reads as follows: "El Estado es responsable en este concepto cuando obra por mediación de un agente especial; pero no cuando el daño hubiese sido causado por el funcionario á quien propiamente corresponda la gestión practicada, en cuyo caso será aplicable lo dispuesto en el articulo anterior."

It was suggested upon the argument that a more satisfactory translation into English than that adopted in the Porto Rican Code is as follows: "The State is liable in this respect when it acts through the medium of a special agent, but not when the damage was caused by an official to whom the action taken properly pertained, in which case the provisions of the preceding article apply." In Walton's "Civil Law in

Assuming, however, that the facts certified in the findings, taken by themselves, show a liability on the part of the People of Porto Rico under these sections, still defendant, both by demurrer and by answer, set up prescription by virtue of the provisions of § 1869 of the Civil Code. That section, which is one of a series of sections relating to the prescription of actions, reads as follows:

"Section 1869.—The following prescribe in one year:

1.—Actions to recover or retain possession.

2.—Actions to demand civil liability for grave insults or calumny, and for obligations arising from the fault or negligence mentioned in § 1803, from the time the aggrieved person had knowledge thereof."

It seems to us clear that an action against the State, based upon the pertinent clause of § 1804, is an action to demand civil liability "for obligations arising from the fault or negligence mentioned in section 1803," within the meaning of § 1869. Section 1804 by its very terms imposes upon the principal, with respect to the acts of the representative, not any different obligation but the same obligation imposed by the preceding section. We say this, notwithstanding the somewhat peculiar form of expression in that part of § 1804 which exempts the State from liability when the damage is caused by the official to whom properly it pertained to do the act performed, viz.: the clause, "in which case the provisions of the preceding section shall be applicable." This cannot reasonably be interpreted as excluding the liability of the State under § 1803 in other cases, but is evidently intended to impose upon the official himself, in respect to damages

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Spain," p. 458, the following version is given: "The state is liable, in this sense, when it acts through a special agent, but not when the damage has been caused by the official to whom properly it pertains to do the act already done, in which case the provision of the preceding article shall apply." And see interpretation by Supreme Court of Spain in decision of May 18, 1904, 98 Jur. Civ. 390.

caused in the performance of his ordinary duties, a personal liability under the provisions of § 1803, leaving the State liable in the sense of that section when it acts through a special agent. No reason is suggested for limiting the prescription to one year in the case of a default or negligence attributable to defendant personally, and leaving the action unlimited when it is attributable to the fault of defendant's representative or agent.

Section 1869 being thus found to be applicable to such an action as the present, it only remains to ascertain and compare the pertinent dates. From his complaint herein and from the findings of the trial court it is plain that plaintiff had full knowledge of the wrongful acts of defendant's representative at least as soon as the time of the commencement of his former action against the People of Porto Rico, which was on January 30, 1901, and that the damage resulting from that wrongful conduct, and to recover which his present action is brought, was complete before the end of the year 1905. Evidently the damage was of such a character as to carry notice with it. As already mentioned, the present action was commenced in July, 1908. There is nothing in the record or the findings to explain or excuse this delay or to interrupt the prescription.

We are not advised of the grounds upon which the court below overruled the plea of prescription. In its opinion it simply said: "We are also of the belief that under the circumstances the court ought not to hold that the claim is barred by the one year statute of limitations, and of course no other is applicable to the facts." Counsel for appellee has not suggested any ground for avoiding the prescription—indeed, has made no argument upon the subject. We deem it clear that § 1869 applies, and that the action is therefore prescribed, and it follows that the judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Under the facts of the case it is unnecessary to consider whether the period of prescription began to run when plaintiff first had knowledge of the alleged wrongful acts of Hollander, or only when he had knowledge of the damage consequent thereon. Upon this point, therefore, we express no opinion.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS *v.* RUPP.

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

No. 50. Submitted November 5, 1914.—Decided November 30, 1914.

A State may prescribe that a voluntary special appearance in one of its courts, even for the purpose of objecting to the jurisdiction, shall be deemed a general appearance, without violating the due process clause of the Fourteenth Amendment.

In the Federal courts a defendant may appear specially to insist upon the illegality of service, and if overruled does not waive his objections by answering to the merits, *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, but the States may, as Kentucky has, establish a different rule, and nothing in the Fourteenth Amendment prevents them from so doing.

The due process provision of the Fourteenth Amendment has regard not to matters of form but to substance of right.

While there is a rule in Kentucky that appearance in the appellate court operates as a submission to the jurisdiction so as to dispense with service of process, the rights of the defendant in a case where plaintiff appeals are safeguarded by his right to a cross-appeal on this or any other objection.

While a non-resident, against whom a personal action is instituted in a state court without personal service within the jurisdiction, may ignore the proceeding as wholly ineffective and set up its invalidity when an attempt is made to take his property thereunder, if he wishes to contest the validity of the proceeding in advance in the courts of the State he must enter the courts subject to the rules as to submitting to the jurisdiction.

It is not unreasonable for a State to prescribe such rules of procedure in regard to special appearances in its courts as will prevent a defendant from attempting to obtain a binding adjudication on the merits in his favor through the exercise of the court's jurisdiction, while depriving the plaintiff of the possibility of success by reserving an objection to the jurisdiction of the court.

Where, in a state court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the full faith and credit clause of the Federal Constitution.

The Kentucky court, having recognized the existence, validity and relevancy of a statute of Illinois prohibiting an insurance company from issuing a policy of insurance upon a life in which the beneficiary has no insurable interest, but having, in the absence of any decision of the courts of Illinois placing a different construction thereon, construed the statute as not having any extra-territorial effect or any application to business done in Kentucky, there was no refusal to give the Illinois statute the full faith and credit required by the Federal Constitution.

If a party setting up a statute of one State in a court of another State intends to rely upon an authoritative judicial construction of the statute in the State of its origin, it is incumbent upon him to prove it as a matter of fact.

The rule that what is matter of fact in the state court is matter of fact in this court upon review, applies where foreign law is in question in the state court as well as to any other issue of fact.

If the state court has not denied full faith and credit to the statute of another State, this court has not jurisdiction to determine whether the interpretation given to such statute is or is not erroneous.

147 Kentucky, 489, affirmed.

THE facts, which involve the validity of a judgment based on substituted service, and the validity under the Fourteenth Amendment of the practice of the Kentucky courts in regard to special appearances and also ques-

tions arising under the full faith and credit clause of the Federal Constituion, are stated in the opinion.

Mr. Henry Burnett, Mr. Pendleton Beckley, Mr. H. W. Batson, Mr. Graddy Cary, Mr. Thomas J. Graydon and *Mr. John M. Scott* for plaintiff in error:

A foreign insurance company sued in a state court of Kentucky cannot lawfully be summoned by a substituted service on the State Insurance Commissioner, unless it has been licensed to do business in the State, and has assented to such substituted service. § 631, Ky. Stats.; *Hunter* v. *Mutual Ins. Co.*, 218 U. S. 573; *Mutual Ins. Co.* v. *Phelps*, 190 U. S. 147.

Illegality in the service of process by which jurisdiction is to be obtained, is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Such illegality is considered as waived, only when he, without having insisted upon it, pleads in the first instance to the merits. *Harkness* v. *Hyde*, 98 U. S. 476.

A corporation doing business in a foreign State can exercise in that State only such powers as are granted to it by the laws of the State in which it is organized. Story on Conflict of Laws, 175 (note); 3 Clark & Marshall on Priv. Corp., § 840; 5 Thompson on Corps., 2d Ed., § 6627; *Canada Southern Ry.* v. *Gebhard*, 109 U. S. 527; *Pierce* v. *Crompton*, 13 R. I. 312; *Harris Lumber Co.* v. *Coffin*, 179 Fed. Rep. 257; *Scott* v. *Stockholders Oil Co.*, 142 Fed. Rep. 287; *Bucki Lumber Co.* v. *Atlantic Lumber Co.*, 128 Fed. Rep. 332; *Michigan State Bank* v. *Gardner*, 15 Gray, 362; *Rue* v. *Mo. Pac. Ry.*, 8 S. W. Rep. 533; *Manhattan Life Ins. Co.* v. *Field*, 26 S. W. Rep. 280; *Oregon Railway* v. *Oregonian Ry.*, 130 U. S. 1; *State* v. *Southern Pac. Co.*, 28 So. Rep. 372; *Nathan* v. *Lee*, 52 N. E. Rep. 987; *Thomas* v. *Railroad Co.*, 101 U. S. 71.

The present constitution of the State of Illinois, adopted

in 1870, provides that no corporation shall be created by special laws. Art. 11, § 1; *Chicago Traction Co.* v. *Chicago*, 199 Illinois, 484.

The restrictions placed upon a corporation organized in the State of Illinois follow the corporation into every State in which it attempts to transact business. Section 9, Illinois Assessment Ins. Co. Act, appr'd, June 22, 1893; Story on Conflict of Laws, p. 175 (note); 3 Clark & Marshall, Priv. Corps., § 840; *Pierce* v. *Crompton*, 13 R. I. 312; *State* v. *So. Pacific Co.*, 28 So. Rep. 372.

Assessment life insurance companies alone are prohibited by the statutes of Illinois from issuing policies in favor of a beneficiary who has no insurable interest in the life of the insured. Section 9, *supra;* 1 Cooley's Briefs on Insurance, pp. 245–252; *Bloomington Mutual Assn.* v. *Blue*, 120 Illinois, 121.

The appellant company is not estopped from pleading that the contract of insurance herein was *ultra vires*. *Mutual Ins. Co.* v. *Barker*, 107 Iowa, 143; *National Building Association* v. *Home Savings Bank*, 181 Illinois, 35; *Central Trans. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *Seattle Gas Co.* v. *Citizens Light Co.*, 123 Fed. Rep. 588; *State* v. *Tobacco Co.*, 75 S. W. Rep. 737; *Relph* v. *Rundle*, 103 U. S. 226; *Blitz* v. *Bank of Kentucky*, 21 Ky. Law Rep. 1554; *Murphy* v. *Louisville*, 9 Bush (Ky.), 189; *Jessamine County* v. *Newcomb Buchanan Co.*, 8 Ky. Law Rep. 692; *Bell & Coggeshall* v. *Kentucky Glass Works*, 20 Ky. Law Rep. 1089; *Georgetown Water Co.* v. *Central Thompson-Houston Co.*, 17 Ky. Law Rep. 1270; *Green* v. *Middlesborough Town Co.*, 89 S. W. Rep. 229.

Mr. J. M. Chilton, Mr. James P. Edwards, Mr. Charles F. Ogden and *Mr. R. F. Peak* for defendant in error:

The affidavits filed on motion to quash the summons were not made a part of the record by order of court or bill of exceptions. The sufficiency of the summons and

return were questions of fact and the affidavits filed on the motion to quash not having been made a part of the record, there is nothing in the record disclosing that said affidavits were all the evidence heard upon the motion. This being a question of fact cannot be reviewed by the higher courts unless the record should contain all of the evidence heard. *Skidmore* v. *Raymond*, 144 Kentucky, 303; *Runyons* v. *Bruchett*, 135 Kentucky, 18.

The question as to whether the trial court correctly overruled the motion to quash the summons having been raised in the Circuit Court before the first appeal, it is now concluded by that opinion. It is the law of the case. *Rupp* v. *Western Life Co.*, 138 Kentucky, 18; *Western Life Co.* v. *Rupp*, 147 Kentucky, 489; *Stewart* v. *Louis. & Nash. R. R.*, 136 Kentucky, 721; *Wall &c.* v. *Demitt*, 141 Kentucky, 716; *McDowell* v. *C., O. & S. W. R. R.*, 90 Kentucky, 346; 23 Ency. of Law & Proc., p. 1306.

Service on the insurance commissioner is service upon an insurance company, although the company had ceased doing business in the State at the time of the service. *Home Benefit Society* v. *Muehl*, 109 Kentucky, 479; *Kenton Ins. Co.* v. *Osborne*, 21 Ky. Law Rep. 330.

It was the legislative intention in adopting § 631, that an insurance company organized in other States should not come into this State and do business and then leave the policyholder without redress under the Kentucky law and the policyholder had the right to assume that the company had complied with all the laws with respect thereto. *Germania Ins. Co.* v. *Ashby*, 112 Kentucky, 306.

When a corporate citizen of one State goes into another State for the purpose of transacting business it may be required to respond personally to such method of service as the legislature of said State may in its wisdom provide, so long as the method prescribed by the legislature constitutes due process of law. *Schwartz* v. *Christie Grain Co.*, 166 Fed. Rep. 341.

The construction placed on a state statute by the highest judicial tribunal of the State is binding on the Federal courts, if the service obtained in pursuance to the action constitutes due process of law or in other words does not violate the Federal Constitution. *Evans* v. *Willis*, 187 U. S. 271; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Cross* v. *Allen*, 141 U. S. 528.

The plaintiff in error entered its appearance by its objection to the motion for judgment and motion to assign the action for hearing to April 1, 1908, as also by its motion to remand. *Royal Wheel Co.* v. *Dunbar*, 25 Ky. Law Rep. 747; *Maysville and Big Sandy R. R.* v. *Ball*, 108 Kentucky, 241; 3 Ency. of Law & Proc. 504.

Sections 631 and 657 of the Kentucky Statutes are a proper exercise of the legislative authority of the State. *Home Benefit Society* v. *Muhl*, 22 Ky. Law Rep., 1378; *Germania Ins. Co.* v. *Ashby*, 23 Ky. Law Rep. 1654; *Ætna Ins. Co.* v. *Commonwealth*, 116 Kentucky, 861.

Plaintiff in error having accepted the premium and retained the same until after the death of the insured, it is now estopped from relying upon the plea of *ultra vires*. *Albin Co.* v. *Commonwealth*, 128 Kentucky, 295; *Underwood* v. *Newport Lyceum*, 5 B. Mon. 129; Bigelow on Estoppel, 467; 29 Am. & Eng. Ency., 2d ed., *ultra vires*, p. 50; Greene-Bryce's *Ultra Vires*, pp. 721, 729; *Louisville Warehouse Co.* v. *Stewart*, 24 Ky. Law Rep. 934.

The statutes of a State do not have extraterritorial force; they only regulate the insurance business in that particular State and cannot be relied upon to defeat a policy in another State. *Washington Life Ins. Co.* v. *Glore*, 25 Ky. Law Rep. 1327; *Prudential Life Ins. Co.* v. *Fusco's Admr.*, 145 Kentucky, 379; *Mutual Life Ins. Co.* v. *Cohn*, 179 U. S. 262.

No Federal question is presented in this record. *Davidson* v. *New Orleans*, 96 U. S. 104.

MR. JUSTICE PITNEY delivered the opinion of the court.

In September, 1907, plaintiff in error, an Illinois corporation organized under the general laws of that State applicable to life insurance, issued to one George McCormick, a resident of Louisville, Kentucky, two policies, each insuring his life in the sum of $1,000, for the benefit of his nephew, Clarence Rupp, if living, otherwise for the benefit of the executors of the insured. After the death of the insured, which occurred in the same year, the present action was brought by Rupp against the Company in the Jefferson Circuit Court at Louisville. His petition set forth his relationship to the insured, and beyond this showed no insurable interest. It averred that the policies were issued upon McCormick's application, who also paid the premiums thereon, and this without plaintiff's instance, request or knowledge. The summons was served upon the Insurance Commissioner of the State. Section 631, Kentucky Statutes, 1909, provides: "Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office."

The defendant Company made a special appearance to the action and moved the court to quash the return upon the summons on the ground that it was a corporation organized and existing under the laws of the State of Illinois; that at the time the policies in question were issued it had applied to the Superintendent of Insurance of the State of Kentucky for a license to transact business in that State,

and in case such license was issued to appoint said Superintendent of Insurance its agent for service of process; that the application for license was pending for some time, and that it was during this time that the policies sued on were issued, but that the application for license was afterwards rejected by the insurance department of the State; that the Company never appointed the Superintendent of Insurance its agent for service of process, and never consented that he might be served with or accept such service on the Company's behalf.

The motion was overruled, and the company thereafter filed an answer in which, without waiving its objection to the jurisdiction of the court over it, but reiterating that objection, it set up sundry defenses upon the merits, including an allegation of fraudulent representations in the application pursuant to which the policies were issued, and a denial that the plaintiff had an insurable interest in McCormick's life. To certain paragraphs of this answer plaintiff demurred, and the Circuit Court, upon the ground that this demurrer rendered it proper and necessary to determine the sufficiency of plaintiff's petition, reviewed that pleading, and reached the conclusion that by the law of Kentucky the relationship of uncle and nephew did not constitute an insurable interest, that one who could not take out a policy because of lack of interest could not hold it if assigned to him after its issuance, and that the same rule prevented a person from taking out a policy of insurance upon his own life in favor of another having no insurable interest. Therefore the court sustained the demurrer as against the petition, and, plaintiff having declined to plead further, judgment was rendered in favor of defendant.

Plaintiff appealed to the Court of Appeals, which held (138 Kentucky, 18) that while according to the law of Kentucky one who obtains a policy of insurance upon the life of another must have an insurable interest in that life,

it is otherwise with respect to a policy taken out by a person upon his own life, he paying the premium for the benefit of another having no insurable interest, and that such a policy is not a wagering transaction but is valid. The judgment of the Circuit Court was therefore reversed and the cause remanded for further proceedings. Thereafter defendant filed a "second amended answer" in the Circuit Court, withdrawing by the court's leave "each and every allegation of the original answer and the first amended answer herein," and—"without waiving its plea to the jurisdiction of this court of the person of this defendant in this action"—set up that defendant was a corporation organized and incorporated under an act of the Legislature of the State of Illinois approved June 22, 1893, entitled "An Act to incorporate companies to do the business of life or accident insurance on the assessment plan, and to control such companies of this State and of other States doing business in this State," etc., which contains in § 9 the following: "No corporation doing business of life insurance under this act shall issue a certificate or policy upon . . . a life in which the beneficiary named has no insurable interest. Any assignment of the policy or certificate to a person having no insurable interest in the insured life shall render such a policy or certificate void." It was further averred that under this act defendant had no power to issue any policy of insurance upon the life of any person in which the beneficiary named had no insurable interest; that the plaintiff Rupp was the nephew of the insured McCormick; that Rupp had no insurable interest by virtue of such relationship or otherwise in the life of the insured, and that the policies sued on were null and void. There was a tender of the amount of the premiums paid and a denial of further liability. The answer invoked the "full faith and credit" clause of the Federal Constitution, averring that to compel defendant to pay the policies

sued on would be a failure upon the part of the State of Kentucky to give full faith and credit to the act of the Legislature of the State of Illinois.

To this answer plaintiff demurred, and the Circuit Court sustained the demurrer, with leave to amend the answer. Defendant declined to further amend, and elected to rely only upon the answer to which the demurrer had been sustained. Judgment having been thereupon rendered in favor of plaintiff for the amount of the two policies with interest, defendant prosecuted its appeal to the Court of Appeals, and to review the decision of that court affirming the judgment (147 Kentucky, 489), the present writ of error is sued out.

There are two Federal questions. The first is raised by the contention that under the Kentucky statute already quoted a foreign insurance company sued in a state court cannot lawfully be summoned by a substituted service upon the state Insurance Commissioner unless the company has been licensed to do business in the State and has by resolution of its board of directors assented to such substituted service; and that to sustain a judgment rendered in the absence of such service is violative of the "due process" clause of the Fourteenth Amendment. To this contention the Court of Appeals responded thus (147 Kentucky, 489, 490): "It is too late now to raise the question that the process was not properly served. This question should have been presented on the first appeal. On that appeal the case was heard here on the merits, and it is too late after a reversal on the merits to raise any question as to the sufficiency of the process." Citing *McDowell* v. *Chesapeake, Ohio &c. R. R. Co.*, 90 Kentucky, 346, and *Illinois Central R. R. Co.* v. *Glover*, 24 Ky. Law Rep. 1447, 71 S. W. Rep. 630. That it is and long has been the practice of the courts of Kentucky to treat the appearance of a party in the appellate court as a submission to the jurisdiction so as to dispense with the

service of process in the court below, and that this rule is applied even where a judgment against the defendant is reversed because of a defect in process, will appear from an examination of the cases. *Grace* v. *Taylor*, 1 Bibb, 430; *Graves* v. *Hughes*, 4 Bibb, 84; *Wharton* v. *Clay*, 4 Bibb, 167; *Bradford* v. *Gillespie*, 8 Dana, 67, 68; *Salter* v. *Dunn*, 64 Kentucky (1 Bush), 311, 317; *Chesapeake, Ohio &c. R. R. Co.* v. *Heath*, 87 Kentucky, 651, 660.

It is contended that where, as here, the first appeal is prosecuted by plaintiff, the defendant's objection to the jurisdiction of the trial court over its person is not thereby waived, because no other question could properly be submitted to the appellate court except that raised by the plaintiff's appeal. But by § 755 of the Kentucky Civil Code "The appellee may obtain a cross-appeal, at any time before trial, by an entry on the records of the Court of Appeals." And under this section it is held that "When either party appeals from a final judgment, his adversary may have a cross-appeal from that judgment, for the purpose of correcting any errors in the judgment to his prejudice or any interlocutory judgment or order which has influenced or controlled the final judgment to his prejudice." *Brown* v. *Vancleave*, 86 Kentucky, 381, 386.

The provisions of the Code and the course of previous decisions fairly sustain the decision of the Court of Appeals in the present case to the effect that the now plaintiff in error, by permitting the first judgment to be reviewed at the instance of the plaintiff in the action without interposing a cross-appeal to call into question the decision of the trial court upon the motion to quash the return upon the process, waived its objection to the jurisdiction of the court over it, and could not have any benefit of that objection upon the second appeal.

That a State, without violence to the "due process" clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its courts to contest any

question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in *York* v. *Texas*, 137 U. S. 15; followed in *Kauffman* v. *Wootters*, 138 U. S. 285.

It is true that in *Harkness* v. *Hyde*, 98 U. S. 476, on review of the judgment of a territorial court, it was held that the right of the defendant to insist upon an objection to the illegality of the service of process was not waived by the special appearance of his counsel to move the dismissal of the action or the setting aside of the service upon that ground, nor when that motion was overruled by his answering to the merits; and that the objection was available here as a ground for reversal. To the same effect are the decisions on review of judgments and decrees of the Federal courts. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 206; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 209; *Goldey* v. *Morning News*, 156 U. S. 518; *Davis* v. *C., C., C. & St. Louis Ry.*, 217 U. S. 157, 174. And a standing rule of a Federal court, requiring a party appearing specially for any purpose to declare at the same time that if the purpose for which the special appearance was made should not be sanctioned or sustained by the court he would appear generally, was held inconsistent with the laws of the United States and therefore invalid. *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, 18. But the recognition and enforcement of this right on the part of defendants in the Federal courts is a matter quite apart from the authority of the States to establish a different rule of practice within their jurisdictions, as was expressly recognized in *York* v. *Texas*, 137 U. S. 15, 17, 20; *Southern Pacific Co.* v. *Denton*, 146 U. S.

202, 208; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 207; *McLaughlin* v. *Hallowell*, 228 U. S. 278, 289.

The Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714, 732, 733; *York* v. *Texas*, 137 U. S. 15, 21. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case, that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it. As appears from *Southern Pacific Co.* v. *Denton*, and other cases of the same class above cited, the distribution of original and appellate jurisdiction in the Federal courts is such as to sometimes give an advantage of this kind to defendants; but it is not indispensable to "due process of law."

The second Federal question is raised by the insistence of plaintiff in error that the Kentucky Court of Appeals

failed to give such credit to the Illinois statute as it was required to give under Art. IV, § 1, of the Constitution of the United States, and the Act of Congress passed to carry it into effect (§ 905, Rev. Stat.).

Upon an examination of the record, we are unable to perceive that the Kentucky court failed to accord to the Illinois statute the credit to which it was entitled under the Federal system. The court recognized the existence of the statute and its validity, as pleaded by defendant and as admitted by plaintiff's demurrer. It also recognized the relevancy of the statute to the question in controversy, and either admitted or assumed that it had the effect of limiting the powers of defendant with respect to issuing policies of insurance, so far as the terms of the statute extended. Thereupon it became necessary for the court in the due performance of its judicial function to interpret the meaning of the enactment, in order to determine whether it evidenced the purpose of the law-making body to limit the powers of the corporations with respect to business conducted beyond the confines of the State of its origin. So doing, the court held as follows (147 Kentucky, 490, 491):

"Upon an inspection of the whole act we are satisfied that the section above quoted was not intended by the Legislature of Illinois to have an extra territorial effect. It was only intended to regulate the business done in Illinois. The act is a general one governing this character of business and evidently refers to business done in Illinois. . . . When in a charter of an incorporated company restrictions are imposed as to the kind of business it may do, such limitations upon the power of the company ordinarily follow it wherever it goes, that is, when such a company comes into another State, it has only the powers which its charter confers. But that is not this case. The act in question is a general law regulating insurance companies and was evidently designed as a

regulation of the business in the State of Illinois. It has no application to the business done in Kentucky."

It does not appear that the court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as matter of fact. We are referred to no authoritative judicial construction of the statute in the State of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review; and this applies where foreign law is in question in the state court as well as to any other issue of fact. *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Chicago & Alton R. R.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622.

It is earnestly argued that the court erred in its construction of the Illinois statute. We do not pass upon this question, deeming it to be outside of the limits of our jurisdiction; for it is settled that where in a state court the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the "full faith and credit" clause of the Federal Constitution. *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222, 227; *Banholzer* v. *New York Life Insurance Co.*, 178 U. S. 402, 406; *Allen* v. *Alleghany Co.*, 196 U. S. 458, 464; *Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36, 51; *Texas & N. O. R. R. Co.* v. *Miller*, 221 U. S. 408, 416.

Judgment affirmed.

MR. CHIEF JUSTICE WHITE concurs in the result.

UNITED STATES *v.* WIGGER, ALIAS MOOSE JOHN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FOURTH DIVISION.

No. 349. Argued October 23, 1914.—Decided November 30, 1914.

The act of the legislature of Alaska of April 26, 1913, so amending § 43 of Title II of the Alaska Code of Criminal Procedure enacted by Congress March 3, 1899, that several charges against any person for similar offenses can properly be joined in one indictment, was within the power delegated by Congress to the legislature of Alaska by the act of August 24, 1912.

The clause in § 3 of the act of August 24, 1912, providing that all laws theretofore passed by Congress establishing executive and judicial departments in Alaska should continue until amended or repealed by Congress, related to laws establishing such departments and not merely regulating procedure, and the form of indictment was open to amendment by the territorial legislature.

THE facts, which involve the validity and construction of an act of the territorial legislature of Alaska amending § 43 of Title II of the Alaska Code of Civil Procedure so as to permit one indictment for several offenses of the same class, are stated in the opinion.

Mr. Assistant Attorney General Warren for the United States.

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

MR. JUSTICE PITNEY delivered the opinion of the court.

The grand jury returned an indictment against defendant in error containing three counts, charging him with as many different violations of the criminal laws in force

in Alaska. He demurred upon the ground (among others) that more than one crime was charged. The demurrer was sustained by the District Court upon this ground, and the case comes here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246. The other grounds of the demurrer need not be further noticed.

By § 43 of Title II of the act of Congress approved March 3, 1899 (Alaska Code of Criminal Procedure, c. 429, 30 Stat. 1253, 1290; Comp. Laws of Alaska, § 2152), it was declared that "the indictment must charge but one crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative." And by § 90 of the same Code (30 Stat. 1294; Comp. Laws of Alaska, § 2199), the defendant was entitled to demur where more than one crime was charged. But by an act of the legislature of Alaska, approved April 26, 1913 (Sess. Laws, p. 65), it was enacted that § 43 of Title II of the act just mentioned should be amended to read (like § 1024, Rev. Stat.) as follows:

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

The sole question presented for decision is whether this act of the territorial legislature was efficacious to amend the act of Congress. In *Summers* v. *United States*, 231 U. S. 92, 105, the validity of the territorial act was assumed; but no question had been raised about it.

Local powers of legislation were first conferred upon Alaska by act of Congress of August 24, 1912, c. 387, 37

Stat. 512, of which the most pertinent clauses are set forth in the margin.[1] The scope of the authority of the

[1] An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes.

* * * * * * * *

SEC. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: *Provided*, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: *Provided further*, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and a house of representatives. . . .

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SEC. 9. LEGISLATIVE POWER—LIMITATIONS.—The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; [Here follow numerous express limitations none of which has reference to the present subject.]

* * * * * * * *

territorial legislature, so far as the present question is concerned, depends especially upon the true intent and meaning of the clause contained in § 3, "that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress."

In order to determine what laws were by this language preserved from interference at the hands of the local legislature a brief review is necessary.

The territory in question having been ceded to the United States by the Emperor of Russia by treaty of March 30, 1867 (15 Stat. 539), Congress in the following year extended to it certain of the laws of the United States, at the same time enacting that until otherwise provided violations of the Act should be prosecuted in any district court of the United States in California or Oregon or in the District Courts of Washington (Act of July 27, 1868, c. 273, 15 Stat. 240, 241, § 7). By act of May 17, 1884, entitled "An act providing a civil government for Alaska" (c. 53, 23 Stat. 24), the Territory was declared to constitute a civil and judicial district; the appointment of a governor with executive authority was provided for, and by the third section it was enacted: "There shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law." Provision was made for the appointment of a district judge and four commissioners, whose

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SEC. 20. LAWS SHALL BE SUBMITTED TO CONGRESS.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

jurisdiction and powers were prescribed, and for appellate review.

By the act of March 3, 1899, already mentioned (c. 429, 30 Stat. 1253), Congress provided an elaborate criminal code and code of criminal procedure, of which Title I contains 219 sections, defining crimes and offenses, and providing for their punishment, and Title II contains 481 sections, dealing for the most part with proceedings for the punishment and prevention of the crimes defined in Title I. By act of June 6, 1900, entitled "An Act Making further provision for a civil government for Alaska, and for other purposes" (c. 786, 31 Stat. 321), further provision was made, under Title I, for the establishment of the executive and judicial departments in the Territory.[1] Title II contains 1048 sections, constituting a Code of Civil Procedure (31 Stat. 333–494; Comp. Laws of Alaska, 378–638). Title III contains 368 sections, and is called the Civil Code (31 Stat. 494–552; Comp. Laws of Alaska, 277–362). In the Code of Civil Procedure, a chapter (31 Stat. 442, §§ 698 *et seq.*) is devoted to the courts of justice, and contains sections prescribing their jurisdiction, powers, and authority. By an act approved March 3, 1909, c. 269, 35 Stat. 838, 839, § 2, the act of 1900 was amended with respect to the jurisdiction of the District Court.

As already remarked, legislative power was first conferred upon the Territory by the act of August 24, 1912, c. 387, 37 Stat. 512. From the provision of this act

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[1] "An Act Making further provision for a civil government for Alaska, and for other purposes.

* * * * * * * *

SEC. 4. There is hereby established a district court for the district, which shall be a court of general jurisdiction in civil, criminal, equity, and admiralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President. . . .

"That all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress" the District Court, after a review of the other legislation to which attention has been called, drew the conclusion that the laws concerning procedure in actions prosecuted in the name of the United States and by its officers are an essential and integral part of the laws establishing the executive and judicial departments, and that therefore these can be amended or repealed only by act of Congress.

With this view we are unable to concur. It seems to us that by the language employed, Congress intended to draw a clear distinction between those laws by which the executive and judicial departments had been established in the Territory and those minor regulations that had to do with practice and procedure. Those enactments by which Congress had provided for the appointment of executive and judicial officers for the Territory and had marked out the powers, authority, and jurisdiction of each, and provided safeguards for their maintenance, are properly within the category of laws "establishing" those departments. These laws, and not those merely regulating the procedure, were by the act of 1912 continued in force until amended or repealed by act of Congress. The section respecting the form of indictments was open to amendment by the territorial legislature, and the act of April 26, 1913, passed for that purpose, is therefore valid.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

UNITED STATES *v.* LEWIS.

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

No. 380. Argued October 22, 1914.—Decided November 30, 1914.

The plain object of the prohibition in the Meat Inspection Law of 1906 against alteration or destruction of tags and labels is to safeguard food products against alteration and substitution so as to render the process of inspection effective, and the statute will not be so construed as to defeat the purpose for which it was passed.

The prohibition in the Meat Inspection Law against altering, defacing or destroying marks, tags, labels, etc., does not relate alone to those engaged in the business of preparing meats for transportation and carrying or assisting in the carrying of such meats in interstate commerce, but is as broad as its language and applies to any and every person, firm or corporation, or officer, agent or employé thereof.

THE facts, which involve the construction of certain provisions of the Federal Meat Inspection Law, are stated in the opinion.

Mr. Assistant Attorney General Underwood for the United States.

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

MR. JUSTICE PITNEY delivered the opinion of the court.

Defendants in error were indicted for an alleged violation of the so-called Meat Inspection Law, which is a part of the "Act making Appropriations for the Department of Agriculture," etc., approved June 30, 1906, c. 3913, 34 Stat. pp. 669, 674, etc. Upon motion of

defendants the District Court quashed the indictment, basing its decision upon the construction of the statute, and the Government has brought this writ of error under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. p. 1246.

The pertinent portions of the Meat Inspection Law are set forth in the margin.[1]

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[1] That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture . . . shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and passed;" and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned," all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof. . . .

That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for

Pursuant to the authority conferred by the Act, the Secretary of Agriculture made certain rules and regulations, effective May 1, 1908, among which was the following:

"An official establishment may ship from the said establishment to any other official establishment any meat

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human food; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products.

* * * * * * * *

That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of this Act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector. . . .

* * * * * * * *

That on and after October first, nineteen hundred and six, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as

or meat food product which has been inspected and passed under these regulations without marking the same 'Inspected and passed,' if such shipment be placed in a rail-

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"inspected and passed," in accordance with the terms of this Act and with the rules and regulations prescribed by the Secretary of Agriculture.

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That no person, firm, or corporation, or officer, agent, or employé thereof, shall forge, counterfeit, simulate, or falsely represent, or shall without proper authority use, fail to use, or detach, or shall knowingly or wrongfully alter, deface, or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in this Act, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture, on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of this Act, or any certificate in relation thereto, authorized or required by this Act or by the said rules and regulations of the Secretary of Agriculture.

* * * * * * * *

That no person, firm, or corporation engaged in the interstate commerce of meat or meat food products shall transport or offer for transportation, sell or offer to sell any such meat or meat food products in any State or Territory or in the District of Columbia or any place under the jurisdiction of the United States, other than in the State or Territory or in the District of Columbia or any place under the jurisdiction of the United States in which the slaughtering, packing, canning, rendering, or other similar establishment owned, leased, operated by said firm, person, or corporation is located unless and until said person, firm, or corporation shall have complied with all of the provisions of this Act.

That any person, firm, or corporation, or any officer or agent of any such person, firm, or corporation, who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and shall be punished on conviction thereof by a fine of not exceeding ten thousand dollars or imprisonment for a period not more than two years, or by both such fine and imprisonment, in the discretion of the court. . . .

. . . Said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act.

road car which is sealed by an employé of the Bureau of Animal Industry, and provided that not less than 25 per cent of the contents of each car consists of meat or meat food products not marked 'Inspected and passed.'" (Reg. 25, § 12, par. 1.)

The indictment charged, in substance, that defendants knowingly and wrongfully altered, defaced, broke, and destroyed a certain government seal, then being upon a certain railroad freight car containing meat and meat products then under government supervision for inspection and offered for transportation in interstate commerce, the seal having been affixed to the car in accordance with the rules and regulations of the Secretary of Agriculture. The clauses of the statute upon which the indictment rests are those which declare "That no person, firm, or corporation, or officer, agent, or employé thereof, shall . . . knowingly or wrongfully alter, deface, or destroy . . . any of the marks, stamps, tags, labels, or other identification devices provided for in this Act, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture, on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of this Act," and "That any person, firm, or corporation, or any officer or agent of any such person, firm, or corporation, who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor."

The District Court construed the prohibition as relating alone to those engaged in the business of preparing meats for transportation, and the carrying or assisting in the carrying of such meats in interstate transportation. We are unable to discern any sufficient reason for giving to the language of the statute so limited an application. The plain object of the clause is to safeguard the food products in question against alteration or substitution, and thus enable the officials of the Government to sys-

tematize and render effective the processes of inspection; an object that is interfered with if the tags or other identification devices are destroyed, whether they be destroyed by those engaged in the business or by others. Moreover, one of the other prohibitions of the Act is in terms limited to those engaged in the interstate commerce of meat or meat food products.

It seems to us clear that the prohibition upon which the present indictment is founded has an effect as broad as its language, and applies to any and every "person, firm, or corporation, or officer, agent, or employé thereof." See *United States* v. *Portale*, decided November 2, 1914, *ante*, p. 27.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

HOPKINS *v.* HEBARD.

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

No. 30. Argued October 16, 19, 1914.—Decided November 30, 1914.

The function of a bill of review filed for newly discovered evidence is to relieve a meritorious complainant from a clear miscarriage of justice where the court is able to see, upon a view of all the circumstances, that the remedy can be applied without mischief to the rights of innocent parties and without unduly jeopardizing the stability of judicial decrees.

The relief prayed by a bill of review for newly discovered evidence is a matter of sound discretion and not of absolute right; and even though

the evidence be persuasive of error in the former decree the bill of relief should not be allowed if it should result in mischief to innocent parties.

Notwithstanding this court has recently decided, in an action between North Carolina and Tennessee, that the boundary between them is different from that which the Circuit Court of Appeals had previously adjudged it to be in cases affecting titles to land now owned by third parties relying on the decrees of that court, it will not now overturn those decisions, as the stability of judgments and the protection of rights acquired in reliance upon them would, under the circumstances of this case, make the review inequitable.

194 Fed. Rep. 301, refusing a bill to review 103 Fed. Rep. 531, affirmed.

THE facts, which involve the principles controlling the granting of bills of review in cases affecting title to land, and their application to property the title to which is claimed under grants of different States, the boundary between which has long been in dispute, are stated in the opinion.

Mr. C. B. Matthews for petitioners.

Mr. John Franklin Shields and *Mr. William A. Stone*, with whom *Mr. T. E. H. McCroskey* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In 1907, petitioners, alleged successors to David W. Belding and others, filed a bill of review against the heirs and representatives of Charles Hebard in the United States Circuit Court, Eastern District of Tennessee, wherein they sought to reverse the decree for complainant granted by the same court, June 10, 1899, and later affirmed by the Circuit Court of Appeals in the cause entitled *Hebard* v. *Belding*, which was instituted to determine the title to some seven thousand acres of mountain land. The Smoky Mountain Land, Lumber and Improvement Company intervened, denied the alleged equities

and set up that it had purchased the property for value and in good faith. The trial court having heard the matter upon the pleadings and evidence dismissed the bill; and this was affirmed by the Circuit Court of Appeals (194 Fed. Rep. 301). The cause is here upon certiorari.

The land in controversy lies on the waters of Slick Rock Creek, an affluent of the Little Tennessee River, and for some time prior to 1895 was claimed by Hebard under a grant from the State of Tennessee. Belding and others claimed it under a North Carolina grant. The rights of the disputants depended on the true location of the dividing line between the two States. If, after crossing the Little Tennessee, the line ran southward along Hangover ridge, the land was within Tennessee and belonged to Hebard; if, on the other hand, it ran along Slick Rock Creek the North Carolina grant was good and Belding and others were the owners. In 1895 Hebard began a suit in the Chancery Court, Monroe County, Tennessee, seeking an adjudication of his rights. This was removed to the United States Circuit Court; elaborate proofs were taken; and, upon the hearing, the court determined that the state line ran along Hangover ridge, as contended by Hebard, and adjudged the title to be in him. The Circuit Court of Appeals in a final decree, entered July 13, 1900, affirmed this action, the opinion being written by the late Mr. Justice Lurton (103 Fed. Rep. 532).

Some years before the present suit was brought, The Smoky Mountain Land, Lumber and Improvement Company, relying upon the last-mentioned final decree in the Circuit Court of Appeals, in good faith and for value, acquired the interest of Hebard. As security for debt, Belding and others, by deeds of December, 1899, and March, 1900, transferred to Archer and McGarry, Trustees, with power of sale, their interest in a large tract of land the boundaries of which included the seven thousand acres now in question "subject nevertheless to all deduc-

tions, if any, arising by, through or under the 'State Line' suit hereinafter mentioned" (*Hebard* v. *Belding*). Default having occurred, the trustees executed a deed to William R. Hopkins and others, petitioners here, with covenants of seisin and right to convey and special warranty; but from the covenants they expressly excepted "all those lands situated at or near the State Line, between the State of North Carolina and Tennessee, which were recovered in a certain action known as the 'State Line Suit' which was pending in the United States Circuit Court for the Eastern District of Tennessee and was brought by one Hebard against David W. Belding and others if future proceedings do not recover the title thereof."

During the year 1821 Commissioners appointed by North Carolina and Tennessee located and marked the southern portion of the dividing line between the two States and prepared a map roughly indicating it. After being lost for many years, in December, 1903, or early in 1904, this was found among old, discarded papers stored in the basement of the Capitol at Nashville. Relying on the map as newly discovered evidence adequate, when considered in connection with that formerly introduced, to demonstrate that the dividing line between the two States ran along Slick Rock Creek and to establish the invalidity of the Tennessee grant under which Hebard claimed, petitioners began the present proceeding.

Likewise relying in part upon the same map, the State of North Carolina in March, 1909, presented an original bill in this court against Tennessee, claiming that the true line between them ran along Slick Rock Creek, and praying an adjudication to that effect. In an opinion recently announced, the contention of North Carolina was sustained. *North Carolina* v. *Tennessee*, *ante*, p. 1.

The function of a bill of review filed for newly discovered evidence is to relieve a meritorious complainant from a

clear miscarriage of justice where the court is able to see upon a view of all the circumstances that the remedy can be applied without mischief to the rights of innocent parties and without unduly jeopardizing the stability of judicial decrees. The remedy is not a matter of absolute right but of sound discretion. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Ricker* v. *Powell*, 100 U. S. 104, 107; *Craig* v. *Smith*, 100 U. S. 226, 233; 2 Daniell's Ch. Pr. *1577; Story's Eq. Pl., § 417; Street's Fed. Eq. Pr., §§ 2143, 2156, 2159; Gibson's Suits in Chancery, §§ 1058, 1062.

The trial court regarded the newly-discovered evidence as favorable, rather than in opposition, to the original decree and accordingly dismissed the petitioners' bill. The Circuit Court of Appeals, in a well-considered opinion, upheld the result but for a different reason, saying (194 Fed. Rep. 301, 310): "In our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable."

Notwithstanding our conclusion in the proceeding between the States of North Carolina and Tennessee, where the established facts in respect to the location of the dividing line were for the most part the same as those disclosed in the record now before us, we think the decree of the Circuit Court of Appeals was right and it is accordingly

Affirmed.

MR. JUSTICE DAY took no part in the consideration and decision of this case.

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY *v.* HARRISON, SHERIFF OF PITTSBURG COUNTY, OKLAHOMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 45. Argued November 3, 4, 1914.—Decided November 30, 1914.

A Federal instrumentality acting under Congressional authority cannot be subjected to an occupation or privilege tax by a State. *Farmers' Bank* v. *Minnesota*, 232 U. S. 516.

Where the agreement between the Government and an Indian tribe imposes upon the Government a definite duty in regard to operation of coal mines, as is the case with the Choctaw and Chickasaw agreement of April 23, 1897, lessees of the mines are the instrumentalities through which the obligation of the United States is carried into effect, and they cannot be subjected to an occupation or privilege tax by the State in which the mines are located.

Neither state courts nor legislatures, by giving a tax a particular name, can take from this court its duty to consider its real nature and effect. *Galveston &c. Ry. Co.* v. *Texas*, 210 U. S. 227.

Where the manifest purpose of a gross revenue tax equal to a specified percentage on gross receipts from production of a mine in addition to

taxes levied and collected upon an *ad valorem* basis, is to reach all sales and secure such percentage, the tax is, in effect, a privilege or occupation tax; and so *held* as to such a tax imposed by Oklahoma on persons engaged in mining and producing coal.

THE facts, which involve the constitutionality of a gross revenue tax levied by the State of Oklahoma on persons engaged in mining and the production of coal, and the power of a State to tax instrumentalities of the Federal Government, are stated in the opinion.

Mr. J. G. Gamble, with whom *Mr. M. L. Bell* and *Mr. C. O. Blake* were on the brief, for appellant.

Mr. A. L. Hull, with whom *Mr. Charles West*, Attorney General of the State of Oklahoma, was on the brief, for appellee:

The state court has held the mining tax to be one on property—not a license tax. *McAlester Coal Co.* v. *Trapp*, 141 Pac. Rep. 794; *Meyer* v. *Wells, Fargo & Co.*, 204 Fed. Rep. 140; *S. C.*, 223 U. S. 298, distinguished.

This is a tax on property and is not an interference with the Federal Government in its care of the Indians. See cases *supra*.

The internal evidence of § 8 is that this is a property tax.

Section 6 is the section levying a tax on mineral production. The rebate provided for in § 8 is an attempt to avoid a duplication of taxation on the same property.

While the lessees of both coal and oil lands in a certain sense are Federal instrumentalities, they are no more so than Indian traders or lessees of Indian grazing lands are such. The property, though on Indian Reservations, is taxable, provided it is not taxed so as to interfere with the Federal purpose they subserve.

Likewise the ores and minerals while in the earth upon

segregated or Indian lands, are not taxable by the State. But the ore, coal, or oil when severed from the soil is taxable as the property of the non-exempt lessee, citizen of the United States and of this State.

Under these circumstances, especially during the time the vast majority of the real estate in what was Indian Territory, remains inalienable and non-taxable, is it to be supposed that the State of Oklahoma, as a matter of convenience, would prefer to place its tax on the privilege of mining or the mined product as property?

If the latter is the method selected, harmony with § 8 and an effective tax is provided for; but, if the legislature did not mean to levy a property tax but a privilege tax only, then the vast oil industry in Eastern Oklahoma as well as the large coal industry is probably to go entirely untaxed. And until the Indian lands are taxable, the cities and Western Oklahoma are to bear the burden of government. A conclusion so unjust will not be reached. As a property tax the tax measured by output is sound.

Complainant is only a licensee. A coal lease payable in royalty though on government land is taxable property. *Honing Co.* v. *Dillon*, 6 L. R. A. (N. S.) 628; *Forbes* v. *Gracey*, Fed. Cas. 4924; *S. C.*, 94 U. S. 762; *Moore* v. *Beason*, 51 Pac. Rep. 875; *State* v. *Bell*, Phil. N. C. 76; *Conder* v. *McMillan*, 56 Pac. Rep. 965; *Noble* v. *Amoretti*, 71 Pac. Rep. 879.

Weston v. *Charleston*, 2 Pet. 449, distinguished; and see *Snyder* v. *Bettman*, 190 U. S. 249; *South Carolina* v. *United States*, 199 U. S. 437; *Baltimore Ship Co.* v. *Baltimore*, 54 Atl. Rep. 623; *S. C.*, 195 U. S. 375; *Thomson* v. *Un. Pac. Ry.*, 9 Wall. 579, 591; *Lane Co.* v. *Oregon*, 7 Wall. 77.

An exemption from state taxation, of agencies of the National Government depends not on the nature of their agency, but whether the tax does in truth deprive them of the power to serve the Government as they were in-

tended to serve it. *Thomson* v. *Un. Pac. Ry., supra; Railroad Company* v. *Peniston,* 18 Wall. 5. In both of the cases emphasis was laid upon the question of whether the hindrance is remote or direct. And see *First National Bank* v. *Kentucky,* 9 Wall. 353; *Utah Navigation Co.* v. *Fisher,* 116 U. S. 28; *M. & P. Co.* v. *Arizona,* 156 U. S. 347; *Cherokee Nation* v. *Southern Kansas Ry.,* 135 U. S. 641.

Neither a tax on a Federal instrumentality nor other tax which only in a remote way interferes with a Federal purpose, is void. *West. Un. Tel. Co.* v. *Massachusetts,* 125 U. S. 549; *Ficklin* v. *Shelby Co.,* 145 U. S. 1; *Reagan* v. *Mercantile Co.,* 154 U. S. 413; *Postal Tel. Co.* v. *Adams,* 155 U. S. 687, 696; *N. Y., L. E. & W. Ry.* v. *Pennsylvania,* 158 U. S. 431; *Central Pacific* v. *California,* 162 U. S. 125; *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150; *Thomas* v. *Gay,* 169 U. S. 264; *Wagoner* v. *Evans,* 170 U. S. 586; *Montana Mission* v. *Missoula Co.,* 200 U. S. 118.

The tax is an output, less royalty, and that argues that it is a property tax.

Mr. Justice McReynolds delivered the opinion of the court.

By an original bill filed July 19, 1909, in the Circuit Court of the United States, Eastern District of Oklahoma, appellant sought to enjoin the sheriff of Pittsburg County from collecting taxes claimed by the State upon the gross sale of coals dug from mines belonging to the Choctaw and Chickasaw Indians which it leased and operated. The claim was based on the Oklahoma statute which provides for a gross revenue tax; and was resisted upon the ground (among others) that in reality the demand was for an occupation or privilege tax to which the appellant could not lawfully be subjected, because, as a Federal instrumentality acting under Con-

gressional authority, it had leased and was operating mines to which the Indians held title. A general demurrer was sustained, and the cause is here by direct appeal.

No objection has been interposed to the forum selected or the procedure adopted. *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298.

Appellant is a railroad corporation with power to lease and operate coal mines. In the region formerly known as Indian Territory—now within the State of Oklahoma—the Choctaw and Chickasaw Indians, as wards of the United States, own a large area of segregated and unallotted lands containing valuable coal deposits which are not subject to taxation by the State. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310, 312; *Ex parte Webb*, 225 U. S. 663, 684.

The act of Congress approved June 28, 1898, c. 517, 30 Stat. 495, 510,—"Curtis Act," ratified, confirmed and put into effect the Atoka Agreement of April 23, 1897, between the United States and the Choctaws and Chickasaws, which provided that their coal lands should remain common property of the members of the tribes; that the revenues derived therefrom should be used for the education of their children; that the mines thereon should be under the supervision and control of two trustees appointed by the President and subject to rules prescribed by the Secretary of the Interior; that all such mines should be operated and the royalties paid into the Treasury of the United States; that the royalty should be fifteen cents per ton, with power in the Secretary of the Interior to reduce or advance the same according to the best interests of the tribes; and that all lessees should pay fixed sums as advanced royalties.

In harmony with the provisions of the Curtis Act appellant secured from the duly appointed trustees leases of certain mines obligating itself to take out annually

specified amounts of coal, and to pay the stipulated royalty. It proceeded actively to develop these, either directly or through its agent, and for some years before the present suit was begun took therefrom large quantities of coal and fully complied with the obligations assumed.

Section 6 of the Oklahoma statute approved May 26, 1908 (Session Laws, 1908, pp. 640, 642), entitled "An Act providing for the levy and collection of a gross revenue tax from . . . persons, firms, corporations or associations engaged in the mining or production of coal, . . ." provides: "Every person, firm, association, or corporation engaged in the mining, or production, within this state, of coal . . . shall, within thirty days after the expiration of each quarter annual period expiring respectively on the first day of July, October, January and April of each year, file with the state auditor a statement under oath, on forms prescribed by him, showing the location of each mine . . . operated by such person, firm, association, or corporation during the last preceding quarter annual period, the kind of mineral; . . . the gross amount thereof produced; the actual cash value thereof; . . . and shall at the same time, pay to the state treasurer a gross revenue tax, which shall be in addition to the taxes levied, and collected upon an *ad valorem* basis upon such mining . . . property and the appurtenances thereunto belonging, equal to two per centum of the gross receipts from the total production of coal therefrom . . ." An amendment of March 27, 1909, (Laws 1909, p. 624) changed the quarterly periods and reduced the rate on receipts to one-half of one per centum.

Appellants furnished the auditor with a statement of the output of the mines operated, but declined to pay the tax assessed upon the gross receipts from sales. Thereupon the sheriff, under directions of the auditor, was

about to enforce the demand by a levy, and the present bill was filed to restrain him.

From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a State. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 425; *Farmers Bank* v. *Minnesota*, 232 U. S. 516. But it is insisted that the statute rightly understood prescribed only an *ad valorem* imposition on the personal property owned by appellant—the coal at the pit's mouth,—which is permissible according to many opinions of this court. *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Union Pacific Railroad* v. *Peniston*, 18 Wall. 5; *Central Pacific Railroad* v. *California*, 162 U. S. 91; *Thomas* v. *Gay*, 169 U. S. 264.

The court below held that the effect of the act was to lay a valid tax on personalty, and the same result was subsequently reached by the Supreme Court of Oklahoma. *McAlester-Edwards Coal Co.* v. *Trapp*, 38 Oklahoma, 792, 794. The United States District Court for the Western District of Oklahoma arrived at a different conclusion. *Missouri, Kansas & Texas Ry.* v. *Meyer*, 204 Fed. Rep. 140.

Neither state courts nor legislatures by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217, 227.

It is unnecessary to consider the power of the State of Oklahoma to treat coals dug from mines operated by the appellant as other personalty and to subject them to a uniform *ad valorem* tax, for it seems to us clear that the act of 1908 provided for no such imposition. Its very

language imposes a "gross revenue tax which shall be in addition to the taxes levied and collected upon an *ad valorem* basis." We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment—provision is made for determining that upon a different basis. *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 301. The requirement is not on account of property owned on a given day, as is the general custom where *ad valorem* taxes are provided for and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes. *Pullman Co.* v. *Knott*, *ante*, p. 23.

A tax upon a merchant's, manufacturer's, or miner's gross sales is not the same thing as one on his stock treated as property. Cooley on Taxation (3rd ed.), p. 1095. The former is upon his business. In effect, the Oklahoma Act prescribes an occupation tax (*Ohio Tax Cases*, 232 U. S. 576, 592); and, accepting as true the allegations of appellant's bill, we think it cannot lawfully be subjected thereto. The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

FALLOWS *v.* CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, TRUSTEE IN BANKRUPTCY OF TENGWALL COMPANY.

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

No. 69. Argued November 9, 1914.—Decided November 30, 1914.

First National Bank v. *Staake*, 202 U. S. 141, and *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354, followed as to the purposes of § 67-f of the Bankruptcy Act of 1898 in subrogating the trustee to liens acquired by creditors on assets of the bankrupt within four months of the petitions.

Where the referee and both courts below have sustained the propriety of subrogating the trustees to liens and no abuse of the discretion vested in them is shown, this court accepts their action as correct.

The validity and priority of mortgage liens depend on the law of the State.

The statutes of Illinois relating to the continuation of a lien of a mortgage on personal property have not been definitely construed by the courts of that State; but this court sustains the construction of the District Court and the Circuit Court of Appeals holding that the lien of such a mortgage expires as against judgment creditors three years after record subject to one extension for twelve months on proceedings taken in strict conformity with the statute, and that attempts to further extend the lien are ineffective.

As between judgment creditors and the holder of a mortgage on personal property, *held* that as the lien of the mortgage had expired as to judgment creditors under the state law prior to the entry of the judgments, and under the state law could not be further extended, the lien of the judgments attached if not fraudulently obtained.

Executions delivered to the sheriff for service without any instructions to refrain from carrying out the mandate, *held*, under the circumstances of this case, to include levy.

In the absence of directions not to levy it is the duty of the officers to obey the directions and commands of the writ.

201 Fed. Rep. 82, affirmed.

THE facts, which involve the validity and priority of liens on property of the bankrupt of judgment creditors

and holders of notes secured by mortgage on personal property, and the construction of the laws of Illinois relating to such mortgages, are stated in the opinion.

Mr. Herman Frank for appellee.

Mr. Edwin H. Cassels for appellant, submitted:

Appellant's trust deed was invalid as against the bankrupt, and as against ordinary contract creditors, and had it not been for the entry of the order preserving the lien of the judgment creditors, and subrogating the appellee to all rights thereunder, this controversy would not have arisen. *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146; *Allcock* v. *Log*, 100 Ill. App. 573; *Stewart* v. *Platt*, 101 U. S. 731; Illinois Stat. Ann., 1913, par. 6755, p. 3687.

No liens on the property of the bankrupt were created by the judgments.

All statutes which create liens must be strictly construed and anything less than the delivery of an execution to the sheriff for the purpose of demand and levy cannot operate to create a lien in favor of a judgment creditor. *Gilmore* v. *Davis*, 84 Illinois, 487; *West. Un. Storage Co.* v. *Davis*, 64 Ill. App. 452; *Hawes* v. *Cameron*, 23 Fed. Rep. 327; *Smith* v. *Irwin*, 77 N. Y. 466; *Doyle* v. *Herod*, 9 Colo. App. 257; *Williams* v. *Mellor*, 12 Colorado, 1.

The validity of the liens claimed by the judgment creditors must be decided by the law of the State of Illinois. *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354.

"Serving" and "levying" mean entirely distinct and different things.

An execution must be held by the sheriff "for levy" in order to operate to create a lien upon the personal property of the judgment creditor. *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354; *Andrews* v. *Keep*, 38 Alabama, 315; *Waterman* v. *Merrill*, 4 Vroom, 378; *Kemble* v. *Harris*, 36 N. J. L. 526; *State* v. *Hamilton*, 16 N. J. L. 153; *Harris*

v. *Rankin*, 4 Manitoba, 115; *Wood* v. *Lowden*, 117 California, 232; *Cheston* v. *Gibbs*, 13 L. J. Exch. 53.

Peck v. *City National Bank*, 51 Michigan, 353, distinguished, and see *Hildreth* v. *Ellice*, 1 Caines, 192.

The referee abused the discretion lodged in him by the statute in entering the order preserving the alleged liens of the judgment and in subrogating the trustee in bankruptcy to all rights thereunder, even though it be conceded that the entry of the judgment and delivery of the executions to the sheriff did create liens. Section 67-f, Bankruptcy Act of 1898; *First National Bank* v. *Staake*, 202 U. S. 141; *Thompson* v. *Fairbanks*, 196 U. S. 516; *In re Moore*, 107 Fed. Rep. 234; 5 Cyc. 367 (note); *In re Sentenne Co.*, 9 A. B. R. 648; 1 Remington on Bankruptcy, 1489; Jones on Chattel Mortgages, 5th ed., par. 138.

Appellant's claim should have been allowed as a secured claim and appellant's mortgage should have been held to be a first lien on the assets of the bankrupt. Appellant's lien should not have been postponed to the alleged liens of the judgments.

A mortgage good as between the mortgagor and the mortgagee is good also against general creditors. *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146, 180; Hammon on Chattel Mortgages in Illinois, p. 50; *Allcock* v. *Foy*, 100 Ill. App. 573; *In re Antigo Screen Co.*, 123 Fed. Rep. 249; *Stewart* v. *Platt*, 101 U. S. 731.

A mortgage in Illinois on after-acquired property creates an equitable lien good as against the mortgagor and all his creditors who have not obtained liens by equitable proceedings. *Borden* v. *Croak*, 131 Illinois, 68, 75; *Morganstein* v. *Commercial Bank*, 125 Ill. App. 397; Illinois Stat. Anno., 1913, par. 7580, p. 4298; *Keller* v. *Robinson*, 153 Illinois, 458.

The debt in the case at bar became due fifteen years after the date of the bonds and mortgage. Notwithstanding this fact, the lien of the mortgage could be made

valid for four years, and appellant contends that it may be kept valid by successive renewals in accordance with the statute, until the maturity of the debt. *Fuller* v. *Smith*, 71 Ill. App. 576.

The provision of the statute with reference to the renewal or extension of a lien, after it once has attached to the personal property is to be liberally construed. *Cox* v. *Stern*, 170 Illinois, 452; *Hamilton* v. *Seegar*, 75 Ill. App. 599; *Fuller* v. *Smith*, 71 Ill. App. 576. And see *Swift* v. *Hart*, 12 Barb. 530; *Newell* v. *Warner*, 44 Barb. 258; *Nixon* v. *Stanley*, 33 Hun, 247; *Baker* v. *Becker*, 67 Kansas, 831; *Riederer* v. *Pfaff*, 61 Fed. Rep. 872.

In re New York Economical Printing Co., 6 A. B. R. 615; *Marsden* v. *Cornell*, 62 N. Y. 215, distinguished.

The burden of establishing the judgment lien was upon appellee and such liens could be established in one way only, and that by showing a compliance with the statute. Such compliance appellee has not shown.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Bonds amounting to twenty thousand dollars were issued to Fallows, Trustee, by The Tengwall Company, October 7, 1905, payable fifteen years thereafter. To secure them a trust deed or mortgage covering all its personal property was executed and duly recorded in Cook County, Illinois, November 1, 1905; an affidavit for the extension of this was filed October 5, 1908; and a second one October 6, 1909. On June 3, 1910, it gave promissory notes to sundry creditors aggregating more than twenty-five thousand dollars; the same day the holders took judgments thereon by confession in the Superior Court of Cook County; executions were taken out at once and delivered to the sheriff for service, but no levy was ever made.

June 4, 1910, a petition in involuntary bankruptcy was filed against the Company; a Receiver immediately appointed took possession of its property; and an adjudication of bankruptcy followed, June 17th. The Continental & Commercial Trust & Savings Bank was duly selected as trustee August 9th, and shortly thereafter presented a petition asking that the lien created by the executions upon the judgments of June 3rd be preserved, and that it be subrogated thereto for the benefit of the estate. (Bankruptcy Act, § 67-c.) The referee held appellant's answer resisting this petition insufficient, and allowed the subrogation as prayed.

The appellant sought to have all the bonds issued to him allowed as a preferred debt, claiming that they were secured by the above-mentioned trust deed, the lien of which was good as against all the world. The trustee in bankruptcy objected upon the ground that the deed could not prevail over the execution creditors because the Illinois statute limited its effect to three years subject only to a single extension of twelve months, and even if another were possible the second affidavit for extension filed October 6, 1909, was one day too late, and therefore unavailing. The referee sustained the objection and entered an order refusing to allow a preference in favor of the bonds. The District Court approved this action, and its decree was affirmed by the Circuit Court of Appeals (201 Fed. Rep. 82). Thereupon an appeal was taken to this court.

Three assignments of error are relied upon: (1) The order of the referee undertaking to subrogate the trustee to the judgment creditors' liens was erroneous and ought not to have been approved. (2) The trust deed of October 7, 1905, constituted a valid first lien upon all the property specified therein when the bankruptcy proceedings were begun. (3) The executions issued upon judgments of June 3, 1910, created no liens upon the bankrupt's property.

Section 67-f of the Bankruptcy Act, approved July 1, 1898, c. 541, 30 Stat. 544, 565, is copied in the margin,[1] Its purposes have been pointed out in *First National Bank of Baltimore* v. *Staake*, 202 U. S. 141, and *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354.

The propriety of subrogating the trustee to whatever liens were acquired under the judgments has been sustained by the three tribunals below. There is no proof showing an abuse of the discretion necessarily vested in them, and we accept their action in that regard as correct.

The validity and priority of the liens in question depend on the laws of the State, and § 9, chapter 77, and §§ 1 and 4, chapter 95, of Hurd's Revised Statutes of Illinois (1913) are pertinent. They are copied in the margin.[2]

[1] "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

[2] "§ 9. No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed; and for the better manifestation of the time, the sheriff or other officer shall, on receipt of such writ, indorse upon the back thereof the day of the month and year and hour when he received the same.

"§ 1. That no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property,

The provisions relative to the continuation of a mortgage after three years have not been definitely and authoritatively construed by the courts of Illinois. The Circuit Court of Appeals concluded that under them a mortgage lien expires as to judgment creditors three years after recordation, subject to one extension of twelve months from the filing of an affidavit in strict conformity with

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shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage.

"§ 4. Such mortgage, trust deed or other conveyance of personal property acknowledged as provided in this act shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded, or in case the mortgagor is not a resident of this State, then in the county where the property is situated and kept, and shall thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation, or extension thereof made as hereinafter specified: *Provided*, such time shall not exceed three years from the filing of the mortgage unless within thirty days next preceding the expiration of such three years, or if the debt or obligation matures within such three years, then within thirty days next preceding the maturity of said debt or obligation the mortgagor and mortgagee, his or their agent or attorney, shall file for record in the office of the recorder of deeds of the county where the original mortgage is recorded, also with the justice of the peace, or his successor, upon whose docket the same was entered, an affidavit setting forth particularly the interest which the mortgagee has by virtue of such mortgage in the property therein mentioned, and if such mortgage is for the payment of money, the amount remaining unpaid thereon, and the time when the same will become due by extension or otherwise; which affidavit shall be recorded by such recorder and be entered upon the docket of said justice of the peace, and thereupon the mortgage lien originally acquired shall be continued and extended for and during the term of one year from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage: *Provided*, such time shall not exceed one year from the date of filing such affidavit."

the prescribed requirements. This conclusion harmonizes with the purpose and history of the statute, and we think is correct. The lien claimed by appellant, as against judgment creditors, therefore, did not continue after the fifth day of October, 1909, and the attempt further to extend it was ineffective. *Cook* v. *Thayer*, 11 Illinois, 617; *Porter* v. *Dement*, 35 Illinois, 478, 480; *Silvis* v. *Aultman*, 141 Illinois, 632; *Re New York Economical Printing Co.*, 110 Fed. Rep. 514; Jones on Chattel Mortgages (5th ed.), p. 287.

There is no adequate proof that the judgments against the bankrupt were fraudulently obtained. The referee found the executions were delivered to the sheriff for *service;* and appellant maintains this conclusively shows they were not "delivered to the sheriff or other proper officer *to be executed,*" as required by the statute,—that "service" does not include "levy." The record discloses no instruction to the officer to refrain from carrying out the mandate of the writs, nor are there facts which clearly indicate a conditional delivery.

The Circuit Court of Appeals decided that under the circumstances of the present case the word service must be taken to include levy, saying (201 Fed. Rep. 82, 85): "In *Peck* v. *City National Bank*, 51 Michigan, 353, it is said: 'Service of an execution includes every act and proceeding necessary to be taken by the sheriff to make the money and includes the sale of the property when necessary.' The word has been defined to mean 'execution of process.' 35 Cyc. 1432. This construction seems to us reasonable in the case before us. It would be placing a strained meaning upon the transaction to hold that, when a party places an execution in the hands of a process officer, the latter is not charged with the duty, without further instructions, to proceed to make the money called for by the writ, which itself commands him to do so. In the absence of directions not to levy, it is the duty

of the officer to obey the directions and commands of the writ."

We are of opinion that the courts below properly interpreted the finding of the referee, and that the execution creditors secured valid prior liens upon the bankrupt's property. The decree is

Affirmed.

GARRETT, ADMINISTRATOR OF LEWIS *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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

No. 81. Submitted November 12, 1914.—Decided November 30, 1914.

The Employers' Liability Act of 1908, prior to the amendment of April 5, 1910, declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury:

1. Liability to the injured employé for which he alone could recover;

2. In case of death, liability to his personal representative for the benefit of the surviving widow or husband and children, and if none, then of the parents, but only for pecuniary loss and damage resulting to them by reason of the death.

The declaration must contain an averment substantially of every fact necessary to be proved to sustain plaintiff's right of recovery in order to let in the proof; and every issue must be founded upon a certain point, so that parties may come prepared with their evidence and not be taken by surprise, and so that the jury may not be misled by introduction of various matters.

While the same precision is not required as in pleadings at law, a convenient degree of certainty must be adopted as to bills in equity so as to maintain plaintiff's case.

When proofs go to matters not set up in the bill, the court cannot act upon them as a ground for decision. They are not put in contestation by the pleadings.

Common experience may be taken as a guide in teaching that financial damage is not always a necessary consequence to the parent as the result of the death of an adult son; and if such damage is not pleaded proof cannot be offered in regard thereto.

Where plaintiff refused to amend after permission so as to allege pecuniary damage due to the death of his son, the court below committed no error in excluding evidence as to such damage and dismissing the complaint, and the judgment should be affirmed and the case will not be remanded for new trial on the declaration being amended.

197 Fed. Rep. 715, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908, and the right of parents to recover for death of an adult son, are stated in the opinion.

Mr. John A. Pitts and *Mr. H. N. Leech* for plaintiff in error:

The Employers' Liability Act should be construed in the light of its own language, and the purpose of its enactment. Congress did not have in mind the changing of any common-law principle as the survival of an action for personal injuries. Its purpose was to exercise its legislative power under the commerce clause of the Constitution over the relation of employer and employé in interstate commerce. It is the same character of legislation as the Safety Appliance Acts,—the primary and controlling purpose of such legislation being to prevent the loss of life and the infliction of injuries, and its secondary purpose by means of such prevention, to bring about a better and more efficient railroad service to the public.

The Safety Appliance Act has for its sanction or means of enforcement, both fines and damages. That statute gives damages for a failure to have the required equipment, and does not, in words, give an action for such failure. For such failure it is held that damages may be had for death or injury thereby occasioned. The

personal representative suing for such failure, could recover damages for the mental and physical suffering, etc., for which the deceased would have recovered, and the value of the life lost. The act has for its sanction or means of enforcement the recovery of damages.

"Damages" is a generic term, and there is nothing in the wording of the statute that restricts its meaning to the recovery of anything short of the entire results occasioned by the negligent act or conduct for which a liability was created under the first section of the act.

In support of these contentions see: *Am. R. R. Co.* v. *Didricksen*, 227 U. S. 145; *A. S. & W. Co.* v. *Griffin*, 42 S. W. Rep. 1034; *C. & O. R. R. Co.* v. *Haekins*, 174 Fed. Rep. 602; *Emery* v. *Philadelphia*, 208 Pa. St. 492; *Fulgham* v. *M. & V. R. R. Co.*, 167 Fed. Rep. 660; *G. C. & C. R. R.* v. *McGinnis*, 228 U. S. 173; *Heahl* v. *San Francisco*, 42 California, 215; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *M. C. R. R. Co.* v. *Vreeland*, 227 U. S. 59; *Matthews* v. *Warner*, 22 Am. Rep. 399; *Meyer* v. *San Francisco*, 42 California, 215; *Mason* v. *So. Ry. Co.*, 58 So. Car. 70; *Penna. R. R.* v. *McClosky*, 23 Pa. St. 526; *Railroad Co.* v. *Baron*, 5 Wallace, 90; *Rhodes* v. *C. & A. R. R.*, 227 Illinois, 328; *Schlemmer* v. *Railroad Co.*, 205 U. S. 1; *Severns* v. *Nor. Ry. Co.*, 45 Fed. Rep. 407; *Trimmer* v. *Railroad Co.*, 84 So. Car. 203; *Walsh* v. *N. Y. & C. R. R.*, 173 Fed. Rep. 495.

Mr. John B. Keeble for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

This action for damages under the Employers' Liability Act, approved April 22, 1908, c. 149, 35 Stat. 65, was originally brought in the state court March 31, 1910. It was removed to the Circuit Court of the United States, Middle District of Tennessee, and tried there in May, 1911. The declaration contains three counts, each of which

alleges that plaintiff is the administrator of T. W. Lewis, Jr., by appointment of the County Court, Stewart County, Tennessee; defendant is a Kentucky railroad corporation engaged in interstate commerce; in September, 1909, the deceased was employed as a brakeman on one of its freight trains moving in such commerce; through negligence of its operatives and servants a collision occurred; in an effort to save his life he was caught under the engine and held there for six hours or more, suffering intense agony and pain, followed shortly by death; he was twenty-four years of age, strong, vigorous, with fine business qualifications and earning capacity. The first and second counts allege that the deceased left surviving T. W. Lewis, his father, and Mrs. T. W. Lewis, his mother, and that "plaintiff, as administrator of the said intestate, sues the defendant, for the benefit of his parents, in the sum of fifty thousand dollars damages." The third count alleges the survival of not only father and mother but also brothers and sisters (the names of the latter not being given), and that "plaintiff, as administrator of the said decedent, sues the defendant in the sum of fifty thousand dollars damages."

The trial judge, having definitely offered the plaintiff an opportunity to amend his declaration, which was declined, excluded all evidence relating to the mental and physical suffering of the deceased and also all tending to show pecuniary loss sustained by the parents; and then peremptorily instructed the jury to return a verdict for defendant. The United States Circuit Court of Appeals tendered a further opportunity to amend and when this was rejected affirmed the judgment of the trial court (197 Fed. Rep. 715). The cause is here upon writ of error.

The questions presented are: *First*, whether, under the Employers' Liability Act of 1908 (before amendment of April 5, 1910), the administrator of one who died of painful injuries suffered while employed in interstate commerce

by a railroad engaging therein can recover damages for the benefit of the estate (third count); and, *Second*, whether, if such administrator sue for the benefit of the employé's parents—there being no surviving widow or husband or child, it is necessary to allege facts or circumstances tending to show that as a result of the death they suffered *pecuniary* loss (first and second counts).

The nature of the rights and responsibilities arising out of this Act have been discussed and determined in four opinions announced by this court since the instant cause was decided by the Circuit Court of Appeals. *Michigan Central Railroad* v. *Vreeland*, 227 U. S. 59; *American Railroad of Porto Rico* v. *Didricksen*, 227 U. S. 145; *Gulf, Colorado &c. Ry.* v. *McGinnis*, 228 U. S. 173; *North Carolina Railroad* v. *Zachary*, 232 U. S. 248. It is now definitely settled that the act declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury: (1) liability to the injured employé for which he alone can recover; and (2), in case of death, liability to his personal representative "for the benefit of the surviving widow or husband and children," and if none then of the parents, which extends only to the *pecuniary* loss and damage resulting to them by reason of the death.

The third count of the declaration under consideration states no cause of action. The employé's right to recover for injuries did not survive him.

Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point so that the parties may come prepared with their evidence and not be taken by surprise and the jury may not be misled by the introduction of various matters. *Bank of the United States* v. *Smith*, 11 Wheat. 171, 174; *Minor* v. *Mechanics' Bank*, 1 Pet. 46, 67; *De*

Luca v. *Hughes*, 96 Fed. Rep. 923, 925; *Rose* v. *Perry*, 8 Yerg. 156; *Citizens' St. R. R.* v. *Burke*, 98 Tennessee, 650; 1 Chitty on Pleading, *270. Although the same precision of statement is not required as in pleadings at law, nevertheless it is held to be absolutely necessary that in bills of equity such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer. Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the plaintiff's case; and if the proofs go to matters not set up therein, the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation. *Harrison* v. *Nixon*, 9 Pet. 483, 503; Daniell's Ch. Pl. & Pr. *368.

The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. Common experience teaches that financial damage to a parent by no means follows as a necessary consequence upon the death of an adult son. The plaintiff expressly declined in both courts below so to amend his declaration as to allege pecuniary loss to the parents; and judgment properly went against him.

The request is now made that in view of all the circumstances—especially the former undetermined meaning of the statute, this court remand the cause for a new trial upon the declaration being so amended as to include the essential allegation. But we do not think such action would be proper. The courts below committed no error of which just complaint can be made here; and the rights of the defendant must be given effect, notwithstanding the unusual difficulties and uncertainties with which counsel for the plaintiff found himself confronted.

Judgment affirmed.

UNITED STATES OF AMERICA *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE COMMERCE COURT.

No. 39. Argued February 24, 25, 1913.—Decided December 7, 1914.

The very purpose for which the Interstate Commerce Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.

Where the evidence is undisputed and shows a discrimination between localities, a finding by the Interstate Commerce Commission that such discrimination is undue is a finding of fact which is not subject to review by the Commerce Court.

Quære, and not now decided, whether the method adopted by the Interstate Commerce Commission of considering, and basing its opinion upon, matter gathered in its general investigations regarding the subject-matter in controversy, but not produced upon the particular proceeding against particular carriers in which an order is made requiring them to desist from practices complained of in that proceeding, amounts to a denial of a hearing and results in want of due process of law.

After the amendment to § 4 of the Interstate Commerce Act by the act of June 18, 1910, the authority of the carriers to primarily determine for themselves the propriety of charging a higher rate for a shorter than for a longer distance ceased to exist and was taken from them and primarily vested in the Commission.

In this case the rates and allowances involved and the grain reshipping privilege at Nashville are governed by § 4 of the act. *Intermountain Rate Cases*, 234 U. S. 476.

The application of the principle of public policy embodied in § 4 of the Interstate Commerce Act is to be determined by the substance of things and not by names; otherwise the statute would be wholly inefficacious.

THE facts, which involve the jurisdiction of the Commerce Court to review orders of the Interstate Commerce Commission, are stated in the opinion.

Mr. Solicitor General Bullitt for the United States:

The finding of the Interstate Commerce Commission that the reshipping privilege constituted an undue preference in favor of Nashville had substantial evidence to support it; is a finding of fact; and is not open to reexamination.

There is substantial evidence to support the finding that the practice unduly prefers Nashville over Atlanta and other Georgia towns.

The Commission's finding that an undue preference exists is a finding of fact, not of law, and therefore is conclusive here. *Balt. & Ohio R. R.* v. *United States*, 215 U. S. 481; *Int. Com. Com.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Com.* v. *D., L. & W. R. R.*, 220 U. S. 235; *Int. Com. Com.* v. *C., R. I. & P. Ry.*, 218 U. S. 88; *Int. Com. Com.* v. *Louis. & Nash. R. R.*, 227 U. S. 88.

The theory of the Commerce Court would practically destroy the Interstate Commerce Commission.

Where the facts are undisputed it is essentially one of the functions of the Interstate Commerce Commission to determine what is the correct order to make, and its conclusion is binding unless based on some mistake of law.

The preference given to Nashville over Atlanta and other Georgia towns cannot be justified by the alleged fact that the reshipping privilege was originally granted to meet water competition or that such water competition still exists.

The evidence is by no means undisputed that the reshipping privilege was originally installed to meet the water competition.

The mere fact that the railroads may have been justified in 1872 in granting Nashville a reshipping privilege is absolutely no evidence that it is now lawful. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *L. & N. R. R.* v. *Mottley*, 219 U. S. 467.

The mere potentiality of water competition does not

justify a preferential regulation or practice. The water competition which will justify a preference must be actual and substantial; not merely conjectural. *Int. Com. Com.* v. *Louis. & Nash. R. R.*, 190 U. S. 273, 282; *Louis. & Nash. R. R.* v. *Behlmer*, 175 U. S. 648, 673.

Assuming, however, that the river competition is controlling to-day, that fact does not give the carrier a right to meet such competition by means of the reshipping privilege where, as here, a non-preferential though less profitable means was open to the carrier. *E. T., V. & G. R. R.* v. *Int. Com. Com.*, 181 U. S. 1, 18; *Int. Com. Com.* v. *Alabama Midland Ry.*, 168 U. S. 144, 167; *Louis. & Nash. R. R.* v. *Behlmer*, 175 U. S. 648, 673.

Water competition to an intermediate point in a through journey does not justify any preference for any portion of the journey except between the competitive points.

The ruling of the Commission was inherently correct.

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

Mr. William A. Wimbish for Duncan & Co., *et al.*

Mr. Albert S. Brandeis, with whom *Mr. Henry L. Stone* was on the brief, for Louisville & Nashville Railroad Co.:

The order of the Commission of the ninth day of June, 1911, should be annulled and set aside, because it was based upon a consideration of evidence, matters, and things not found in the record or introduced at the hearings.

The reshipping privilege at Nashville having been compelled by the controlling influence of the competition of Cumberland River, which does not exist at the Georgia points, the advantage and preference thereby given Nashville are not undue and the discrimination is not unjust.

There is no undue discrimination in maintaining the

reshipping practice at Nashville, because it is compelled and justified by circumstances and conditions prevailing there which do not prevail elsewhere in the southeast.

It is not within the province of the Commission to overcome the natural advantages which Nashville, owing to its geographical situation and water transportation, has over Atlanta and the other complaining points with respect to grain movements into the southeastern territory.

There was no valid basis for the Commission's order and the same should be set aside and annulled as wholly beyond its powers.

The order of the Commission is void on its face, because it necessarily results in a discrimination against Nashville in comparison with Ohio River crossings.

In support of these contentions, see *Ashland Brick Co.* v. *Southern Ry.*, 22 I. C. C. 115, 121; *Brewer* v. *C. G. W. Ry.*, 84 Fed. Rep. 268; *Bultie Milling Co.* v. *C. & A. R.*, 15 I. C. C. 351; *Chattanooga* v. *Southern Ry.*, 10 I. C. C. 134; *Duncan* v. *N. C. & St. L. Ry.*, 16 I. C. C. 590; *Duncan & Co.* v. *N. C. & St. L. Ry.*, 21 I. C. C. 186, 193; *E. Tenn. V. & G. Ry.* v. *Int. Com. Com.*, 181 U. S. 1, 12; *Enterprise Mfg. Co.* v. *Georgia R. R.*, 12 I. C. C. 451; *In re Substitution of Tonnage*, 18 I. C. C. 280; *Int. Com. Com.* v. *Un. Pac. R. R.*, 222 U. S. 541; *Int. Com. Com.* v. *Louis. & Nash. R. R.* (decided Jan. 20, 1913); *Int. Com. Com.* v. *Diffenbaugh*, 222 U. S. 42; *Int. Com. Com.* v. *Ala. Mid. R. R.*, 168 U. S. 141, 171, 175; *Int. Com. Com.* v. *Balt. & Ohio R. R.*, 43 Fed. Rep. 37; *Int. Com. Com.* v. *Chicago G. W. Ry.*, 209 U. S. 108, 118; *Int. Com. Com.* v. *C., R. I. & P. Ry.*, 218 U. S. 88, 102; *Louis. & Nash. R. R.* v. *Behlmer*, 175 U. S. 648; *Lake Cargo Coal Case*, 22 I. C. C. 604, 612, 613; *Louis. & Nash. R. R.* v. *United States*, 197 Fed. Rep. 58; *Minneapolis* v. *G. Nor. Ry.*, 4 I. C. C. 230; *Peavy & Co.* v. *Int. Com. Com.*, 176 Fed. Rep. 409; *Quimby* v. *Maine Central R. R.*, 13 I. C. C. 246; *Spokane* v. *Nor. Pac. R. R.*, 21 I. C. C. 400; *Squire* v. *Mich.*

Cent. R. R., 4 I. C. C. 515; *Traffic Bureau of St. Louis* v. *C., B. & Q. R. R.*, 14 I. C. C. 317, 331, 510.

Mr. K. T. McConnico, with whom *Mr. John A. Pitts* and *Mr. Lee Douglas* were on the brief, for the Nashville Grain Exchange and the Nashville Board of Trade.

Mr. Merrel P. Callaway and *Mr. R. Walton Moore* filed a brief for the Nashville, Chattanooga & St. Louis Railway.

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

This case involves a controversy as to the legality of a reshipping privilege permitted at Nashville by the carriers who are parties to the record, described by the court below as follows:

"On grain, grain products, and hay shipped to Nashville by rail from or through Ohio or Mississippi River crossing points such as Louisville, Evansville, Hickman, Paducah, Cairo, etc., the L. & N. and N. C. & St. L. charge the full local freight rate from said crossing points to Nashville. These shipments may then be stopped at Nashville for a period not exceeding six months, during which time they may be rebilled or reshipped to destinations in southeastern and Carolina territory; and on such reshipments so rebilled the freight charges into and out of Nashville are readjusted so that the total transportation charge on any one shipment from any given Ohio or Mississippi River crossing, via Nashville, to any given destination in said territory, shall exactly correspond with the transportation charge legally assessable on that shipment had it been billed and moved through from its point of origin at the said Ohio or Mississippi River crossing points to its final destination without having been stopped in transit at Nashville."

We adopt the history of the litigation in so far as it relates to the privilege in question contained in the brief on the part of the United States.

"1. In 1908 certain Georgia grain dealers complained to the Interstate Commerce Commission of various traffic practices at Nashville; after taking voluminous proof, the Commission, on June 24, 1909, held the reshipping privilege illegal and ordered it stopped. (16 I. C. C. 590, 595).

"2. The Commission, on its own motion, postponed the effective date of the order, so that it might institute a country-wide investigation of the practices involved; and on May 3, 1910, the Commission, after a hearing at which about 150 shippers and carriers were represented by counsel, reported that its former order abolishing the reshipping privilege *in toto* was too strict, and remitted the matter to the carriers and shippers to frame regulations that would prevent any rebating under the privilege (18 I. C. C. 280) and, pursuant thereto, new and satisfactory regulations were adopted to safeguard the reshipping privilege (21 I. C. C. 183, 188).

The previous order of June 24, 1909, which had abolished the reshipping privilege at Nashville was vacated and the Commission thereafter again considered the controversy between the grain dealers of Georgia and the Nashville dealers and carriers.

"3. . . . On June 9, 1911, the Commission delivered a Supplemental Report, holding that the action of the carriers in granting the reshipping privilege to Nashville, while refusing it to Atlanta, etc., was an undue and unreasonable preference to Nashville, in violation of section 3 of the Interstate Commerce Act. (21 I. C. C. 186.) The Commission entered an order in accordance therewith.

"4. The Nashville Board of Trade, the L. & N. R. R. Co., and the N. C. & St. L. R. R. Co. thereupon sued in the Commerce Court to enjoin the enforcement of the order; the two suits were consolidated." The record evi-

dence before the Commission was introduced and some additional testimony was taken.

The Commerce Court, finding that there was no conflicting or disputed evidence concerning the origin and character of the reshipping privilege, concluded that whether such privilege was an undue preference was not a matter of fact but a question of law upon which it was its duty to reach an independent conclusion. The court, therefore, among other considerations because the privilege was of long standing and was justified by water competition at Nashville, declared it to be not unlawful and not preferential. A peremptory injunction was allowed restraining the enforcement of the order of the Commission. And the correctness of this action is the question here for decision.

In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn. &c. Ry. Co.* v. *Interstate Com. Com.*, 181 U. S. 1, 23–29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the

inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

While these conclusions demonstrate the error in the action of the court below, that result does not authorize us to reverse and give effect to the order of the Commission without going further, since it must be determined whether the action of the Commission was repugnant to the Constitution, in excess of the powers which that body possessed, or, what is equivalent thereto, was wholly unsustained by proof,—questions which the court below failed to pass upon because of the erroneous conception in which it indulged concerning its own powers. But if it were essential for us to consider these questions we should be confronted with a grave situation arising from the serious doubt which would exist whether it would be possible for us to do so in view of the manner in which the Commission had discharged its functions, and whether that method had not in and of itself amounted to a denial of a hearing and thus resulted in want of due process of law. See *Inter-State Com. Com.* v. *Louisville & Nashville R. R.*, *supra*, at p. 91, and the paragraph from the answer of the Commission filed in the court below which is in the margin.[1]

[1] "That in said investigation and in arriving at its decision therein this respondent, as in duty bound under the law, weighed and considered all the facts and arguments presented by the petitioners herein, by other carriers, and all other parties to said proceeding; that in forming its opinion and arriving at its conclusions this respondent, exercising its administrative functions and powers, considered all pertinent facts and matters set forth in many reports and statistics on file with said respondent, together with other facts coming to the knowledge of this respondent in the performance of its duties and functions prescribed and set forth in the act to regulate commerce and the amendments

We pass this subject by, however, because its consideration is not essential to determine whether the Commission was right in prohibiting a continuance of the rebilling privilege, since we are of opinion that even if the allowance of such rebilling privilege when originally made was authorized by the statute and was therefore not a preference, the right to continue it had been expressly prohibited by statute until on application made to the Commission its consent to that end was given. The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of § 4 of the Act to Regulate Commerce and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by statute, ceased to exist after the adoption of the amendment to

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thereto pertaining to the privileges of rebilling and reshipping; that from said reports and tariffs it appears that said rebilling and reshipping privileges exist at many interior points where no water competition obtains; it is therefore not competent, nor is it relevant, for said petitioners to allege that any particular fact or facts before this respondent in said proceeding were uncontradicted or conclusive in favor of the petitioners' contention; nor can the petitioners by judicial proceedings ascertain each and all the facts, circumstances, and conditions in regard to said transportation that were necessarily and properly considered by and which aided this respondent in arriving at its conclusion that said practice of rebilling and reshipping said products from Nashville was unduly and unreasonably discriminatory.

"This respondent denies that there is, or can be, under the law, any complete record of all the evidence, facts, and circumstances before the Commission in determining that this, or any other practice by carriers, is unduly and unjustly discriminatory as between localities or persons, and respondent is advised and so alleges that the determination of said question, as to whether said admitted discrimination is undue and contrary to the provisions of said act to regulate commerce, is one wholly and exclusively within the jurisdiction of this respondent."

§ 4 by the act of June 18, 1910, c. 309, 36 Stat. 539, 547. This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying the greater charge for a shorter than was exacted for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibitions efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. *Intermountain Rate Cases*, 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by § 4 of the act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below. To determine whether § 4 is applicable requires a very brief consideration of the uncontroverted situation from which the rebilling privilege arose and upon the existence of which it depended. It is undoubted that for many years the Ohio River was a basing point for rates, and traffic moving from the producing regions of the northwest to the consuming regions in the southeast bore rates from Ohio River points to destination which because of competition were lower from Ohio River points to the farther points of consumption than were charged from intermediate (nearer) points between the Ohio River and such points of consumption. This lesser charge for the longer than for the shorter distance as to the traffic in question was

typically illustrative of the condition contemplated by § 4 of the Act to Regulate Commerce. As to Nashville, however, this idiosyncracy arose: The carriers from the Ohio River to Nashville instead of giving the lesser rate for the longer distance from the Ohio River to Nashville than was asked for intermediate points, maintained a local and proportionate rate for grain and other northwestern products from the Ohio River to Nashville, although giving a lower rate for the longer haul from the Ohio River to points in the south or southeast territory beyond Nashville. Upon the basis, however, that there was water competition between the Ohio River and Nashville if not for other reasons, as to which we think it is not relevant to inquire, there was granted by the carriers to shippers of grain at Nashville the rebilling privilege which we have at the outset described. That is to say, shippers of grain at Nashville on establishing the receipt at Nashville of grain from Ohio River points equal in quantity to grain proposed to be shipped, received an allowance on the local rate from Nashville to the point of destination which made the rate on the shipment equivalent to what it would have been had the grain originally moved from the Ohio River point to its ultimate point of destination and not stopped at Nashville at all. We quote a clear illustration of the operation of the privilege taken from the argument at bar of one of the carriers:

"For example, the local rate on grain from Evansville, on the Ohio River, to Nashville, is 10 cents per 100 pounds, and the local rate from Nashville to Atlanta is 17 cents per 100 pounds. The joint rate from Evansville to Atlanta is 24 cents per 100 pounds, or 3 cents less than the sum of the locals. Under the reshipping practice the joint rate of 24 cents is protected when the shipment has been stopped in transit at Nashville. The local rate of 10 cents from Evansville to Nashville having been paid at the time of the shipment into Nashville, an adjustment

of the total transportation charge is made when the reshipment to Atlanta occurs, so that the shipper in the end pays upon the shipment the joint rate instead of the combination of local rates into and out of Nashville."

When the result of this allowance is understood there seems to be no room for serious controversy that the right to continue the privilege is controlled by § 4 of the act. The actual shipment from Nashville must either be considered as a movement from Nashville, irrespective of the rate which would have been applicable on a through shipment from an Ohio River point to the same point of destination, or it must be treated by a fiction as one moving from an Ohio River point to the same destination. If the first, then clearly the allowance made of a rate from Nashville to the point of destination was a lesser charge for the longer distance hauled as to such grain than was charged for the shorter distance as to any other grain moving from Nashville to intermediate points or from such points to places further on and came clearly within the grasp of § 4. If on the other hand it be imagined to be a shipment from the Ohio River crossing to the point of destination upon the theory that the traffic before stoppage at Nashville originated at the Ohio River point, then exactly the same conditions would be reproduced, since the charge as the result of the reduction made was the equivalent of a lesser rate for the longer than for the shorter distance, which, as we have stated, was the prevailing system from Ohio River crossings to points of destination in the southeast.

It is true that in argument it was said that the question here is whether there was a preference or discrimination under §§ 2 and 3 of the act and not an inquiry under § 4 and that a distinction between the various sections has been recognized. It has, indeed, been held that the provisions of §§ 2, 3 and 4 of the act being in *pari materia* required harmonious construction and therefore they

should not be applied so that one section destroyed the others and consequently that a lesser charge for a longer than for a shorter distance permitted by § 4 could not for such reason be held to be either a preference or discrimination under §§ 2 or 3. *Louisville & Nashville R. R.* v. *Behlmer*, 175 U. S. 648; *East Tenn. &c. Ry.* v. *Interstate Com. Com.*, 181 U. S. 1. But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction and indeed is in direct conflict with all three of the sections,—a result clearly arising in the case before us in consequence of the amendment of § 4. Indeed when the evil which it may be assumed conduced to the adoption of the amendment of § 4 and the remedy which that amendment was intended to make effective are taken into view (see *Intermountain Rate Cases*, *supra*), it would seem that the case before us cogently demonstrates the applicability of the amendment to the situation. And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined by the substance of things and not by names, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose.

It follows from what we have said that the court below was wrong in enjoining the order of the Commission and on the contrary should have dismissed the complaint. The case will therefore be appropriately remanded to enable a decree to that effect to be entered, without prejudice, however, to the right of the carriers to apply to the Commission to be relieved from the operation of the provisions of § 4 of the Interstate Commerce Act if they are so advised.

Reversed.

MR. JUSTICE PITNEY concurs in the result.

UNITED STATES OF AMERICA FOR THE USE OF ALEXANDER BRYANT COMPANY *v.* NEW YORK STEAM FITTING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 67. Argued November 9, 1914.—Decided December 7, 1914.

Where the District Court understood that the controversy involved its jurisdiction and dismissed the case because the publication under the Materialmen's Act was insufficient to bring in some of the necessary parties and so certified, the issue of jurisdiction is involved and this court has jurisdiction of a direct appeal under § 238, Judicial Code.

Even if the District Court is in error in holding that failure to perform a prerequisite condition to commencing an action raises a question of jurisdiction of the court, and dismisses the action on that ground instead of on the merits, this court can and must review the decision and correct the error, if any, under § 238, Judicial Code.

Although a statute may be ambiguous and repel accommodation, the court must try to give coherence to its conflicting provisions and accomplish the intent of the legislature.

The Materialmen's Act of 1894, as amended in 1905, is highly remedial; its purpose, simple and beneficial, is to give a remedy to materialmen and laborers on the bond of the original contractor and a reasonable time to enforce it and to unite all claimants in a single proceeding.

Although the provisions of the act present an apparently insolvable puzzle owing to ambiguity and conflict with each other, they must be adapted to fulfil the purpose of the act, and the court must consider which of such provisions must give way and which are the fittest to accomplish that result.

The provision in the third proviso of the amended Materialmen's Act requiring notice to be given to other creditors by the creditor availing of the right to commence suit within the year in case the Government has not instituted a suit within six months after completion, is not of the essence of jurisdiction of the court over such a case nor a condition of the liability of the surety on the bond.

THE facts, which involve the construction of the Materialmen's Acts of 1894 and 1905, are stated in the opinion.

Mr. George B. Class for plaintiff in error:

The construction of the act of Congress of February 24, 1905, is involved in the question as to jurisdiction which is certified to this court.

The third proviso of the act of Congress of February 4, 1905, is directory and not mandatory or jurisdictional.

When one section of a statute treats specifically and solely of a matter, that section prevails in reference to that matter. *Long* v. *Culp*, 14 Kansas, 412.

When the first section of a statute conforms to the obvious legislative intent, it is not rendered inoperative by any later section which may appear inconsistent with that intent. *State* v. *Bates*, 96 Minnesota, 110; *Hall* v. *State*, 39 Florida, 637.

A later clause which is obscure and incoherent will not prevail over an earlier one which is clear and explicit. Gundlich on Interpretation of Statutes, § 183.

The third proviso is directory and not mandatory or jurisdictional. 1 Sutherland on Statutory Construction, p. 1114.

Statutes are to be construed so as to effectuate legislative intent. *United States* v. *Freeman*, 3 How. 556; *Durousseau* v. *United States*, 6 Cr. 307.

The third proviso of the act is not intended to change the period of limitation within which the claims of subcontractors, etc., may be asserted in a suit on the bond, and where claims were asserted within the six months specified it was immaterial that the notice was not published three months and three weeks prior to the expiration of the year within which suit might be instituted. *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. Rep. 429.

The failure to obtain a court order as to service by publication, under the act, is not fatal to plaintiff's recovery, in view of the ambiguity of the statute upon the subject,

and where the notice to all creditors of their right to intervene was published daily for three consecutive weeks in manner and form as done by plaintiff, and where the record fails to show that any creditor was injured by any alleged defect as to time and manner of notice.

The stipulation equitably estops the defendants from raising any objection as to the sufficiency of the notice required by proviso three of the act. The time and circumstances under which the stipulation was made show that no injury or fraud was wrought against creditors by the making of the stipulation.

Defendants should not be permitted to assert provisions of the act intended for the benefit of creditors, in order to extinguish their own liability to such creditors upon the bond given for their benefit. *Van Rensselaer* v. *Kearney*, 11 How. 326.

Defendants are estopped from pleading insufficiency of notice under the circumstances, etc. 5 Ency. U. S. Sup. Ct. Rep., pp. 590, 938; *Catts* v. *Whalen*, 2 How. 376; *United States* v. *Girault*, 11 How. 22; *Ins. Co.* v. *Wilkinson*, 13 Wall. 222; *Dair* v. *United States*, 16 Wall. 1; *Dickerson* v. *Colegrove*, 100 U. S. 78.

Mr. John R. Halsey, with whom *Mr. Adrian T. Kiernan* was on the brief, for defendant in error:

Compliance with the requirements of the third proviso of the act is a limitation upon the liability to the plaintiff.

The stipulation did not give existence to a cause of action where there was none under the act.

The motion to dismiss the writ of error should be granted.

The writ of error should be dismissed or the judgment should be affirmed.

In support of these contentions, see *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Texas Cement Co.* v. *McCord*, 233 U. S. 157; *Vermont Marble Co.* v. *National*

Surety Co., 213 Fed. Rep. 429; *United States* v. *Congress Const'n Co.*, 222 U. S. 199; *United States* v. *Stannard*, 206 Fed. Rep. 326.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The United States, suing for the use of the Alexander Bryant Company, plaintiff in error, was plaintiff in the court below, and the defendants in error defendants.

The complaint alleged the following facts: the New York Steam Fitting Company, entered into a contract with the United States for the mechanical equipment of the New York Custom House at New York. It gave bond for the faithful performance of its contract with defendant in error, The Title Guaranty and Surety Company as surety. One of the conditions of the bond was that the Steam Fitting Company would, among other things, promptly make payment to all persons supplying its labor and material in the prosecution of the work contemplated by the contract of the Steam Fitting Company with the United States.

The bond was accepted and the work undertaken and duly completed on or about February 19, 1908, the Alexander Bryant Company having, in pursuance of a contract with the Steam Fitting Company, furnished all the materials and performed all of the work, upon which there is a balance due to the Bryant Company of $5,431.18. Under the terms of the agreement between it and the Steam Fitting Company it should have been paid as the Government paid the former, and as final payment was made by the Government February 15, 1908, interest is demanded.

No action, it is alleged, had been brought by the United States against defendant within six months after, nor had one year elapsed since, the performance and final settle-

ment of the contract by the New York Steam Fitting Company prior to the commencement of this action.

It is alleged that in pursuance of the requirements of the act of Congress of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, under and by virtue of which this action is brought, complainant served personal notice of the pendency of this action upon all known creditors, informing them of their right to intervene as the court might order, and in addition thereto published the notice in a newspaper of general circulation in the city, county and State of New York for three successive weeks, the last publication of which was three months before the time limited therefor as in the acts of Congress provided.

A bill of particulars was furnished defendants, of which the following is a copy:

"The plaintiff as and for a Bill of Particulars, demanded by The Title Guaranty & Surety Company herein, avers:

"That pursuant to the requirements of the Acts of Congress under which this action is brought, the plaintiff herein made personal service of Notice of the Pendency of this action upon all known creditors of the New York Steam Fitting Company, as follows:—

"On Messrs. Peet and Powers, November 21st, 1908, on Hermann & Grace, November 21st, 1908, on Henry R. Worthington, November 19th, 1908, on John Simmons Company, November 20th, 1908, on Cutler Hammer Company, November 19th, 1908, on Rob't A. Keasby Co., November 20th, 1908.

"That under date of November 21st, 1908, Messrs. Hardy & Shellabarger, attorneys for New York Steam Fitting Company and The Title Guaranty & Trust Company of Scranton, Penna. (now The Title Guaranty & Surety Company) stipulated with the attorney for the plaintiff as follows:—

"'It is hereby consented on the part of the defendants

that defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent.'

"That on the 5th day of November, 1908, and on each day thereafter to and including November 25th, 1908, there was published in the New York Press of New York City, New York, a notice of the pendency of this action, addressed to all known creditors of the defendant, the New York Steam Fitting Company.

"Attached hereto and forming a part of this Bill of Particulars is a copy of the form in which personal notice of the pendency of this action was served upon all known creditors of the New York Steam Fitting Company, and a copy of the notice which was given by publication in the New York Press to aforesaid creditors.

"Dated, New York, December 7th, 1909."

Copies of the notices are inserted in the margin.[1] It

[1] "Please take notice that the above named Alexander Bryant Company, has commenced an action in the name of the United States of America under the provisions of the Act of Congress of August 13th, 1894 (as amended by Act of Congress of Feb. 24th, 1905) to recover a judgment against the defendant New York Steam Fitting Company and its surety The Title Guaranty & Trust Company of Scranton, Penna., for a sum of money alleged to be due and owing to the aforesaid Alexander Bryant Company for work, labor, materials and services furnished as sub-contractors under the contract and bond entered into by the New York Steam Fitting Company for the mechanical equipment of the new custom house at New York City, New York, in which bond the defendant, The Title Guaranty & Trust Company of Scranton, Penna., is joined as surety.

"As required by the express provisions of the aforementioned acts of Congress, and as one of the creditors of the New York Steam Fitting Company, under aforesaid contract, you are hereby notified of your right to intervene and be made an additional party plaintiff in this action, as the Court may order, so as to have the rights and claims of any and all existing creditors under said contract and bond, adjudicated in one and the same action.

"Dated, New York, Nov. 2nd, 1908."

"Pursuant to the requirements of an Act of Congress of August 13th,

was stipulated that certain of the creditors who were served with personal notice appeared in the action and filed pleas of intervention. The action was subsequently discontinued as to them, they having been settled with by the Surety Company.

The answer of the Surety Company is unimportant except so far as it raises the issue, which is the crux of the case, whether the action was brought in time or whether proper notice of it was given to other creditors.

The answer of the Steam Fitting Company is also unimportant.

The case, by consent of the parties, was referred to a referee, upon whose report judgment was to be entered "as if said cause had been heard before the court."

The referee found and reported the basic facts of liability of the Surety Company, but found besides that the action was not commenced in time as provided by the acts of Congress, nor was notice given to creditors as required, and therefore directed a judgment dismissing the complaint. A judgment was subsequently entered by the court after motion for a new trial was denied by the referee.

The following facts appear from the report of the referee: The date of final settlement between the United States and the Steam Fitting Company was February 19, 1908, and to show compliance with the provisions of the act of Congress set out below, the Bryant Company

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1894, and of February 24th, 1905, amendatory thereof, notice is hereby given to all creditors of the above named defendant New York Steam Fitting Company, under the contract between the plaintiff and the said last named defendant (and the co-defendant, as their surety) for work incident to the construction of the Custom House, that the above entitled action has been instituted upon the bond of the defendant-contractor and against said surety, and that any creditor may file his claim in this action and be made a party herein as in said acts of Congress provided.

"New York, October 16th, 1908."

Both notices were signed by plaintiff's attorney.

offered evidence of the publication of notice to creditors in the New York Press, beginning November 5, 1908, and also introduced in evidence a stipulation between it and the defendants made November 21, 1908, by which defendants' time to move or plead was extended and by which it was stipulated as follows:

"It is hereby consented on the part of defendants, that defendants waive any failure on the part of plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent."

Prior to the execution of the stipulation the Bryant Company had personally served all known creditors with notice in the form hereinbefore given. Notwithstanding the stipulation, notice by publication continued for the full twenty-one days, to and including November 25, 1908.

The Surety Company moved to strike out the evidence of publication as incompetent, irrelevant and immaterial on the grounds (1) That there was no order of the court obtained for the giving of the notice. (2) That under the act of Congress the last publication of such a notice must expire three months before the end of the year after the final completion of the contract, that is, on November 18, 1908, whereas the last publication of the notice offered in evidence was on November 25, 1908, seven days beyond the time.

The motion was based on certain provisos of the act of Congress already referred to. The act is entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." It provides for the execution of a bond by any person entering into any formal contract with the United States for any public work and that in any action instituted by the United States any person who has furnished materials or labor to the contractor may intervene and become a party to the action. If no action be brought by the United States within six months from the completion and final settle-

ment of the contract, then any person furnishing materials or labor may bring suit in the name of the United States in the circuit court of the United States [now district court] in the district in which the contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere, for his or their use and benefit, against the contractor and his sureties.

The provisos are as follows:

"*Provided*, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later:

"*And provided further*, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. . . .

"*Provided further*, that in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the Court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

It was admitted that no court order was obtained specifying the kind of notice to be given creditors or giving directions as to publication.

The referee decided that an order of the court was necessary and that "the publication proved did not come within the time limit of the statute."

The argument of the referee was that the conditions

of suit by the creditors of a contractor were (1) the omission of the United States to sue within six months from the completion and final settlement; (2) an action by a creditor must be commenced within one year after such performance and final settlement; (3) only one action can be brought, in which any creditor may file his claim and be made a party thereto within one year from the completion of the work under said contract, and not later. (4) Personal notice must be given to known creditors and in addition notice by publication, the last publication to be at least three months before the time limited therefor. In other words, and succinctly, the referee held that the time for a suit by creditors must be within one year from the complete performance of the contract and its final settlement, and as there could be only one action, this time was the limit within which other creditors could file their claims, and that notice to them, whether personal or by publication, must be in such time as to enable this to be done. He held further that this was a jurisdictional requirement. In this ruling the District Court concurred and certified "that the jurisdiction of the Court over the persons and subject matter in this action is in issue," and that this was done in accordance with the provisions of § 238 of the Judicial Code.

Defendants in error, however, move to dismiss the writ of error on the ground "that no question as to the jurisdiction of the court below to hear and determine the cause is in issue."

Under § 238 of the Judicial Code a case may be brought here directly from a District Court if the jurisdiction of the court was in issue, that question alone to be certified.

The present case satisfies this requirement. The controversy between the parties must have been understood by the referee and the District Court to involve the jurisdiction of the court. Indeed such was the explicit contention of the Surety Company, and both referee and

court in the decision of the issue thus presented dismissed the action. The Bryant Company combated the conclusion and still combats it. The issue of jurisdiction was and is, therefore, plainly marked. It may be that the referee and the court were in error in their decision, but this could not be asserted or demonstrated except by proceedings in error, to be taken as prescribed by law, and to this court. We cannot make the possible error of the court a ground for refusing to review it. The right of review is given to correct the error, if error there be, and the decision of the question involved is given to this court by § 238 of the Judicial Code. We are brought, therefore, to the consideration of the correctness of the ruling.

The act of Congress is undoubtedly ambiguous. Indeed, considering the letter only of the three provisos with which we are concerned they absolutely repel accommodation. We must try, however, to give coherence to them and accomplish the intention of Congress. The act is intended to be highly remedial. Its purpose is simple and beneficial. It is to give a remedy to material men and laborers on the bond of the original contractor and a reasonable time to enforce it, and in a single proceeding to unite all claimants. It, however, imposes a limitation of time on all claimants, the time beginning to run from the same event. From this the complexity in the construction of the act arises.

By the first proviso of the act a creditor cannot institute suit until after the complete performance of the contract and its final settlement, but after such events he may do so (the United States not having sued) within one year from their fulfillment. This is clear enough. The next proviso introduces ambiguity. "Only one action shall be brought," is its provision, in which "any creditor may file his claim . . . and be made a party thereto *within one year from the completion of the work and not later.*" The words in italics are disturbing. "These

rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms." *Texas Cement Co.* v. *McCord*, 233 U. S. 157, 163. But by its terms the instituting creditor has one year from the designated events to commence his action. If he file it on the last day of the designated time what then becomes of the rights of other creditors who must file their claim within the same limit of time and not later? The question is not easy to answer and any answer may be disputed. It presents a puzzle for judicial resolution apparently insolvable.

There is more ambiguity when we bring forward the next, and third, proviso. Notice of the suit must be given to creditors, personally if they be known and by publication besides, informing them "of their right to intervene as the court may order." Passing what the quoted words may mean and coming to the requirement of notice, it is provided that it must be "for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

This seemingly brings us to an impasse. How can the instituting creditor (so called for convenience) have a year to commence his suit and yet give the notice required?—and it is to be remembered that the intervening creditor must file his claim also within a year.

The Surety Company sees the difficulty and seizes it to press its contention that the year's time for bringing suit is not an authorization of such time but a permission and must be availed of so as to permit of the notice to creditors provided for; in other words, that the time in which to bring suit or file a claim, which is explicitly given, is cut down by the provision for notice; that is, the instituting creditor is given not one year from the indicated events to institute a suit but one year to institute suit and serve notice of it, which notice must precede the expiration of the year by at least three months and three weeks. This

limitation of time is brought about, it is contended, with all of its embarrassment to the creditor who institutes the suit and to the creditors who may want to intervene in it, by the third proviso, which is made all-dominating, bending the other provisions to it, and made even a jurisdictional condition of suit against the sureties of the contractor.

There are grounds for the contention, but there are opposing grounds, which, we think, are supported by the better reason, all things considered. As we have said, the act of Congress is highly remedial and its provisions must be adapted to fulfill its whole purpose.

In *Vermont Marble Company* v. *National Surety Company*, 213 Fed. Rep. 429, the Circuit Court of Appeals for the Third Circuit had occasion to pass upon the act of Congress under consideration. The Court, Circuit Judge Gray speaking for it, decided against the contention now made by the Surety Company. The careful review and exposition of the statute there made leave little else to be said.

That case illustrates the consequences of the contention of defendants in error. Here the contention is urged to defeat a suit by the instituting creditor against the surety of the contractor; there it was urged to defeat a claim of an intervening creditor.

The suit was on a contractor's bond by one who furnished materials to the contractor. The work was completed and final settlement made June 14, 1912. The suit was brought February 28, 1913, within one year from the completion of the work. Notice to creditors was given by publication, the last publication being on April 9, 1913, twenty-three days prior to the expiration of the time within which the suit could have been brought. The Vermont Marble Company intervened and filed its statement of claim within the time prescribed by the statute. The claim was resisted on the ground that publication of notice

to creditors should have been so made that the last publication would have been at least three months before the time limited for bringing the suit, and therefore should have been started not later than February 21, 1913 (it was started February 28, as we have seen), so that the last publication should have been on or before March 14, 1913, three months before June 14, 1913, the time when the right to bring suit expired. It was contended that the suit not having been brought nor publication made within the time required by the act, it could not be maintained either by the original plaintiff or the Vermont Marble Co. or other intervening creditors. The contention found favor with the District Court; it was rejected by the Court of Appeals. The latter court concluded that the third proviso was directory and not a limitation upon the right of action given by the other provisos.

Texas Cement Company v. *McCord*, 233 U. S. 157, does not militate against that conclusion. In the latter case it was decided that no right of action accrued to a material man until the time reserved to the United States to sue had expired and that this condition was expressed too clearly to be mistaken.

It is urged that it is a consequence of our construction that an action may be commenced on the last day of the year and that all opportunity for intervention may be precluded, for, counsel say, "intervention cannot be conducted in a day" and it would seem as if the act intended "to afford creditors an interval of three months within which to secure an intervention." Even if this be the consequence, some of the provisions of the act, as we have intimated, must give way. We can only select those which we consider the fittest to prevail to accomplish the purposes of the statute; and at the very start comes the suggestion that even if it be granted that the diligent creditor is under obligation to give notice to a waiting or tardy, or, it may be, unwilling one, how is the surety of

the contractor concerned with the discharge of the obligation? At the most its concern is only to be protected against claims delayed beyond the limit of time provided by the act. We may refer again to *Vermont Marble Company* v. *National Surety Company*. The court in that case, in careful distinction between the purposes of the provisos, said that the first and second confer a substantive right of action or intervention limited only by a time for assertion, that is, one year from the completion of the work; and that that time was "obviously for the benefit of the sureties on the bond"; while the last proviso (the third) was "just as obviously for the benefit of the creditors alone." It was pointed out that indeed it was to the interest of the sureties not to bring in the other creditors, and yet they contended that the provision for notice to the creditors was mandatory and jurisdictional and not simply directory. The same contention is made in this case. In other words, it is in effect contended that a provision which it is to the interest of the Surety Company not to have observed the statute gave it a right to have observed. Such a contradiction of interests and rights we cannot assume the statute intended to create nor that it was intended to give to the Surety Company a right to have done that which it is its interest not to have performed. The provision for notice therefore is not of the essence of jurisdiction over the case, nor a condition of the liability of the Surety Company. We need not go farther in this case.

In the cited case it was held that the third proviso was directory only, and the conclusion has reason to sustain it. There can be no sacrifice of rights in it, neither of surety companies nor of creditors. Every creditor has the same rights and may institute the action provided for in the first proviso. If he does not choose to do so it is his own affair; and he may guard against surprise or deception. He knows the time limit of suit and of intervention. He knows

that the suit must be brought in the District Court of the United States in the district where the contract was performed. It would seem as if the law owed him no further care. If he chooses he may institute proceedings if another has not done so. If another has, he knows in what court and within what time and he may intervene. He has, therefore, the means of suit or the means of intervention. An attentive waiting is all that is necessary for either, and indeed is his ultimate safeguard, as intervention must depend on a suit previously instituted.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

JOHN Ii ESTATE, LIMITED, *v.* BROWN.

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

No. 98. Argued November 13, 1914.—Decided December 7, 1914.

The decision of the Supreme Court of the Hawaiian Islands, made while the present Territory was an independent sovereignty, in a case construing a will, that a devise of lands was in fee and not in trust, should not be disturbed or pronounced void by the courts of the Territory on grounds mainly of form and procedure.

A duly filed written decision of the highest court of the former sovereignty must be regarded as an adjudication if at that time it was the recognized practice that the case, the submission and the written decision constituted the record.

Where the constitution and statutes of the former sovereignty permitted the highest court to fill a vacancy by calling in a member of the bar, and it was the practice for years to fill more than one vacancy, the question of the validity of a judgment of that court should not be raised long after the change of sovereignty.

Even if under the statutes of the Republic of Hawaii questions in equity

could not be reserved, if the highest court did act on questions so reserved and entertained the cause, it had authority to decide and its judgment cannot be subsequently attacked in another court on that ground.

Even if a case holding that a prior decision should not be disturbed did not again make the matter *res judicata*, the later case may be referred to as authority with regard to local procedure.

201 Fed. Rep. 224, reversed.

THE facts, which involve a will as the same had been construed by the Supreme Court of the Republic of Hawaii and the effect of that decision as an adjudication in subsequent actions in the courts of the Territory, are stated in the opinion.

Mr. Reuben D. Silliman, with whom *Mr. Joseph Larocque* and *Mr. Clarence Blair Mitchell* were on the brief, for plaintiff in error.

Mr. A. A. Wilder, with whom *Mr. F. E. Thompson* was on the brief, for defendants in error:

The land was devised to Irene for life, remainder in fee to her children.

Counsel for plaintiff in error contend that the Supreme Court of Hawaii has already decided that under the will Irene was given the fee, and the opinion of the court is claimed to have adjudicated the claims of these defendants in error adversely to them and that they are bound conclusively thereby. The opinion in the first case, 11 Hawaii, 47, cannot be held to be *res judicata*.

The alleged court, which rendered the opinion, was not legally constituted, and so its acts were absolutely void.

These defendants in error were not parties to that cause, and no jurisdiction was ever acquired over them.

The opinion was rendered upon questions reserved by a circuit judge, and no decree was ever entered in that cause.

If any question was legally litigated and determined within the meaning of *res judicata*, it was only the question whether or not a trust existed, and that any question as to the nature of the devise to Irene and her children was only incidentally and collaterally involved.

The court delivering the first opinion as it was constituted was not a legal court, and its acts were therefore void and subject to collateral attack. See § 1, Art. 83, Constitution of the Republic of Hawaii, promulgated in 1894; Laws 1892, c. 57, § 56, as amended by Act 12, Laws of 1896; *Van Slyke* v. *Ins. Co.*, 39 Wisconsin, 390; *State* v. *Phillips*, 27 La. Ann. 663; *State* v. *Sadler*, 26 So. Rep. 390, 395.

A person undertaking to act as substitute for a judge of a court cannot be regarded as a *de facto* judge for the very reason that he has no commission, or any color of title, and does not claim the office but actually recognizes the incumbency of the real judge for whom he purports to be substituting only.

The court had no jurisdiction upon questions reserved in equity. Laws 1892, c. 57, § 72; Revised Laws Hawaii, § 1862. See also Act 55, Laws 1907; *Brown* v. *Brown*, 11 Hawaii, 47; *County Commissioners of Hampshire*, 140 Massachusetts, 181; *Bearce* v. *Bowker*, 115 Massachusetts, 129; *Terry* v. *Brightman*, 129 Massachusetts, 535; *Taft* v. *Stoddard*, 141 Massachusetts, 150; *Johnson* v. *Parotte*, 46 Nebraska, 51, 56.

There being no jurisdiction, the opinion of the court in the first case was void, the same as if it had been made by any other three members of the bar. See *Elliott* v. *Peirsol*, 1 Pet. 328, 340; *Williamson* v. *Berry*, 8 How. 495, 541; *Lewers & Cooke* v. *Redhouse*, 14 Hawaii, 290, 294.

Jurisdiction of the subject-matter cannot be conferred by consent or waiver. *Dudley* v. *Mayhew*, 3 N. Y. 9, 12; Cooley, Const. Lim. (7th Ed.) 575–6; *Holloway* v. *Brown*, 14 Hawaii, 170; *In re Bishop*, 11 Hawaii, 33.

No decree was ever entered in the first case, and it is therefore no bar. 16 Cyc. 471; 5 Enc. Pl. & Pr. 949; *Oklahoma* v. *McMaster*, 196 U. S. 529, 533; *Bouldin* v. *Phelps*, 30 Fed. Rep. 547, 578; *Springer* v. *Bien*, 128 N. Y. 99; *Wilson* v. *Hubbard*, 39 Washington, 671; *Hart* v. *Brierly*, 189 Massachusetts, 598, 604; *Chicago* v. *Goodwillie*, 208 Illinois, 252; *Child* v. *Morgan*, 51 Minnesota, 116, 121.

Federal courts are not bound by state decisions, on general questions of law.

Federal courts are not bound by state decisions, particularly when they are conflicting or when the law has not been definitely settled.

Federal courts are not bound by *dicta* of a state court.

Even assuming that the Supreme Court in the second case was in a position to pass upon the validity of the decision in the first case, it wholly fails to even consider the fact that no final decree had ever been entered in the first case at all, which fact leaves yet to be decided and adjudicated upon a point which we contend can allow but one conclusion, namely, that the first case never reached final judgment, was therefore utterly worthless as *res judicata*, and could be given no possible effect by any subsequent holding in another case.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case began as a proceeding by the United States for the taking of certain land. The land was condemned and the sum that was determined by the judgment to be the compensation due to the owners was paid into court. Supplementary proceedings then were had in the cause, according to local statutes, for the determination of the title to this fund as among different claimants who appeared and set up their claims. The plaintiff in error

claimed the whole by virtue of a deed from Irene Ii (Brown), daughter of John Ii, to its grantor, alleging that John Ii devised the land to Irene in fee and that her title in fee was established by judgments of the Supreme Courts of the Hawaiian Islands and of the Territory of Hawaii. The defendants in error, two of the three children of Irene, claim one-third each, subject to their mother's life-interest, on the ground that John Ii devised the land to Irene for life only with remainder to her children. The Circuit Court of Appeals sustained the latter claim. 119 C. C. A. 458; 201 Fed. Rep. 224.

It will be enough to give a few passages from the agreed but more or less impugned translation of the will out of its original Hawaiian: "All my property both real and personal shall descend to my heirs who are mentioned below as follows: First. Irene Haalou Ii, my own daughter is the first heir as follows: [describing certain lands, including that condemned] . . . I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will. All the income from the lands that are leased and all other receipts from all the lands of my daughter they two alone shall have the sole care of it until she becomes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will. . . . And further, if my daughter should die having borne children, then the property shall descend to her children and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikehuehu." It is obvious what hesitation an American court ought to feel in attempting to construe a Hawaiian will on the strength of this translation, and, still more, in disregarding the opinion of the court on the spot, familiar

with Hawaiian habits and not improbably with Hawaiian speech.

John Ii died in 1870. In 1894, the Hawaiian Islands then being an independent sovereignty, a bill was filed by Irene and her two children, the present defendants in error, by A. F. Judd as their next friend, and A. F. Judd, as executor, guardian of Irene, and trustee under the will, against Charles A. Brown, husband of Irene, alleging that Brown was in possession and squandering the estate, and praying among other things for a construction of the will and determination of the relative rights of the children and mother and for the reinstatement of Judd in possession as trustee. An amended complaint joined Sanford B. Dole as plaintiff, he having been appointed to take the place of Komoikehuehu deceased. The case dragged along and finally, the Chief Justice and one of the Justices being disqualified, the remaining Justice requested and authorized two members of the bar to sit with him, which they did. At the hearing they reserved questions of law to the Supreme Court of the Islands, two of which were: "1. Was a trust created in the property devised to Irene Ii by the will of her father John Ii? 5. Has Irene Ii Brown, a fee simple title in said property or is her estate one for life only?" The Supreme Court entertained the case and, as appears from the opinion, against the earnest contention of the counsel for the plaintiffs decided on May 11, 1897, that Irene, after she bore a child, became the owner in fee simple of the estate. This decision is relied upon as an adjudication concluding the present case. *Brown* v. *Brown*, 11 Hawaii, 47.

The chief objection that is urged to the conclusiveness of the decision is that after the opinion of the Supreme Court no further proceedings were taken in the case. This seems to be answered by the decision next mentioned, and by the analogy, if not by the letter of the statute then in force as to cases stated; that the case, the submission, and

the written decision, shall constitute the record. Civil Code of 1859, § 1142. It is said further that the Court was not legally constituted because two members of the bar were called in. The Constitution and statutes allowed the filling of a vacancy if a Justice was disqualified but it is said that the power extended only to a single one. We understand that the practice was the other way for years, and as the Supreme Court seems to have felt no difficulty it would be most undesirable to allow the question to be raised now. It is urged again that the children were not properly parties and were not separately represented although their interest was adverse to their mother's. The bill was brought by the trustee for instructions among other things and the *cestuis que trust* were made parties. It is true that they do not appear to have had separate counsel, but it appears from the decision of the court that the counsel represented and pressed their interest against that of their mother, and it seems to us not permissible to declare that the highest court of what was then a foreign jurisdiction did not know its own powers and was proceeding in a manner that the court of another country might pronounce wholly void. Finally it is said that under the statutes in force questions in equity could not be reserved by circuit judges sitting in chambers. To this again it is enough to answer that the court had authority to decide that matter and, although disapproving the practice, entertained the cause and thereby established its warrant in law.

In January, 1903, another bill was brought by the defendants in error, by their next friend, A. F. Judd, the purposes of which it is unnecessary to state further than it sought to have the previous decision declared void and the interest of Irene adjudged to be only a life estate. The bill was dismissed upon demurrer and the Supreme Court of the Territory expressed the opinion that the previous decision precluded a collateral attack by the

minors, dealing in terms with all the objections except the first which it sufficiently disposed of by assuming the prior decision to have the effect of a formal decree. *Brown* v. *Brown*, 15 Hawaii, 308. See *Calaf* v. *Calaf*, 232 U. S. 371, 374. It is unnecessary to consider whether this second case again made the matter *res judicata*. It is enough to refer to it here as authority with regard to matters of local procedure, as to which innumerable cases have established the weight to be given to the local courts. *Tevis* v. *Ryan*, 233 U. S. 273, 291; *Nadal* v. *May*, 233 U. S. 447, 454.

It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirements of the law of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decisions, has been stated and restated, from *United States* v. *Percheman*, 7 Pet. 51, 95, to *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 354. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure and wholly of local control, it seems to us plain that the judgment must be reversed.

Judgment reversed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 119. Argued February 25, 26, 1914.—Decided December 7, 1914.

While this court is concluded as to the mere construction of a state tax statute by the decision of the highest court of the State, it is not concluded by the state court's characterization of the scheme of taxation in determining whether it deprives a party of rights secured by the Federal Constitution.

In determining the nature of a state tax and constitutionality of the statute imposing it, this court must regard substance rather than form and the controlling test is found in the operation and effect of the statute as applied and enforced.

A state statute imposing an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the State, the amount being fixed solely by reference to the property of the corporation within that State and used in intra-state business and excluding any imposition upon or interference with interstate commerce, does not run counter to, and is not unconstitutional under, either the commerce clause of, or the Fourteenth Amendment to, the Federal Constitution; and so *held* as to those provisions of the Annual Franchise Tax Statute of Arkansas of 1911, involved in this case.

Such a tax is not repugnant to the due process clause on the ground of being in effect a tax upon property beyond the State as it is measured by reference to property situate wholly within the State.

Property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, and may take the form of a tax for privilege of exercising its franchise within the State, if measured on value of property wholly within the State, and provided payment of the tax be not made a condition precedent to carrying on business including interstate business, but the enforcement of the tax left to ordinary means for collection of taxes. *Postal Tel. Co.* v. *Adams*, 155 U. S. 688.

Nothing in the Fourteenth Amendment imposes an iron clad rule upon States with respect to internal taxation, or prevents double taxation or any other form of unequal taxation so long as the inequality is not based on arbitrary distinctions.

A provision in a state statute forfeiting the right of a foreign corporation engaged in interstate commerce to transact interstate commerce within the State on account of non-payment of a tax imposed on such corporations as to their intra-state business, might render the statute unconstitutional as a regulation of interstate commerce unless it could be treated as separable.

This court will not regard such a provision of the statute as inseparable and strike down the entire statute in advance of such a construction by the state court in a case to collect the tax as a debt and not to forfeit the franchise for non-payment.

In exercising jurisdiction under § 237, Judicial Code, this court should wait until the state court has construed the statute attacked rather than to assume that the state court will construe it so as to make it repugnant to the Federal Constitution.

If a statute will bear two constructions, one within and the other beyond constitutional limitations, the courts should adopt the former, as legislatures are presumed to act within their authority.

In construing the Arkansas Annual Franchise Tax Statute of 1911 this court will assume, until the State places a different construction upon it, that the provision for forfeiture for non-payment is limited in its operation to intra-state commerce, or else if construed as applying to interstate commerce it will be treated as void for unconstitutionality under the commerce clause and severable from the other provisions of the statute.

106 Arkansas, 321, affirmed.

THE Attorney General of Arkansas, proceeding under Act No. 112, approved March 23, 1911, entitled "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," (Acts of Arkansas, 1911, p. 67), brought this suit in one of the courts of the State to recover a tax levied against the St. Louis Southwestern Railway Company by the state Tax Commission under the provisions of that act for the year 1911, amounting to the sum of $6,798.26, besides a penalty and interest.

The act is one of three that were passed by the General Assembly during the same year, designed for the purpose of obtaining revenue from corporations doing business in the State. The first of these is Act No. 87, approved March 8 (Acts 1911, p. 48), which prescribes the fees to

be paid by domestic corporations for the filing of their articles of incorporation and by foreign corporations for the privilege of doing intra-state business in Arkansas. Its eighth section requires railroad and other transportation companies organized under the laws of the State to pay incorporation fees based upon the mileage of their lines; and, by § 9, "All foreign railroad, street, interurban or other transportation companies now doing intra-state business, or desiring to engage in intra-state business, or authorized to engage in intra-state business, shall, before being permitted to continue to do intra-state business, or authorized to engage in intra-state business, shall pay the same fees as are required of such domestic corporations."

Act No. 112 provides for what are called "annual franchise taxes" on corporations doing business in the State. The first three sections refer to domestic corporations doing business for profit. Sections 4 and 5 require each foreign corporation for profit doing business in the State, and owning or using a part or all of its capital or plant in the State, to make an annual return to the Tax Commission, showing among other things the total amount of its capital stock, the market value of the same, and the value of property owned and used by it, within and without the State respectively. Section 6 provides that the Commission, from the facts thus reported and any other facts bearing upon the question, shall determine "the proportion of the authorized capital stock of the company represented by its property and business in this State," and shall report the same to the Auditor, who shall charge and certify to the Treasurer for collection annually from such company, "in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State, one-twentieth of one per cent. each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in

business transacted in this State." Section 12 requires the Attorney General to collect the tax, with an added penalty for delinquency in payment, by suit to be brought in the name of the State. By § 14 the tax and penalty are made a first lien upon all property of the corporation. By § 15, if a corporation "organized under the laws of Arkansas or any foreign country authorized to do business in this State for profit" fails or neglects to make the report or pay the tax prescribed for thirty days after the expiration of the time limited by the act, and the default is willful and intentional, an action may be brought by the Attorney General or prosecuting attorney to forfeit and annul the charter of the corporation, and "if the court is satisfied that such default is wilful and intentional it shall revoke and annul such charter." By § 20, when any corporation shall have paid the franchise tax prescribed by the act, the Tax Commission, or the Secretary of State if the Commission be abolished, is required to issue to it a certificate authorizing it to do business in the State for the term of five years, upon condition that it pay annually the franchise tax prescribed by the Act, and such certificate is made evidence in all the courts of the State of the right of the corporation to do business in the State during the term of the certificate. And, "In case any corporation shall fail to pay the franchise tax prescribed by this Act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this Act." By Act No. 313, approved May 26, 1911 (Acts 1911, p. 285), Act No. 112 was amended with respect to the time of its taking effect, and in another particular not now pertinent.

On May 4, the Legislature passed Act No. 251, entitled "An Act to provide the manner of assessing for taxation the property of railroads, express, sleeping car, telegraph,

telephone and pipe lines companies." (Acts of Arkansas, 1911, p. 233.) This provides that the property of railroad corporations, and of the others named in the title, shall be assessed by the Tax Commission. Section 2 is as follows:

"Section 2. The franchise (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Section 9 requires railroad companies to file with the Tax Commission statements showing their physical property in the State. Section 10 requires that the statement shall show "the aggregate value of the whole railroad, and there shall be taken into consideration in fixing said value the entire right-of-way as given by the charter of the company or statutes of the State, the franchises, privileges and everything of any character whatever situated upon the right-of-way of the road connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing."

The defendant, a Missouri corporation, owning and operating lines of railroad in the States of Missouri, Arkansas and other States, over which it carries both intrastate and interstate commerce, made its report for the year 1911 in accordance with Act No. 112, but under protest, reserving the right to contest the validity of the Act. This report, among other things, showed that the total amount of authorized capital stock was $55,000,000.00 and the total amount of issued and outstanding capital stock was $36,249,750.00. The Commission found the

proportion of the outstanding capital stock represented by property owned and used by defendant in business transacted in the State of Arkansas for the year 1911 to be $13,596,520.00, on which the franchise tax amounted to $6,798.26.

The complaint filed in behalf of the State herein set forth the making of the report by defendant as mentioned and the taking of the necessary proceedings to fix its responsibility under the provisions of Act No. 112.

Defendant's answer, besides setting up its status as a railway corporation incorporated under the laws of Missouri, owning and operating a railway line in Arkansas and several other States, and engaged as a common carrier in interstate business in those States, and also doing intrastate business in the State of Arkansas pursuant to its laws, averred that its property in that State was assessed for the purposes of general taxation for the year 1910 at the value of $9,155,965.00 and the tax levied thereon amounted to $191,713.95, which defendant paid; and that under Act No. 251, approved May 4, 1911, the state Tax Commission assessed its property within the State for tax purposes for the latter year at the value of $11,260,240, upon which assessment taxes had been levied in the sum of $239,388.84, which defendant offered to pay (and has since paid), and averred that the tax sued on "is a tax upon the privilege and right of this defendant to do both an interstate and intra-state business in the State of Arkansas, and is a tax upon the interstate business, property and income of the defendant, and is a tax placed and imposed upon defendant for the privilege of engaging in interstate commerce and an attempt to regulate interstate commerce and a burden thereon; and that if said Act is enforced defendant will be deprived of its right to engage in an interstate business in and through the State of Arkansas." The answer also challenged the validity of Act No. 112, as applied and attempted to be enforced against

defendant, on the ground that it amounted to a taking of its property without due process of law and a denial of the equal protection of the laws.

The Attorney General's demurrer to this answer was sustained, and, the defendant declining to plead further, judgment was entered for the tax and penalty sued for.

The Supreme Court of the State affirmed the judgment (106 Arkansas, 321), and the present writ of error was sued out.

Mr. William T. Wooldridge, with whom *Mr. Samuel H. West*, *Mr. Edward A. Haid* and *Mr. Frank G. Bridges* were on the brief, for plaintiff in error:

Act No. 112, of Arkansas, as construed by the Supreme Court of Arkansas, being the necessary basis for this suit, and being, by its terms and as so construed, a burden on interstate commerce, there is a Federal question involved, and this court has jurisdiction. *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Leathe* v. *Thomas*, 207 U. S. 93; *Houston &c. R. R.* v. *Mayes*, 201 U. S. 321; *Wabash &c. Ry.* v. *Illinois*, 118 U. S. 557; *St. Louis S. W. Ry.* v. *Arkansas*, 217 U. S. 136; *Seaboard Air Line* v. *Duvall*, 225 U. S. 477.

The act as so construed is void, because the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiff in error which is engaged in and devoted to interstate commerce. *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411; *Leloup* v. *Mobile*, 127 U. S. 640; *West. Un. Tel. Co.* v. *Pennsylvania*, 128 U. S. 39; *West. Un. Tel. Co.* v. *Alabama*, 132 U. S. 472; *G. H. & S. A. Ry.* v. *Texas*, 210 U. S. 217; *Fargo* v. *Hart*, 193 U. S. 490; *A. & P. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *Webster* v. *Bell*, 68 Fed. Rep. 183; *State Freight Tax Cases*, 15 Wall. 232; *Express Co.* v. *Seibert*, 142

U. S. 339; *Postal Tel. Co.* v. *Adams*, 155 U. S. 688; *Allen* v. *Pullman Co.*, 191 U. S. 179; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 216; *Williams* v. *Talladega*, 226 U. S. 404; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Freeo Valley R. R.* v. *Hodges*, 105 Arkansas, 314; *Adams Express Co.* v. *New York*, 232 U. S. 14.

The act as so construed, in connection with Act No. 251, subjects the property of plaintiff in error to double taxation and the tax is in violation of the due process of law clause, and because it attempts to impose taxes upon property beyond the jurisdiction of the State of Arkansas; the tax also denies to plaintiff in error equal protection of the law. *A. & P. Tel. Co.* v. *Philadelphia*, 190 U. S. 165; *Post. Tel. Co.* v. *Adams*, 155 U. S. 688; *Galveston &c. Ry.* v. *Texas*, 210 U. S. 217; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Atchison &c. R. R.* v. *O'Connor*, 223 U. S. 280; *Southern Ry.* v. *Greene*, 216 U. S. 400; *Harris Lumber Co.* v. *Grandstaff*, 78 Arkansas, 187.

Mr. William H. Rector, with whom *Mr. William L. Moose*, Attorney General of the State of Arkansas, *Mr. De E. Bradshaw*, *Mr. Lewis Rhoton* and *Mr. Thomas E. Helm* were on the brief, for defendant in error:

The right of the State to exact from a railway company a tax upon that portion of its property actually within its borders, and, in assessing it for the purposes of taxation, to take into consideration its value as a going concern and as a part of a general system extending over several States, is thoroughly established by the decisions of this court, and is not inhibited by Art. I, § 8, of the Federal Constitution. *Am. Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Co.* v. *Lynch*, 177 U. S. 149; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *West. Un. Tel. Co.* v.

Taggart, 163 U. S. 1; *West. Un. Tel. Co.* v. *Attorney General*, 125 U. S. 530; *Same* v. *Same*, 141 U. S. 40; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *Maine* v. *Grand Trunk R. R.*, 142 U. S. 217; *Pittsburg &c. R. R.* v. *Backus*, 154 U. S. 421; *Cleveland &c. R. R.* v. *Backus*, 154 U. S. 439; *Indiana Express Company Cases*, 165 U. S. 256; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Adams Exp. Co.* v. *Kentucky*, 166 U. S. 171.

As construed by the Supreme Court of Arkansas, the tax here involved is a legal exaction, intended to reach and make amenable to taxation an element of value which is a well-recognized factor in ascertaining the full value of corporate property, and which expressly has been omitted from taxation in the general enactments relative to the assessment and collection of taxes upon property owned by railway corporations and actually situated in the State of Arkansas. As thus construed, it is not a burden upon interstate commerce nor upon the right of the plaintiff in error to engage in such commerce, and it is therefore not repugnant to Art. I, § 8, of the Constitution of the United States. *Maine* v. *Grand Trunk R. R.*, 142 U. S. 217; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Pittsburg &c. R. R.* v. *Backus*, 154 U. S. 421; *West. Un. Tel. Co.* v. *Taggart*, 163 U. S. 1; *Am. Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *West. Un. Tel. Co.* v. *Attorney General*, 145 U. S. 549; *Galveston &c. R. R.* v. *Texas*, 210 U. S. 217; *Myer* v. *Wells-Fargo & Co.*, 223 U. S. 298; *Fargo* v. *Hart*, 193 U. S. 490; *Wisconsin &c. R. R.* v. *Powers*, 191 U. S. 379.

If the tax be regarded as a privilege, license or excise tax, rather than as a tax upon property, it is nevertheless a valid exercise by the State of its right to prescribe the terms and conditions upon which corporations may

transact an intrastate business within its borders, and, inasmuch as it is not based in whole or in part upon interstate business or upon property beyond the State, it is not violative of the Federal Constitution as amounting to a burden upon interstate commerce. *Hammond Packing Co.* v. *State*, 212 U. S. 322; *Am. Smelting Co.* v. *Colorado*, 204 U. S. 103; *Security Ins. Co.* v. *Prewett*, 202 U. S. 246; *Hooper* v. *California*, 155 U. S. 648; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *John Hancock Ins. Co.* v. *Warner*, 181 U. S. 73; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *Horn Silver Co.* v. *New York*, 143 U. S. 305; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *California* v. *Pacific R. R.*, 127 U. S. 41; *Ashley* v. *Ryan*, 153 U. S. 436; *Postal Tel. Co.* v. *Charleston*, 153 U. S. 692; *Williams* v. *Talladega*, 226 U. S. 404; *Ewing* v. *Leavenworth*, 226 U. S. 464; *Adams Express Co.* v. *New York*, 232 U. S. 14; *New York* v. *Roberts*, 171 U. S. 658; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Mills* v. *Lowell*, 178 Massachusetts, 459; *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326.

The tax does not deny to plaintiff in error the equal protection of the law, nor deprive it of its property without due process of law, and is not repugnant to the Fourteenth Amendment. *Davidson* v. *New Orleans*, 96 U. S. 97; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Coulter* v. *Louisville & Nashville R. R.*, 196 U. S. 599; *Savannah &c. R. R.* v. *Savannah*, 198 U. S. 392; *Met. St. R. R.* v. *New York*, 199 U. S. 1; *St. Louis &c. R. R.* v. *Davis*, 132

Fed. Rep. 629; *Barbier* v. *Connolly*, 113 U. S. 27; *Magoun* v. *Illinois Sav. Bank*, 170 U. S. 283; *Tennessee* v. *Whitworth*, 117 U. S. 129; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Baltic Min. Co.* v. *Massachusetts*, 231 U. S. 68; *Spencer* v. *Merchant*, 125 U. S. 345; *King* v. *Portland City*, 184 U. S. 61; *Carson* v. *Brockton*, 182 U. S. 398; *Williams* v. *Eggleston*, 170 U. S. 304.

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

The validity of Act No. 112, and of the tax that, pursuant to its provisions, has been levied against plaintiff in error, is questioned on the ground of repugnancy to the commerce clause of the Constitution of the United States and the "due process" and "equal protection" clauses of the Fourteenth Amendment.

The act is entitled "An Act for an annual franchise tax on corporations doing business in the State of Arkansas," (Acts of Arkansas, 1911, p. 67). Its fourth, fifth, and sixth sections require each foreign corporation for profit doing business in the State, and owning or using a part or all of its capital or plant in the State, to pay "for the privilege of exercising its franchise in this State, one-twentieth of one per cent. each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State." On the other hand, Act No. 251, approved May 4, 1911 (Acts of Arkansas, p. 233), is entitled "An Act to provide the manner of assessing for taxation the property of railroads, express, sleeping car, telegraph, telephone and pipe lines companies." By its second section the franchises (other than the right to be a corporation) of all railroad, express, telegraph, and telephone companies are declared to be

property for the purpose of taxation, and the values of such franchises are to be considered by the assessing officers when assessing the property of such corporations.

The Supreme Court of the State, in its opinion herein, after reciting the pertinent provisions of the state constitution, went on to say (106 Arkansas, 326): "Our court has held that a corporation owes its existence to the State, and the right to enjoy this privilege is a subject of taxation, and that upon the power of the legislature to impose such a tax there exists no restriction in our Constitution. In the case of a foreign corporation, the tax or license is paid for the privilege of exercising its corporate powers in the State. *Baker* v. *State*, 44 Arkansas, 138, and cases cited. . . . (p. 327): In the passage of the act in question [Act No. 112], no doubt the legislature had in mind the fact that the right or privilege to be or exist as a corporation, although a matter of value to the stockholders of the corporation, is not an asset of the corporation and transferable as such, and that its value can not, under ordinary rules, be ascertained for the purpose of taxation as property, but since it is a privilege or right granted by the State, a franchise tax may be imposed upon this right or privilege for the purpose of raising revenue. We think it plain, then, under our Constitution and decisions, that the act in question is valid unless it be held a burden upon interstate commerce." And, after citing certain decisions of this court bearing upon the latter question, the court proceeded (p. 329): "In the case at bar the gross receipts from all sources of the railway company have not been used as a means for ascertaining the value of the property in the State. By the express provision of Act No. 251, enacted for the purpose of providing the manner for assessing for taxation the property of railroad companies, the right to be or exist as a corporation was expressly excluded from the items which go to make up the value of the property of the corporation. As we have

already seen, the right or privilege to be or exist as a corporation is the subject of taxation, and this right or privilege is not considered in fixing the value of the property of corporations under Act No. 251, the general tax act. Our State has fixed a franchise tax based solely 'upon the proportion of outstanding capital stock of corporations represented by property owned and used in business transacted in this State.' The act in question seems to have been drawn with great care and with the evident purpose to exclude any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, and *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, and therefore intended to pass an act that would not be contrary to the principles therein announced. We think it has done so. It will be noted in the *Ludwig Case*, the statute requires a foreign corporation engaged in interstate commerce to pay as a license tax for doing intra-state business, a given amount on its capital stock whether employed within the State or elsewhere, and the court held that on the authority of the *Kansas Case*, the statute in question was unconstitutional and void because it directly burdened interstate commerce and imposed a tax on property beyond the jurisdiction of the State."

Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State. *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 268; *Williams*

v. *Mississippi*, 170 U. S. 213, 225; *Smith* v. *St. Louis & Southwestern Ry.*, 181 U. S. 248, 257; *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Reid* v. *Colorado*, 187 U. S. 137, 151; *Galveston, Harrisburg &c. Ry.* v. *Texas*, 210 U. S. 217, 227; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 27; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 162; *Sioux Remedy Co.* v. *Cope*, decided November 30, 1914, *ante*, p. 197.

We therefore accept the construction of Act No. 112, that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the State, the amount of the tax being fixed solely by reference to the property of the corporation that is within the State and used in business transacted within the State, and excluding any imposition upon or interference with interstate commerce. By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intra-state business; and this exposition of Act No. 112 brings it into harmony with Act No. 87 (quoted in the prefatory statement) which requires foreign corporations to pay initial fees only for the privilege of doing intra-state business; and renders it harmonious, also, with Act No. 251, under which the franchise of corporate existence is excluded from the assessment.

And we proceed to consider whether, in view of the construction thus placed upon Act No. 112, the franchise tax imposed upon plaintiff in error pursuant to its terms runs counter to the commerce clause or the Fourteenth Amendment.

The tax, as will be observed, is not in any wise based upon the receipts of the railroad company from interstate commerce, either taken alone or in connection with the receipts from its intra-state business. Since, therefore, the amount of the imposition is not made to fluctuate with the

volume or the value of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, as in *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379; *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298; and *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335.

And we have no hesitation in overruling the contention that the tax is repugnant to the "due process" clause on the ground of being in effect based on property located beyond the limits of the State, as in *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 30; and in *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 162; for this tax is measured by reference to property situate wholly within the confines of the State.

So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly

thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

So, in *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, the court, reviewing numerous previous cases, laid down certain propositions as well-established, and among them the following: (a) No State can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce; (b) This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in interstate commerce; and (c) The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States.

Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the State. It is fixed at a definite percentage ($\frac{1}{20}$ of one per cent.) of "the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State," and the Act provides machinery for ascertaining the market value of the entire capital stock and striking a proportion between the value of the property owned and used by the corporation in the State and that owned and used by it outside of the State. In its essence the tax is not distinguishable from that which was sustained by this court in *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, and in another case between the same parties, 141 U. S. 40. See also *Pittsburgh &c. Ry.* v. *Backus*, 154 U. S. 421, 430, 435; *Indianapolis &c.*

R. R. v. *Backus*, 154 U. S. 438; *Cleveland &c. Ry.* v. *Backus*, 154 U. S. 439, 444, 445; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 18; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412, 424.

It is insisted that Act No. 112, as construed by the state court, in connection with Act No. 251, subjects the property of plaintiff in error to double taxation, and that this contravenes the constitutional guaranties respecting due process of law and the equal protection of the laws. No attempt is made to show that the classification of corporations adopted in Act No. 112 is not a reasonable one, or that in any respect corporations of the class to which plaintiff in error belongs are discriminated against in favor of domestic corporations, as was the case in *Southern Railway Co.* v. *Greene*, 216 U. S. 400. Under the first three sections of this act, each corporation organized and doing business under the laws of the State for profit is required to pay a tax of one-twentieth of one per cent. upon "that part of its subscribed or issued and outstanding capital employed in Arkansas," with an exception not now pertinent; whereas by the next three sections each foreign corporation for profit doing business in the State and owning or using a part or all of its capital or plant in the State is required to pay according to the same percentage "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State." It is not contended that there is here any substantial discrimination. The gist of the criticism seems to be that the two acts in question subject the property of plaintiff in error, as well as that of all other corporations that are within the operation of those Acts, to double taxation, and that this is a denial of "equal protection" in favor of other classes of taxpayers. Reference is made to an extract from the opinion in the *Adams Case* (155 U. S. 696) where the court said: "Doubtless, no State could add to the taxation of prop-

erty according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland &c. Ry.* v. *Backus*, 154 U. S. 439, 445." This, however, does not mean, as is contended, that because of the Fourteenth Amendment a State may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the State, including that employed in interstate commerce. The court was dealing only with the Commerce Clause, and the language quoted means that, by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 154 U. S. at p. 445.

Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the in-

equality is not based upon arbitrary distinctions. *Davidson* v. *New Orleans*, 96 U. S. 97, 105, 106; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 237; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 228; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461, 464; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 295; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Michigan Central R. R.* v. *Powers*, 201 U. S. 245, 293.

Thus far we have dealt only with the authority of the State to levy a tax of this character, and with the mode in which the amount of the tax is ascertained. But the case presents another question that is more serious. By § 20 of Act No. 112 it is enacted: "In case any corporation shall fail to pay the franchise tax prescribed by this Act when it becomes due during the term of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this Act."

If this must needs be construed to mean that for non-payment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intra-state and interstate commerce is to forfeit its right to do business in the State, not only with respect to intra-state but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce; unless, indeed, § 20 could be treated as separable. This result would follow from the principles laid down in *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 554; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 644, 647; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472, 477; *Allen* v. *Pullman Co.*, 191 U. S. 171, 179; and many other cases.

But the state court has not as yet construed the section

as calling for the forfeiture of the privilege of doing interstate business in the event of non-payment of the franchise tax; nor is the State here insisting upon such a construction. The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its non-payment. *Non constat* but that the state court will hold, when confronted with the question, that the franchise to be forfeited pursuant to § 20 is confined to intra-state commerce. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by § 237, Jud. Code, it is proper for this court to wait until the state court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution. *Bachtel* v. *Wilson*, 204 U. S. 36, 40; *Adams* v. *Russell*, 229 U. S. 353, 360; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546. And see *Ohio Tax Cases*, 232 U. S. 576, 591. At present, therefore, we have merely to consider whether § 20 so clearly requires a forfeiture of the interstate franchise for non-payment of the tax in question that it is not reasonable to anticipate that the state court will put another construction upon it. And in doing this we ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the State will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority. *United States* v. *Coombs*, 12 Pet. 72, 76; *Grenada County Super-*

visors v. *Brogden*, 112 U. S. 261, 269; *The Japanese Immigrant Case*, 189 U. S. 86, 101. It hardly needs to be said that the Supreme Court of Arkansas recognizes and applies this fundamental rule of construction. *State* v. *Lancashire Ins. Co.*, 66 Arkansas, 466, 477; *Waterman* v. *Hawkins*, 75 Arkansas, 120, 126; *State* v. *Moore*, 76 Arkansas, 197, 201.

It does not seem to us that § 20, when taken in connection with the context, requires to be so construed as to interfere with interstate commerce. The taxing provisions of the act apply to all corporations doing business in the State for profit, whether organized under its laws, or under the laws of other States, or of foreign countries, and entirely irrespective of the question whether they are engaged in commerce. Therefore it was natural that, in such a provision as is contained in § 20, language having upon its face a general scope should be adopted; but it need not be indiscriminately applied to all the several kinds of corporations that are subject to the act. The forfeiture in terms is of "the right of such corporation to do business in this State." This does not necessarily include the right to transact business that is done partly within and partly without the State. The section does not call for an annulment of the charter. That topic is covered by § 15 of the same act, which applies, however, only to corporations organized under the laws of Arkansas or of foreign countries, and not to corporations of other States, to which class plaintiff in error belongs.

In view of all these considerations, we ought to assume, until the State, through its judicial or administrative officers, places a different construction upon the act, that § 20 will be limited in its operation to forfeiting for nonpayment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act. Under either view it is ob-

vious, from what has been already said, that the tax does not amount to a regulation of or a burden upon interstate commerce.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

BERWIND-WHITE COAL MINING COMPANY *v.* CHICAGO AND ERIE RAILROAD COMPANY.

ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

No. 92. Argued December 3, 1914.—Decided December 14, 1914.

Filing with the Interstate Commerce Commission the book of rules as to demurrage of the Car Service Association, of which the railroad is a member, with a statement as to what its rates will be, *held*, in this case, to be a compliance with the provisions of the Act to Regulate Commerce requiring filing of tariff sheets, no objection having been taken as to form, and it appearing that the documents were adequate to give notice and that there was proof of posting.

Although cars billed for reconsignment may not have actually reached the point named as destination, demurrage may attach for the time held after reaching the point convenient to the belt line for transfer where, under usual practice for many years, cars so billed were held for reconsignment.

171 Ill. App. 302, affirmed.

THE facts, which involve questions of filing tariff sheets under the Act to Regulate Commerce and the right of the railroad company to collect demurrage, are stated in the opinion.

Mr. Henry T. Martin, with whom *Mr. Edward D. Pomeroy* was on the brief, for plaintiff in error:

The booklet of the Chicago Car Service Association and the letters and circular which were mailed to the Interstate Commerce Commission do not constitute a tariff. *England & Co.* v. *Balt. & Ohio R. R.*, 13 I. C. C. 614; *Porter* v. *St. L. & S. F. R. R.*, 15 I. C. C. 4.

The alleged tariffs in question were never established. *Tex. & Pac. Ry.* v. *Cisco Oil Mills*, 204 U. S. 449; *Ill. Cent. R. R.* v. *Henderson Elevator Co.*, 226 U. S. 441.

The filing of papers with the Interstate Commerce Commission raises no presumption of approval. *Suffern Hunt & Co.* v. *I. D. & W.*, 7 I. C. C. 279; *San Bernardino* v. *A., T. & S. F. R. R.*, 3 I. C. C. 138–143, and cases *supra.*

Demurrage is governed by the Interstate Commerce Act. *Michie* v. *N. Y., N. H. & H. R. Ry.*, 151 Fed. Rep. 694; *United States* v. *Standard Oil Co.*, 148 Fed. Rep. 722; *St. Louis & Iron Mt. Ry.* v. *Edwards*, 227 U. S. 265; *C., R. I. & P. Ry.* v. *Hardwick*, 226 U. S. 426.

There can be no charge for demurrage upon interstate shipments without a specific tariff authority therefor.

The published rate should govern and the value of a service cannot be fixed by agreement. *Chicago & Alton* v. *Kirby*, 225 U. S. 155; *N. H. R. Co.* v. *Int. Comm. Com.*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80–81; *Tex. & Pac. Ry.* v. *Abilene Oil Co.*, 204 U. S. 439; *Tex. & Pac. Ry.* v. *Mugg*, 202 U. S. 242; *United States* v. *D. & R. G. R. R.*, 18 I. C. C. 7, 10; *Monroe & Sons* v. *M. C. R. R.*, 17 I. C. C. 27–29; *Crescent Coal Co.* v. *Balt. & Ohio R. R.*, 20 I. C. C. 569.

In the absence of a published demurrage rate, it is presumed that the through rate embraces terminal charges. *Int. Comm. Com.* v. *C., B. & Q. R. R.*, 186 U. S. 320, 328.

The purpose of the Interstate Commerce Act is to fix the rate absolutely and take it out of the realm of contract. The rates on file, being binding upon shipper and carrier

alike, *Penna. R. Co.* v. *International Coal Co.*, 230 U. S. 184, the statute required the carrier to abide absolutely by the tariff. Cases *supra* and *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467.

The tariffs are binding upon shipper and carrier alike. *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184.

The Interstate Commerce Act supersedes the common law with reference to interstate shipments. *St. L. & Iron Mt. Ry.* v. *Edwards*, 227 U. S. 265; *Chi., R. I. & P. Ry.* v. *Hardwick*, 226 U. S. 426.

Demurrage cannot properly be assessed until the shipment has reached its destination. *United States* v. *Denver & R. G. R. R.*, 18 I. C. C. 9; *Staten Island Ry.* v. *Marshall*, 136 N. Y. App. Div. 571; *Crescent Coal Co.* v. *Balt. & Ohio R. R.*, 20 I. C. C. 569.

The appellate court of Illinois is the highest court in which a decision could be had. *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364.

The denial of a right under the Interstate Commerce Act gives this court jurisdiction. *Atchison, T. &c. Ry.* v. *Robinson*, 233 U. S. 173; *Chicago & Alton* v. *Kirby*, 225 U. S. 155.

The denial of a right under other Federal statutes is sufficient to give this court jurisdiction. *Seaboard Airline* v. *Duvall*, 225 U. S. 477; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *St. L., I. M. & S. Ry.* v. *Taylor*, 210 U. S. 281; *Eau Claire Bank* v. *Jackman*, 204 U. S. 522; *Nutt* v. *Knut*, 200 U. S. 12; *Charleston &c. Ry.* v. *Thompson*, 234 U. S. 576.

The alleged tariffs introduced in evidence were not tariffs at all and without which there was no evidence whatever to support a verdict and judgment. *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Kansas City Southern* v. *Albers*, 223 U. S. 573; *Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655; *Oregon R. & N. Co.* v. *Fairchild*, 225 U. S. 111.

Mr. Edward W. Rawlins, with whom *Mr. William J. Calhoun* and *Mr. Will H. Lyford* were on the brief, for defendant in error:

Defendant in error having filed with the Interstate Commerce Commission its demurrage rules and statement of charges, was not only entitled, but required to collect demurrage charges in accordance therewith.

Even though the demurrage rules and charges filed with the Interstate Commerce Commission were in certain respects informal, yet such fact would not excuse plaintiff in error from paying the charges in question, as they were the regular and usual charges for such service.

As to that portion of the demurrage charges which accrued prior to the Hepburn Amendment, the question of tariffs is not controlling.

The demurrage charges in question were properly assessed on the cars while they were being held in the yards at Hammond, as those yards were the regular Chicago holding yards for carload freight held for reconsignment.

In support of these contentions, see *Blackhorse Tobacco Co.* v. *Ill. Cent. R. R.*, 17 I. C. C. 588; *Cudahy Packing Co.* v. *C. & N. W. Ry.*, 12 I. C. C. 446; *Erie R. R.* v. *Wanaque Lumber Co.*, 69 Atl. Rep. 168; 2 Hutchinson on Carriers, § 710; *I. C. R. R. Co.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573; *Kehoe* v. *Railroad Co.*, 11 I. C. C. 166; *Memphis Freight Bureau* v. *Kansas City So. Ry.*, 17 I. C. C. 90; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184; *Schumacher* v. *Chi. & N. W. Ry.*, 207 Illinois, 199; *Tex. & Pac. Ry.* v. *Mugg*, 202 U. S. 242; *Tex. & Pac. Ry.* v. *Cisco Oil Mill*, 204 U. S. 446; *Woolner Distilling Co.* v. *Peoria & P. R. R.*, 136 Ill. App. 479.

Memorandum opinion by direction of the court by Mr. Chief Justice White.

The judgment which is under review awarded demur-

rage on carloads of coal shipped by the plaintiff in error from West Virginia to Chicago, there to be reconsigned. (171 Ill. App. 302.) There are only two alleged Federal contentions:

1. That allowing the demurrage conflicted with the Act to Regulate Commerce because no tariff on the subject was filed or published. The fact is that the railroad had complied with the law as to filing tariff sheets and had also long before the time in question filed a book of rules of the Chicago Car Service Association, of which it was a member, relating to liability for demurrage and a few days after had written the Commission a letter stating that the demurrage charge would be one dollar per day. The argument is that such documents were not sufficiently formal to comply with the law and hence afforded no ground for allowing demurrage. But the contention is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that as a matter of fact they were adequate to give notice. Equally without merit is the insistence that there was no proof that the documents were posted for public inspection. *Texas & Pac. Ry.* v. *Cisco Oil Mill*, 204 U. S. 449; *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, 594; *United States* v. *Miller*, 223 U. S. 599.

2. Conceding that a tariff concerning demurrage was filed, it is insisted it only authorized demurrage at destination and the cars never reached their destination, but were held at a place outside of Chicago. The facts are these: The storage tracks of the railroad for cars billed to Chicago for reconsignment were at Hammond, Indiana, a considerable distance from the terminals of the company nearer the center of the city, but were convenient to the belt line by which cars could be transferred to any desired new destination, and the holding on such tracks of cars consigned as were those in question was in accordance with

a practice which had existed for more than twenty years. Under these circumstances the contention is so wholly wanting in foundation as in fact to be frivolous.

Affirmed.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* WRIGHT.

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

No. 218. Argued December 2, 1914.—Decided December 14, 1914.

Where there is no contention as to the meaning of the Employers' Liability Act, this court, in a case where the judgment of the District Court has been affirmed by the Circuit Court of Appeals, need only determine whether plain error was committed in relation to the principle of general law involved.

In this case the only error pressed being that the court below held that there was no assumption of risk by the injured party, and as it is impossible to deduce any assumption from the facts stated, the judgment is affirmed.

207 Fed. Rep. 281, affirmed.

THE facts, which involve the validity of a judgment for damages obtained by the administratrix of an employé of a railroad company under the Employers' Liability Act, are stated in the opinion.

Mr. H. D. Minor, with whom *Mr. Charles N. Burch* was on the brief, for plaintiff in error:

As this case involves no violation of any safety appliance act, the defense of assumption of risk is open as at common law. *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Southern Ry.* v. *Crockett*, 234 U. S. 725.

The defense of assumption of risk was duly set up in both courts below and in the assignments of error in this court.

Among the rules prescribed for the protection of engineers was one requiring them to move their trains with caution over yard tracks, expecting to find them occupied. The deceased engineer had frequently operated through these yards, and knew the usual situation there. The risk was, therefore, one ordinarily incident to his employment and was assumed by him.

Even where the situation which was responsible for the accident was due to the master's negligence, yet if the situation was observed by the servant or was so obvious that an ordinarily prudent person would have seen and appreciated it, the servant assumed the risk. *Washington &c. R. R.* v. *McDade*, 135 U. S. 234; *Choctaw &c. R. R.* v. *McDade*, 191 U. S. 68; *Tex. & Pac. Ry.* v. *Harvey*, 228 U. S. 321, 324; *S. A. L. Ry.* v. *Horton*, 232 U. S. 292; *Tex. & Pac. Ry.* v. *Archibald*, 170 U. S. 673.

Where the knowledge of the situation on the part of the servant is equal to that of the master and he afterwards voluntarily encounters it, he assumes the risk and cannot recover. *Fletcher* v. *Railroad*, 102 Tennessee, 7; 3 Labatt's M. & S., § 1184.

The doctrine of assumption of risk is not confined to risks existing at the time the contract of employment was entered into, but applies to dangers which subsequently arise and which became known to the employé or which were so plainly observable that he must be presumed to have known them. *S. A. L. Ry.* v. *Horton*, 233 U. S. 492; *Railroad* v. *Ponn*, 191 Fed. Rep. 682.

The evidence in this case shows that the engineer elected to take the chance of passing safely. Therefore, he assumed the risk.

Failure to find that there was any assumption of risk, because there was nothing to show that the engineer was chargeable with the knowledge of the danger and voluntarily exposed himself to it, was clearly error; for the true test is not in the exercise of care to discover dangers, but

whether the defect is known or plainly observable by the employé. *Choctaw &c. R. R.* v. *McDade*, 191 U. S. 68.

Plaintiff's case cannot be saved by the claim that it was a matter of contributory negligence and not assumption of risk. *S. A. L. Ry.* v. *Horton*, 233 U. S. 492.

There was no negligence on the part of the master.

The railroad company was not chargeable with negligence merely because a car on one track protruded on another track. Engineers were warned that they must expect to find such conditions and instructed to act accordingly.

There was no negligence on the part of the fireman.

There being testimony which clearly went to show assumption of risk by the decedent, the Circuit Court of Appeals should not, in view of the error of the trial court, have affirmed the case on the ground that the evidence showed no assumption of risk, but should have remanded the case for a submission of that question to the jury at least. *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 387.

Mr. R. M. Barton, with whom *Mr. McKinney Barton* was on the brief, for defendant in error.

Memorandum opinion by direction of the court, by Mr. Chief Justice White.

While this second appeal rests on the Employers' Liability Act, there is no contention as to its meaning (207 Fed. Rep. 281); hence we need only determine whether plain error was committed in relation to the principles of general law involved.[1]

Error in holding that the facts afforded no ground for the application of the doctrine of assumption of the risk is the sole contention pressed in argument. A freight train

[1] *Chicago Junction Ry.* v. *King*, 222 U. S. 222; *Seaboard Air Line* v. *Moore*, 228 U. S. 433; *Chicago, R. I. & Pac. Ry.* v. *Brown*, 229 U. S. 317; *Southern Railway* v. *Gadd*, 233 U. S. 572, 577.

of which the deceased was engineer, proceeding southward on a lead track, approached or was traversing a railroad yard. Ahead—the distance not being specifically defined—on a yard track connecting with, and to the left of, the lead track there stood some loaded coal cars which, while visible to the engineer from the right side of the engine, became more and more shut off from his view as the train advanced. The engineer asked the fireman, who was on the left side of the engine and therefore in full view of the cars, whether they were clear of the lead track and was answered that they were. There is a dispute as to whether a head brakeman was riding in the cab and whether subsequently, if there, he called the engineer's attention to the fact that the coal cars were not clear. But there is no dispute that the engineer again asked the fireman who answered that the cars were not clear and jumped from the locomotive. The engineer, having shut off his power, stepped to the left side where from the collision which immediately resulted he received the injuries from which he subsequently died.

Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent since the facts as stated absolutely preclude all inference that the engineer knew or from the facts shown must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.[1]

[1] *Union Pacific Railway* v. *O'Brien*, 161 U. S. 451; *Texas & Pacific Railway* v. *Archibald*, 170 U. S. 665; *Texas & Pacific Railway* v. *Behymer*, 189 U. S. 468; *Choctaw, Oklahoma &c. R. R.* v. *McDade*, 191 U. S. 64; *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 12; *S. C.*, 220 U. S. 590; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503–504.

The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employés of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result from the collision, yet as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant.

Affirmed.

EASTERLING LUMBER COMPANY *v.* PIERCE.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 589. Submitted November 30, 1914.—Decided December 14, 1914.

A classification based on the use of engines, locomotives and cars propelled by steam, electricity, gas, gasoline or lever power and running on tracks, in a state statute, abolishing the principle of negligence of fellow servant as a defense to actions against corporations and individuals for damages, is not so unequal as to deny equal protection of the law under the Fourteenth Amendment; and so *held* as to chap. 194, Laws of Mississippi of 1908.

A state statute which cuts off no substantive defense but simply provides a rule of evidence controlling the burden of proof, does not deny

due process of law even when applied in the trial of an action for injuries sustained prior to the enactment of the statute; and so *held* as to chap. 215, Laws of Mississippi of 1912, making proof of the happening of an accident a *prima facie* presumption of negligence.
64 So. Rep. 461, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of two statutes of Mississippi, one abolishing the defense of fellow servant in certain cases, and the other creating a presumption of negligence in certain cases, are stated in the opinion.

Mr. Edward Mayes and *Mr. T. Brady, Jr.*, for plaintiffs in error.

Mr. Joseph Hirsh and *Mr. E. L. Dent* for defendant in error.

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

The injuries for which damages were awarded by the judgment sought to be reviewed (64 So. Rep. 461) happened on a steam logging railroad engaged in purely domestic business. The power to here review is based on two constitutional grounds seasonably asserted below assailing two state statutes, the one (chap. 194, Miss. Laws of 1908, p. 204) enacted before the accident, doing away in the cases for which it provided with the principle of fellow servant; and the other (chap. 215, Miss. Laws of 1912, p. 290), enacted after the happening of the accident but before the trial below, providing that from the proof of the happening of an accident there should arise a *prima facie* presumption of negligence.

The constitutional objection to the first statute is that the classification for which it provided was so unequal as to cause the statute to be in conflict with the Fourteenth

Amendment. The classification was this: "Every employé of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, . . ." That the objection is without merit is so clearly established as to require only references to the decided cases to that effect.[1]

The objection to the second statute is that it was wanting in due process because retroactively applied to the case since the statute was enacted after the accident occurred. But the court below held that the statute cut off no substantive defense but simply provided a rule of evidence controlling the burden of proof. That as thus construed it does not violate the Fourteenth Amendment to the Constitution of the United States is also so conclusively settled as to again require nothing but a reference to the decided cases.[2]

As it results that at the time the writ of error was sued out it had been conclusively settled by the decisions of this court that both grounds relied upon were devoid of merit, we think the alleged constitutional questions were too frivolous to sustain jurisdiction and we therefore maintain the motion which has been made to dismiss and our judgment will be

Dismissed for want of jurisdiction.

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[1] *Tullis* v. *Lake Erie & W. R. R.*, 175 U. S. 348; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36; *Aluminum Company* v. *Ramsey*, 222 U. S. 251.

[2] *Mobile, J. & K. R. R.* v. *Turnipseed*, 219 U. S. 35, 42–43; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 82; *Reitler* v. *Harris*, 223 U. S. 437, 441–442; *Luria* v. *United States*, 231 U. S. 9, 25–27.

LOVELL-McCONNELL MANUFACTURING COMPANY *v.* AUTOMOBILE SUPPLY MANUFACTURING COMPANY.

APPLICATION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 722. Motion for leave to file petition for writ of mandamus or certiorari, submitted November 16, 1914.—Decided December 14, 1914.

In this case a petition for mandamus directing the court below to correct its action is denied and a petition for certiorari granted, and the parties having so stipulated, the papers filed are treated as the record, and the case regarded as submitted for decision on the merits.

Although the provisions in the Act of February 13, 1911, c. 47, 36 Stat. 901, in regard to clerk's fee for supervising printing the record, may not apply to appeals from every interlocutory decree, it does apply where the decree, as in this case, although interlocutory in character, is, within the intendment of the statute, a final decree. *Smith* v. *Farbenfabriken of Elberfeld Co.*, 197 Fed. Rep. 894, approved.

THE facts, which involve the construction of the act of February 13, 1911, 36 Stat. 901, amending the fee bill and its application to interlocutory decrees, are stated in the opinion.

Mr. Irving M. Obrieght and *Mr. George C. Dean*, for Lovell-McConnell Co., in support of the motion.

Mr. C. A. L. Massie and *Mr. Ralph Lane Scott*, for Automobile Supply Co., in opposition to the motion:

The act of February 13, 1911, deals with a review by a Court of Appeals upon either "writ of error" or "appeal," as the case may be of "the final judgment or decree." The present controversy arises upon an appeal from an "interlocutory" decree, therefore the act does not here apply.

Prior to this act the fee bill imposed the so-called supervision fee of twenty-five cents for each page of the transcript on every appeal—whether from an interlocutory decree or from a final decree. The act deals exclusively with an appeal from "the final" decree; and being to that extent inconsistent with the fee bill, the requirement of the fee bill relating to an appeal from the final decree is repealed by implication.

Inasmuch as the act does not deal with appeals from interlocutory decrees, there is no implication of repeal of the requirement of the fee bill governing appeals from interlocutory decrees; that requirement remains in force.

If the implication of the act does not repeal the provisions of the fee bill governing appeals from "interlocutory" decrees, then the clerk was entitled to charge (in fact, it was his duty to charge) the full amount actually received, as an "indivisible fee." *Bean* v. *Patterson*, 110 U. S. 401.

This act has been considered judicially in only four reported decisions in the first of which the court suggested the desirability of further legislative action, which, however, has not yet been taken. See *Colt's Patent Fire Arms* v. *N. Y. Sporting Goods*, 186 Fed. Rep. 625; *Victor* v. *Hoschke*, *id.*; *Smith* v. *Farbenfabriken*, 197 Fed. Rep. 894.

This court has definitely settled that such decree—one awarding an injunction and an accounting in a patent suit—is an "interlocutory" decree and not a final one. *Ex parte National Enameling &c. Co.*, 201 U. S. 156.

In *Rainey* v. *Grace*, 231 U. S. 703, this court, in reaching its conclusions regarding the effect of the act upon the fee bill, noted that the act contains no express repeal of the earlier law; pointed out that repeals by implication are not favored, and that only in cases of clear inconsistency will a later act be held to repeal a former one. And, having before it an appeal from a final decree, this

court was careful to limit its decision to holding merely that the act repealed the fee bill in the case mentioned under the facts certified.

The act of February 13, 1911, must be regarded not as creating *de novo* entirely new rights, but as modifying or changing, or, by implication, repealing, certain already subsisting requirements created by the fee bill promulgated by this court under the authority of a prior statute.

When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. *Hobbs* v. *McLean*, 117 U. S. 567, 579.

In two bankruptcy cases where review was sought of certain decisions below, which the Court of Appeals held to constitute "final" decrees, the act was held to apply, and the clerk was directed to return the supervision fees to the parties who had paid them in. *In re Burr Mfg. Co.*, 215 Fed. Rep. 898; *In re Leavitt & Grant*, *id.*

The department of justice has taken the view that the act abolished the supervision fee in all cases. But, in *Rainey* v. *Grace*, 231 U. S. 703, this court held merely that by this act the supervision fee was abolished when the appeal was from a final decree in admiralty. It does not appear that this court intended to decide that the supervision fee was abolished in other cases presenting different facts.

The reply to petitioner's argument of convenience and that Congress intended to reduce the fees is that we have to accept the act as we find it; that its terms are plain and unambiguous; and that to construe the expression "the final judgment or decree" as meaning "the final judgment or every decree (whether interlocutory or final)," and to construe the expression "the final decree" as applying to an "interlocutory" decree—would be not to construe the law but to amend it. *Hobbs* v. *McLean*, 117 U. S. 567, 579; 36 Cyc. 1106–1113.

The requirement of the fee bill concerning appeals from interlocutory decrees remains unaffected by the act of February 13, 1911, and is still controlling of the case at bar.

In granting the order under review, the Court of Appeals was acting in strict conformity with the existing law, and properly directed the clerk to retain the supervision fee and to tax it against the defeated appellee.

The correctness of that order is so manifest that this court will forthwith either approve said order, or refuse to interfere with it.

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

The application is for leave to file a petition for mandamus directing the court below to correct the action taken by it which is complained of or for the allowance of a certiorari to bring up the record in order that such complained of action may be reviewed. We decline to allow leave to file the petition for mandamus, but grant the petition for certiorari and conformably to the stipulation of the parties treat the document made a part of this proceeding as the record for the purpose of the certiorari and proceed to act upon the same treating the case as under submission on the merits.

The Automobile Supply Company appealed to the court below from an interlocutory decree in favor of the complainant, the Lovell-McConnell Company, finding that the patents sued on had been infringed and awarding an injunction and directing an accounting for damages and profits. On such appeal the Automobile Supply Company furnished the clerk of the court below a complete printed record accompanied with a written index of the contents of the same and in consequence of a demand made by the clerk deposited under protest the sum of $696.00 as a fee

due the clerk for supervising the printed record so furnished. When after a hearing the court reversed the decree of the trial court, the Automobile Supply Company called upon the clerk either to refund the money charged for supervision or to include it in his statement of the costs to be entered on the mandate. The clerk, being doubtful as to his duty in the matter, refused to do either and insisted that the propriety of the charge be tested to the end that he might act advisedly in the premises. The Automobile Supply Company thereupon moved to direct the clerk to include the supervision fee in the mandate or to refund the amount of the deposit which had been made. The court held that the charge for supervision was lawful and was therefore properly taxable as costs and directed the clerk to retain the money and include a charge for the same in the mandate. The application before us was then made by the Lovell-McConnell Company, the party cast and ultimately bound for the costs, both the parties, however, entering into the agreement as to the record and the submission on the merits which we at the outset stated.

Considering the act of Congress of February 13, 1911, c. 47, 36 Stat. 901, U. S. Comp. Stat. Supp. 1911, p. 275, in *Rainey* v. *W. R. Grace Co.*, 231 U. S. 703, it was held that the provisions of the act were applicable to the Circuit Courts of Appeals and it was consequently decided that where a printed transcript of the record was filed in compliance with the statute with the clerk of the Court of Appeals no supervision fee could be charged by such clerk. Of course, if that ruling is here applicable, the court below clearly erred in allowing the charge for supervision, and the only possible question therefore is whether the statute, although generally applicable to records filed in the Circuit Court of Appeals, is not so applicable in this case. It is insisted that it is not—and the court below so held—because as the statute only provides for an appeal from a "final judgment or decree," it does not apply to

a case like the one under consideration where the appeal was from a decree interlocutory in character. But without affixing to the statute a latitudinarian meaning upon the theory that to do so is essential to give effect to its purpose and intent and bring every interlocutory decree within its reach, we are of opinion that to exclude an interlocutory decree of the character of the one here involved from the operation of the statute would be to frustrate its plain purpose by a too rigid and unreasoning adherence to its letter. We so conclude because, while in a technical sense the decree here in question was interlocutory, when its character and the scope of the subject-matter which the appeal brought under review and the relief under it which it was competent to afford are considered, we are of opinion it must follow that such decree was within the intendment of this statute a final decree and therefore that error was committed in permitting the supervision charge. Indeed, this view was taken in a well considered opinion by the Circuit Court of Appeals for the Sixth Circuit in a case decided before the ruling in the *Rainey Case, supra* (*Smith* v. *Farbenfabriken of Elberfeld Co.*, 197 Fed. Rep. 894), and we approve the reasoning by which the ruling in that case was sustained.

It results that the Circuit Court of Appeals erred in its order approving the charging and retaining the fee for supervision and such order is therefore reversed with directions to the court below to take such steps as may be necessary by recalling the mandate, if needs be, or otherwise, to afford the relief essential to give effect to the conclusions which we have expressed.

Reversed.

McGOVERN, ADMINISTRATRIX, *v.* PHILADELPHIA & READING RAILWAY COMPANY.

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

No. 430. Argued November 30, 1914.—Decided December 14, 1914.

Where appellants, plaintiffs below, had a verdict on the first trial which was set aside on motion for new trial on which the District Court discussed questions arising under treaties and ruled adversely to plaintiffs, and on the second trial the court ruled adversely to plaintiffs under the Federal statute, this court will presume that the court also considered the treaty questions, and a direct appeal will lie to this court based on the construction and application of the treaty.

In deciding *Maiorano* v. *Baltimore & Ohio Railroad Co.*, 213 U. S. 268, which came here on writ of error from the state court, this court simply accepted the ruling of the state court that a non-resident alien could not maintain an action for death of a relative under the state statute, as being the construction by the highest court of the State of that statute.

After reviewing the rulings of many jurisdictions in regard to the right of non-resident aliens to maintain actions for death of relatives under statutes giving the right, *held* that the weight of authority in this country and in England is that alienage is not a condition affecting right of recovery under the Federal Employers' Liability Act.

Quære, whether under the favored nation provision in the existing treaty with Great Britain and the express provision in the treaty with Italy permitting Italian aliens, non-resident in the United States, to maintain actions in the courts of the United States and of the States, a citizen of Great Britain has a treaty right to maintain an action for the death of a relation under the Federal Employers' Liability Acts of 1908 and 1910.

In this case, *held*, that in view of the conflict of evidence as to the circumstances under which the intestate was killed, the question of assumption of risk was properly presented to the jury.

Where there has been a verdict for plaintiff and it has been set aside on the ground that plaintiff has not capacity to sue, and on the second

trial a verdict directed for defendant on that ground, the Circuit Court of Appeals cannot reverse and direct judgment on the original verdict even if the plaintiff waives a jury trial; the case must be sent back for new trial.

Judgment based on 209 Fed. Rep. 975, reversed.

THE facts, which involve the construction of the Federal Employers' Liability Acts of 1908 and 1910, and the right of non-resident aliens to maintain actions thereunder, and also questions involving rights under the favored nation clause of the treaty with Great Britain, are stated in the opinion.

Mr. George Demming for plaintiff in error:

This court has jurisdiction. *Nichols Lumber Co.* v. *Franson*, 203 U. S. 278; *Giles* v. *Harris*, 189 U. S. 475; *Williamson* v. *United States*, 207 U. S. 425.

Non-resident aliens can benefit under the provisions of the Act of Congress of April 22, 1908. See *Maiorano* v. *Balt. & Ohio R. R.*, 213 U. S. 268; affirming 216 Pa. St. 402; and see *Deni* v. *Penna. R. R.*, 181 Pa. St. 525; *Balt. & Ohio R. R.* v. *Baldwin*, 144 Fed. Rep. 53; *Brannigan* v. *Union Mining Co.*, 93 Fed. Rep. 164; *Zeiger* v. *Penna. R. R.*, 151 Fed. Rep. 348; *S. C.*, 158 Fed. Rep. 809; *Roberts* v. *Great Northern Ry.*, 161 Fed. Rep. 239; *Fulco* v. *Schuylkill Stone Co.*, 163 Fed. Rep. 124.

Maiorano v. *Balt. & Ohio R. R.*, 213 U. S. 268, distinguished, as since that decision there has been a new treaty with Italy, of February 25, 1913, and Pennsylvania has passed an act permitting non-resident aliens to recover in Pennsylvania in like cases.

Under the terms of the treaties between the United States and foreign countries, especially with Italy and with Great Britain, plaintiff in error can recover.

Because of the most favored nation clause the terms of the treaty with Italy would be held to apply to subjects of Great Britain and Ireland.

If a new rule of law was promulgated by the new treaty with Italy it went back and covered all cases, which, though originating before, nevertheless had not been tried and decided up to that time.

Treaties are construed with regard to the intention as well as with reference to justice and convenience. *The Amistad*, 15 Pet. 518, 591, 595; *United States* v. *Texas*, 162 U. S. 1; *Tucker* v. *Alexandroff*, 183 U. S. 424.

A treaty is to be construed in the light of all the facts and circumstances surrounding its making. *In re Ross*, 140 U. S. 453; *United States* v. *Schooner "Peggy,"* 1 Cranch, 103.

Even ignoring the treaties between the United States and Italy and the doctrine of the most favored nation clause, plaintiff in error has the right to bring the present suit and to recover therein by reason of direct treaty rights and provisions between the United States and Great Britain and Ireland. See Arts. II and V of the treaty of March 2, 1899, with Great Britain.

A treaty is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights. *Chew Heong* v. *United States*, 112 U. S. 536; *Tucker* v. *Alexandroff*, 183 U. S. 424.

A treaty should be liberally construed, *De Geofrey* v. *Riggs*, 133 U. S. 258, and if it admits of two constructions the more liberal one is to be preferred. *Hauenstein* v. *Lynham*, 100 U. S. 483; 2 Herod on Favored Nation Treatment, p. 9; Hall's Int. Law, pp. 350–355 (4th Ed.). See also *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142, 150; *Maiorano* v. *Balt. & Ohio R. R. Co.*, *supra*.

Within the broad intent of this treaty such a right of action for the death is the personal property of the heirs. As to what is property see *Sinking Fund Cases*, 99 U. S. 700, 738; *Seaman* v. *Clarke*, 69 N. Y. Supp. 1002; *Power* v. *Harlow*, 57 Michigan, 107, 111; *Battishell* v. *Humphreys*,

64 Michigan, 494; *Smith* v. *Stage Co.*, 28 How. Prac. (N. Y.) 277; William's Personal Property, 16th ed., 144; Schouler, Personal Property, 3d ed., §§ 11–15, 58; 32 Cyc. 669.

This is plain, no matter what theory of the origin of the suit for death by negligence is accepted. *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 67.

While in this country rights of foreigners to real estate and immovable property rest primarily in the laws of the State where such property is situated, *Hauenstein* v. *Lynham*, 100 U. S. 483; *Blythe* v. *Hinckley*, 180 U. S. 333, this law does not apply to personal estate, but aliens have full power and right in this country to succeed thereto. *McLearn* v. *McClellan*, 10 Pet. 625, 637.

By international law and the law of comity and reciprocity between nations this plaintiff should be allowed to recover.

International law is undoubtedly part of the law of this land. 2 Butler's Treaty-making Power, 187, 223; *Love* v. *United States*, 29 Ct. of Cl. 332; *Ekiu* v. *United States*, 142 U. S. 651; *McEwan* v. *Zimmer*, 38 Michigan, 765; *Hilton* v. *Guyot*, 159 U. S. 113; *Paquette Habana*, 175 U. S. 677; *Bank* v. *Earle*, 13 Pet. 519, 589; Story's Con. Laws, § 618.

Such is the rule in Great Britain, under Employers' Liability Act of England, enacted in 1880, Lord Campbell's Act of 1846, and the "Fatal Accidents Act," although the acts themselves are silent on this point. Ruegg's Employers' Liability, 7th ed., 148; *Davidson* v. *Hill*, 2 K. B. (1901) 606; Elliott, Workmen's Compensation, 6th ed., 311; *Baird* v. *Savage*, 43 Scot. Law Rep. 300 (1906); *Krzus* v. *Crow's Nest Coal Co.*, Law Rep. App. Cas. 1912, 590.

If the statute meant otherwise, it should have said so in plain words. See 6 Butterworth's Workmen's Compensation, 271; *Davidson* v. *Hill*, 70 L. J., K. B., 1901, 788;

Varesick v. *British Columbia Copper Co.*, 12 B. C. 286, 1906.

By the laws of international reciprocity and comity this country is bound to extend the same rights and benefits, under our own laws, to British subjects.

This is not any new or strange doctrine. *United States* v. *O'Keefe*, 11 Wall. 178, 183.

Under the plain reading of the state statute itself plaintiff in error can recover. Endlich, Inter. Stat., § 4.

Where the language of an act is so clear and explicit as not to be open to construction, its construction cannot be changed by the practice of the departments, however long continued. *United States* v. *Graham*, 110 U. S. 219; *Thornley* v. *United States*, 113 U. S. 310.

A statute must be held to mean what the language imports. When it is clear and imperative, reasoning *ab inconvenienti* is of no avail, and there is no room for construction. *The Cherokee Tobacco*, 11 Wall. 616; *United States* v. *Temple*, 105 U. S. 97; *Lake County* v. *Rollins*, 130 U. S. 662; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1.

So universally has this come to be regarded as the true rule of interpretation, that where the legislatures of the individual States have passed compensation acts and have decided that where non-resident aliens are excluded from the benefits of the Act a provision to that effect has been inserted. See Workmen's Compensation Act New Jersey, 1911, ch. 95, § 12; Act of Washington, 1911, ch. 74, § 3; New Hampshire Act, 1911, ch. 163, § 6.

For specific provisions in regard to aliens, see Wisconsin Act, 1911, ch. 50, § 10, par. 5; and see *McMillan* v. *Spider Lake Mill Co.*, 115 Wisconsin, 332; Michigan Act, 1912, No. 3, § 7.

The New York Act, ch. 816, 1913, § 17, makes its provisions applicable to non-resident aliens.

The acts of other States appear to be silent on the subject. Bradbury's Workmen's Compensation.

The California Act 1911, ch. 399, has been construed by the board to include in its benefits non-resident aliens. See Boyd's Workmen's Compensation, § 263.

In all other States, where this question has arisen, and where the statutes are silent on the point of the relatives who shall recover for a negligent death, it appears to have been held in respective state courts that, by the plain reading of the statute itself, non-resident aliens are necessarily included among those entitled to the remedies and benefits of the statute. See *Kellyville Coal Co.* v. *Petraytis*, 195 Illinois, 215; *Mulhall* v. *Fallon*, 176 Massachusetts, 266; *Vetaloro* v. *Perkins*, 101 Fed. Rep. (Mass.) 393; *Szymanski* v. *Blumenthal*, 3 Pennewill (Del.), 558; *Renlund* v. *Commodore Co.*, 89 Minnesota, 41; *Bouthron* v. *Phœnix Fuel Co.*, 8 Arizona, 129; *Romano* v. *Capital City Brick Co.*, 125 Iowa, 591; *Cleveland & St. L. R. R.* v. *Osgood*, 36 Ind. App. 34; *Pocohontas Collieries* v. *Rukas*, 104 Virginia, 278; *Alfson* v. *Bush*, 182 N. Y. 393; *Pittsburgh & St. L. Ry.* v. *Naylor*, 73 Oh. St. 115; *Jeffersonville Co.* v. *Hendricks*, 41 Indiana, 48, 71; *Luke* v. *Calhoun County*, 52 Alabama, 115; *Philpott* v. *Mo. Pac. Ry.*, 85 Missouri, 164; *Chesapeake &c. Ry.* v. *Higgins*, 85 Tennessee, 620; *Augusta Ry.* v. *Glover*, 92 Georgia, 132, 142; *Trotta* v. *Johnson*, 121 Kentucky, 827; *Atchison &c. Ry.* v. *Fajardo*, 74 Kansas, 314. For similar construction of analogous statutes, see also *Davidson* v. *Hill*, 2 K. B. (1901) 606; disapproving *Adams* v. *British & F. S. S. Co.*, 2 Q. B. (1898) 430; *Patek* v. *American Smelting Co.*, 154 Fed. Rep. 190; *Cetofonte* v. *Camden Coke Co.*, 78 N. J. 662; Thornton's Federal Employers' Liability Acts, 176; Boyd, Workmen's Compensation, § 500; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 476; *Dennich* v. *Railroad Co.*, 103 U. S. 11, 17.

The general and accepted policy of this country is to extend to foreigners exactly the same means of redress, as is enjoyed by our own citizens. Wharton on Conflict of Laws, §§ 17, 478, 478a, 483, 705, 737, 743.

And see similar rule in Canada. *Varesick* v. *British Columbia Copper Co., supra;* Op. of Att. Gen., 1855, 7, 229. And see *Breedlove* v. *Nicolet,* 7 Pet. 413, 431.

The transitory character of an action for a tort is well recognized, and the action is enforced wherever the defendant can be found, irrespective of the residence of the beneficial plaintiff. Wharton, Confl. Laws, §§ 478a, 480a; *Gardner* v. *Thomas,* 14 Johnson (N. Y.), 134; *Dewitt* v. *Buchanan,* 54 Barb. (N. Y.) 31; *Crashley* v. *Press Pub. Co.,* 179 N. Y. 27, 71; *Slater* v. *Mexican Natl. R. R.,* 194 U. S. 120, 129; *Barrow S. S. Co.* v. *Kane,* 170 U. S. 100, 112.

In the courts of the United States, under the Constitution and laws, alien friends irrespective of treaty stipulations are entitled to the same protection of their rights as citizens. *Taylor* v. *Carpenter,* 3 Story, 458, 463. And see 1 Ops. Att. Gen. 192; 12 *id.* 319; *Stewart* v. *Balt. & Ohio R. R.,* 168 U. S. 445; *Mich. Cent. R. R.* v. *Vreeland, supra; American R. R.* v. *Birch,* 224 U. S. 547; *Taylor, Admr.,* v. *Taylor,* 232 U. S. 363; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 754.

There was no material fact at issue and a new trial was not necessary; and the case should have been in a position immediately for a writ of error without the additional expense and delay of a new trial. The Circuit Court of Appeals should have reinstated the judgment of the District Court. *Barney* v. *Schmeider,* 9 Wall. 248; *Hodges* v. *Easton,* 106 U. S. 408; *Baylis* v. *Travelers' Ins. Co.,* 113 U. S. 316.

In this case *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364, does not apply. And see Schofield in Vol. VIII, Illinois Law Rev., December, 1913, January and February, 1914, numbers, pages 294, 295, 307, 308, 390, 391, 399.

Mr. William Clarke Mason, with whom *Mr. Charles Heebner* was on the brief, for defendant in error:

The trial judge was correct in affirming the defendant's point, to the effect that plaintiffs, being non-resident aliens, had no right of action under the Act of Congress of April 22, 1908, etc.

The record justified the action of the trial judge in directing the jury that "Under all the evidence the verdict should be for the defendant," for two reasons:

The deceased employé assumed the risk of his employment.

The non-resident alien plaintiffs were not dependent upon the deceased employé for maintenance and support.

The case may not have been properly brought before this court by the direct writ of error.

In support of these contentions see, *Adam* v. *British & F. S. S. Co.*, 2 Q. B. 430; *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *American Railroad Co.* v. *Didricksen*, 227 U. S. 145; *Crowe* v. *Railroad Co.*, 70 Hun, 37; *Connelly* v. *Penna. Railroad Co.*, 201 Fed. Rep. 54; *Colorado Mining Co.* v. *Turk*, 150 U. S. 138; *Davis* v. *Concordia Parrish*, 9 How. 280; *Davidson* v. *Hill*, 2 K. B. 606; *Farrugia* v. *Phila. & Reading Ry.*, 233 U. S. 352; *Filhiol* v. *Maurice*, 185 U. S. 108; *Gillman* v. *Philadelphia*, 3 Wall. 713; *Pollard* v. *Kibbe*, 9 How. 471; *Gulf &c. Ry. Co.* v. *McGinnis*, 228 U. S. 173; *Hertz* v. *Woodman*, 218 U. S. 205; *Hijo* v. *United States*, 194 U. S. 315; *Jecker* v. *Magee*, 9 Wall. 32; *Maiorano* v. *Balt. & Ohio R. R.*, 213 U. S. 268; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59; *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430; *Nye* v. *Penna. R. R. Co.*, 178 Pa. St. 134; *Norfolk & W. R. Co.* v. *Gesswine*, 144 Fed. Rep. 56; *Peterson* v. *Am. Ice Co.*, 83 N. J. L. 579; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Southern Railway* v. *Crockett*, 234 U. S. 725; *Sloan* v. *United States*, 193 U. S. 614; *Stephens* v. *Cherokee Nation*, 174 U. S 445; *Sanchez* v. *United States*, 216 U. S. 167; *Thomas* v. *Gay*, 169 U. S. 264; *Winfree* v. *Nor. Pac. Ry.*, 227 U. S. 296.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in trespass under the Railroad Employers' Liability Act of Congress of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291, brought against the railway company, which, it is alleged, caused by negligence the death of Peter McGovern, one of its employés. Plaintiff was duly appointed administratrix of the estate of McGovern and brought the action in behalf of his surviving parents, who are citizens of Great Britain and Ireland.

McGovern was not married, was twenty-four years old, and was in the habit of making regular contributions to the support of his parents. The facts of the killing are not now in dispute, the principal question in the case being whether under the act of Congress an action can be maintained for the benefit of non-resident aliens.

There were two trials of the action. At the first trial plaintiff obtained a verdict. On motion of the railway company, the court, being of opinion that the action could not be maintained for the benefit of non-resident aliens, granted a new trial. 209 Fed. Rep. 975. On the second trial the railway company submitted to the court for its affirmance the following propositions, among others: (1) The parents of McGovern, being non-resident aliens, have no right under the act of Congress for which the action might be maintained and, therefore, a verdict should be directed in favor of the company. (2) Under all of the evidence in the case a verdict should be for the company. The court affirmed the propositions and directed a verdict for the company. The jury returned a verdict accordingly, and judgment was duly entered for the railway company. This writ of error was then sued out.

It is suggested rather than urged that the case is not properly here on direct appeal. But the right of direct

appeal is based on the ground, among others, that the construction and application of the treaty between the United States and Great Britain and Ireland are involved in the case, the favored-nation clause of which give the residents and citizens of Great Britain and Ireland the same rights as those of Italy, and that by a treaty between the latter and the United States its citizens are entitled to exactly the same rights as citizens of this country in the courts of this country, although the citizens of Italy may be residing abroad.

In its first opinion in the case the District Court discussed at length the question arising upon the treaty and held adversely to plaintiff. We must presume, therefore, that the court considered the treaties as elements in its decision upon the right of McGovern to recover for the benefit of the parents of the deceased. This court, therefore, has jurisdiction.

We need not, however, discuss the treaties. The view we take of the statute makes such course unnecessary. But see *Maiorano* v. *Balt. & Ohio R. R.*, *infra*.

Section 1 of the Act of Congress of 1908 provides that every common carrier by railroad, while engaged in interstate commerce, "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents . . . " the carrier or its agents being negligent or its instrumentalities being defective due to its negligence. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 501.

In ruling upon the statute the District Court considered that the reasoning in *Deni* v. *Penna. R. R.*, 181 Pa. St. 525, and in *Maiorano* v. *Baltimore & Ohio R. R.*, 213 U. S. 268, applied. In the *Deni Case* the Supreme Court of Penn-

sylvania, passing upon a statute of the State which permitted certain named relatives to recover damages for death occurring through negligence, held that the statute had no extra-territorial force and that plaintiff in the action was not within its purview, though its language possibly admitted of the inclusion of non-resident aliens. The *Maiorano Case* came to this court on writ of error to the Supreme Court of Pennsylvania, where the doctrine of the *Deni Case* was repeated and applied. This ruling was simply accepted by this court as the construction of the state statute by the highest court of the State.

We concede some strength of persuasion to the Pennsylvania decision but to it may be opposed the ruling in other jurisdictions. *Mulhall* v. *Fallon*, 176 Massachusetts, 266; *Kellyville Coal Co.* v. *Petraytis*, 195 Illinois, 217; *Atchison, Topeka & Santa Fe Ry.* v. *Mateo Fajardo et ux.*, 74 Kansas, 314. In the latter case and in *Mulhall* v. *Fallon* many other cases are reviewed, including English and Canadian cases, and it was concluded that the weight of authority in this country and in England was that alienage is not a condition affecting a recovery under acts such as that involved in the case at bar.

In *Patek* v. *American Smelting Company*, 154 Fed. Rep. 190, the Circuit Court of Appeals for the Eighth Circuit, passed on a statute of Colorado which gave a right of action for wrongful death to persons standing in certain relation to one whose death was caused by the wrongful act of another. The court, after considering the policy of the act, as manifested in the legislation, and reviewing the cases under other statutes of like character, said (p. 194): "We think that the better reason, as also the greater weight of adjudged cases, forbids that non-resident aliens be excluded, by interpretation, from among the beneficiaries designated in the statute."

We may refer to these cases for their reasoning without reproducing it, and need not do much more than add that

the policy of the Employers' Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies. Even if that were its only object we might accept the distinction expressed in *Mulhall* v. *Fallon, supra,* between the duties imposed by a statute upon persons in another State and benefits conferred upon them. Extra-territorial application would naturally not be given to the first, "but rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." *Mulhall* v. *Fallon, supra* (p. 268).

The rights and remedies of the statute are the means of executing its policy. If this "puts burdens on our own citizens for the benefit of non-resident aliens," as said by the District Court, quoting the *Deni Case, supra,* it is a burden imposed for wrongdoing that has caused the destruction of life. It is to the prevention of this that the statute is directed. It is for the protection of that life that compensation for its destruction is given and to those who have relation to it. These may be wife, children or parents. The statute, indeed, distinguishes between them, but what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed.

It is, however, contended by the railway company that the deceased McGovern assumed the risk of his employment. This is attempted to be supported by the facts in the case. The testimony of plaintiff tended to show the following facts: McGovern was killed by a train bound from New York to Philadelphia while he was engaged in cleaning snow from the tracks of the railway company when there were mist, smoke and occasional flurries of

snow. At the place where the men were working were four main lines of trackage. Shortly after nine o'clock the men were warned off what was called track No. 4 by a call of the foreman to "look out" or "heads up," in order to let a local train pass by.

McGovern and two others were working on track No. 2. There was no call to them, the practice of the foreman being to designate the track in his warning, the men on the other track continuing to work. The foreman testified that he did not see the New York train "because it was a bad morning, snowing, and the Norristown train was a little bit slack, and there was steam and smoke and snow in front of the New York train." The New York train gave no signal and no warning was given of it. It was testified that the watchman had got his feet wet and had gone to change his shoes. And it was also in testimony that the Norristown train was slow and the New York train came fast and that while the men were attracted by the first the other rushed down upon them.

There was testimony by the railway company that the engine whistled. One witness called it a "wicked whistle," and there was also testimony that the men and McGovern directly were warned that they were working in a dangerous place and to be careful.

There was testimony that the watchman was not absent and that it was his duty to notify the workmen of approaching trains; that the company, besides, have subforemen to direct the workmen; that the men are "told to be careful" and to watch for themselves "and depend upon the sub-foreman, of course. . . . No man should continue working if he sees a train coming." It further appeared that the place where the accident occurred was regarded as a dangerous place, the tracks being in frequent use.

It is hence contended by the railway company that McGovern assumed the risk of the situation and that, there-

fore, it was error for the District Court to refuse to give an instruction which presented that contention.

We have given the testimony in general outline, but enough to show that what conflict there was in it was for the jury to judge of and what deductions there were to be made from it were for the jury to make. And the District Court, being of this view, refused to charge the jury, as we have seen, that McGovern had assumed the risk of the situation. We cannot say that as a matter of law the court was mistaken. We see no error, therefore, in its ruling.

Plaintiff in error contends that the District Court should not have ordered a new trial because she offered to waive her rights to a trial by jury. This was not error.

Judgment reversed and cause remanded for new trial.

DETROIT AND MACKINAC RAILWAY COMPANY *v.* MICHIGAN RAILROAD COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 209. Argued December 2, 1914.—Decided December 14, 1914.

As the constitution of Michigan separates legislative, executive and judicial powers and plainly forbids giving the judicial department legislative powers, this court will not, in the absence of a decision to that effect by the state court, believe that the legislature, in establishing a railroad commission and granting power of review to the courts, intended to clothe them with power to act in a legislative capacity. *Atlantic Coast Line* v. *Prentis*, 211 U. S. 210, distinguished.

Under the Michigan Railroad Commission Act, as construed in the light of the provisions of the constitution of that State, the function of the Supreme Court of the State in reviewing an order of the Commission fixing rates is judicial and not legislative; and its final order or decree sustaining a rate established by the Commission as not con-

fiscatory is *res judicata* and can be so pleaded in another action in the Federal court to prevent the Commission from enforcing such rates.

Where the state court, in construing a statute of the State, has held that the establishment of rules regulating public utility corporations is a legislative function, this court, in the absence of a clear decision of the state court to the contrary, assumes that the same principle applies also to rates. *Michigan Telephone Co.* v. *St. Joseph*, 121 Michigan, 502, followed.

In any ordinary, even though judicial, proceeding a party is bound to present his whole case to the court. *Calaf* v. *Calaf*, 232 U. S. 371.

Whether the railroad commission of Michigan did or did not exceed its jurisdiction in making orders establishing rates, the Supreme Court of the State had jurisdiction, and one seeking to review the orders is bound by the decree of that court.

203 Fed. Rep. 864, affirmed.

THE facts, which involve the construction of the Michigan Railroad Commission Act and the effect of a decree of the Supreme Court of the State sustaining orders of the Commission, are stated in the opinion.

Mr. Fred A. Baker, with whom *Mr. James McNamara* was on the brief, for appellant.

Mr. Edward S. Clark, with whom *Mr. Grant Fellows*, Attorney General of the State of Michigan, was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellant, alleging its railroad to be wholly within the State of Michigan and subject to the jurisdiction of the Michigan Railroad Commission, to prevent the enforcement of two orders of the Commission, respectively reducing certain rates and fixing minimum rates for the transportation of logs. The contention is that the orders take the appellant's property without due process of law, contrary to the Fourteenth

Amendment. The bill alleges that after the passing of the orders the appellant brought a bill in the state court upon the same ground among others; that the testimony before the Commission was introduced with other additional evidence; that, as provided by the Michigan statutes, this further evidence was transmitted to the Commission, which did not modify its orders, and that thereafter the orders were sustained and the bill dismissed by the state Circuit Court, and on appeal by the Supreme Court of Michigan. 171 Michigan, 335. An application for a preliminary injunction in the present cause was heard by three Judges, as required by the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087, § 266, and on their denying the writ an appeal was taken to this court. The decision below is reported in 203 Fed. Rep. 864.

The ground of the decision below was that the petitioner was concluded by the judgment of the Michigan court; and, of course, if the matter properly can be said to be *res judicata,* there is an end of the case. The argument against its being so is drawn from *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210; but the applicability of that decision depends upon whether the state courts, in the hearings before them, were acting in a legislative capacity or simply were fulfilling their ordinary function as courts. In Virginia the state constitution itself provided for an appeal from an order by the Commission to the Supreme Court of Appeals and gave that body power to substitute such order as in its opinion the Commission should have made. 211 U. S. 224. It is with regard to an order upon such a preliminary appeal that it is said that even though issuing from a court it would not be a judicial act or effect an adjudication, conclusive if questioned later in a suit. 211 U. S. 226, 227. But the constitution of Michigan, Art. II, separates legislative, executive and judicial powers, and so plainly forbids conferring those given by the Virginia constitution to the Virginia Supreme Court of

Appeals, that in the absence of a clear decision by the state court we should not believe that the legislature attempted to grant or could grant such powers to the courts of Michigan.

The Michigan Statutes though they may not have a perfectly clear vision of the distinctions developed in *Prentis* v. *Atlantic Coast Line*, do not attempt to transgress the limits that the Constitution lays down. The important provisions are that any common carrier or other party in interest dissatisfied with the orders of the Commission may bring a suit in the state Circuit Court in Chancery to set aside the order on the ground that the rates fixed are unreasonable, and the court is given power "to affirm, vacate or set aside the order . . . in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law." If different or additional evidence is introduced, the court before judgment is to transmit a copy of it to the Commission and the Commission may alter or rescind its order and is to report its action to the court, and the judgment is to be rendered as though the last action of the Commission had been taken at first. Public Acts, 1909, No. 300, § 26. Taking the two provisions together it seems plain that the words 'such other order or decree' in the first do not embrace a change in the rates fixed but only such other orders or decrees as are incident to an equity cause. If the order of the Commission is to be modified by fixing a new rate that is to be done upon the new evidence by the Commission. This interpretation not only is the natural one upon the face of the statute but avoids the difficulty that otherwise would arise under the constitution of the State. It is true that the Supreme Court in the case cited said that 'the duty of the courts in the premises is not essentially different from that of the Commission,' 171 Michigan, 346, but we agree with the District Court of three Judges that this must be taken to

mean only that it is the same in respect of the inquiry whether the rate is confiscatory or not. That the establishment of rules is a legislative function is recognized in *Michigan Telephone Co.* v. *St. Joseph*, 121 Michigan, 502, 506, and in the absence of a clear decision to the contrary we shall assume that the principle applies to rates.

The distinction between the judicial function of declaring a rate unreasonable and the legislative one of establishing a rate as reasonable is developed in *Louisville & Nashville R. R.* v. *Garrett*, 231 U. S. 298; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 440; *Janvrin, Petitioner*, 174 Massachusetts, 514. And in *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134, it was held that statutory provisions very like those of Michigan, under a constitution that in like manner separated legislative, executive and judicial powers, gave only the last to the courts. Of course, when once it is established that the bill in the state court was an ordinary though statutory judicial proceeding, we must assume that the plaintiff was bound to present its whole case. *Calaf* v. *Calaf*, 232 U. S. 371, 374. Whether the Commission exceeded its jurisdiction or not, as it purported to make orders the Michigan court had jurisdiction and the appellant is bound by its decree.

Decree affirmed.

SCOTTEN *v.* LITTLEFIELD, TRUSTEE OF BROWN, BANKRUPT.

APPEAL FROM CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 439. Motion to dismiss or affirm submitted October 13, 1914.—Decided December 14, 1914.

Bills of review are on two grounds: first, error of law apparent on the face of the record without further examination of matter of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result.

An aspect of the claim involved cannot be held back when the case is presented to the court and later made the subject of a bill of review.

Although the decision of the District Court which determined the case sought to be reviewed is alleged to have been decided upon principles inconsistent with a subsequent decision by this court, the subsequent decision will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and requiring a different result.

213 Fed. Rep. 705, affirmed.

THE facts, which involve the principles of law upon which bills of review are granted and their application to this case, are stated in the opinion.

Mr. Daniel P. Hays for appellee, in support of the motion:

No appeal lies to this court from the decree dismissing the bill of review. A bill of review cannot be filed after the time to appeal has expired. At the time of filing the bill of review the time to appeal had long since expired. *Thomas* v. *Harvey*, 10 Wheat. 146.

There is no error of law apparent upon the face of the record. The decree now said to be erroneous has been affirmed by this court upon the direct appeal of and

against the attack of these appellants. *First National Bank* v. *Littlefield*, 226 U. S. 78.

The error of law must be apparent upon the face of the record and not upon evidence outside of the record. *Buffington* v. *Harvey*, 95 U. S. 99.

The suggestion that this court has changed its rulings in regard to reclamation proceedings and cases of the kind at bar is not tenable. *Littlefield* v. *Gorman*, 229 U. S. 19, has no application to the facts presented in the case at bar, and see *First National Bank* v. *Littlefield*, 226 U. S. 78; *Schuyler* v. *Littlefield*, 232 U. S. 466.

It is no ground for filing a bill of review that the court has changed its rulings. *Tilgham* v. *Werk*, 39 Fed. Rep. 680.

Mr. Thorndike Saunders for appellant, in opposition to the motion:

This appeal is within this court's jurisdiction. It brings up dismissal of bill of review to modify order of denying reclamations of 300 shares U. S. Steel Co. stock. The authoritative decision on which the case was decided was subsequently reversed by this court, 229 U. S. 19, on authority of *Richardson* v. *Shaw*, 209 U. S. 365. This newly arisen fact is the basis of this bill of review. It is not new law, nor is it a change of the ruling of the Supreme Court. If this reversal had occurred before, the decision below in this case would have been different.

Appellants' claims for the Steel Company stock were severable from their claims for other stocks; they were so treated by the master and by the District Court.

Appellants' counsel meanwhile presented the appeal which was decided by the Circuit Court of Appeals and subsequently appealed from their decision to this Supreme Court.

Appellants could not trace their Steel Company shares of stock; their claims were as to stock in control of bankrupts by restoration, as in Gorman. So considering the

remedies and the situation, they preferred to rest that claim till final decision of the Gorman appeal.

Appellants joined the traced proceeds of their other stocks with the First National Bank of Princeton in their appeal to this court, and there was no waiver of these Steel Company stock claims.

In support of these contentions, see Bankruptcy Act, § 24*a*; *Barrow* v. *Hunton*, 99 U. S. 80; *Brown* v. *Guaranty Trust Co.*, 228 U. S. 403; *Clark* v. *Trustee*, 193 N. Y. 360; *Ensminger* v. *Powers*, 108 U. S. 292; *Fidelity Trust Co.* v. *Fed. Trust Co.*, 143 Fed. Rep. 156; *First Natl. Bk.* v. *Peavy*, 75 Fed. Rep. 155; *First Natl. Bk. of Princeton* v. *Littlefield*, 226 U. S. 41; *Genet* v. *Davenport*, 60 N. Y. 197; *Ex parte Gibbons*, 22 A. B. R. 550; *S. C.*, 171 Fed. Rep. 254; *Gorman* v. *Littlefield*, 184 Fed. Rep. 454; *S. C.*, 229 U. S. 19; *In re Graff*, 8 A. B. R. 744; *In re Ham & Co.*, 23 A. B. R. 596; *Hanrick* v. *Patrick*, 119 U. S. 156; *Hewitt* v. *Berlin Machine Wks.*, 194 U. S. 296; *Hill* v. *Chi. & Evans. R. R.*, 140 U. S. 54; *Houghton* v. *Burden*, 228 U. S. 290; *Hoffman* v. *Knox*, 50 Fed. Rep. 488; *Hutchinson* v. *Otis*, 190 U. S. 552; Loveland, Bankruptcy, 869; *Re McIntyre*, 24 A. B. R. 20; *O'Hara* v. *McConnell*, 93 U. S. 150; *Pilkinton* v. *Potwin*, 144 N. W. Rep. 39; *Re Potts*, 166 U. S. 203; *Purcell* v. *Miller*, 4 Wall. 519; Remington, Suppl., § 623; *Ricker* v. *Powell*, 100 U. S. 109; *Richardson* v. *Shaw*, 209 U. S. 365; *In re Sanford Tool Co.*, 160 U. S. 249; *Skiff* v. *Stoddard*, 63 Connecticut, 22, 25; *Ex parte Scotten*, 189 Fed. Rep. 439; *Ex parte Scotten*, 193 Fed. Rep. 25; *Re Strickland*, 21 A. B. R. 734; Street, Federal Equity, § 2146; *Re Talbot*, 181 Fed. Rep. 960; *Tilghman* v. *Werk*, 39 Fed. Rep. 682; *Williams* v. *West. U. Tel. Co.*, 93 N. Y. 162.

Memorandum opinion by MR. JUSTICE DAY, by direction of the court.

This case presents another phase of the bankruptcy of A. O. Brown & Company, stock brokers in New York.

See *First National Bank of Princeton* v. *Littlefield, Trustee*, 226 U. S. 110; *Gorman* v. *Littlefield*, 229 U. S. 19; *Schuyler* v. *Littlefield*, 232 U. S. 707. This case is submitted on the motion of appellee to dismiss, affirm, or place on the summary docket. The appellants filed a petition for reclamation in the bankruptcy court, which concerned among other stocks three hundred shares of United States Steel stock, which are now the subject-matter of this controversy. On April 20, 1911, the District Court confirmed the report of the Master, and entered an order dismissing the petitions of appellants and of some other claimants. Appellants appealed to the Circuit Court of Appeals, and that court affirmed the District Court, 193 Fed. Rep. 24. The case then came to this court, and the judgment of the Court of Appeals was affirmed, 226 U. S. 110. On August 4, 1913, the bill of review with which the present proceeding is concerned, was filed in the District Court. This was more than two years after the original order in the District Court, dismissing the reclamation proceeding, was made. The District Court dismissed the bill of review, 213 Fed. Rep. 701. That decree was affirmed in the Circuit Court of Appeals, 213 Fed. Rep. 705. Then the case was appealed here.

Both courts below put their decisions on the ground that the appeal to the Circuit Court of Appeals from the original order of the District Court in the reclamation proceedings really involved the claim for the United States Steel stock in its present aspect, and that if not presented to the Court of Appeals when there on appeal it could not be held back and made the subject of a bill of review, as is now attempted to be done. We think this decision was clearly right. Furthermore, the ground alleged for the bill of review now is, that the principles which determined the disposition of the *Gorman Case*, 229 U. S. 19 (decided May 26, 1913, a little more than two years after the decree in the District Court) reversing

the Circuit Court of Appeals in the same case, 175 Fed. Rep. 769, would, had they been applied in this case, have required a different result in the District Court in dealing with the original petition in reclamation, so far as the three hundred shares of the United States Steel stock, pledged with the Hanover National Bank, are concerned.

Bills of review are on two grounds; first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result. 2 Bates' Federal Equity Procedure, 762; Street's Federal Equity Practice, Vol. 2, § 2151.

If the decision in the *Gorman Case* would have required a different result if the principles upon which it was decided had been applied in the original proceeding, which we do not find it necessary to decide, such subsequent decision will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and probably requiring a different result. *Tilghman* v. *Werk*, 39 Fed. Rep. 680 (opinion by Judge Jackson, afterwards Mr. Justice Jackson of this court); *Hoffman* v. *Knox*, Circuit Court of Appeals, Fourth Circuit, 50 Fed. Rep. 484, 491 (opinion by Chief Justice Fuller).

The decree of the Circuit Court of Appeals is

Affirmed.

SHAPIRO *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 93. Argued December 3, 4, 1914.—Decided December 14, 1914.

In a case remanded to it by the Circuit Court of Appeals, the District Court must apply the principles laid down in the decision for its guidance; and if the mandate required it to reject a plea of *nolo contendere* on the only counts on which the Government stood and to proceed with the case, it must, in obedience to the mandate, set aside the plea.

This court cannot reverse the ruling of the Circuit Court of Appeals upon a writ of error to the District Court which acted upon the mandate even though new constitutional questions were raised in the District Court after the case had been remanded. *Union Trust Co.* v. *Westhus*, 228 U. S. 519.

This court cannot take a case in fragments and, if reviewable on direct writ of error, by reason of the presence of a constitutional question, the whole case must come here.

There is ample opportunity for a review by this court of every judgment or decree of a lower court contemplated by the act of 1891 (now embodied in the Judicial Code); but, in the distribution of jurisdiction, this court is not authorized to review a judgment or decree of the Circuit Court of Appeals otherwise than by proceedings addressed to that court. *Brown* v. *Alton Water Co.*, 222 U. S. 325.

THE facts, which involve the jurisdiction of this court to directly review the judgment of the District Court in a case in which that court acted in accordance with the mandate of the Circuit Court of Appeals, are stated in the opinion.

Mr. Elijah N. Zoline for plaintiff in error.

Mr. Assistant Attorney General Wallace, with whom *The Solicitor General* was on the brief, for the United States.

MR. JUSTICE HUGHES delivered the opinion of the court.

On June 21, 1910, David Shapiro—the plaintiff in error—was indicted for violation of the Internal Revenue Laws. The indictment contained thirteen counts. Eleven charged offenses punishable by both fine and imprisonment; one (the tenth) was for an offense punishable by fine only; and one (the thirteenth) was for an offense punishable by fine or imprisonment, or both.[1] On June 24, 1910, the plaintiff in error pleaded 'not guilty' to every count; on January 3, 1911, 'by leave of court first had and obtained,' he withdrew this plea, and, being then arraigned upon the indictment, he pleaded '*nolo contendere* thereto'; on January 20, 1911, the United States entered a *nolle prosequi* as to all the counts, save those numbered 4, 9 and 12, each of which charged a felony (Crim. Code, § 335); later, on the same day, the cause 'coming on to be heard on defendant's plea of *nolo contendere*,' the court 'having heard the evidence by the parties adduced and statements of counsel' took the cause under advisement; and on January 23, 1911, the court being fully advised found the defendant guilty as charged in the indictment, and upon this finding sentenced him to imprisonment for two years and to pay a fine in the sum of $10,000 in addition to costs.

Shapiro sued out a writ of error from the Circuit Court of Appeals, assigning as errors (1) that the District Court had no jurisdiction to pass judgment in this case on a plea of *nolo contendere;* (2) that it erred in sentencing him without a trial by jury; (3) that by the judgment he had been deprived of his liberty without due process of law, within

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[1] Counts 1, 2, 3 and 4 charged a violation of § 3296 of the Revised Statutes; counts 5, 6, 7 and 8, of § 3317, amended by Act of March 1, 1879, c. 125, § 5, 20 Stat. 327, 339; count 9, of § 3318; count 11, of § 3326; count 12, of § 3324; and count 13, of § 3455.

Count 10 charged a violation of the act of July 16, 1892, c. 196, 27 Stat. 183, 200. See Rev. Stat., § 3456.

the meaning of the Fifth Amendment; and (4) that the sentence was excessive and should be limited to a fine only. The Circuit Court of Appeals reversed the judgment. 196 Fed. Rep. 268. The grounds of the reversal are set forth in its opinion in *Tucker* v. *United States*, 196 Fed. Rep. 260,—a case, decided at the same time, which the court deemed to be similar in all material respects. It was held that the plea of *nolo contendere* was not authorized in the case of an offense which must be punished by imprisonment, with or without a fine; that where counts charging offenses which must be punished by imprisonment are joined with counts charging those which may be punished by fine only, the plea may be entertained as 'in the nature of a compromise'; and that in such case it is 'within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto,' and it is 'within the jurisdiction of the court to approve such submission.' It was further held that in the particular case the proceedings and judgment were in derogation of the plea; that it did not appear in the record that the plea was either 'accepted in fact' or 'substantially so treated'; that the proceedings leading to the judgment, the adjudication of guilt, and the judgment itself in its sentence of imprisonment, were inconsistent with the acceptance of the plea; and hence that the record failed to show an authorized plea to support the judgment. *Id.*, pp. 267, 268. The cause was remanded 'with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law.'

Thereupon, the District Court, against the exception of the plaintiff in error, refused to accept the plea of *nolo contendere* tendered by him and directed him to plead to the indictment; he stood mute, and the court entered for him a plea of not guilty. Subsequently, by leave of the court, the plaintiff in error filed three special pleas. The first

plea, in substance, set forth the prior proceedings and alleged that the plea of *nolo contendere* had been duly accepted, that the court acting thereon had heard evidence solely for the purpose of fixing the punishment to be imposed, and that therefore he had been once before in jeopardy for the same offense and ought not, by virtue of the protection guaranteed by the Fifth Amendment, to be further prosecuted. The second special plea set forth that the defendant had compromised the civil and criminal liability with the Commissioner of Internal Revenue. And the third special plea urged that, while the writ of error was pending in the Circuit Court of Appeals, the original order of supersedeas had been modified so as to permit the judgment to be enforced as to the fine, that thereupon the United States had procured to be seized a certain draft for $5,000 in partial satisfaction of the fine, and that it followed under the Fifth Amendment that, the judgment having been satisfied in part, the plaintiff in error could not be tried again upon the same indictment.

Meanwhile, the plaintiff in error moved in the District Court to correct the record so as to have it show that the plea of *nolo contendere* had been accepted, and petitioned the Circuit Court of Appeals to release its mandate in order that the correction might be made. This petition was denied and the motion in the District Court was not pressed.

The Government demurred to each of the three special pleas and the District Court, sustaining the demurrers, proceeded to trial. The jury rendered a verdict of guilty, motions for a new trial and in arrest were overruled, and the plaintiff in error was sentenced to imprisonment for two years and to pay a fine of $5,000. The case is now brought directly to this court.

The motion to dismiss must be granted. *Aspen Mining Co.* v. *Billings*, 150 U. S. 31; *Brown* v. *Alton Water Co.*, 222 U. S. 325; *Metropolitan Water Co.* v. *Kaw Valley District*,

223 U. S. 519; *Union Trust Co.* v. *Westhus*, 228 U. S. 519. The duty of the District Court was defined by the decision of the Circuit Court of Appeals and in its further proceedings it was bound to apply the principles which that court had laid down for its guidance. It may not have been observed by the appellate court that, in the case of Shapiro, the Government had entered a *nolle prosequi* as to the counts charging an offense which might be punished by fine alone; but this being the actual state of the record, it cannot be doubted that, reading the mandate of the appellate court in the light of its opinion, the District Court was not free to accept the plea of *nolo contendere* as applicable to the remaining 'prison counts.' Its obedience to the mandate under the law as declared by the Circuit Court of Appeals required it with respect to these counts upon which the Government stood to reject the plea of *nolo contendere* and to proceed with the case. It is now assigned as error that the District Court did set aside this plea. It is insisted that the plea had been accepted when originally tendered, but this is negatived by the ruling of the Circuit Court of Appeals and we are in substance asked to revise its decision upon a writ of error to the District Court. This would be to transcend the limits of our jurisdiction as it has been clearly defined in the cases cited.

It is no answer to say that new constitutional questions were raised by the special pleas after the case had been remanded to the District Court. We cannot take the case in fragments and if it is reviewable upon a direct writ of error, by reason of the presence of a constitutional question, the whole case must come here and we must assume the duty of passing upon the proceedings of the District Court which were taken by it under the mandate of the Circuit Court of Appeals. The ruling upon this point in *Union Trust Co.* v. *Westhus, supra*, is controlling. There, the constitutional question was raised by an amendment to the pleadings in the District Court after the decision of

the Circuit Court of Appeals, and it was insisted that this fact made the previous decisions inapplicable. But the asserted distinction was not sustained. The error lay, it was said, 'in pursuing a mistaken avenue of approach to this court,' that is, 'of coming directly from a trial court in a case where, by reason of the cause having been previously decided by the Circuit Court of Appeals, the way to that court should have been pursued even if it was proposed to ultimately bring the case here.' There is, as was pointed out in *Brown* v. *Alton Water Co.*, 222 U. S. 325, ample opportunity for a review by this court of every judgment or decree of a lower court which the act of 1891 (now embodied in the Judicial Code) contemplated should be here reviewed, but, in the distribution of jurisdiction, this court is not authorized 'to review a judgment or decree of a Circuit Court of Appeals otherwise than by proceedings addressed directly to that court.'

Dismissed.

ADKINS *v.* ARNOLD.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 52. Submitted November 5, 1914.—Decided December 14, 1914.

Under § 16 of the Creek Indian Allotment Act of June 30, 1902, c. 1323, 32 Stat. 500, only allotments to living members of the tribe in their own right were subjected to restrictions upon alienation. Allotments on behalf of deceased members were left unrestricted. *Skelton* v. *Dill*, *ante*, p. 206.

In putting the laws of Arkansas in force in the Indian Territory by the acts of May 2, 1890, and February 19, 1903, Congress intended that those laws should have the same force and meaning that they had in Arkansas, and that they should be construed as they had theretofore been interpreted by the Supreme Court of that State. *Robinson* v. *Belt*, 187 U. S. 41.

Although the laws of Arkansas were put in force in the Indian Territory by different acts of Congress, they were not adopted as unrelated but as parts of a single system of laws, whose relative operation, as determined by the Supreme Court of Arkansas, had become an integral part of them.

The Supreme Court of Arkansas having held prior to the acts of Congress putting either section in force in the Indian Territory that § 4621, Mansfield's Digest was a later enactment than § 648 and superseded it so far as they were in conflict, Congress must have intended that those sections should be so regarded in the Indian Territory, although § 648 was part of a chapter put in force by the later act of Congress.

32 Oklahoma, 167, affirmed.

THE facts, which involve the construction of statutes relating to Creek Indian allotments and the laws of descent applicable thereto, are stated in the opinion.

Mr. Lewis C. Lawson for plaintiff in error:

The deed to Arnold was null and void, because, under the allegations in her said answers and cross complaints, it was not made, executed or delivered to said Arnold; plaintiff in error never received any consideration therefor, or for said lands therein described; she at that time was in possession of said lands and ever thereafter retained such possession and claimed said lands as her own in fee simple.

The deed bears date the fifteenth of January, 1907, and said lands were allotted to the plaintiff in error under an Act of Congress known as the Original Creek Agreement, which put in force in the Indian Territory the Creek laws of descent and distribution of said Creek Nation; and the lands, being thus inherited by plaintiff in error from her deceased daughter, were restricted in her hands under that act, especially § 7 thereof and under § 16 of the Supplemental Creek Agreement, which became effectual on August 7, 1902; the deed was therefore null and void when so made, because of such Acts of Congress.

The deed was absolutely null and void for the further reason that the same was not made or executed in the way and manner provided for in chapter 27, Statutes of Arkansas of 1884, and especially as therein provided for in §§ 648 and 659, which chapter was put in force under an Act of Congress of February 19, 1903, the legal effect and consequence of which was discussed and considered in the opinion of said Supreme Court and by which plaintiff in error was denied her right, title and interest in the lands.

No appearance or brief filed for defendants in error.

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

This is a suit to foreclose a mortgage upon real property, 80 acres of which was part of a Creek allotment. The allotment was made on behalf of Otheola Adkins after her death, which occurred in her infancy. Her mother was a Creek woman, duly enrolled as such, but her father was not a Creek citizen. The date of the allotment is not given, but it is conceded that the allotment passed a life estate or more to the mother and nothing to the father. After the allotment was completed and the usual tribal deed issued, the father and mother joined in executing and delivering a deed for the 80 acres to one Arnold, who in turn mortgaged it to the plaintiff. The mother was made a defendant to the suit and by her answer set up two defenses requiring notice here. One was to the effect that the deed to Arnold was made in violation of restrictions imposed by Congress upon the right to alienate the land, and therefore was void; and the other was to the effect that the deed did not satisfy the requirements of a law of Arkansas put in force in the Indian Territory by Congress, and therefore did not affect or pass her title. Upon a demurrer to the answer, which set forth the deed and the certificate of its ac-

knowledgment, these defenses were held not well taken and there was a judgment for the plaintiff. The judgment was affirmed by the Supreme Court of the State. 32 Oklahoma, 167.

Other rulings than those just mentioned were made in the cause, but they need not be noticed, for no Federal question was involved in them.

The claim that the deed to Arnold was made in violation of existing restrictions rests upon the assumption that § 16 of the act of June 30, 1902, c. 1323, 32 Stat. 500, imposed restrictions upon the alienation of all Creek allotments. That this is an erroneous assumption is shown in *Skelton* v. *Dill*, *ante*, p. 206. Only allotments to living members in their own right were subjected to restrictions. Allotments on behalf of deceased members were left unrestricted. Thus the mother was at liberty to make a sale of her interest to Arnold if she chose.

A right appreciation of the claim respecting the insufficiency of the deed involves a consideration of the acts of Congress adopting and extending over the Indian Territory certain statutes of Arkansas. The act of May 2, 1890, c. 182, 26 Stat. 81, § 31, put in force, until Congress should otherwise provide, several general laws of Arkansas appearing in Mansfield's Digest of 1884, among them being chapter 104 concerning the rights of married women. Section 4621 of this chapter reads as follows:

"The real and personal property of any *femme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a *femme sole;* and the same shall not be subject to the debts of her husband."

The act of February 19, 1903, c. 707, 32 Stat. 841, put in force chapter 27 of Mansfield's Digest of 1884 concern-

ing conveyances of real estate, in so far as it was applicable and not inconsistent with any law of Congress. Section 648 of this chapter declares:

"A married woman may convey her real estate or any part thereof by deed of conveyance, executed by herself and her husband, and acknowledged and certified in the manner hereinafter prescribed."

The deed to Arnold, if tested by § 4621 and the applicable decisions of the Supreme Court of Arkansas, was sufficient to pass the mother's title, but if tested by § 648, it probably was insufficient, because not acknowledged and certified in the manner contemplated by that section.

It is insisted that § 648 is inconsistent with § 4621 and should be treated as controlling because its adoption by Congress was the later in time. Assuming that the two sections are inconsistent as claimed, we think § 4621 is controlling. While both were embodied in the Arkansas compilation known as Mansfield's Digest of 1884, § 4621 was a later enactment than § 648 and superseded the latter in so far as they were in conflict. This was settled by the Supreme Court of the State before either section was put in force in the Indian Territory (*Bryan* v. *Winburn*, 43 Arkansas, 28; *Stone* v. *Stone*, *Id.* 160; *Criscoe* v. *Hambrick*, 47 Arkansas, 235), and we think Congress intended they should have the same force and meaning there that they had in Arkansas. See *Robinson* v. *Belt*, 187 U. S. 41, 47–48. Although put in force in the Indian Territory by different acts, they were not adopted as if they were unrelated but as parts of a single system of laws whose relative operation, as determined by the Supreme Court of Arkansas, had become an integral part of them. *Pennock* v. *Dialogue*, 2 Pet. 1, 18; *Cathcart* v. *Robinson*, 5 Pet. 264, 280. It was upon this theory that the Supreme Court of Oklahoma held the mother's deed sufficient.

Judgment affirmed.

WASHINGTON *v.* MILLER.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 53. Submitted November 5, 1914.—Decided December 14, 1914.

Under the original Creek Agreement of March 1, 1901, controlling effect was given to the Creek tribal laws of descent and distribution rather than to the laws of Arkansas upon that subject put in force in the Indian Territory, and the provisions giving such effect to the tribal laws embraced allotments to living citizens as well as allotments on behalf of deceased citizens.

Under § 6 of the Supplemental Creek Agreement of June 30, 1902, the provisions of the agreement of March 1, 1901, giving effect to the Creek tribal laws of descent and distribution were repealed and the provisions of chap. 49 of Mansfield's Digest of the laws of Arkansas were substituted therefor with the proviso that only citizens of the Creek Nation should inherit lands of the Creek Nation except in instances where there were no such citizens to take the descent.

Section 6 looked to the future no less than to the present and is intended to prescribe rules of descent applicable to allotments and there is nothing in that section indicating that it was intended to be less comprehensive; the words "lands of the Creek Nation" as used therein mean lands in the Creek Nation and include such lands after as well as before allotment.

The provision in the act of April 28, 1904, making all the laws of Arkansas put in force in Indian Territory applicable to all persons and estates in that Territory, being general, did not operate to repeal the special provisos in § 6 of the act of June 30, 1902, confining the descent and distribution of Creek lands to citizens of the Creek Nation where there were Creek citizen heirs to take the inheritance.

Repeals by implication are not favored and usually occur only in cases of such irreconcilable conflict between an earlier and later statute that effect cannot reasonably be given to both.

Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is to remain in force as an exception to the general.

There is no incompatibility between a general statute purporting to

regulate descent and distribution of all lands within a Territory and a special statute directly regulating descent and distribution of a particular class of Indian lands therein.

Under § 6 of the agreement of June 30, 1902, regulating descent and distribution of Creek Indian allotments, the non-citizen father does not inherit where there are citizens heirs who can take the inheritance.

Questions concerning the effect of allegations and admissions which conflict with denials in the same pleading are matters of local pleading and practice, and the ruling of a state court thereon is not open to review in this court.

34 Oklahoma, 259, affirmed.

THE facts, which involve the construction and application of the laws of descent and distribution relating to Creek Indian allotments, are stated in the opinion.

Mr. Lewis C. Lawson for plaintiff in error.

Mr. Nathan A. Gibson for defendant in error.

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

This was a suit to quiet the title to lands within what until recently was the Creek Nation in the Indian Territory. The lands were allotted to an enrolled Creek, who died intestate November 3, 1907, after receiving the usual tribal deeds approved by the Secretary of the Interior. He left no widow or descendant, but was survived by his father and mother, two half brothers and a half sister on the paternal side and a half sister on the maternal side. The father was an enrolled Seminole and the mother an enrolled Creek. The half brothers and half sister on the paternal side were Seminoles and the half sister on the maternal side was a Creek. The plaintiff in the suit was in possession and claimed under a deed from the mother, executed July 16, 1909, and approved by the County

Court. See *United States* v. *Knight*, 206 Fed. Rep. 145. The father was a defendant and by his answer admitted the facts here stated and insisted that, although not a Creek citizen, he was an heir of the deceased allottee and as such had an interest in the lands. Upon this answer a judgment was given against him, which was affirmed by the Supreme Court of the State. 34 Oklahoma, 259. He then sued out this writ of error.

The ultimate question for decision is whether the father was an heir, and that involves an ascertainment and interpretation of the applicable law of descent.

The allotment was made and the tribal deeds were issued under the act of March 1, 1901, c. 676, 31 Stat. 861, known as the Original Creek Agreement, and the modifying act of June 30, 1902, c. 1323, 32 Stat. 500, known as the Supplemental Creek Agreement.

Before coming to the provisions of those acts, it may be helpful to refer to the situation existing at the time of their enactment. Long prior thereto the Creek Nation had adopted laws of its own regulating the descent and distribution of property of its citizens dying intestate. Creek Laws of 1867, § 6; Perryman's Compiled Creek Laws of 1890, § 6, p. 32, § 8, p. 76; Bledsoe's Indian Land Laws, 2d ed., §§ 829–831. Congress also had dealt with that subject. By the act of May 2, 1890, c. 182, 26 Stat. 81, §§ 30 and 31, it had "extended over and put in force in the Indian Territory" several general laws of the State of Arkansas, among which was Chapter 49 of Mansfield's Digest of 1884 relating to descent and distribution. At first the operation of this act was materially restricted by a proviso declaring that "the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian

Territory by this act shall not apply." But the proviso lost much of its force when the act of June 7, 1897, c. 3, 30 Stat. 62, 83, declared that "the laws of the United States and the State of Arkansas in force in the [Indian] Territory shall apply to all persons therein, irrespective of race," and was practically abrogated when the act of June 28, 1898, c. 517, 30 Stat. 495, abolished all tribal courts in the Indian Territory (§ 28) and provided (§ 26) that "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." Of course, these congressional enactments operated to displace the Creek tribal laws of descent and distribution and to substitute in their stead the Arkansas law as expressed in Chapter 49 of Mansfield's Digest.

Notwithstanding the situation just mentioned, provisions were inserted in the Original Creek Agreement of March 1, 1901, *supra*, which undoubtedly gave controlling effect to the Creek tribal laws rather than to the Arkansas law; and those provisions embraced allotments to living citizens as well as allotments on behalf of deceased citizens. Thus in § 7 it was provided that, if, after a homestead had served the purposes of its creation, the allottee should die intestate, the land should "descend to his heirs according to the laws of descent and distribution of the Creek Nation;" and in § 28 it was provided that, if a citizen or child entitled to enrollment should die before receiving his allotment and share of the funds of the tribe, the lands and money to which he would be entitled, if living, should "descend to his heirs according to the laws of descent and distribution of the Creek Nation." In other parts of the agreement the word "heirs" was used without any accompanying explanation of who was intended, but this evidently was because the word was intended to have the same signification as in §§ 7 and 28, and therefore no further explanation was necessary.

But the purpose to give effect to the Creek tribal laws was soon changed, for the act of May 27, 1902, c. 888, 32 Stat. 245, 258, not only expressly repealed so much of the act or agreement of March 1, 1901, as provided for descent and distribution according to the Creek tribal laws, but also declared: "and the descent and distribution of lands and moneys provided for in said Act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory." A little more than a month later what was said in the act of May 27, 1902, was repeated in § 6 of the Supplemental Creek Agreement of June 30, 1902, and was there qualified by two provisos which have an important bearing here. That section reads:

"The provisions of the act of Congress approved March 1, 1901 (31 Stat. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

Applying this section to the facts of this case the Supreme Court of the State held that the father, although an heir according to Chapter 49 of Mansfield's Digest, was excluded by the two provisos from the right to inherit, because he was not a Creek citizen and the mother, who was such citizen, had an inheritable status according to that chapter.

The first contention requiring consideration is that the two provisos do not affect the right to inherit from one

who dies after receiving his allotment, but only the right to receive lands from the tribe in place of one who was entitled to an allotment and died before receiving it. The contention rests upon the words "lands of the Creek Nation" in the first proviso and is sought to be sustained upon the theory that lands which have been allotted and passed into private ownership are no longer lands of the tribe, and therefore not within the provisos. We think the words indicated were merely descriptive of the body of lands which were being allotted in severalty and subjected to the incidents of individual ownership, that is, the lands in the Creek Nation. In that sense they would include the lands as well after allotment as before. The section as a whole shows that it looked to the future no less than to the present, and was intended to prescribe rules of descent applicable to all Creek allotments. Nothing in the provisos indicates that they were to be less comprehensive. Their purpose was to give Creek citizens and their Creek descendants a preferred right to inherit, and no reason is perceived for giving such a preference where a citizen entitled to an allotment died before receiving it that would not be equally applicable if he had died after it was received. We conclude therefore that the contention is not well founded.

It next is insisted that the two provisos were repealed by a provision in the act of April 28, 1904, c. 1824, 33 Stat. 573, reading as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, . . ."

No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication. There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and dis-

tribution without any qualification or restriction. But this would be only by reason of the generality of its terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, § 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, *Id.* 556, 570; *Rodgers* v. *United States*, 185 U. S. 83, 87–89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians whose affairs were peculiarly within its control. *Taylor* v. *Parker*, *ante*, p. 42. See also *In re Davis' Estate*, 32 Oklahoma, 209.

In the briefs there is considerable discussion of the question whether the mother, through whom the plaintiff

claimed, took the fee simple or only a life estate, but as the judgment against the father was amply sustained in either event that question need not be considered.

The allegations and admissions in one part of the defendant's answer were held to overcome the denials in another and complaint is made of this, but, as it appears that nothing more than a question of local pleading and practice was involved, the ruling is not open to review in this court.

Judgment affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* ROSBOROUGH.

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

No. 357. Argued November 30, 1914.—Decided December 14, 1914.

Where the cause was removed from the state court to the District Court and comes here solely because plaintiff in error is incorporated under an act of Congress, this court goes no further than to inquire whether there is plain error.

Where defendant on the trial insisted that sparks or cinders from only three identified locomotives which were properly equipped with spark consumers could have caused the fire which destroyed plaintiff's goods, but introduced evidence tending to show that all its locomotives were properly equipped, which fact it had pleaded, it was not error to admit evidence in rebuttal to the effect that locomotives were seen within a few days after the accident near the scene of the fire which were emitting large cinders.

The trial court having properly instructed in respect to contributory negligence, it was not error to refuse to instruct that a railway company was not liable for damage by fire caused by its own negligence because it had not consented to storage of the damaged cotton on its

platform, it appearing that there had been a long continued custom for such storage.

209 Fed. Rep. 205, affirmed.

THE facts, which involve the validity of a judgment against a railroad company for damages by fire caused by sparks from one of its locomotives, are stated in the opinion.

Mr. F. H. Prendergast, with whom *Mr. W. L. Hall* was on the brief, for plaintiff in error.

Mr. S. P. Jones, with whom *Mr. William Thompson* and *Mr. J. S. Patterson* were on the brief, for defendants in error.

Memorandum opinion by MR. JUSTICE MCREYNOLDS, by direction of the court.

This cause was removed from the state court to the District Court and comes here solely because plaintiff in error is incorporated under an act of Congress. We go no further than to inquire whether there is plain error. *Chicago Junction Ry.* v. *King*, 222 U. S. 222, 224; *Texas & Pacific Railway* v. *Howell*, 224 U. S. 577, 582.

The Circuit Court of Appeals affirmed the judgment of the District Court, rendered upon a verdict, against the Railway Company for the value of cotton destroyed by fire alleged to have started from sparks and cinders negligently permitted to escape from some passing locomotive. The answer of the Company denied all negligence, and expressly set up: (1) That it exercised ordinary care to procure and use upon all of its engines proper spark arresters, and that these were in good repair when the accident occurred. (2) That, without its consent, the cotton was stored on the part of an open platform which

extended over its right of way, and was thus voluntarily exposed near tracks along which twenty engines were operated every day.

While insisting that sparks or cinders from only three identified engines could have caused the fire, the Railway Company nevertheless introduced some evidence tending to show that all locomotives were properly equipped. In rebuttal, and over objection, a witness was permitted to testify that within a few days after the accident he saw engines while passing near the scene emit large cinders; and the admission of such evidence constitutes the principal subject of complaint here. In view of the pleadings and the statements of preceding witnesses this action was not improper. *Texas & Pacific Railway* v. *Watson*, 190 U. S. 287, 289; *Goodman* v. *Lehigh Valley R. R.*, 78 N. J. L. 317, 325, 326.

The court was requested, but refused, to charge that if the railway had not assented to the storage of the cotton over its right of way, and if in fact the fire started there, then it would not be liable. This refusal is said to constitute plain and material error; but we think otherwise in view of the long continued use of the platform, and the clear instruction in respect of contributory negligence. The mere presence of the cotton on the right of way without affirmative permission would not suffice to relieve the Company from the consequence of its own negligence. *Grand Trunk Railroad* v. *Richardson*, 91 U. S. 454, 471.

The other assignments of error are not much relied upon and are without substantial merit.

Judgment affirmed.

DREW, SHERIFF OF COOS COUNTY, NEW HAMPSHIRE, *v.* THAW.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

No. 514. Argued December 11, 1914.—Decided December 21, 1914.

A State may enact that a conspiracy to accomplish what an individual is free to do shall be a crime.

The New York Penal Law, §§ 580, 583, making an agreement to commit any act for the perversion of justice or the due administration of the laws a misdemeanor if an overt act is committed, may include the withdrawal by connivance of a person from an insane asylum to which he had duly been committed by order of court as a lunatic.

A party to a crime who afterwards leaves the State is a fugitive from justice; and, for purposes of interstate rendition, it does not matter what motive induced the departure.

The purpose of the writ of *habeas corpus* is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried.

The Federal Constitution peremptorily requires that upon proper demand the person charged with crime shall be delivered up to be removed to the State having jurisdiction of the crime. There is no discretion allowed nor any inquiry into motives; nothing is said in regard to *habeas corpus* and the technical sufficiency of the indictment is not open.

Questions as to the sufficiency of an indictment charging an admittedly insane person with having committed a crime, are for the courts of the State having jurisdiction of the crime to determine according to the law of that State. They cannot be determined by the courts of another State on *habeas corpus* proceedings in interstate rendition.

The constitutionally required surrender of an identified fugitive from justice on a demand made in due form is not to be interfered with by the summary process of *habeas corpus* upon speculation as to what ought to be the result of a trial in the place where the Constitution provides for its taking place.

THE facts, which involve questions arising out of a demand made by the Governor of one State upon the

Governor of another State for the rendition of a fugitive from justice who had been indicted by the demanding State for conspiracy to effect his own escape from the State Asylum to which he had been committed as a lunatic by order of the court, are stated in the opinion.

Mr. William Travers Jerome and *Mr. Franklin Kennedy*, with whom *Mr. James A. Parsons* was on the brief, for appellant:

The State of New York does not claim as a basis for the rendition of the petitioner that any right exists on its part to recover, in interstate rendition proceedings, custody of Thaw on the ground that he is an insane person who has escaped from the custody of the State, his legal guardian; nor that to escape from the State Hospital, after being legally committed thereto, was a crime under the laws of the State of New York.

The petitioner has not been indicted in the State of New York for escaping from the Matteawan State Hospital, nor for a conspiracy to commit a crime.

The indictment is for conspiracy to pervert and obstruct justice and the due administration of the law.

Every element required to warrant interstate rendition of petitioner exists in the case at bar.

The indictment accompanying the demand charges a crime even though it appears therefrom that the petitioner was confined in an insane asylum.

In interstate rendition the good faith or ultimate purpose of the demanding State may not be inquired into.

The indictment is technically correct.

In support of these contentions see: *Appleyard* v. *Massachusetts*, 203 U. S. 222; *Charlton* v. *Kelly*, 229 U. S. 447; *Kentucky* v. *Dennison*, 24 How. 66; *Dow's Case*, 18 Pa. St. 37; *Ex parte Hoffstot*, 180 Fed. Rep. 240; *S. C.*, 218 U. S. 665; *Ex parte Reggel*, 114 U. S. 642; *Guiteau's Case*, 10 Fed. Rep. 161; *Hadfield's Case*, 27 Howell's State Trials

(1800), Case No. 646, p. 1282; *In re Clarke*, 86 Kansas, 539; *Matter of Fetter*, 3 Zabr. 311; *Matter of Voorhees*, 3 Broom, (32 N. J. L.) 145; *Munsey* v. *Clough*, 196 U. S. 364; *People* v. *Cain*, 206 N. Y. 202; *People* v. *Silverman*, 181 N. Y. 240; *Peabody* v. *Chanler*, 13 App. Div. (N. Y.) 159, *S. C.*, affi'd 196 N. Y. 525; *People* v. *Pinkerton*, 17 Hun, 199; *Pettibone* v. *United States*, 148 U. S. 197; *Pierce* v. *Crecy*, 210 U. S. 387; *Roberts* v. *Reilly*, 116 U. S. 80; *State* v. *Anderson*, 1 Hill, 327; *United States* v. *Lawrence*, 4 Cr. C. C. 518; *United States* v. *Ridgeway*, 31 Fed. Rep. 144.

Mr. P. C. Knox and *Mr. William A. Stone*, with whom *Mr. Merrill Shurtleff* and *Mr. George F. Morris* were on the brief, for appellee:

Thaw did not escape from guardianship control, but from police control. His commitment to Matteawan the appellate court said was made in the exercise of the police power of the State. *Peabody* v. *Chanler*, 117 N. Y. Supp. 322.

The *parens patriæ* power has been recognized and exercised from time immemorial.

It is a political relationship existing only between sovereign and subject and for the subject's protection.

The confinement of the dangerously insane for the public protection in the exercise of the police power has no relation to the *parens patriæ* power, has its origin in the statutes enacted long subsequent to the recognition of the *parens patriæ* power, and operates in a different field and for a different purpose, the one having in exclusive view the protection of the public, the other the care and protection of the ward.

The *parens patriæ* power is protective, not punitive nor police. It is invoked only to help the helpless and to protect his person and estate. It is a prerogative of sovereignty usually committed to the chancellor. It is a duty the sovereign owes the subject in return for his

allegiance. New York has never exercised it or sought to exercise it, and cannot exercise it in respect to Thaw, a citizen of Pennsylvania.

New York's relation to Thaw was that of a prosecutor, and in the issue joined between that great State and Thaw the stake was Thaw's life. Thaw was acquitted. New York's present relation to him is just the same as to every other person. She may defend her peace against him, her courts having found him dangerously insane, if by his presence in her jurisdiction he menaces her peace.

There can be no purpose of alleging in an extradition proceeding that a ward has escaped from legal guardianship, then that his extradition is sought only to punish him for crime, and finally that the purpose is to have him immediately returned to the alleged guardianship control. If these allegations in any way raise the question of the right of the State of New York to exercise *parens patriæ* control over a citizen of Pennsylvania domiciled within that State, petitioner insists that no such right or power exists.

Appellee must for the purposes of this case be regarded as insane and subject to all the liabilities and entitled to all the privileges which such a status imposes on or gives to him. The authorities of New York cannot play fast and loose here; they cannot have this appellee sane when he escapes from a lunatic asylum, in order that they may supply a necessary intent to an alleged crime, and dangerously insane when they oppose his release.

On the record this man must be regarded as insane, and his extradition must be considered from that viewpoint.

This is not a case in which it is sought (as in *Charlton* v. *Kelly*, 229 U. S. 427), to set up the plea of insanity as a defence to the charge of crime, and to establish the plea by evidence *aliunde* the record. Here the insanity is shown on the face of the record.

Extradition, or interstate rendition, will lie only for

crimes, and this includes misdemeanors, and an act to constitute a crime or misdemeanor must contain the elements and satisfy the requirements that are essential to constitute crimes or misdemeanors at common law. The power of a State to create extraditable crimes is subject to this limitation. Blackstone's Comm., Bk. 4, ch. 1, p. 5.

In construing terms of an article in the Constitution we are to look at the meaning which those terms had at common law, both in the United States and England, at the time of the adoption of the Constitution. *United States* v. *Wilson*, 7 Pet. 160; *Thompson* v. *Utah*, 170 U. S. 343; *Ex parte Bain*, 121 U. S. 1; *West* v. *Gammon*, 98 Fed. Rep. 426.

As to the meaning of "*ex post facto*," see *Carpenter* v. *Pennsylvania*, 17 How. 456; of "pardon," *United States* v. *Wilson*, 7 Pet. 160; *United States* v. *Harris*, 26 Fed. Cas. No. 15,315; of terms in the Fifth, Sixth and Seventh Amendments, *United States* v. *Potter*, 56 Fed. Rep. 83; *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343; *United States* v. *Copper Stills*, 47 Fed. Rep. 495; *United States* v. *Gilbert*, 25 Fed. Cas. No. 15,204; *United States* v. *Ayres*, 46 Fed. Rep. 651.

In interstate rendition the papers of the demanding State should show, by competent proof, that the accused is substantially charged with crime against the laws of the demanding State. That is, the papers must charge a crime and must make out a *prima facie* case against the accused in respect to the crime charged; otherwise the rendition of the fugitive must fail. *Roberts* v. *Reilly*, 116 U. S. 80, 95; *Hyatt* v. *Corkran*, 188 U. S. 691, 709; *Appleyard* v. *Massachusetts*, 203 U. S. 222, 228; *Pierce* v. *Creecy*, 210 U. S. 387.

Whether or not a crime has been charged within the foregoing rule and a *prima facie* case duly and properly made out will be examined into on *habeas corpus* in cases of

interstate rendition. *Roberts* v. *Reilly*, 116 U. S. 80, 94; *Ex parte Slauson*, 73 Fed. Rep. 666; *Appleyard* v. *Massachusetts*, 203 U. S. 222, 228; *McNichols* v. *Pease*, 207 U. S. 110; *Robb* v. *Connolly*, 111 U. S. 624, 638; *In re Buell*, 4 Fed. Cas. No. 2102; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Fowkes*, 49 Fed. Rep. 50.

Petitioner has the constitutional right to demand that this court shall consider and pass upon the question whether or not he has in this proceeding been charged with a crime within the meaning of the Constitution, whether in this respect a *prima facie* case is made out against him. This is not a matter of aid to criminals. It is a safeguard to the liberty of the citizen.

The *sine qua non* of all crimes and misdemeanors at law is a criminal intent. Blackstone, Bk. 4, ch. 2, p. 20; 1 Bishop's New Crim. Law, §§ 206, 430; *Davis* v. *United States*, 160 U. S. 469, 484; *Stokes* v. *People*, 53 N. Y. 164, 179; *People* v. *Powell*, 63 N. Y. 88; *Martin* v. *Goldstein*, 46 N. Y. Supp. 961.

In cases of conspiracy such as this the gist of the crime is the intent. Wright's Law of Conspiracy, Carson's ed., p. 6; Bishop's New Crim. Law, p. 171.

Insane persons are incapable of entertaining a criminal intent, and therefore incapable of committing a crime. Hawkins' Pleas of the Crown, ch. 1, § 1; Hale's Pleas of the Crown, pt. 1, ch. 1; Bishop's New Crim. Law, § 396a.

An indictment and accompanying papers which, on their face, show that the person accused of committing the crime charged is an avowed and adjudged lunatic, who as a matter of law is not criminally responsible, are fatally and substantially defective in interstate rendition proceedings, because they fail to charge a crime within the meaning of the Federal Constitution; and the person so charged is entitled to be set free from any and every custody based upon such insufficient and substantially defective process.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a final order discharging the appellee on *habeas corpus*. Thaw was held upon a warrant from the Governor of New Hampshire for his extradition to New York in pursuance of a demand of the Governor of the latter State. He was alleged to be a fugitive from justice and a copy of an indictment found by a New York grand jury accompanied the demand. The indictment alleged that Thaw had been committed to the Matteawan State Hospital for the insane under an order of court reciting that he had been acquitted at his trial upon a former indictment on the ground of insanity and that his discharge was deemed dangerous to public safety. It then alleged that being thus confined, he conspired with certain persons to procure his escape from the hospital and did escape, to the obstruction of justice and of the due administration of the laws. By the New York Penal Law an agreement to commit any act for the perversion or obstruction of justice or of the due administration of the laws is a misdemeanor, if an overt act beside the agreement is done to effect the object. Penal Law, §§ 580, 583.

In the wide range taken by the argument for the appellee it was suggested among other things that it was not a crime for a man confined in an insane asylum to walk out if he could, and that therefore a conspiracy to do it could not stand in any worse case. But that depends on the statute. It is perfectly possible and even may be rational to enact that a conspiracy to accomplish what an individual is free to do shall be a crime. An individual is free to refuse his custom to a shop, but a conspiracy to abstain from giving custom, might and in some jurisdictions probably would be punished. If the acts conspired for tend to obstruct the due administration of the laws the statute makes the conspiracy criminal whether the acts themselves are so or not. We do not regard it as open

to debate that the withdrawal, by connivance, of a man from an insane asylum, to which he had been committed as Thaw was, did tend to obstruct the due administration of the law. At least, the New York courts may so decide. Therefore the indictment charges a crime. If there is any remote defect in the earlier proceedings by which Thaw was committed, which we are far from intimating, this is not the time and place for that question to be tried.

If the conspiracy constituted a crime there is no doubt that Thaw is a fugitive from justice. He was a party to the crime in New York and afterwards left the State. It long has been established that for purposes of extradition between the States it does not matter what motive induced the departure. *Roberts* v. *Reilly*, 116 U. S. 80; *Appleyard* v. *Massachusetts*, 203 U. S. 222, 226, 227. We perceive no ground whatever for the suggestion that in a case like this there should be a stricter rule.

The most serious argument on behalf of Thaw is that if he was insane when he contrived his escape he could not be guilty of crime, while if he was not insane he was entitled to be discharged; and that his confinement and other facts scattered through the record require us to assume that he was insane. But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon *habeas corpus*, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about *habeas corpus* in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the State having jurisdiction of the crime. Article 4, § 2. *Pettibone* v. *Nichols*, 203 U. S. 192, 205. There is no discretion allowed, no inquiry into motives. *Kentucky* v. *Dennison*, 24 How. 66; *Pettibone* v. *Nichols*, 203 U. S. 192, 203. The technical sufficiency of the indictment is not open. *Munsey* v. *Clough*, 196 U. S.

364, 373. And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide. The statute that declares an act done by a lunatic not a crime adds that a person is not excused from criminal liability except upon proof that at the time 'he was laboring under such defect of reason as: 1. Not to know the nature and quality of the act he was doing; or 2. Not to know that the act was wrong.' Penal Law, § 1120. See § 34. The inmates of lunatic asylums are largely governed, it has been remarked, by appeal to the same motives that govern other men, and it well might be that a man who was insane and dangerous, nevertheless in many directions understood the nature and quality of his acts as well, and was as open to be affected by the motives of the criminal law as anybody else. How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether at the moment of the conspiracy Thaw was insane in such sense as they may be instructed would make the fact a defence. *Pierce* v. *Creecy*, 210 U. S. 387, 405; *Charlton* v. *Kelly*, 229 U. S. 447, 462. When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that State and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of *habeas corpus* upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once.

Final order reversed.

SIZEMORE *v.* BRADY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 59. Submitted November 4, 1914.—Decided December 21, 1914.

The Original Creek Agreement of March 1, 1901, was not a grant *in præsenti* which invested the then living members of the tribe and their heirs with absolute rights that could not be recalled or impaired by Congress without violating the due process clause of the Fifth Amendment.

Unless and until the Original Creek Agreement of 1901 was carried into effect Congress possessed plenary power as before to deal with the lands and funds to which it related as tribal property. *Choate* v. *Trapp*, 224 U. S. 665.

The Supplemental Creek Agreement of 1902 and the Act of May 27, 1902, repealing the provisions of the act of March 1, 1901, recognizing the tribal laws of descent and distribution, and declaring that the descent and distribution of Creek lands and moneys should be in accordance with the specified laws of Arkansas, were valid acts within the plenary power of Congress to deal with Indians and their tribal property.

An exertion of the administrative control of the Government over tribal property of tribal Indians is subject to change by Congress at any time before it is carried into effect and while tribal relations continue.

The descent and distribution of a Creek Indian Allotment, not selected or made until after the Supplemental Creek Agreement of 1902 went into effect, are controlled under that agreement by Chapter 49 of Mansfield's Digest of the Law of Arkansas.

Under Chapter 49 of Mansfield's Digest of the Law of Arkansas a paternal cousin of the intestate inherits real estate to the exclusion of maternal cousins.

33 Oklahoma, 169, affirmed.

THE facts, which involve the construction of the provisions in the Original and Supplemental Creek Agreements regarding the descent and distribution of Creek Indian Allotments, are stated in the opinion.

Mr. Frederick E. Chapin, Mr. Andrew B. Duvall and *Mr. James B. Diggs* for plaintiffs in error:

Where an enrolled member, a citizen of the Creek Tribe or Nation of Indians, who dies prior to the going into effect of the act of March 1, 1901, 31 Stat. 861, known as the Creek Agreement, was, under the terms of such treaty, entitled to receive an allotment, and died without having selected or received such allotment, the allotment such citizen would have been entitled to under the treaty had he lived to select and receive the same descends to his heirs under the Original Creek Agreement. These heirs are to be ascertained as of the date of the death of such enrolled Creek citizen, and the right of the heirs of such enrolled member or citizen of the Creek Nation to such allotment is a vested right, which cannot be impaired or taken away by subsequent legislation. In support of these contentions see *Aspey* v. *Barry*, 83 N. W. Rep. 91; *Auman* v. *Auman*, 21 Pa. St. 348; *Aytlett* v. *Swope*, 17 S. W. Rep. 208; *Ballentine* v. *Wood*, 9 Atl. Rep. 582; *Barclay* v. *Cameron*, 35 Texas, 242; *Barnett* v. *Way*, 119 Pac. Rep. 418; *Best* v. *Dow*, 18 Wall. 112; *Borgner* v. *Brown*, 33 N. E. Rep. 92; *Brown* v. *Belmarde*, 3 Kansas, 35; *Brooks* v. *Kip*, 35 Atl. Rep. 658; *Burke* v. *Modern Woodmen*, 84 Pac. Rep. 275; *Choate* v. *Trapp*, 224 U. S. 665, 671; *Cark* v. *Lord*, 20 Kansas, 390; *Cooper* v. *Wilder*, 43 Pac. Rep. 590; *Crews* v. *Burcham*, 1 Black, 352; *Dem. Man* v. *Wilson*, 23 How. 461; *Donivan* v. *Pitcher*, 53 Alabama, 411; *Doren* v. *Gillum*, 35 N. E. Rep. 1101; *Drew* v. *Carroll*, 28 N. E. Rep. 148; *Durbin* v. *Redman*, 40 N. E. Rep. 133; *Fabens* v. *Fabens*, 5 N. E. Rep. 650; *Gilmore* v. *Morrill*, 8 Ver. 74; *Goodrich* v. *O'Connor*, 52 Texas, 375; *Gould* v. *Tucker*, 105 N. W. Rep. 624; *Gray* v. *Coffman*, 10 Fed. Cas. 1003; *Ground* v. *Dingman*, 127 Pac. Rep. 1078; *Hall* v. *Russell*, 101 U. S. 503; *Haun* v. *Martin*, 86 Pac. Rep. 371; *Hayes* v. *Barringer*, 168 Fed. Rep. 221; *Halstead* v. *Hall*, 60 Maryland, 209; *Henry Gas Co.* v. *United States*, 191

Fed. Rep. 137; *Hobbie* v. *Ogden*, 53 N. E. Rep. 106; *Irving* v. *Diamond*, 100 Pac. Rep. 557; *Jackson* v. *Lyon*, 9 Cowan, 664; *Johnson* v. *Norton*, 10 Pa. St. 245; *Jones* v. *Meehan*, 175 U. S. 1, 11; *Jumbo Cattle Co.* v. *Bacon*, 79 Texas, 5; *Leathers* v. *Gray*, 2 S. E. Rep. 455; *McCrea's Appeal*, 36 Atl. Rep. 412; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Meadowcroft* v. *Winnebago Co.*, 54 N. E. Rep. 949; *Mullen* v. *United States*, 224 U. S. 448; *Niles* v. *Anderson*, 5 How. 365, 383; *Prentice* v. *Stearns*, 113 U. S. 435; *Reichert* v. *Felps*, 6 Wall. 160; *Reynolds* v. *Fewell*, 124 Pac. Rep. 623; *Rock Hill College* v. *Jones*, 47 Maryland, 1; *Shallenberger* v. *Fewell*, 124 Pac. Rep. 617; *Shulthis* v. *McDougal*, 170 Fed. Rep. 529; *Spangenberg* v. *Guiney*, 3 Ohio Dec. 163; *Starnes* v. *Hill*, 112 Nor. Car. 1; *Starr* v. *Hamilton*, 22 Fed. Cas. 1107; *Stratton* v. *McKinne*, 62 S. W. Rep. 636; *Tate* v. *Townsend*, 16 Mississippi, 316; *Turner* v. *Fisher*, 222 U. S. 204; *United States* v. *Brooks*, 10 How. 42, 460; *Walker* v. *Ehresman*, 111 N. W. Rep. 219; *Ward* v. *Stow*, 27 Am. Dec. 239; *White* v. *Martin*, 66 Texas, 340; *Wilburn* v. *Wilburn*, 83 Indiana, 55; *Wittenbrook* v. *Wheadon*, 60 Pac. Rep. 664; *Wray* v. *Doe*, 10 Smedes & M. 452, 461.

If the act of June 30, 1902, 32 Stat. 500, known as the Supplemental Creek Agreement which was in force at the time of the selection of the land, determines the heirs, such agreement is prospective in operation, and does not, and was not intended to, operate on or affect the estates of members or citizens of the Creek Tribe or Nation who died prior to the going into effect of the Supplemental Agreement; but such Supplemental Agreement was passed for the purpose of affecting, and was intended to affect, only the descent of estates where such descent took place after its going into effect. *Carroll* v. *Carroll*, 16 How. 275; *Chew Heong* v. *United States*, 112 U. S. 536; *City R. R.* v. *Citizens Railway*, 166 U. S. 557; *Murry* v. *Gibson*, 151 How. 421; *United States* v. *Peggy*, 1 Cranch, 103; *White* v. *United States*, 101 U. S. 545; note 12, L. R. A. 50.

Mr. Grant Foreman and *Mr. James D. Simms* for defendant in error:

A duly enrolled citizen of the Creek Nation who died on March 1, 1901, without having selected an allotment of land, died seized and possessed of no interest either legal or equitable in the domain of the Creek Nation, and no persons claiming to be his heirs at any time after his death and before allotment had a vested right to land to be allotted in his name or right. They had a mere expectancy, subject to be changed or extinguished by subsequent acts of Congress. *McKee* v. *Henry*, 201 Fed. Rep. 74; *Braun* v. *Bell*, 192 Fed. Rep. 427; *Shellenbarger* v. *Fewel*, 124 Pac. Rep. 617.

The mere right to allot land of the Creek Nation was not a vested right before it was exercised, because it was subject at any time to be withdrawn. *Gritts* v. *Fisher*, 224 U. S. 640; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Hayes* v. *Barringer*, 168 Fed. Rep. 221; *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Woodbury* v. *United States*, 170 Fed. Rep. 302.

For analogous cases under preemption laws, see: *Emblen* v. *Lincoln Land Co.*, 102 Fed. Rep. 559; *Hutchings* v. *Low*, 15 Wall. 77; *Frisbie* v. *Whitney*, 9 Wall. 187; *Campbell* v. *Wade*, 132 U. S. 34.

The lands of the Creek Nation before allotment were held by the Tribe for the common use of the members, and no right in severalty could be asserted by any member. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 292; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127; *Eastern Band* v. *United States*, 117 U. S. 288; *Ligon* v. *Johnson*, 164 Fed. Rep. 670; *Stephens* v. *Cherokee Nation*, 174 U. S. 488.

Congress had full power to make laws of descent in Indian Territory, independently of the Indians or other people residing there; but the Muskogee or Creek Tribe were under the special guardianship of Congress and it had plenary authority over them. *McKee* v. *Henry*, 201 Fed. Rep. 74;

Lone Wolf v. *Hitchcock*, 187 U. S. 553; *United States* v. *Kagama*, 118 U. S. 375; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Choctaw Nation* v. *United States*, 119 U. S. 1.

The selection or allotment of the land was the initiatory step and was prerequisite to the vesting of any individual title or interest in the land of the tribe. *Hooks* v. *Kennard*, 28 Oklahoma, 457; *deGraffenried* v. *Iowa Land Co.*, 20 Oklahoma, 687; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Braun* v. *Bell*, 192 Fed. Rep. 427; *Hayes* v. *Barringer*, 168 Fed. Rep. 221.

The purpose of § 28 of the Original Creek Agreement was to establish a basis for the allotment of the lands of the tribe. A legislative grant to any member or the vesting of rights by any method other than by allotment is foreign to the general purpose of the act and is not expressed nor intended.

If decedent had no vested right in this land before allotment, no greater estate vested in his heirs.

Application of § 6 of the Creek Supplemental Agreement changing the rule of descent of lands allotted after the act, in the right of citizens dying before the act, is not to be denied on the ground that it would operate retrospectively. In view of the purpose to be accomplished and the state of the subject-matter, the operation was not retrospective. The power reposed in Congress and the legislation discloses the intention to make all lands allotted to heirs after the date of the act, descend according to the rule of descent in force at the date of the allotment, regardless of what rule of descent was in force before the act. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Braun* v. *Bell*, 192 Fed. Rep. 427.

Allotment was necessary to segregate and vest a member's interest in lands of the tribe. *Choate* v. *Trapp*, 224 U. S. 665.

Reason for the amendment is found in § 6 of the Supplemental Agreement.

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

This was a suit to determine conflicting claims to an allotment selected and made after August 8, 1902, on behalf of Ellis Grayson, a Creek citizen duly entitled to enrollment, who died unmarried March 1, 1901, leaving as his only surviving relatives three first cousins, one on the paternal and two on the maternal side. All were Creek citizens. In the papers evidencing the selection and approval of the allotment, as also in the ensuing tribal deed, the beneficiaries were designated as the "heirs" of the deceased, without otherwise naming them; and this was in accord with the usual practice. The suit was brought by the paternal cousin, who insisted that the title under the allotment and tribal deed passed to him alone. The others were made defendants and answered asserting an exclusive right in themselves. Each side also advanced an alternative claim that the three took the land in equal parts. Two questions of law were involved: First, whether the beneficiaries were to be ascertained according to the Creek tribal law or according to an Arkansas law presently to be noticed; and, second, whether the governing law preferred either paternal or maternal relatives when all were of the same degree. The trial court, concluding that the tribal law was applicable and preferred maternal relatives, gave judgment for the defendants; but the Supreme Court of the State held that the Arkansas law was controlling and preferred paternal relatives, so the decision below was reversed with a direction that judgment be entered for the plaintiff. 33 Oklahoma, 169. The defendants then sued out this writ of error.

Anterior to the legislation which we must consider, the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in

the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was neither alienable nor descendible. Under treaty stipulations the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient and in time proved unsatisfactory. Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government. This Congress undertook to do. The earlier legislation was largely preliminary and need not be noticed.

The first enactment having a present bearing is that of March 1, 1901, c. 676, 31 Stat. 861, called the Original Creek Agreement, which went into effect May 25, 1901, 32 Stat. 1971. It made provision for a permanent enrollment of the members of the tribe, for appraising most of the lands and allotting them in severalty with appropriate regard to their value, for using the tribal funds in equalizing allotments, for distributing what remained, for issuing deeds transferring the title to the allotted lands to the several allottees, and for ultimately terminating the tribal relation. In § 28 this act directed that the enrollment, except as to children, should include "all citizens who were living" on April 1, 1899, and entitled to enrollment under the earlier legislation, and then declared that "if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

So much of that act as recognized the tribal laws of descent and distribution was repealed by the act of May 27, 1902,[1] c. 888, 32 Stat. 245, 258, which also provided: "and the descent and distribution of the lands and moneys provided for in said act [March 1, 1901] shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory." This was repeated, with a qualification not material here, in § 6 of the act of June 30, 1902, c. 1323, 32 Stat. 500, called the Supplemental Creek Agreement, which went into effect August 8, 1902. See 32 Stat. 2021; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 301.

Ellis Grayson was living April 1, 1899, and entitled to enrollment. Had he lived he would have been entitled, under the original agreement, to participate in the allotment and distribution of the tribal property. But he died March 1, 1901, before the agreement went into effect and without receiving any part of the lands or funds of the tribe. In these circumstances the agreement contemplated that his heirs should take his place in the allotment and distribution and should receive "the lands and money to which he would be entitled, if living;" and it also contemplated that effect should be given to the Creek laws of descent and distribution in determining who were his heirs and in what proportions they were to take the property passed to them in his right. But, as before said, the act of May 27, 1902, and the supplemental agreement repealed the provision giving effect to the Creek laws of descent and distribution and substituted in their stead the laws of Arkansas embodied in Chapter 49 of Mansfield's Digest. This change went into effect before the allotment in question was selected or made, and has an important

[1] This act went into effect July 1, 1902. See Joint Resolution No. 24, 32 Stat. 742.

bearing here, because, according to the Creek laws,[1] the maternal cousins were either the sole heirs or joint heirs with the paternal cousin, while according to the Arkansas laws [2] the paternal cousin was the only heir.

On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in præsenti* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in præsenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the

[1] Perryman's Compiled Creek Laws of 1890, p. 32, § 6; Bledsoe's Indian Land Laws, 2nd ed., § 829.

[2] Mansfield's Digest, § 2532.

adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate* v. *Trapp*, 224 U. S. 665, 671.

In principle it was so held in *Gritts* v. *Fisher*, 224 U. S. 640. There an act or agreement of 1902 had made provision for allotting and distributing the lands and funds of the Cherokees in severalty among the members of the tribe who were living on September 1, 1902, and an act of 1906 had directed that Cherokee children born after September 1, 1902, and living on March 4, 1906 should participate in the allotment and distribution. By enlarging the number of participants the later act operated to reduce the distributive share to which each would be entitled, and because of this the validity of that act was called in question, the contention being that the prior act confined the allotment and distribution to the members living on September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds, and that this right could not be impaired by subsequent legislation. This court rejected the contention and said (p. 648): "No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' *Cherokee Intermarriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect, and while the tribal relations continued. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Wallace* v. *Adams*, 204 U. S. 415, 423."

We have seen that the allotment in question was not selected or made until after the supplemental agreement went into effect. The heirs designated in chapter 49 of Mansfield's Digest were therefore the true beneficiaries. According to its provisions, as is conceded, the paternal cousin was the sole heir.

Judgment affirmed.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 104. Argued December 8, 1914.—Decided January 5, 1915.

Although parties to a contract may agree that time is of the essence and may stipulate for liquidated damages, they may subsequently so modify the requirements as to completion that performance within the stipulated time becomes unimportant. *Flynn* v. *Des Moines Railway*, 63 Iowa, 490, approved.

As the record in this case does not show that there was any culpable delinquency in completion of a contract for the building of a vessel, or any detriment to the Government, but that the vessel was delivered, tested, approved and paid for without protest on the part of the Government on account of delay, and, as it does appear, the Quartermaster General had, in his discretion, orally waived the time limit in the contract, *held*, that:

In a case of contract authorized by law necessarily entered into and conducted by officers of the Government, they must necessarily have the power to make it effective in its progress as well as in its beginning; and the oral agreement of the Quartermaster General was within the scope of his official authority and amounted to a modification of the contract. *Salomon* v. *United States*, 19 Wall. 17, followed. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, distinguished.

48 Ct. Cls. 50, reversed.

THE facts, which involve the right of the Government to deduct from final payment on a contract an amount

alleged to be due as liquidated damages for non-completion on a former contract with the claimant, and also the question of whether such liquidated damages had been waived by the Government, are stated in the opinion.

Mr. Walter D. Davidge, with whom *Mr. Alexander Preston* was on the brief, for appellant:

Within the time limited for the completion and delivery of the steamer under the first contract the Government waived the time limit. *Salomon* v. *United States,* 19 Wall. 17; *Ford* v. *United States,* 17 Ct. Cl. 60; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453; *Phillips Const. Co.* v. *Seymour,* 91 U. S. 646; *Williams* v. *Bank,* 2 Pet. 96; *Ittner* v. *United States,* 43 Ct. Cl. 336.

The waiver of the time limit in the first contract necessarily tolls the provision in that contract for liquidated damages. *Kemp* v. *Rose,* 1 Giff. 258; *Dodd* v. *Churton,* 1 Q. B. 562; Wait's Engineering Jurisprudence, § 726, p. 667; *Flynn* v. *Des Moines R. R.,* 63 Iowa, 491; *Phillips* v. *Seymour,* 91 U. S. 646; *Mosler Safe Co.* v. *Maiden Lane S. D. Co.,* 199 N. Y. 479, 489.

Aside from the express waiver of the time limit by the Quartermaster General, the fact of payment in full of the entire balance due under the first contract was an accord and satisfaction and conclusive on the Government and a waiver of any claims against the claimant under that contract. *United States* v. *Corliss Steam Engine Co.,* 10 Ct. Cl. 494; *S. C.,* 91 U. S. 321; *Shipman* v. *United States,* 18 Ct. Cl. 138; 1 Hudson on Building Contracts, 538; Wait, *supra,* § 325.

The payment of the entire contract price under the first contract, without any deduction, was deliberate and under no mistake. Cases *supra* and *Griffith* v. *United States,* 22 Ct. Cl. 165; *Barnes* v. *District of Columbia,* 22 Ct. Cl. 366, 394.

There was no loss or damage suffered by the Govern-

ment in completing and delivering the steamer under the first contract.

United States v. *Bethlehem Steel Co.*, 205 U. S. 105; *Sun Printing Ass'n* v. *Moore*, 183 U. S. 642, do not apply to this case.

Mr. Assistant Attorney General Thompson for the United States:

Where the contract provides for the payment of liquidated damages the same become chargeable without a showing of actual damage suffered. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

The waiver of the stipulated time limit for the performance of the contract did not destroy the right to liquidated damages. *Phillips* v. *Seymour*, 91 U. S. 646, 651; *McGowan* v. *Am. Pressed Bark Co.*, 121 U. S. 575, 600. See also *Graveson* v. *Tobey*, 75 Illinois, 450; *United States* v. *McMullen*, 222 U. S. 460, 468; *Nibbe* v. *Brauhn*, 24 Illinois, 268; *Redlands Association* v. *Gorman*, 161 Missouri, 203; *Fisk* v. *Tank*, 12 Wisconsin, 306; *Jeffrey Mfg. Co.* v. *Central Coal Co.*, 93 Fed. Rep. 408, 412; *Wisconsin Cent. R. R.* v. *United States*, 164 U. S. 190, 212; *Logan Co.* v. *United States*, 169 U. S. 259; *United States* v. *Saunders*, 79 Fed. Rep. 408; *United States* v. *Utz*, 80 Fed. Rep. 852.

Mr. Justice McKenna delivered the opinion of the court.

Petition in the Court of Claims for judgment for the sum of $4,750.00, balance due upon a contract entered into between petitioner in such court, appellant here, and the United States for the construction of a steel hull twin-screw suction dredge and for installing therein the propelling and other machinery.

There was and is no controversy as to the performance

of the contract or as to the amount due upon it. The Government set up as an offset an amount alleged to have been illegally paid on a prior contract between appellant and the Government, which contract, according to the findings of the Court of Claims, (all the facts which we state being the findings of the Court of Claims) was entered into between appellant and the Government on June 24, 1903, for the construction and equipment of a single screw steamer for harbor service of the Quartermaster's Department and submarine cable service, according to certain specifications which were made part of the contract, for a consideration of $88,000.00, to be paid in various amounts as the work progressed, less 10% to be withheld to make good any defects, the vessel to be completed within one hundred and forty days, exclusive of Sundays and legal holidays, or by December 9, 1903.

It was provided that if appellant should "fail to complete and deliver the steamer within the stipulated time it should pay to the United States the sum of $50.00 per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount, it was provided, might be withheld from any money due" appellant under the contract.[1]

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[1] "That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York Harbor, or as directed by him, in one hundred and forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is hereby fixed at the rate of fifty ($50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract. In the event of

On December 1, 1903, before the time stipulated for completion had expired, at the request of appellant, owing to unavoidable delays in procuring the necessary material, the Quartermaster General of the Army, within his discretion under the contract, orally waived the time limit in the contract, and subsequently, on April 2, 1904, confirmed the waiver by letter.

On April 1, 1904, or ninety-five days, exclusive of Sundays and holidays, after the time fixed in the contract, the Quartermaster General directed the depot quartermaster at New York to make final payment for the steamer, retaining, however, the 10% to make good any defects there might be in the material and workmanship. On July 13, 1904, the entire sum stipulated to be paid by the Government was paid without any deduction whatever.

It does not appear that appellant unreasonably delayed the work after the waiver of the time limit, or that the Government suffered any actual pecuniary loss or damage by reason of the delay in the completion and delivery of the steamer.

The court found the facts as to the other contract as set out in the petition of appellant and that appellant was paid the stipulated price therefor, less the sum of $4,750, "which [we quote from the findings, 48 Ct. Cls., p. 53] the defendants (the United States) claim was the amount arising as liquidated damages for the ninety-five days' delay of the claimant (appellant here) in the completion of the steamer under the first contract hereinbefore referred to and which amount the defendants further claim was inadvertently and under mistake of fact paid to the claimant company" (appellant). And the court recites

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the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such period as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above mentioned causes."

that the Government set up by way of counterclaim the amount so paid and that the Government claimed such sum was due as liquidated damages for the ninety-five days' delay of the claimant (appellant) in the execution of the first contract and claimed further that such sum was "inadvertently, improperly and illegally paid by the officers of the Government." The record shows that the counterclaim was filed February 15, 1912.

From the findings of fact the court decided "as a conclusion of law that the petition be dismissed." And this as a consequence of sustaining the counterclaim of the Government, the court deciding that a waiver of the time limit "did not embrace and release from the payment of the agreed damages, which were assessable upon its (appellant's) default." The court said (48 Ct. Cls., p. 60), "Under such circumstances an officer, in the absence of some provision of law or contract therefor, would have no authority to release a contractor from the provision for liquidated damages so arising." This appeal was then taken.

Appellant attacks the conclusion of the court and contends that "the waiver of the time limit in the first contract necessarily tolled the provision in that contract for liquidated damages." The Government, on the other hand, maintains "that the waiver of the time limit simply estopped the Government from annulling the contract, but that this in no way affected the other terms of the contract." It is the effect of the contention of the Government, curious certainly at first impression if we consider the intention of the parties, that the time limit was waived but its sanction was retained, and what seemed to be concession to a delay which was without fault (so found by the Court of Claims) carried with it the full rigor of the bond.

It may be that the Government would have had the right to annul the contract upon the default of appellant

and avail itself of resultant remedies. It did not do so, but preferred to retain the contract and extend the time of its execution; and, we may assume, upon a consideration of the circumstances—as much in view of the Government's interest as appellant's interest, the Government suffering no damage by the delay, but getting the instrumentality for which it had contracted in time for its purpose, sooner, indeed, it may be, than if it had annulled the contract with appellant and re-let the work to another. These were considerations which the Quartermaster General, in the Government's interest, might well entertain. And it may have seemed to that officer that it would have been as harsh as it would have been useless to sacrifice what had been already done, and faithfully done, by annulling the contract or by refusing to excuse the delay in final performance which was without fault. The case should be judged by that consideration and conduct. But the Government insists that these seemingly natural suppositions cannot be indulged and urges against them the principle of building contracts that if the builder has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party has the option of abandoning the contract for such failure or of permitting the party in default to go on. If he chooses the latter course he so far waives absolute performance as to be liable on his covenant for the contract price of the work when completed. For the injury done him through the broken covenant he may sue, or, if he waits to be sued, he may recoup the damages thus sustained in reduction of the sum due upon the contract for the completed work. *Phillips* v. *Seymour*, 91 U. S. 646, and *United States* v. *Bethlehem Steel Company*, 205 U. S. 105, are cited. Cases are also cited which declare the same principle in regard to contracts for the sale and delivery of goods where time is of the essence of the contract. The latter cases were cases of actual damages, and so also was

Phillips v. *Seymour*, where, there being no legal evidence of actual damage, it was decided none could be recovered.

It may be said that a provision for liquidated damages is a declaration by the parties of the fact of damage from delay in the performance of the work contracted for and the measure of its amount, it not being susceptible of exact ascertainment. *United States* v. *Bethlehem Steel Company*, *supra*, is adduced for the application of the proposition to the case at bar. The contract in that case was entered into when war was imminent with Spain and was for the delivery of gun carriages. It contained a clause for a deduction, in the discretion of the Chief of Ordnance, of $35.00 per day from the price to be paid for each day of delay in the delivery of each carriage. The clause was held, considering the circumstances, to be not a penalty but a provision for liquidated damages and that it was competent for the parties to the contract to provide the latter, and, having so provided, recovery might be had "for the amount stated as liquidated damages upon the violation of the contract and without proof of the damages actually sustained." It will be observed, therefore, that a condition of recovery was proof of violation of the contract. The condition does not exist in the case at bar. The contract was not violated. The time for its performance was extended and, we may observe, before any default had occurred. In that case there was no waiver of the time limit; in the case at bar there was an express waiver. That case, therefore, fails in its asserted analogy. Undoubtedly parties may agree that time shall be of the essence of their contract and, the proper legal conditions existing, may stipulate for damages and the measure of them, but they may subsequently change their views and requirements and consider that performance within the stipulated time is unimportant.

Flynn v. *Des Moines Ry.*, 63 Iowa, 490, is directly in point. The plaintiff in the case entered into a contract

with the railroad to construct part of its line. Payments for the work were to be made monthly upon the certificate of the engineer of the company, and it was covenanted that 10% from the value of the work as an agreed compensation for damages should be retained by the company in case of failure by Flynn to complete the whole amount of the work according to the stipulations of the agreement. It was contended by the railway company that it was entitled to retain the 10% as liquidated damages. The court found that the stipulation as to time was waived and by being waived was eliminated from the contract and the railway company was not entitled to any sum as liquidated damages.

In the present case, as we have seen from the findings, there was no thought by the officers of the Government of a culpable delinquency on the part of the appellant or of detriment to the Government. The steamer was delivered, tested, approved and paid for.

It was held, however, by the Court of Claims that the Quartermaster General had no power to waive the provision for liquidated damages. It is not clear that counsel contends for so broad a proposition. His contention is that "the Government is not bound by the acts of its officers in making unauthorized payments through mistake of fact or of law." There was no mistake of fact, and by mistake of law counsel may mean, the action of the Quartermaster General was outside of the scope of the official authority given him by law. If that officer so acted the Government is not bound by his acts. *Wisconsin Central R. R.* v. *United States*, 164 U. S. 190, 212, and *Logan* v. *United States*, 169 U. S. 255, 259.

The cited cases (they are those upon which the Government relies) involved the construction of statutory law, in other words, of a specific law which was the source of the officer's authority. The case at bar is a case of contract, authorized by law, necessarily entered into and

conducted by the officers of the Government and as necessarily they must have had the powers to make it effective in its beginning and progress. The Court of Claims recognized this and found that (48 Ct. Cls., p. 52) "the Quartermaster General, United States Army, within his discretion under the contract, orally waived the time limit in said contract,"—a very essential discretion which might have been embarrassed or defeated if it had not extended to what depended upon the time limit of the contract. We think the case, therefore, falls under the ruling of *Salomon* v. *United States*, 19 Wall. 17, 19–20, where it is said that "The Act of 1862 (12 Stat. 411), requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter, accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid." See also *District of Columbia* v. *Camden Iron Works*, 181 U. S. 453.

Judgment reversed and cause remanded with direction to dismiss the counter petition of the Government and to enter judgment for appellant in the amount claimed by it.

Mr. Justice McReynolds took no part in the consideration and decision of the case.

LANKFORD AND OTHERS, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA, *v.* PLATTE IRON WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 381. Argued October 14, 15, 1914.—Decided January 5, 1915.

The decision of state tribunals in regard thereto is an important element to be considered in determining the interest which the State has in a fund administered by a state board.

The state courts of Oklahoma having held that the statute creating the State Banking Board intended to give the State a definite title to the Depositors' Guaranty Fund, the fact that the fund is to be used to satisfy claims of beneficiaries does not take its administration from the officers of the State or subject them to judicial control. This court will not assume that the fund will not be faithfully managed and applied. *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151.

A suit by a depositor in a bank in Oklahoma against members of the State Banking Board and the Bank Commissioner of Oklahoma to compel payments from, distribution of, and assessments for, the Depositors' Guaranty Fund, is a suit against the State, and, under the Eleventh Amendment, cannot be maintained in the Federal court.

THE facts, which involve the application of the Eleventh Amendment to suits brought in the Federal courts against the members of the State Banking Board of Oklahoma to compel payments from, and distribution of, the Depositors' Guaranty Fund of that State, are stated in the opinion.

Mr. Charles West, Attorney General of the State of Oklahoma, for appellants:

The action is against the State of Oklahoma. Defendants are sued in their official capacity. The relief sought is such as could only be granted against them as officials of the State. They have no personal interest in the litiga-

tion. Were they not officers of the State they could not in any way comply with the decree rendered. The bill seeks payment of the plaintiff's claim out of the Depositors' Guaranty Fund or if the cash available be insufficient to issue Depositors' Guaranty Fund Warrants in payment of same.

The Supreme Court of Oklahoma held, that the Depositors' Guaranty Fund is a fund of the State, and that the State had a first lien on the failed bank's assets to discharge whatever the State should advance for it. *State* v. *Cockrell*, 27 Oklahoma, 630; *Lankford* v. *Oklahoma Engraving Co.*, 130 Pac. Rep. 278.

The object of the law is to serve public not private rights. Whether or not the Oklahoma Act served a private or a public purpose was the basis of the decision of this court in *Noble State Bank* v. *Haskell*, 219 U. S. 104; *S. C.*, 219 U. S. 575.

The essence of the law is not to establish a private right but to conserve public welfare; and, as such, no justiciable rights in the depositors are to be presumed to arise; the law was not primarily enacted to return to the depositor his money, but more properly to prevent the public injury by bank panics. Nowhere is there language used showing an intent to give to a depositor the right to sue. See § 1, ch. 22, Sess. Laws, 1913; § 6, ch. 22, Sess. Laws, 1913.

With the exercise of a high executive discretion, the courts will not interfere. *Decatur* v. *Paulding*, 14 Pet. 497.

An action to compel state officers to pay a claim from a state fund in their charge, which they, in the exercise of an executive discretion, refused to pay, is an action against the State. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123; *Smith* v. *Reeves*, 178 U. S. 436.

An action to compel payment by the Treasurer of the State of a sum unlawfully collected as taxes is one to compel the State to pay out money from its funds and

therefore one against the State. See *Re Ayers*, 123 U. S. 443; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick Ry.*, 109 U. S. 446.

Murray v. *Wilson Distilling Co.*, 213 U. S. 150, is conclusive of the issue here. The State has placed the management of a state fund in the hands of a board of state officers; and, as in that case, the purpose of the fund is to pay certain claimants; the State has selected that board, and no other tribunal to determine what claims shall be paid. The courts have no jurisdiction.

The case is not one in which it is sought to move the officer through the State but on the contrary the State is sought to be moved through its officers. Of this, the court has no jurisdiction, as it is in violation of the Eleventh Amendment.

The action is for mandamus, not ancillary to a prior judgment. *Farmers Nat. Bank* v. *Jones*, 105 Fed. Rep. 459. Not being ancillary to any judgment previously obtained, the Federal District Court had no jurisdiction thereof. *Covington &c. Bridge Co.* v. *Hager*, 203 U. S. 109; *Knapp* v. *Lake Shore Ry.*, 197 U. S. 540; *Fuller* v. *Aylesworth*, 75 Fed. Rep. 694. See also *Jabine* v. *Oats*, 115 Fed. Rep. 861; *Wiemer* v. *Louisville Water Co.*, 130 Fed. Rep. 246; *Large* v. *Consul*, 137 Fed. Rep. 168; *Pensacola* v. *Lehman*, 57 Fed. Rep. 324; *Denton* v. *Barber*, 79 Fed. Rep. 189; *Burnham* v. *Fields*, 157 Fed. Rep. 248; *Gares* v. *Northwest Bldg. Assn.*, 55 Fed. Rep. 210; *Indiana* v. *Lake Erie &c. Ry.*, 85 Fed. Rep. 3.

This rule applies to district courts as well as circuit courts. *In re Forsyth*, 78 Fed. Rep. 301.

The petition sets forth no cause of action.

Mr. Charles A. Loomis and *Mr. Allen McReynolds*, with whom *Mr. Howard Gray* and *Mr. John W. Halliburton*, were on the brief, for appellee:

A proceeding to obtain a judgment against officials in a representative capacity, payable out of a specific fund in their charge and control, is a proceeding to obtain a judgment for money not otherwise secured, within the meaning of the Federal Judiciary Act and confers jurisdiction upon the United States court. And this is true although it may be necessary to resort to mandamus to enforce collection of the judgment when obtained. *Jordan* v. *Cass Co.*, 3 Dill. 185; *Cass Co.* v. *Johnston*, 95 U. S. 360; *Davenport* v. *Dodge Co.*, 105 U. S. 237; and see also *Aylesworth* v. *Gratiott*, 43 Fed. Rep. 340; *S. C.*, aff'd, 159 U. S. 40; *Fuller* v. *Aylesworth*, 75 Fed. Rep. 694; *Heidekoper* v. *Hadley*, 177 Fed. Rep. 1.

This is not a suit against the State. An action against a state officer to compel him to perform duties prescribed by law, is not an action against the State. An officer who refuses to obey the law does not stand for the State, within the meaning of the Federal Constitution.

A sovereign State must be presumed to be willing that its laws shall be obeyed. Through its laws it speaks to its servants, and commands them to do something. This suit therefore, instead of being against the State, is against its servants to compel the performance of duties, which by their acceptance of the office, they obligated themselves to perform. *Heidekoper* v. *Hadley*, 177 Fed. Rep. 1; *Lankford* v. *Oklahoma Engraving Co.*, 130 Pac. Rep. 278; *State* v. *Cockrell*, 27 Oklahoma, 630; *Ralston* v. *Missouri Fund*, 120 U. S. 390; *Graham* v. *Folsom*, 200 U. S. 248; *Taylor* v. *Louisville &c. R. Co.*, 88 Fed. Rep. 350; *Smith* v. *Ames*, 169 U. S. 518; *Ex Parte Young*, 209 U. S. 123.

The fact that the complainant may have a remedy in an original proceeding in mandamus in the state court for the cause of action alleged, will not deprive the complainant of the right to sue in equity in the Federal court. *Smith* v. *Ames*, 169 U. S. 518.

The Oklahoma depositors' guaranty fund is not a part

of the general state funds and is not under the control of, and cannot be used by, the executive or legislative branches of the state government for general state purposes, or for any purpose whatever. The fund is in the possession and control of the State Banking Board, and can be used solely for the purpose of paying depositors of failed banks. *Danby* v. *State Treasurer*, 39 Vermont, 92; Sess. Laws, Oklahoma, 1911, ch. 31, § 6; *Id.*, 1913, ch. 22, § 6.

Depositors in failed banks have a justiciable right to enforce payment out of the depositors' guaranty fund. *Danby* v. *State Treasurer*, 39 Vermont, 92.

This is not a suit on a certificate of deposit, as a negotiable instrument, but is a suit for money actually deposited. The fact that a certificate of deposit was accepted as evidence of the deposit, will not deprive the depositor of the right to be paid out of the depositors' guaranty fund.

The holder of a time certificate of deposit is a "depositor" within the meaning of the State Bank Guaranty Law of Oklahoma. Tiffany on Banks, 75; *Williams* v. *Rogers*, 77 Kentucky, 776; *Wilkes & Co.* v. *Arthur*, 74 S. E. Rep. 361; *Lamar* v. *Taylor*, 80 S. E. Rep. 1085.

The Federal courts have an independent jurisdiction in the administration of the state laws in cases between citizens of different States, coördinate with and not subordinate to that of the state courts and are bound to exercise their own judgment as to the meaning and effect of those laws.

As the object in giving the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute an independent tribunal which would not be supposed to be affected by local prejudice or sectional views it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

Burgess v. *Seligman*, 107 U. S. 20, 30; *Bucher* v. *Cheshire R. Co.*, 125 U. S. 555; *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Stanley Co.* v. *Coler*, 190 U. S. 437; *Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349, 360; *Oats* v. *First National Bank*, 100 U. S. 239; *Pana* v. *Bowler*, 107 U. S. 529.

In respect to the doctrine of commercial law and general jurisprudence the courts of the United States will exercise their own independent judgment. In respect to such judgment they will not be controlled by decisions based upon local statutes or local usage, although if the question is balanced with doubt, the United States court, for the sake of harmony, "will lean to an agreement of views with the state courts." *Swift* v. *Tyson*, 16 Pet. 1, 19; *Presidio Co.* v. *Noel-Young Co.*, 212 U. S. 58; *Burgess* v. *Seligman*, 107 U. S. 20, 30.

When the law of a State has not been settled it is not only the right but the duty of the Federal court to exercise its own judgment in construing state statutes, as it also always does when the case before it depends on the doctrine of commercial law and general jurisprudence. *Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349, 360; *Swift* v. *Tyson*, 16 Pet. 1, 19.

This action is not an action against the State. The defendants cannot seek shelter behind the State for the abuse of their discretion in office. See § 55, Art. 5, Const. of Oklahoma, the purpose of which is to control the method in which public money or state funds should be disbursed. The word "appropriation" has a definite and certain meaning in law and is generally defined as the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money and no more, for that object and no other. *State* v. *Moore*, 50 Nebraska, 88; *Ristine* v. *State*, 20 Indiana, 328; *Clayton* v. *Barry*, 27 Arkansas, 129; *Stratton* v. *Greene*, 45 California, 149; *State* v. *LaGrave*, 23 Nebraska, 25; *State*

v. *Wallichs*, 12 Nebraska, 407; *Proll* v. *Dun*, 80 California, 220.

As applied to the general fund in the treasury of a State, "appropriation" is defined to be an authority from the legislature, given at the proper time and in legal form to the proper officer, to supply sums of money, out of that which may be in the treasury in a given year, for specific objects or demands against the State. *State* v. *Lindsley*, 3 Washington, 125; *State* v. *King*, 67 S. W. Rep. 812; *Ristine* v. *State*, 20 Indiana, 328; *Shatteck* v. *Kincaid*, 31 Oregon, 379.

Nothing in *Noble State Bank* v. *Haskell*, 219 U. S. 104, warrants the conclusion that the guarantee fund is one of the State. See § 7919.

Administrative or ministerial officers with duties prescribed by law for their performance may be compelled to perform those duties by those who may be directly interested in their performance. *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Rolston* v. *Missouri*, 120 U. S. 390; *Graham* v. *Folsom*, 200 U. S. 248; *Taylor* v. *Louis. & Nash. R. R.*, 88 Fed. Rep. 350; *Madison* v. *Smith*, 83 Indiana, 502; *Huidekoper* v. *Hadley*, 177 U. S. 1; *State Board* v. *People*, 191 Illinois, 528; *State* v. *Bourne*, 151 Mo. App. 104; *State* v. *Adcock*, 206 Missouri, 556.

The money in the guarantee fund is not subject to appropriation by the legislature for any purpose it may see fit. On the contrary it is collected from a special source for a limited purpose. The credit of the State is not loaned, simply the credit of this fund. *Ipso facto* it follows that this is not a suit against the State.

Under our system of laws there is no wrong without a remedy, and yet to deprive the appellee in this case of its money and deny it judicial relief with the barren statement that this action could not be maintained because against the State would certainly work a wrong, and no less certainly find appellee without a remedy.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit in equity brought by appellee against appellants, constituting the Oklahoma State Banking Board. The Platte Iron Works Company, appellee, is a Maine corporation and a citizen of that State and became the holder of two certain time certificates of deposit issued by the Farmers' & Merchants' Bank of Sapulpa. Appellants are members of the State Banking Board, and the appellant J. D. Lankford is the State Bank Commissioner.

On September 10, 1912, the Bank Commissioner took charge of the Farmers' & Merchants' Bank and of all its assets and proceeded to wind up its affairs. Demand for the payment of the certificates was made upon the Banking Board and the Commissioner out of the Depositors' Guaranty Fund of the State, but payment was refused.

A decree was prayed adjudging appellee owner of the deposits and certificates of deposit and that it was entitled to have the same paid out of the Depositors' Guaranty Fund created under and by virtue of the laws of the State. If there should be not sufficient funds available therefor, that the Banking Board be required to issue to appellee certificates of indebtedness for the amount of the deposit, to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma" bearing 6% interest as provided by § 3, Article 2, Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature, and that the Banking Board be required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of Oklahoma for the purpose of increasing such Depositors' Guaranty Fund and pay the deposits and the "Depositors' Guaranty Fund Warrants of the State of Oklahoma." General relief was also prayed.

Defendants in the suit, appellants here, moved to dismiss the bill on the ground that the court had no jurisdiction of the action or of the persons of the defendants, the suit being one against the State of Oklahoma without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.

The motion was denied and defendants were given thirty days to answer. No answer appears in the record but the decree recites that one was filed. The court entered a decree as prayed for in the bill and this appeal was then prosecuted.

The assignments of error in this court are: (1) The suit is an original action in mandamus and the District Court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained; (2) the suit is one against the State, "the defendants [appellants] having no personal interest therein and being sued in their official capacity as agents" of the State; (3) the amended bill upon its face states no cause of action for relief.

Is the suit one against the State? The appellee earnestly contends that the answer should be in the negative. "An action," counsel say, "against a State officer to compel him to perform duties prescribed by law is not an action against the State. An officer who refuses to obey the laws does not stand for the State, within the meaning of the Federal Constitution."

These contentions depend upon the meaning of the law; they assume its commands are disobeyed by the officers of the State; in other words, that the default of the officers is personal, in opposition—not in conformity—to the law of the State. But another and seemingly broader contention is made. It is asserted that the Depositors' Guaranty Fund is not under the executive and legislative control of the State and cannot be used by either for any purpose whatever, but "can be used solely for the purpose of paying depositors of failed banks." Two questions,

therefore, are presented, one of power and one of interpretation.

This court, in *Noble State Bank* v. *Haskell*, 219 U. S. 104, sustained the constitutionality of the act as an exercise of the police power of the State. The law in its general purpose was there presented and passed on. The relation of the State to the fund did not come up for consideration, but necessarily this is but a detail in administration not one affecting legality of the law. The creation of the fund was said to be justified by its purpose, and the power of the State was declared adequate to accomplish it. "The purpose of the fund," it was said, "is shown by its name. It is to secure the full repayment of deposits."

Where the State should vest the title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the State should commit it to the mere ministerial administration of the Bank Commissioner and Banking Board and subject them to controversies with depositors or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the State done?

By the statute, the Banking Board is composed of the Bank Commissioner and three other persons, to be appointed by the Governor; and it is provided that the "Board shall have supervision and control of the Depositors' Guaranty Fund, and shall have power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund." The fund is created by levying "against the capital stock of each and every bank organized and existing under the laws" of the "State an annual assessment equal to one-fifth of one per cent., and no more, of its average daily deposits during its continuance as a banking corporation," the fund to be "used solely for the pur-

pose of liquidating deposits of failed banks and retiring warrants provided for" in the act. If at any time the fund be insufficient for such purpose or to pay "other indebtedness properly chargeable against the same, the Banking Board shall have authority to issue certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' in order to liquidate the deposits" or such other indebtedness. It is provided that the depositors shall be paid in full, and when the cash available or that can be made immediately available is not sufficient to discharge the obligations of the bank or trust company "the Banking Board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in § 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

The contention of appellee is that the law has created a fund for the payment of depositors and directs that they shall be paid in full from the fund or "from additional assessments." If the fund be insufficient for such purpose, it is further contended, the Board is required to issue guaranty fund warrants in order to liquidate the deposits. Such, it is insisted, are the plain commands of the statute to which obedience is imposed and is necessary to fulfill the purpose of the law, which is to secure the full repayment to depositors. And, therefore, a suit by depositors is not a suit against the State but a suit to compel submission by the officers of the State to the laws of the State, accomplishing at once the policy of the law and its specific purpose.

There is strength in the contentions and we are not insensible to it, but there may be more complexity in fulfilling the scheme of the statute than the language of counsel exhibits and it may be embarrassed if not defeated by subjecting the Banking Board to incessant judicial inquiries of its administration. We certainly cannot assume that it will not do its duty and provide the ultimate payment of all depositors. To this result the State makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors, and against other persons, which may be enforced by the State for the benefit of the fund which its law has created.

In *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, there is analogy to the case at bar. The State of South Carolina in the year 1892 assumed the exclusive management of all traffic in liquor. It subsequently abandoned the scheme and passed an act called "the State Dispensary act" to provide for the disposition of all property of the instrumentality it had created and to wind up its affairs. A commission was appointed for that purpose. A part of the duties of the commission was to dispose of the property, collect all debts due and pay "from the proceeds thereof all just liabilities at the earliest date practicable." Any surplus was to be paid to the State Treasury. A duty, therefore, was imposed upon the commission to collect the assets of the dispensary and pay its debts and it was as directly expressed as was the duty imposed upon the Banking Board in the pending case.

The Wilson Distilling Company contended that the Winding-up Act of the State created a trust, and the funds in the hands of the commission were a trust fund held for the benefit of the creditors of the State dispensary and the suit a plain suit in equity brought by a *cestui que trust* to compel a trustee holding property for his benefit

to perform the duties imposed upon him. The suit, therefore, it was contended, was not to require the commissioners to do that which the law of the State forbade, but to do what the law of the State commanded, and the State was not a necessary nor an indispensable party. The contentions received the approval of the Circuit Court of Appeals, but this court took a different view of them and decided that there was "no just ground for the conclusion that the State, in providing by that legislation for the liquidation of the affairs of the State dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the State as to authorize a judicial tribunal to take the assets of the State out of the hands of those selected to manage the same, and by means of a receiver to administer such assets as property affected by a trust, irrevocable in its nature, and thus to dispose of the same without the presence of the State." (213 U. S., p. 170.) The case, it is true, has some differences from that at bar. There the State was the owner of the property committed to the commissioners for disposition and was also the original debtor. Here the property is that of the contributing banks and is accumulated in a fund for the security of their respective depositors. These are differences, but there are substantial resemblances. In that case officers were appointed to administer the property and liquidate and pay the demands against it, and this was the specific direction of the law, marking the beneficiaries and apparently making them the exclusive parties in any proceedings to enforce the law. In this case officers are appointed having even a greater power. They are not only empowered to liquidate the deposits or other indebtedness of failed banks, but to levy assessments on other banks to make up any deficiency. Therefore, as the

State was said to be a necessary party in the cited case, the State can be said to be a necessary party in the pending case because of its interest that the fund which it has caused to be created in pursuance of its policy shall be administered by the officers it has appointed rather than by judicial tribunals. Certainly this construction can be given to the Oklahoma statute; and, granting that it may admit of dispute, an important element to be considered is the decision of the state tribunals.

In *State* v. *Cockrell*, 112 Pac. Rep. 1000, the Supreme Court of Oklahoma had occasion to define the duties of State Examiner and Inspector. It decided that the office was constituted by the constitution of the State and was independent of the control of the Governor, and passing upon the authority of the Examiner and Inspector over the accounts of the Bank Commissioner it decided that "the funds and assets" of an insolvent bank are "under the management of the State" and "that the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the State as the common school fund."

It was further decided that the act creating the fund was sustained as an exercise of the police power for the public welfare of the people of the State and, having been so exercised, the assessment levied by it upon deposits for the purpose of protecting the depositors of the banks is the exertion of the same power "which levies or causes to be levied, a tax upon the property within the State for the maintenance and support of the common schools and educational institutions." And it was said, "The title of such depositors' guaranty fund vests in the State just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the State for

a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the State."

From this decision it appears that the law intended to give to the State as definite a title to the Depositors' Guaranty Fund as to the common school fund, as definite, therefore, as the title of South Carolina to the assets of the State dispensary, which was the subject of decision in *Murray* v. *Wilson Distilling Company*. In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund having this ultimate destination does not take its administration from the officers of the State or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied.

In *Lovett et al., County Commissioners of Creek County*, v. *Lankford et al.*, composing the Banking Board of the State of Oklahoma, 145 Pac. Rep. 767, the Supreme Court of Oklahoma decided, citing the *Cockrell Case*, that the defendants in error in the case composing the Banking Board were "executive officers of the State, and in performing their duties in administering the law under consideration (the Guaranty Fund Act), do so as such officers, and the property entrusted to their control and management by the law is property owned by the State, or property in which the State has an interest," and that therefore a suit against them to compel their administration of the depositors' guaranty fund "is, in fact, a suit against the State; and in the absence of the consent of the State, the same cannot be maintained." The court further said that "the law has specifically confided to the Banking Board and the Bank Commissioner the duty and authority to determine the validity of claims against the depositors'

guaranty fund," and, also that "it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund. *Lankford* v. *Oklahoma Engraving and Printing Co.*, 35 Oklahoma, 404." Any other view, the court in effect said, would not only substitute the judgment of a court for that of the officials, "but would harass and create confusion, the effect of which would destroy the efficiency of such board." That case and *Columbia Bank and Trust Company* v. *United States Fidelity and Guaranty Company*, 33 Oklahoma, 535, give special emphasis to the principle announced. Both were suits to recover deposits respectively of county and state moneys deposited as general or special deposits.

It will serve no purpose to review the cases cited by appellee in which state officers were enjoined from doing unlawful acts, prescribed, it may be, by unconstitutional laws, or commanded by valid laws to perform specific duties. Examples of such cases are reviewed and distinguished in *Murray* v. *Wilson*, and there is a later example in *Hopkins* v. *Clemson College*, 221 U. S. 636.

The foundation of appellees' argument is, as we have said, that the Oklahoma statute imposed the duty upon the Bank Commissioner of paying depositors of insolvent banks and that "this suit, therefore, instead of being against the State, is against its servants to compel the performance of duties, which, by their acceptance of the office, they obligated themselves to perform." A duty being prescribed, it is further contended, the officers "cannot seek shelter behind the State for the abuse of their discretion in office." But these contentions and the arguments based upon them all depend upon an incorrect version of the statute, as we have seen.

Decree reversed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER and MR. JUSTICE LAMAR, dissenting.

The question upon which we are divided is whether this action, brought by a depositor in an insolvent state bank of Oklahoma, asserting the right to compel payment of his deposit by the State Banking Board out of the Depositors' Guaranty Fund, or, if this be insufficient, then by the issuance of a certificate of indebtedness of the kind known as Depositors' Guaranty Fund Warrants, is in effect a suit against the State, and therefore within the inhibition of the Eleventh Amendment to the Federal Constitution, or whether it is merely an action against state officers to compel the performance of duties of a non-political nature clearly prescribed by a statute of the State, so that the officers in refusing to obey that law do not represent the State. I agree that the question depends upon the true intent and meaning of the law, and that in determining it we are to assume that the commands of the law are disobeyed by the defendants-appellants; so much, indeed, having been adjudged, upon their confession, in the present case.

There is, I think, no controlling decision.

Murray v. *Wilson Distilling Co.*, 213 U. S. 151, seems plainly distinguishable. That case dealt with transactions in which the State of South Carolina had a direct property interest and a direct responsibility as a contracting party; and it was upon this ground that the court held the action brought against the agents of the State was in effect a suit against the State. This will appear by a reference to the opinion, pp. 168, 170, etc. It will be my endeavor to show that, under the Oklahoma statute, there is no such interest or responsibility on the part of the State.

We are referred to certain cases in the state court of last resort, one of which, and a very recent one, bears

directly upon the question; and it is frankly conceded that proper deference should be paid to them. At the same time, it is not to be forgotten that this action was brought in the District Court of the United States because of the diverse citizenship of the parties,—a ground of jurisdiction especially provided for in the Constitution (Art. III, § 2). And, however desirable it may be to preserve harmony of decision between the Federal and the state courts, we cannot, with due regard to our duty, fail to exercise an independent judgment respecting the true intent and meaning of the statute, in the absence of an authoritative adjudication to the contrary *previous to the time that the cause of action arose.* For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion. *Burgess* v. *Seligman*, 107 U. S. 20, 33, 34; *East Alabama Ry.* v. *Doe*, 114 U. S. 340, 353; *Gibson* v. *Lyon*, 115 U. S. 439, 446; *Anderson* v. *Santa Anna*, 116 U. S. 356, 362; *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 372; *Folsom* v. *Ninety-six*, 159 U. S. 611, 625; *Stanly County* v. *Coler*, 190 U. S. 437, 444; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 357, 360.

The statute in question is the so-called Bank Depositors' Guaranty Fund Act of Oklahoma, first enacted December 17, 1907, and several times amended, but not in essential respects. The portions pertinent to the discussion, as they stood upon the statute-book when the present cause of action arose (in the year 1912) are set forth in the margin, followed by an amendment adopted in 1913, shortly before the action was commenced.[1]

[1] Extracts from Bank Depositors' Guaranty Fund Act, as found in Revised Laws of Oklahoma, 1910 (Harris and Day), §§ 298, *et seq.*, and in subsequent Session Laws.

Section 3 (299 and 300, as amended by Laws 1911, p. 54), "There is hereby levied an assessment against the capital stock of each and every

It seems to me clear that, by the language and evident meaning of this law, the State has no property interest in the guaranty fund. No part of it is raised through general taxation, nor can any part of it be lawfully placed in the treasury of the State, or devoted to any of the

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bank and trust company organized or existing under the laws of this State, for the purpose of creating a Depositors' Guaranty Fund, equal to 5 per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessment shall be payable one-fifth during the first year of existence of said bank or trust company, and one-twentieth during each year thereafter until the total amount of said 5 per centum assessment shall have been fully paid. . . . After the 5 per centum assessment, hereby levied, shall have been fully paid, no additional assessment shall be levied or collected against the capital stock of any bank or trust company, except emergency assessments, hereinafter provided for, to pay the depositors of failed banks, and except assessments that may be necessary by reason of increased deposits to maintain such funds at 5 per centum of the aggregate of all deposits in such banks and trust companies, doing business under the laws of this State. . . .

"Whenever the depositors' fund shall become impaired or be reduced below said 5 per centum by reason of payments to depositors of failed banks, the State Banking Board shall have the power and it shall be its duty to levy emergency assessments against capital stock of each bank and trust company doing business in this State to restore said impairment or reduction, but the aggregate of such emergency assessments shall not, in any one calendar year, exceed 2 per centum of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks having valid claims against said Depositors' Guaranty Fund, the State Banking Board shall issue and deliver to each depositor, having such unpaid deposit, a certificate of indebtedness for his unpaid deposit, bearing 6 per centum interest. Such certificate shall be consecutively numbered, and shall be payable, upon the call of the State Banking Board, in like manner as state warrants are paid by the state treasurer in the order of their issue, out of the emergency levy thereafter made; and the State Banking Board shall from year to year levy emergency assessments, as hereinbefore provided, against the capital stock of all the banking corporations and trust companies doing business in this State, until such certificates of indebted-

ordinary purposes of the government, or to any purpose other than the payment of depositors. The State, it is true, through the Banking Commissioner, holds the bare legal title to the fund, and enforces in the name of the

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ness, with the accrued interest thereon, shall have been fully paid. As rapidly as the assets of failed banks are liquidated and realized upon by the bank commissioner, the same shall be applied first, after the payment of the expenses of liquidation, to the repayment of the Depositors' Guaranty Fund of all money paid out of said fund to the depositors of such failed bank, and shall be applied by the State Banking Board toward refunding any emergency assessment levied by reason of the failure of such liquidated bank. Provided, that the guaranty fund collected under this act, shall be re-deposited with the banks from which it was paid and a special certificate, or certificates, of deposit shall be issued to the bank commissioner by each and every bank and trust company, bearing 4 per centum interest per annum."

By § 5 (302) in the event of the insolvency of any bank, the bank commissioner "may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

Section 6 (303) "In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

Section 8 (305) "The bank commissioner shall deliver to each bank or trust company that has complied with the provisions of this chapter a certificate stating that said bank or trust company has complied with the laws of this State for the protection of bank depositors, and that safety to its depositors is guaranteed by the depositors' guaranty fund of the State of Oklahoma. Such certificate shall be conspicuously dis-

State the liabilities of the failed banks, but this is done for the sole benefit of the fund. Thus the State has title only, but without real ownership. Not even is the credit of the State pledged for the success of the scheme, for while § 8 permits banks to display an official certificate of compliance with the law, the certificate declares that safety to the depositors is guaranteed not by the State but by the depositors' guaranty fund, and it is made a misdemeanor for any bank officer to advertise the deposits as guaranteed by the State. It would, I think, be difficult to find language more clearly showing that the State is

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played in its place of business, and said bank or trust company may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the depositors' guaranty fund of the State of Oklahoma: Provided, however, that no bank shall be permitted to advertise its deposits as guaranteed by the State of Oklahoma; and any bank or bank officers or employés who shall advertise their deposits as guaranteed by the State of Oklahoma shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail for thirty days or by both such fine and imprisonment."

By act of March 6, 1913 (Sess. Laws, ch. 22, pp. 27–29), the third section was amended so as to provide for the issuance of certificates of indebtedness to be known as "Depositor's Guaranty Fund Warrants of the State of Oklahoma" in order to liquidate the deposits of failed banks or other indebtedness properly chargeable against the fund; the warrants to bear six per cent. interest, and to constitute a charge and first lien upon the depositors' guaranty fund when collected, as well as a first lien against the capital stock, surplus, and undivided profits of every bank operating under the banking laws of the State to the extent of its liability to the fund; and that "All warrants heretofore issued by the Banking Board shall be paid serially in the order of their issuance from any funds on hand when this act takes effect or provided for by the terms of this act, and all warrants hereafter issued shall be in numerical order and retired in like order. As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the proceeds thereof, after deducting the expenses of liquidation, shall be paid to the State Banking Board, and by said board credited to the Depositors' Guaranty Fund."

neither interested in the fund nor responsible to the depositors with respect to it. And when we read these and the other provisions of the act in the light of the state constitution, the matter becomes still more plain. For, by the constitution, Article 5, § 55, "No money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law, . . . and every such law . . . shall distinctly specify the sum appropriated and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum." It cannot, I think, be reasonably contended that the guaranty fund was intended to be a state fund, or a fund under the management of the State, within the meaning of the constitution. To so hold would render the Act violative of the section quoted, since its provisions are plainly inconsistent with the slow and formal process of legislative appropriations. Again, by Article 10, § 15, of the state constitution, "The credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association . . .; nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association, or corporation." These constitutional limitations explain, I think, why in the framing of the Act the legislature was so careful to dissociate the State in its organized capacity from all participation in the scheme or responsibility for its success. The Act contemplates that the cash constituting the fund is to be in the physical custody of the banks themselves, until actually needed; for by § 3, as amended in 1911, it was provided that the fund should be redeposited with the banks from which it was paid, and a special certificate or certificates of deposit issued to the bank commissioner by each bank, bearing four per centum interest per annum; and by the 1913 amendment the

annual assessments for that and succeeding years are to be paid by cashier's checks, to be held by the Banking Board until in its judgment it is necessary to collect them, but the checks are not to bear interest during the time they are so held. In short, the Act, as I read it, simply establishes a plan for enforced coöperative insurance by all the banks in favor of the depositors of each and every bank, the Bank Commissioner and the Banking Board being charged with the management of it as public trustees, with duties owing to a limited class of persons having financial and not political interests.

The promise held out to bank depositors is clear and unequivocal. By §§ 5 and 6, in the event of the insolvency of any bank, the bank commissioner may take possession of its assets, and in this event "*the depositors of said bank or trust company shall be paid in full*, and when the cash available or that can be made *immediately available* of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make up the deficiency." And by § 3 (300), if the amount realized from emergency assessments shall be insufficient to pay off the depositors, "The state banking board *shall issue and deliver to each depositor, having such unpaid deposit, a certificate of indebtedness for his unpaid deposit, bearing 6 per centum interest;*" these certificates to be consecutively numbered *and to be paid in the order of their issue* out of future emergency assessments which the Banking Board is required to levy annually until the certificates of indebtedness with accrued interest shall have been fully paid. By the 1913 amendment, the certificates of indebtedness are designated as "Depositors' Guaranty Fund Warrants," and are to constitute a charge upon the guaranty fund when collected as well as a lien against the capital stock, surplus, and

undivided profits of every bank to the extent of its liability to the fund.

The entire scheme is carefully devised to give assurance to every bank and to every bank depositor not merely of ultimate payment of the amount of the deposits, but of immediate payment in cash or in certificates salable for cash, in case the bank becomes insolvent. A winding up of the bank's affairs, with a liquidation of its assets and enforcement of the liabilities of stockholders, officers and directors, is provided for, and the proceeds are to be devoted to restoring the guaranty fund and repaying to the solvent banks the amount of the emergency assessments; but the depositors are not to await the outcome of the process. A main purpose of the Act, as I read it, is to relieve them not merely from the hazard of ultimate loss, but from the hardships normally incident to the delays of winding-up proceedings, and for which, as everybody knows, an ultimate allowance of interest is very often an inadequate compensation.

The law was intended, as I think, to render the rights of depositors so clear as to be readily understood by all, and free from cavil or question in any quarter. It constitutes a clear and unequivocal tender of a benefit to every person who might contemplate becoming a depositor of a state bank in Oklahoma. Under § 8 every bank is permitted to advertise that its depositors are protected by the Depositors' Guaranty Fund. Every would-be depositor is thus directly referred to the terms of the law, and on reading it may learn that in the event of insolvency "the depositors of said bank or trust company shall be paid in full," etc.

It was said upon the argument that this promise, however unequivocal, is a "political" promise, and therefore not enforceable by suit. If it is a promise of the State of Oklahoma it of course is a "political" promise; otherwise not. But does not § 8 show most plainly that it is not

at all a promise of the State, and is enforceable out of and only out of a fund kept upon deposit in the banks themselves and controlled by trustees whose salaries are, indeed, paid from the public treasury, but who are charged with no political function, and whose duties are owing solely to the banks and to depositors and others interested in the banks?

The failure of the statute to make any express provision for an action against the Banking Board at the suit of a depositor can hardly be deemed significant. This is taken care of in the Constitution, which declares (Art. 2, § 6): "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation."

That the fund is established for a public purpose through the exercise of the police power of the State does not, I submit, make the fund itself public property. It is closely analogous, I think, to the surplus of a mutual insurance company. The argument that the fund is public will hardly bear analysis. In one of the briefs it is expressed as follows: "The essence of the law, therefore, is not to establish a private right, but to serve public welfare; and as such no justiciable rights in the depositors are presumed to arise; the law was not primarily enacted to return to the depositor his money, but more properly to prevent the public injury by bank panics. Nowhere is there language used showing an intent to give to a depositor the right to sue." But, since bank panics are caused by the fear on the part of depositors that their money—that is, their ability to withdraw the money or otherwise realize upon their deposits—is in jeopardy, the argument pretty clearly defeats itself.

Not only has the State no part in the raising of the guaranty fund nor property in it, nor interest or responsibility in the distribution of it, nor even the remotest

reversionary right should the scheme prove a failure, but the Act contains no expression of a purpose that the public trustees are to be clothed with that immunity from private suit which is one of the prerogatives of sovereignty. There is nothing to suggest any participation by the State in the transaction, except that § 6 declares that "The State shall have for the benefit of the Depositors' Guaranty Fund a first lien upon the assets of said bank," etc., and that "such liabilities may be enforced by the State for the benefit of the Depositors' Guaranty Fund." But does not this plainly show that the State is to be a merely nominal party, and that the fund alone is the real beneficiary? It seems to me the language naturally imports the familiar action brought in the name of one but for the sole use of another; an action in which the nominal plaintiff at the same time avows that he has no interest in the proceeds. I cannot find in § 6, or elsewhere, anything to suggest that the State is to be an active agent in the matter, otherwise than as the Bank Commissioner and Banking Board act therein.

It is argued that the Board is endowed with discretionary powers in respect to the administration of the fund. I concede that the Act implies a considerable latitude of administrative discretion with respect to the care and management of the fund; but it is quite different with the provision for the payment of depositors. Here the plain mandate is: "Pay in cash, so far as you have it, and give certificates of indebtedness or warrants to the extent that the cash falls short." The argument in behalf of appellants goes to the length of saying: "It (the fund) may be used not only to pay the depositors of failed banks, but frequently to aid banks while in a failing condition. All of the fund which may be available at a particular time might, in the judgment of the Banking Board, be better used to aid disabled banks than to be

applied to the immediate payment of depositors of a particular bank which had already been taken into the custody of the Bank Commissioner. In this way the available funds might be withdrawn by the Banking Board, in the exercise of its discretion, from the payment of a failed bank," etc. As showing the results to which the argument for discretionary powers with respect to paying depositors logically leads, this is illuminating; but if anything is clear in the letter and spirit of this enactment, it is that the legislature by no means intended that the fund or any part of it should be subject to use in supporting banks while in a failing condition, or in any other form of hazardous enterprise.

And it would seem plain enough that an interest on the part of the State or a discretion on the part of the Banking Board ought not to be read into the Act by construction, when the result is, not to make the promised guaranty more clear or more readily enforceable by the depositors, but, on the contrary, to render it unenforceable except with the consent of the State, and therefore materially less valuable to the depositors than otherwise it would be.

It is submitted that for the proper interpretation of the statute—or, for its construction if construction be needed—we should observe the fundamental rules that apply to contracts; for while there is disagreement upon the question whether the State is a party to it, we all agree that the Act prescribes a contract, and one of wide importance, between the banks and the depositors, and that the public interest is as much concerned in seeing it carried out and enforced according to its true intent and meaning as in requiring that the contract be made. Not only has the State obliged the banks to make this contract with their depositors, but in the law it has expressed the terms in which it shall be made. The courts, therefore, ought by all means to adopt an interpretation such as reasonably

would have been placed and presumably was placed upon the statute by ordinary bankers and bank depositors in advance of judicial interpretation; reading it according to the fair import of its terms, without resort to legal subtlety in order to overthrow or weaken it, but seeking rather to uphold it and give it effect, "*Ut res magis valeat quam pereat*"; and if construction be needed, adopting that meaning which the promisor had reason to believe the promisee relied upon in accepting the offer. 2 Kent Com. *557; *The Binghamton Bridge*, 3 Wall. 51, 74; *Ewing* v. *Howard*, 7 Wall. 499, 506; *Empire Rubber Mfg. Co.* v. *Morris*, 73 N. J. Law, 602, 610; *Gunnison* v. *Bancroft*, 11 Vermont, 490; *Jordon* v. *Dyer*, 34 Vermont, 104, 80 Am. Dec. 668; *Barlow* v. *Scott*, 24 N. Y. 40, 42; *Tallcot* v. *Arnold*, 61 N. Y. 616; *White* v. *Hoyt*, 73 N. Y. 505; *Chamberlain* v. *Painesville & Hudson R. R.*, 15 Oh. St. 225, 246; *County of Clinton* v. *Ramsey*, 20 Ill. App. 577, 579.

I cannot resist the conviction that this legislation was intended to convey and did convey to the banks and to intending depositors the understanding that the deposits were to be secured by the Fund and not by the State, that in the event of the insolvency of any bank its depositors were to be paid in full, without delay and without "ifs" or "ans," out of the cash in the Fund, or at worst by delivery of interest-bearing certificates of indebtedness capable of being sold for cash and payable in consecutive order as issued, and that the duty imposed upon the Banking Board to thus pay off the depositors without regard to the ultimate outcome of the liquidation of the particular bank would be enforceable, if need be, by process out of the courts of justice. It savors of repudiation to read into the scheme an unexpressed condition that renders the promise unenforceable by any means within the command of the promisee.

Let us now examine the state decisions in their order.

State ex rel. Taylor v. *Cockrell* (1910), 27 Oklahoma, 630; 112 Pac. Rep. 1000. This was an action for a writ of mandamus instituted upon the relation of the "State Examiner and Inspector" (a constitutional officer with large powers, in the performance of which he is independent of the Chief Executive), to require the state bank commissioner to permit relator to examine the records and accounts pertaining to the collection and disbursement of the depositors' guaranty fund and the assets of failed or insolvent banks. Relator invoked a statute which declared: "The Examiner and Inspector shall examine the books and accounts of state officers whose duty it is to collect or disburse funds of the State, or (under) its management at least once each year." As the court said (27 Oklahoma, 632), the sole question involved was whether relator was authorized under the law to examine these records. The court's response was succinctly expressed,—"That the Bank Commissioner is a state officer has not been and cannot be questioned. That the depositors' guaranty fund, and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the State as the common school fund is also true. . . . The title of such depositors' guaranty fund vests in the State just as much so as the common school lands, or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the State for a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the State." I cannot see that this amounts to the placing of a construction upon the statute in any respect pertinent to the question now before us. The decision was in effect that the depositors' guaranty fund was under the management of the State through the bank commissioner, a state officer, and that, therefore,

the accounts of the latter were subject to examination by the Examiner and Inspector by the terms of the statute that defined his duties. Treating it as a decision that the *title* of the fund is in the State, within the meaning of that statute, this is very far from holding that the *real ownership* of the fund is in the State, so as to clothe the managers of the fund with immunity from suit in a controversy raised by one of the stated beneficiaries. The decision rather puts the Bank Commissioner in a subordinate position than in one that entitles him to participate in the sovereign's immunity from responsibility to action in the courts of justice.

Columbia Bank & Trust Co. v. *United States Fidelity & Guaranty Co.* (1912), 33 Oklahoma, 535; 126 Pac. Rep. 556. The bank commissioner applied to a state court for orders in connection with the administration of the affairs of an insolvent bank of which he was in possession, and prayed that the creditors and depositors be granted all relief to which they might be entitled. The Fidelity & Guaranty Company filed its petition in intervention, alleging that it had signed, as surety for the bank, a bond to the State of Oklahoma for the sum of $50,000 to protect the State against loss by reason of a deposit in the bank of certain funds in possession of the commissioners of the land office; and that the bank commissioner since taking charge of the assets of the bank had acted under the direction and control of the State Banking Board, and had paid the claims of other depositors in full without in any way protecting the deposit for which the intervening petitioner was surety. The trial court rendered a decree directing the bank commissioner to treat the amount due the commissioners of the land office as a deposit and pay over to said depositors their *pro rata* share of the assets. The Supreme Court, upon a review of other legislation (Comp. Laws, 1909, § 7943) relating to the custody and investment of the permanent school

funds of the State in the hands of the commissioners of the land office, which provided (*inter alia*) that they might be deposited in bank upon security being given, held that such a deposit of the State's money was not within the purview of § 3 of the Guaranty Fund Law, and hence that the surety was not entitled to relief. In the course of reaching this conclusion the court held (p. 540) that the surety, having responded to the invitation implied in relator's prayer for relief in behalf of creditors and depositors, was entitled to "maintain its petition of intervention, and have its rights, if it has any, in relation to the bank guaranty fund, determined without having previously paid the penalty of its bond." There was no intimation that the Bank Commissioner was clothed with immunity from action, or endowed with any discretion that rendered it inappropriate that he should be sued.

Lankford, Com'r, v. *Oklahoma Eng. & Ptg. Co.* (1913), 35 Oklahoma, 404; 130 Pac. Rep. 278. The court simply held that a "merchandise creditor" of a defunct bank was not entitled to share *pro rata* with the depositors in the distribution of the assets.

It will be observed that both of the two latter cases were decided upon the merits of the intervenor's claims; upon grounds inconsistent, indeed, with the immunity from suit that is now asserted.

The last-mentioned decision was subsequent to the time when the rights of the present plaintiff accrued; the cases in 27 and 33 Oklahoma were decided before that time.

Another case, decided not only after the cause of action accrued but *after this court acquired jurisdiction* by the taking of the appeal, is *Lovett et al., Commissioners,* v. *Lankford* (September 29, 1914, 145 Pac. Rep. 767). Here the Supreme Court of Oklahoma has distinctly held that a petition for mandamus brought by a depositor against the State Banking Board to require payment of the de-

posit is in effect a suit against the State, and that the Board is a part of the executive branch of the government charged with the exercise of judgment and discretion in the administration of the law, so that their acts cannot be controlled by mandamus. This, of course, is directly in favor of the contention of the present appellants. Ought it to control our decision? What are the grounds upon which the state court proceeded? (a) Citing the language of the Act that gives to the State a first lien upon the assets of the Bank, and invoking the authority of *State ex rel. Taylor* v. *Cockrell*, 27 Oklahoma, 630, 633 (*supra*), the court holds that a judgment in favor of the depositor "would directly affect the State, and would, in effect, be a judgment against the State, and would require the subjection of state funds to satisfy said judgment." This treats the word "title" as equivalent to "ownership." I have endeavored to show that this is inconsistent with the language and purpose of the Act, and that state ownership renders the Act, in its other and essential provisions, inconsistent with the limitations found in the state constitution. (b) The court cites *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151. For reasons already indicated, it seems to me this case is clearly distinguishable. (c) It is said that the failure of the legislature to make specific provision for review in the courts of the action of the Banking Board concerning claims against the guaranty fund tends to prove a legislative purpose to give exclusive jurisdiction to the Board. As already shown, it would be a work of supererogation for the legislature to specifically provide for an action in the courts; for, if the statute confers a right upon the depositor, art. 2, § 6 of the state constitution provides a remedy. And I find nothing in the Act that expressly or by reasonable implication confers any judicial jurisdiction upon the Board. Exclusive jurisdiction in that body seems plainly inconsistent with the same constitu-

tional provision. (d) After quoting from the 1st section of the Act, which gives to the banking board supervision and control of the fund, with power to adopt necessary rules and regulations, not inconsistent with law, for its management and administration, and after quoting the other pertinent sections that are set forth in the marginal note, *supra*, the court cites *Lankford* v. *Oklahoma Engraving & Printing Co.*, 35 Oklahoma, 404, *supra*, as authority for holding that under § 6 (303) it is the duty of the Banking Board and the Bank Commissioner to determine the validity of claims against the fund, and that: "By this section, it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund." I am unable to find any provision of this kind in the statute; and the case cited, far from holding that these questions are confided to the decision of the Board or the Commissioner, is directly to the point that such questions are properly to be decided by the courts; and to the same effect is the case from 33 Oklahoma, cited above.

For these reasons, it is submitted that the decision just referred to ought not to be followed by this court in the present case. Laying that on one side, and adopting that view of the statute above indicated as being in accord with its letter and spirit, there appears to be no legal or constitutional obstacle in the way of affirming the present decree.

For, if the action is not nominally or in effect a suit against the State, is not brought to enforce any liability or duty of the State or interfere with its property, but has for its object merely to require public officers to perform a plain official duty, not of a political nature, owing to a special class of persons among whom the plaintiff is included, it is not properly to be deemed a suit against the State within the prohibition of the Eleventh Amend-

ment. We are referred by appellant's counsel to *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443; *N. Y. Guaranty Co.* v. *Steele*, 134 U. S. 230; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Smith* v. *Reeves*, 178 U. S. 436; and similar cases. But there is a broad distinction, uniformly recognized by this court, which, as it seems to me, takes the present action out of the prohibition of the Eleventh Amendment. It was well expressed in *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541, where the court, by Mr. Justice Bradley, said: "The objections to proceeding against state officers by mandamus or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." In the *Jumel Case*, 107 U. S. at p. 727, Mr. Chief Justice Waite said: "The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty." In the *Cunningham Case*, 109 U. S. at p. 452, Mr. Justice Miller, in describing

the class of cases in which public officers may be sued, said: "A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process." In *Rolston* v. *Missouri Fund Commrs.*, 120 U. S. 390, 411, Mr. Chief Justice Waite said: "It is next contended that this suit cannot be maintained because it is in its effect a suit against the State, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana* v. *Jumel*, 107 U. S. 711, is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the State. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied; but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the trustees must do in order to fulfill the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for." In *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 390, where it was objected that the suit was in effect a suit against the State of Texas, the court, by Mr. Justice Brewer, said: "There

is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered."

Finally, this is an equitable action brought to establish and enforce a trust in favor of plaintiff, with only an incidental prayer for a mandatory decree. It is not an original proceeding by mandamus, of which the Federal courts have no jurisdiction. *Bath County* v. *Amy*, 13 Wall. 244; *Jordan* v. *Cass County*, 3 Dill. 185; Fed. Cas. No. 7517; *County of Cass* v. *Johnston*, 95 U. S. 360, 370; *County of Greene* v. *Daniel*, 102 U. S. 187, 195; *Davenport* v. *County of Dodge*, 105 U. S. 237, 242.

It seems to me that the decree should be affirmed.

AMERICAN WATER SOFTENER COMPANY *v.* LANKFORD AND OTHERS, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 418. Argued October 14, 15, 1914.—Decided January 5, 1915.

Decided on authority of *Lankford* v. *Platte Iron Works*, *ante*, p. 461.

THE facts are stated in the opinion.

Mr. C. Wilfred Conard, with whom *Mr. L. J. Roach* was on the brief, for appellant.

Mr. Charles West, Attorney General of the State of Oklahoma, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appellant, on June 8, 1912, deposited with the Farmers' and Merchants' Bank of Sapulpa the sum of $3,337.50. The bank issued to appellant a certificate of deposit for the sum in the usual form.

The bank, which, it is alleged, was entitled to the benefits of the Oklahoma bank guaranty law, subsequently failed and was closed and taken possession of by appellees, composing the State Banking Board. The certificate of deposit was presented to the Banking Board and payment demanded out of the Depositors' Guaranty Fund or, if that fund should be insufficient, that there be issued to appellant a certificate of deposit. Both demands were refused and this suit was instituted to enjoin compliance with one or the other of the demands.

Motion was made by appellees to dismiss the bill on the ground that the court had no jurisdiction of the subject-matter of the action or of the persons of the defendants (appellees), the suit being one against the State of Oklahoma without its consent in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.

The motion was granted on the authority of the court's opinion in *Farish* v. *State Banking Board.*

This appeal was then prosecuted.

The questions in this case are the same as those discussed and decided this day in *Lankford, et al., Composing the State Banking Board*, v. *Platte Iron Works Company*,

ante, p. 461, and on the authority of that case the decree in this is

Affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE LAMAR, dissenting.

For reasons expressed in the dissenting opinion in *Lankford* v. *Platte Iron Works Company*, this day decided, *ante*, p. 461, I am unable to concur in the opinion and judgment of the court in this case.

FARISH *v.* STATE BANKING BOARD OF THE STATE OF OKLAHOMA.

STATE BANKING BOARD OF THE STATE OF OKLAHOMA *v.* FARISH.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

Nos. 446, 447. Argued October 14, 15, 1914.—Decided January 5, 1915.

Lankford v. *Platte Iron Works*, *ante*, p. 461, followed to the effect that under the Eleventh Amendment the State Banking Board and Bank Commissioner of Oklahoma are not subject to suit by depositors of insolvent banks.

Although one may become subrogated to all the rights of a depositor in an insolvent bank in Oklahoma, that does not give him the right of suit against the state officers administering the Depositors' Guaranty Fund.

As the statute creating the State Banking Board of Oklahoma does not give the Board power to waive the State's exemption from suit, an

appearance on behalf of the members of the Board does not amount to such a waiver. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, distinguished.

Quære, where the court has entered a decree establishing rights between the individual parties but dismissing the suit as against the state officers on the ground that it was one against the State, whether those officers by employing counsel to resist complainant's recovery are not bound by the decree to the extent of the rights adjudicated.

THE facts, which involve the claims of depositors in certain Oklahoma banks and the application of the Eleventh Amendment to suits in the Federal court to compel the members of the State Banking Board of Oklahoma to make payments from and distribute the Depositors' Guaranty Fund, and also the question of whether the State consented to be sued, are stated in the opinion.

Mr. Amos L. Beaty for Farish:

The Banking Board does not represent the State of Oklahoma in true governmental capacity and therefore is not within the exemption from suit contained in the Eleventh Amendment.

But even if the Banking Board did represent the State it could not successfully claim here an exemption from suit since it owes the appellant a specific statutory duty.

Moreover, by participation in the former suit and interference with the process of the court the Banking Board waived any exemption from suit which otherwise it might have claimed.

The fact that the statute fails to classify the Banking Board as a body corporate, or to provide that it may be sued, is no impediment in this proceeding; and it is also immaterial that the legislature has changed the composition of the Board and its plan of assessment.

In equity appellant was not only a depositor of the

Oklahoma Trust Company but, funds belonging to him in that amount and other amounts having been used to pay depositors, he became subrogated and is entitled to be treated as though he held assignments from the various depositors who were thus paid; hence the Banking Board should be required to pay him the amount deposited and also such portion of the other funds as may not be realized from the impounded securities or on the decree against the bank, together with legal interest.

Mr. Joseph L. Hull and *Mr. Walter A. Ledbetter*, with whom *Mr. Harry L. Stuart* and *Mr. Robert R. Bell* were on the brief, for the State Banking Board.

The Oklahoma Supreme Court has established the rule that the depositors' guaranty fund created under banking laws of that State by the compulsory assessment of state banks is not liable for any debt except that of the ordinary depositor; that that fund is created not for the benefit of the general creditors of the state bank, nor for any persons to whom the bank might become liable by reason of the torts of its officers, nor upon any obligation whatever except that arising from the ordinary relation which is created when one of its customers deposits his money in the bank. See *Columbia Trust Co.* v. *United States Guaranty Co.*, 33 Oklahoma, 535; *Lankford* v. *Oklahoma Engraving Co.*, 35 Oklahoma, 404; *Lovett* v. *Lankford* (Oklahoma), 145 Pac. Rep. 767.

The depositors' guaranty fund being one of the public funds of the State, created for the taxing power and administered by the public officers of the State, enjoys the same exemption from judicial control as any other public fund which is subject to legislative control. *Lovett* v. *Lankford* (Oklahoma), 145 Pac. Rep. 767, and cases cited in opinion.

In the course of the administration of the depositors' guaranty fund many conflicts of opinion and jurisdiction

would necessarily occur if the courts should assume the authority to participate in the administration of this fund. Under the statutes, control of this fund by the Banking Board is practically complete. It may be used not only to pay the depositors of failed banks but frequently to aid banks while in a failing condition.

If the courts could control the Banking Board there would be an unseemly conflict of jurisdiction between the judicial and the Executive Departments. This is true if the state courts alone should assume jurisdiction to interfere in the administration of the depositors' guaranty fund. More intense and complicated conflicts would arise, of course, if the Federal courts should assume the jurisdiction to administer on any part of the depositors' guaranty fund.

The only safe rule to observe is that the administration of this fund, which under the decision of the Supreme Court of Oklahoma has been held to be one of the public funds of the State, should be left exclusively to the officers composing the Banking Department of the State.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit in equity brought by appellant against the State Banking Board and the Bank Commissioner of the State of Oklahoma, the Oklahoma Trust Company, the Alamo State Bank, the McNerney Company, corporations, and one P. J. McNerney. Later the Union State Bank, another corporation, was made a defendant. The object of the suit was to compel the Banking Board to pay appellant, as an equitable depositor of the Oklahoma Trust Company, a failed banking institution, the sum of $25,351.63. Another object was subrogation to and the establishment and enforcement of liens in the amount of $61,252.40 upon certain funds and impounded securities,

with a decree against the Banking Board for any final deficiency or unpaid balances.

The Banking Board demurred to the bill on the ground, stated with much circumstance, (1) that the suit was in effect against the State of Oklahoma; and (2) for want of equity. The demurrer was overruled. The Banking Board and the Union State Bank filed answers admitting some of the allegations of the bill and denying others, to which there were replications. A decree *pro confesso* was taken against the other defendants which was subsequently made final.

On final hearing the court decreed subrogation and established and foreclosed a lien on certain of the securities in controversy and rendered a money decree against the Union State Bank for $18,018.58.

The court reversed its ruling on demurrer of the Banking Board, holding that "because it is the opinion of the court that said State Banking Board represents the State and is not suable on such account, said complainant shall take nothing as against said Banking Board, and in that behalf the latter shall go hence without day."

Farish then prayed for an order allowing appeal from that part of the decree which denied him relief against the State Banking Board on the ground that it was one in effect against the State and that the question of the jurisdiction of the court be certified to this court. The appeal was allowed and the certificate made.

The Union State Bank and the State Banking Board also prayed an appeal from that part of the decree which adjudged that judgment be rendered against the Union State Bank for the sum of $18,018.58 with interest, being the amount of a certain deposit alleged to have been transferred from the Alamo State Bank to it, and that the State Banking Board and the State Bank Commissioner did not have a first and prior lien as against complainant for the reimbursement of the amount of money

taken by the Board and Commissioner from the Depositors' Guaranty Fund to pay off and discharge the deposits of the Alamo State Bank and the Oklahoma Trust Company and a first lien on the same account and for the same purpose on certain other securities.

There was an order of severance and the case is here on these appeals and the certificate of jurisdiction made by the District Court.

The pleadings are very long and set forth the grounds of suit with circumstantial detail. A repetition of them is not necessary. The appellant's case depends upon two propositions: (1) Whether he was an equitable depositor of the Oklahoma Trust Company. (2) This established, whether the Banking Board is subject to be sued by him.

His rights have their origin in an assignment to him by a corporation called the Texas Company.

The Texas Company furnished material to the contractors for certain paving work in the city of Muskogee, Oklahoma, for which bonds were issued and upon which, by agreement between the parties and the Oklahoma Trust Company, the Texas Company was given a first lien. Bonds to the amount of $154,035.92 were issued and delivered to the Oklahoma Trust Company and disposed of by it or carried as a deposit to the credit of itself as trustee and of which there remained to its credit as trustee on January 3, 1910, the sum of $25,351.63. It paid to the Texas Company only $27,906.57 of the proceeds of the sale of the bonds. The balance of the sum was used by the Oklahoma Trust Company in various ways which are detailed at length in the bill of complaint and traced to the possession of the Alamo State Bank and through that bank to the Banking Board, the Banking Board having taken possession under the banking laws of the State of the Alamo State Bank upon its becoming insolvent. The Alamo State Bank obtained the assets

of the Oklahoma Trust Company through a sale by the latter company to it on January 3, 1910. Composing these assets was the sum of $25,357.63, carried as a deposit by the Oklahoma Trust Company, and other sums, being credit balances of the Oklahoma Trust Company in other banks, cash paid to the Alamo State Bank and used by it to pay the indebtedness of the Oklahoma Trust Company or its depositors.

The assets of the Alamo State Bank were sold to the Union State Bank by the Banking Board acting under the authority of an order of the District Court of Muskogee County. The Union State Bank assumed in consideration thereof the payment of the depositors of the Alamo State Bank.

On December 18, 1909, the complainant herein brought suit against the Oklahoma Trust Company and others to establish his right to the paving bonds or their proceeds. The suit was numbered 1239. A receiver was appointed who was directed to demand and receive from the Oklahoma Trust Company the proceeds of the paving bonds and from all persons who might have them. The receiver duly qualified. On August 6, 1910, subsequent to the sale by the Oklahoma Trust Company of its assets to the Alamo State Bank, the complainant filed a motion against the latter bank for the purpose of obtaining an order for contempt and peremptorily requiring it to immediately pay and turn over to the receiver the proceeds of the bonds received by it.

The Banking Board subsequently appointed counsel to appear in that suit for the purpose of defeating the recovery by the complainant. In that suit all of the defenses herein pleaded were set up. The Union State Bank also appeared in that suit and aided in its defense. The final decree in that case adjudged, among other things, that the complainant became entitled to the proceeds of the paving bonds and the Oklahoma Trust Com-

pany was ordered forthwith to deliver their proceeds to him.

The Oklahoma Trust Company and the Alamo State Bank were banking institutions under the laws of the State and subject to the banking laws and paid in accordance with such laws assessments to the Banking Board, including certain emergency assessments for the purpose of creating and maintaining a depositors' guaranty fund as provided by law. And it is alleged that the depositors of the Oklahoma Trust Company, except complainant, were paid or caused to be paid by the Alamo State Bank and that this was accomplished by the use of the proceeds of the paving bonds obtained by the Alamo State Bank. That the latter bank received not less than $65,000 of the proceeds of the bonds as a part of the consideration of the assumption of the payment of the depositors of the Oklahoma Trust Company: "that the State, and, through it, said depositors, had a lien on all of the assets of said Oklahoma Trust Company to secure the payment of said depositors; and that, to the extent that the proceeds of said paving bonds were so used, your orator is subrogated to said lien, and, moreover, since said depositors were entitled to resort to the depositors' guaranty fund in the hands of said State Banking Board, and this was averted by said use of the proceeds of said paving bonds, a trust fund to which your orator was entitled, he is subrogated to that extent to the rights of said depositors against said guaranty fund, as it exists and shall exist, and against said State Banking Board."

The facts of the case are set out in the opinion of the court and need not be further stated, and the grounds of decision and the relief granted are expressed in the decree hereinafter set out.

The case of complainant is, indeed, sufficiently though generally stated in a letter which his counsel addressed to the Banking Board. It is as follows:

"Dallas, Texas, July 26, 1910.

"State Banking Board, Guthrie, Oklahoma.

"State Banking Board, Oklahoma City, Oklahoma.

"Gentlemen: Under contracts of January 5, and June 14, 1909, and transfer of December 9, 1909, my client, W. S. Farish, had a lien for more than $180,000 on certain paving bonds issued to P. J. McNerney and The McNerney Company, of Muskogee, and on the proceeds of such paving bonds, when sold. In the latter part of the year a considerable amount of such bonds were turned over to the Oklahoma Trust Company, which was engaged in the banking business at Muskogee, with its depositors guaranteed under your state law, and that company afterwards sold these bonds and used the proceeds in paying its depositors. The amount thus used, and to which my client was entitled, was $88,002.31.

"Of the amount stated, $63,117.85, or about that amount was thus misapplied in defiance of an injunction of the United States Circuit Court for the Eastern District of Oklahoma made in cause Eq. No. 1239, *W. S. Farish* v. *P. J. McNerney et al.*, pending at Muskogee, by which injunction the Oklahoma Trust Company was restrained from commingling or confusing the proceeds of said paving bonds with other funds, and was peremptorily required to keep the same separate and apart.

"My client contends that when the trust fund was wrongfully taken and applied to the payment of depositors, who were guaranteed under the State law, he, Farish, became subrogated to the rights of such depositors, and is entitled to resort to the depositors' guaranty fund, and to have you make such assessments as may be necessary to replenish said fund, if it is depleted or from any cause is inadequate to meet this demand.

"If you desire further particulars of the claim, I shall be glad to furnish them, but hardly consider it necessary

at this time, as, if I am correctly informed, you already have full knowledge of the matter.

"Please consider this as a formal demand for payment, and let me have your decision as soon as possible.

"Yours very truly,

(Signed) "A. L. Beatty,

"Attorney for W. S. Farish."

No particularization of the allegations of the answer of the Banking Board is necessary except to say in explanation of its attitude that it admitted that the Bank Commissioner took possession on the twenty-fifth of August, 1910, of the Alamo State Bank and of its property and assets and sold and transferred them to the Union State Bank in pursuance of an order of sale of the District Court of Muskogee County, State of Oklahoma. The sale, it is alleged, was in pursuance of an agreement whereby the bank assumed and agreed to pay the deposits owing by the Alamo State Bank amounting to the sum of $450,000, and the Bank Commissioner and the Banking Board agreed to guarantee the solvency of the assets of the Alamo State Bank to the extent and for a sufficient amount to pay all of the deposits assumed by the Union State Bank and to protect it against loss. On August 25, 1910, in pursuance of the agreement the Banking Board advanced to the Union State Bank the sum of $50,000 and has since from time to time advanced to the bank the additional sum of $150,000. These payments were made in the course of the liquidation of the assets of the Alamo State Bank and in discharge of the obligations assumed by it to pay the deposits of the Oklahoma Trust Company.

It is further alleged that under the law the State of Oklahoma, for the benefit of the Depositors' Guaranty Fund, has a first lien on the assets of the Oklahoma Trust Company and the Alamo State Bank for the reimbursement of the sum to the Union State Bank in the payment

of the deposits assumed by it. That the lien of the State is superior to any lien claimed by complainant under and by virtue of the assignments of the paving bonds under the contract set forth in the first paragraph of the bill, and the Banking Board has a right under the law to enforce the lien of the State against the assets transferred to the Alamo State Bank by the Oklahoma Trust Company and by the former to the Union State Bank.

The answer of the Union State Bank repeated the allegations of the Banking Board in regard to the transfer to it of the assets of the Alamo State Bank and alleged that its purchase of them was in good faith, for a valuable consideration and without notice of any claim or lien of complainant or his assignor, the Texas Company, and the bank became the owner thereof free from any such claim or lien.

Upon the issues thus formed and upon the proofs presented, the court decreed: (1)—(2) That to secure complainant in the payment of a portion, to-wit, the sums of $16,530.98 and $20,000, with interest thereon at the rate of 6% per annum on the first sum from April 18, 1910, and on the second sum from January 22, 1910, of a certain decree for money rendered by the court in equity cause No. 1239 on September 5, 1911, and costs, complainant, W. S. Farish, has a lien, which is hereby foreclosed against each and all of the defendants, upon those certain notes mentioned in paragraphs IX and X of the original bill of complaint in the cause, and on the proceeds of such of the notes as have been collected. The notes are described. (3) That complainant recover from the Union State Bank the sum of $18,018.58, with interest at 6% per annum from August 25, 1911, the net amount, when paid, to apply as a credit on the decree in equity cause No. 1239. (4) That if the last mentioned amount be not paid within ten days, execution shall issue therefor, and if the defendants, including the Banking Board and the Bank Commissioner

or his successor, fail to pay the amounts adjudged against the securities, then the securities, or such of them as remain unpaid, shall be sold to satisfy the amounts so adjudged against them. A special master was appointed to make the sale. (5) The complainant "was a depositor of the defendant, Oklahoma Trust Company, within the meaning of the laws of the State of Oklahoma governing the guaranteed payment of bank deposits, to the extent of $25,357.63, on the third day of January, 1910, but because it is the opinion of the court that the State Banking Board represents the State, and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day." (6) "That the decree *pro confesso* heretofore entered against the defendants, Oklahoma Trust Company, Alamo State Bank, The McNerney Company, and P. J. McNerney, is hereby made final, and, as to said defendants, the complainant is adjudged fully subrogated to the rights of depositors of said Oklahoma Trust Company, not only to the amount of the aforesaid sum of $25,357.63, but also as to any deficiency that may remain after he shall have collected the amount in this decree awarded against said Union State Bank and such amounts as may be realized on the securities mentioned in the first and second paragraphs hereof, which is to say, it is hereby adjudged that in addition to said $25,357.63, funds amounting to $61,252.40, on which the complainant had a lien, and to which he was entitled, were, on the third day of January, 1910, wrongfully used by said Oklahoma Trust Company and said Alamo State Bank, at the instance, request and demand of the Bank Commissioner representing said State Banking Board, to accomplish the payment of depositors of said Oklahoma Trust Company, and therefore the complainant is fully subrogated to all rights of such depositors; but, because it is the opinion of the court that said State Banking Board represents

the State and is not suable on such account, said complainant shall take nothing as against said banking board, and in that behalf the latter shall go hence without day."

It is contended by appellant in No. 446 that "the Banking Board does not represent the State of Oklahoma in any true governmental capacity and therefore is not within the exemption from suit contained in the Eleventh Amendment."

It is further contended, "But even if the Banking Board did represent the State it could not successfully claim here an exemption from suit since it owes the appellant a specific statutory duty."

These contentions are the same as those made in *Lankford, Com'r*, v. *Platte Iron Works Company, ante*, p. 461, and *American Water Softener Company* v. *Lankford, ante*, p. 496, and are disposed of by the decisions in those cases. It was there held that the Banking Board and Bank Commissioner were not subject to suit by depositors of insolvent banks. Therefore, as a depositor, subrogated or direct, of the Oklahoma Trust Company, Farish has no right of suit against the Banking Board.

It will be observed from the decree of the court two sums, to-wit, $16,530.98 and $20,000, with interest on each, were, in accordance with the judgment rendered "in equity cause No. 1239," declared a lien on certain securities, the lien foreclosed and the securities ordered to be sold.

The court also rendered a judgment against the Union State Bank for the sum of $18,018.58, above mentioned as coming under the decree in cause No. 1239, and which when paid with the interest thereon was to be applied as a credit on that decree. In other words such sum was decreed as part of a fund which the court said in its opinion "equitably belonged to the complainant," Farish. Of this part of the decree appellant makes no complaint.

The court further decreed (5) that "complainant [appellant] was a depositor of the Oklahoma Trust Company, within the meaning of the laws of the State of Oklahoma, governing the guaranteed payment of bank deposits to the extent of $25,357.63, on the 3d day of January, 1910." And (6) "that in addition to said $25,357.63, funds amounting to $61,252.40 on which complainant had a lien and to which he was entitled, were on the 3d day of January, 1910, [the day when the Alamo State Bank acquired the assets of the Oklahoma Trust Company] wrongfully used by said Oklahoma Trust Company and said Alamo State Bank, at the instance, request and demand of the Bank Commissioner representing said Banking Board to accomplish the payment of depositors of said Oklahoma Trust Company, and therefore the complainant is fully subrogated to all rights of such depositors. . . ." Relief was not granted against the Banking Board because, as the decree declared, of the immunity of the Board from suit.

Based on the decree the contention of appellant is that he was not only a depositor to the extent of the $25,357.63 but also to the extent of the sum of $61,252.40, it having been used to pay depositors, and he thereby became subrogated to the rights of depositors and "entitled to be treated as though holding assignments from the various depositors who were thus paid," and hence the Banking Board should be required to pay him the first sum and also so much of the second sum as may not be realized from the impounded securities or on the decree against the Union State Bank, and "if necessary"—we quote from the prayer of his bill—"to make assessments for the payment of any balance of his debt."

The contention of appellant is, therefore, that he has become a depositor of the Oklahoma Trust Company by subrogation, his money having been used to pay the depositors of that company; and the court so decreed, carefully distinguishing the rights of complainant against

what the court called "impounded collaterals" and the sum of $18,018.58 which the Union State Bank had received, and his right, to use the language of the court, "as a depositor, either directly or by subrogation." It may be admitted, therefore, that he has the rights of a depositor, but the right of suit against the Banking Board is not one of them. See *Lankford, Com'r,* v. *Platte Iron Works Company* and *American Water Softener Company* v. *Lankford, supra.*

It is further contended by appellant that "by participation in the former suit [cause 1239] and interference with the process of the court the Banking Board waived any exemption from suit which otherwise it might have claimed." *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273, 292, is cited in support of the contention. The case is not apposite. The case was, it is true, ancillary to another, but in it the Attorney General of the State appeared, being directly authorized so to do by statute, and "defend said action for and on behalf of the State." The State, therefore, consented to be sued. The Oklahoma laws do not give the State Banking Board such power. Besides, the judgment in the former suit was that appellant was a depositor of the Oklahoma Trust Company, a right which was confirmed in the decree in the present case. In making this comment we assume but do not decide that the Board by employing counsel to resist the complainant's recovery in cause No. 1239 became bound by its decree.

And we see no reason for disturbing the decree in other particulars, that is, in No. 447. Indeed, there are no briefs filed in the latter case.

Decree affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE LAMAR, dissenting.

In No. 446,—the appeal of Farish, the depositor—for reasons expressed in the dissenting opinion in *Lankford* v. *Platte Iron Works Company*, this day decided, *ante*, p. 461, it seems to me that the decree here under review should be reversed.

In No. 447,—the cross-appeal—I concur in the result reached by the court.

UNITED STATES *v.* ERIE RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 552. Argued December 14, 1914.—Decided January 5, 1915.

Quære, whether § 184, Penal Code, prohibiting the carriage of letters or packets otherwise than in the mail by carriers on post routes, except under certain specified conditions, is penal or remedial, or whether it is to have a liberal or strict construction.

Letters of officers of the carrier, a railroad company, to officers of the telegraph company with which it has a contract and in whose business it participates, relating to immediate and day by day action, is current, as distinguished from exceptional, business and falls within the permitted exceptions of § 184, Penal Code.

THE facts, which involve the construction of § 184 of the Penal Code of the United States, prohibiting, except under specified conditions, the carriage of letters and packets otherwise than in the mails, are stated in the opinion.

Mr. Assistant Attorney General Wallace, with whom *The Solicitor General* was on the brief, for the United States:

Section 184 is a revenue statute and should be liberally

construed. *United States* v. *Bromley*, 12 How. 88; *Johnson* v. *Railway*, 196 U. S. 17; *United States* v. *36 Bbls. Wine*, 7 Blatch. 463; 4 Ops. A. G. 161.

The letters carried were not related to current business of the railroad. In fact neither letter related to the railroad company's business.

The agreement throughout distinguishes between the railroad and the telegraph company's business. *West. Un. Tel. Co.* v. *Penna. Co.*, 129 Fed. Rep. 867; 21 Ops. A. G. 400.

Section 184 is not essentially penal in its nature, but is rather remedial, its main purpose being to preserve the revenues of the United States, and the great establishment which has been built up under the statutes of the United States for the benefit of the whole people. *United States* v. *Bromley*, 12 How. 88.

A statute passed for the purpose of protecting the revenues of the United States is not to be strictly construed, even where it provides a severe penalty. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *United States* v. *36 Barrels of Wines*, 7 Blatch. 459, 463; 4 Ops. Att'y Gen'l, 159, 161, 162.

Construing § 184 fairly, these letters did not relate "to current business" of the defendant.

From 1825 on Congress has endeavored to protect the governmental monopoly in the carriage of the mails by prohibiting entirely such carriage by private expresses and prohibiting it generally to private parties except in the cases where the letters related to the articles being conveyed at the same time.

Every word of the statute must be given some meaning; "current" was added as a word of limitation.

Neither of the letters set out in the indictment related to such business. Even if they related to the railroad company's business at all they evidently did not relate to its passing, present business.

Mr. Rush Taggart for defendant in error:

Both of the letters in question relate to the "current business" of the Erie Railroad Company and there was no violation of Penal Laws, § 184. See § 5263, Rev. Stat.; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *United States* v. *Un. Pac. Ry.*, 160 U. S. 1; *West. Un. Tel. Co.* v. *Penna. R. R.*, 195 U. S. 540.

Penal Laws, § 184, has not yet received judicial construction. It is practically a reënactment of § 3985, Rev. Stat., in force for a great many years before the codification of the penal laws, which was construed by Attorney General Harmon as intended only to prohibit the transportation of communications between third parties, and that it did not prohibit the transportation of communications, whatever their substance, belonging to the carrier or relating to its business. 21 Ops. Atty. Gen. 394.

As to significance of the word "current" as used in the statute, see *Thomas* v. *Peoria &c. R. R.*, 36 Fed. Rep. 808, 819; *Taylor* v. *Mayo*, 110 U. S. 330.

Mr. Justice McKenna delivered the opinion of the court.

Indictment in two counts against the railroad company for carrying otherwise than in the mails certain letters in violation of § 184 of the Penal Code of the United States. The section is as follows:

"Sec. 184. Whoever, being the owner, driver, conductor, master, or other person having charge of any stagecoach, railway car, steamboat, or conveyance of any kind which regularly performs trips at stated periods on any post route, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried, and which shall carry, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, to the current

business of the carrier, or to some article carried at the same time by the same stagecoach, railway car, or other vehicle, except as otherwise provided by law, shall be fined not more than fifty dollars."

The counts are similar except as to the letter carried. The indictment alleged that the railroad between designated points (Jersey City, N. J., and Montgomery, N. Y.) regularly made trips; that it had made a contract with the Western Union Telegraph Company by which provision was made for a joint operation of telegraph lines over the right of way of the railroad company; that the business was under the supervision of a joint superintendent named E. P. Griffith, and that the telegraph office at Montgomery—both for railroad and commercial business—was in charge of G. A. Osborne, the station agent of the railroad; that on June 27, 1912, the railroad carried otherwise than in the mails the following letter:

"June 27, 1912.

"Mr. G. A. Osborne,

"Agent, Erie Railroad and Manager W. U. T. Co.,

"Montgomery, N. Y.

"Dear Sir: The revenue of the W. U. T. Co.'s receipts at Montgomery, N. Y., would indicate that the new telegraph service, such as day and night letters, had not been thoroughly presented to the people of Montgomery. At many of the Erie Railroad stations similar to Montgomery very handsome increases in telegraph receipts have been shown on account of this new service and as the Erie Railroad participates in the telegraph revenues from its railroad stations it is desired that their revenue from the telegraph company shall increase as well as the revenue from its freight and passenger traffic, and I hope you will do everything to make such showing.

"Yours truly,

"(Sd.) E. P. Griffith,

"Supt. of Telgh."

The letter upon which the second count is based was as follows:

"Mr. G. A. Osborne, "June 27, 1912.

"Agent Erie Railroad Co. and Manager W. U. Tel. Co.,

"Montgomery, Orange County, N. Y.

"Dear Sir: I forwarded to you by train mail on June 20th a copy of the new Western Union Telegraph Company's tariff book, which shows a considerable number of changes in telegraph rates, particularly with respect to the old 40-cent rate having been reduced to 30 cents to a considerable number of points, and I would ask that you familiarize yourself with the new rates in order to avoid check errors. The misquoting of rates creates a large number of error sheets and correspondence, and not only confuses the auditing department of the W. U. Tel. Co., but also delays settlements between the Telegraph Company and the Erie Railroad.

"As you are aware, the Erie Railroad receives a percentage of the W. U. Tel. Co.'s telegraph receipts at all Erie railroad stations, where the agent of the railroad, under contract with the telegraph company, also acts as the agent or manager of the telegraph company, and that the handling of Western Union telegrams, in making up of Western Union reports, from which the railroad company's proportion of receipts are figured, and all of the accounting and correspondence relative to Western Union matters are as much the current business of the railroad as handling accounts or reports made in connection with the freight shipments or sale of tickets for the railroad, the railroad company receiving a revenue from all.

"Your attention is specially called to modification of Rule No. 8 for the instructions to all New York State offices only and to be used instead of Rule 8, printed in the tariff book, printed copy of which I enclose herewith.

"Yours truly,

"(Sd.) E. P. Griffith, "Supt. of Telgh."

The indictment was demurred to by the railroad company on the ground that the matters set forth therein were not sufficient in law to constitute a crime. The demurrer was sustained, the court expressing itself to be "clearly of the opinion that the 'current business of the carrier' referred to in section 184 is the kind of business in which it appears from the indictment the carrier was engaged, and that the sending of the letters in question was in accordance with law."

The opinion of the court exhibits the point in the case, to which, though a short one, considerable argument has been addressed by counsel. The solution of it is in the contract between the companies.

It is a very elaborate document, regulating the relations of the railroad and telegraph companies by a variety of provisions and details. By it the railroad company leased to the telegraph company the right to maintain the telegraph line it (the railroad company) then had, and operate the same and the right to build new lines. One wire was to be provided for railroad use and one for commercial use, though joint wires were to be used where nothing more was required.

Article 6 of the agreement is especially relied on by the railroad company. It provides that at all telegraph offices now or hereafter maintained at the stations of the railroad company it shall, at its own expense, furnish office room, light and heat for telegraph service and also at its own expense provide an operator and other employés, who, acting as agents for the telegraph company, shall receive, transmit and deliver, exclusively for the telegraph company, such commercial and public messages as may be offered and shall charge the telegraph company's tariff rates thereon and shall render to the telegraph company monthly accounts thereof, the railroad company to pay all of such receipts to the telegraph or other employés but not to be responsible

for the failure of its operators to pay over such receipts.

The telegraph company agrees to pay the railroad company as soon as practicable after the close of each month 25% of the cash receipts, at offices in the railroad company's stations or other public buildings, received from commercial or public messages of the telegraph company, with certain exceptions not material to mention, and transmit free telegrams relating to railroad business, the railroad company to carry materials, furnish offices and operators, pay for certain lines, and give exclusive privileges, as far as possible to the telegraph company. The railroad company is given the right to investigate the accounts of the telegraph company so far as they relate to such earnings. Either party may discontinue any of its offices. If the telegraph company removes any of its offices from the railroad company's stations the latter company shall still have the right to continue doing a commercial business in such station, and the telegraph company will provide the usual signs for such business, the railroad company not to solicit business in competition with the telegraph company.

By the twelfth article it is provided that the telegraph lines and wires and the offices and operators in railroad stations shall be under the supervision and control of a competent joint superintendent of telegraph who shall be appointed by the railroad company subject to the approval of the telegraph company and be paid jointly and equally by both companies at a salary to be fixed by both, each company paying one-half thereof. Either company may discharge the joint superintendent, but his successor can only be appointed on the written consent of both parties. By the ninth article it is expressly covenanted and agreed that the joint superintendent and all other persons engaged in the work contemplated by the agreement, by whichever company paid, shall be deemed

to be the servants of the telegraph company except when engaged in the transmission of messages for the railroad company and in certain construction work.

It will be observed that while the companies in many respects are independent they are also, in some respects at least, dependent. The telegraph is a facility of the railroad company and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement and but for the agreement with the telegraph company would have to do. The railroad company has an interest in the receipts of the other company and is concerned in their amount and the maintenance and increase of the telegraph business. The control of the telegraph company's instrumentalities and its offices and operators is in a "competent joint superintendent of telegraph," in whose appointment the railroad company has a voice and whom it also may discharge. It is, however, not possible, and keep this opinion within a reasonable length, to detail the many ways in which the two companies are related, and while it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is "current."

In reaching this conclusion it is not necessary to consider the character of the statute, whether it be penal or remedial, or whether it is to have a strict or a liberal construction. It is one justified by the words of the statute and in view of the facts by its history, and is not precluded by anything that was said at the time the act was amended. As originally enacted and carried into the Revised Statutes (§ 3985) it forbade the carrying, "other-

wise than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, or to some article carried at the same time by the same stage-coach, railway car, or other vehicle."

The section coming before the Attorney General for construction, the opinion was expressed that it only intended to prohibit the transportation of communications between third parties and did not prohibit the transportation of communications, whatever their substance, belonging to the carrier or relating to the carrier's business. 21 Op. Atty. Genl. 394. It is the contention of the Government that when § 184 came to be enacted that construction was narrowed by the use of the word "current," Senator Bacon, who suggested it, in effect so declaring, and urged it as an amendment so that the new section might not relate, as the senator said, to the "financial transactions" of the carriers, "or anything of that kind, but to current business and operations." To this comment counsel for the Government adds the definition of "current" from the dictionaries as "now passing; present in its course; as the current month or year"; and supposes this to be the meaning which was in Senator Bacon's mind and urges the view that "the 'current business' of the carrier, therefore, is that business which is, at any particular time, in the present course of its transactions." But so confined in meaning it is not very clear what enlargement the new section is on the old one. We cannot so confine it. The statute certainly cannot mean that the described business should have no relation to the past and no connection with the future, however near. It may be that there might be a business so completely consummated or so much in speculation that it could not be described as "current," but the letters with which this case is concerned are not of either character. They regard not only immediate but day-by-day action and so

relate to "current," as distinguished from exceptional business.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of the case.

LAWLOR *v.* LOEWE.

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

No. 358. Argued December 10, 11, 1914.—Decided January 5, 1915.

Irrespective of compulsion or even agreement to observe its intimation, the circulation of a "we don't patronize" or "unfair" list manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibition of the Anti-trust Act of July 2, 1890, if it is intended to restrain and does restrain commerce among the States. *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U. S. 600.

This court agrees with the courts below that the action of the unions and associations to which defendants belonged in regard to the use and circulation of "we don't patronize" and "unfair dealer" lists, boycotts, union labels and strikes, amounted to a combination and conspiracy forbidden by the Anti-trust Act of July 2, 1890.

In this case, *held* that the trial court properly instructed the jury to the effect that defendants, members of labor unions who paid their dues and continued to delegate authority to their officers to unlawfully interfere with the interstate commerce of other parties, are jointly liable with such officers for the damages sustained by their acts.

Members of unions and associations are bound to know the constitutions of their societies; and, on the evidence in this case, the jury might well find that the defendants who were members of labor

unions knew how the words of the constitutions of such unions had been construed in the act.

The use in this case of the word "proof" by the trial judge in its popular way for "evidence," *held*, in view of the caution by the judge, not to have prejudiced the defendants.

A verdict for damages resulting from an illegal combination in restraint of interstate trade under the Anti-trust Act of 1890, may include damages accruing after commencement of the suit but as the consequence of acts done before and constituting part of the cause of action declared on.

In this case, introduction of newspapers was not improper to show publicity in places and directions to bring notice home to defendants and to prove intended and detrimental consequences of the acts complained of.

Letters from customers of a boycotted manufacturer, giving the boycott as reason for ceasing to deal with him, *held* admissible in this case.

209 Fed. Rep. 721, affirmed.

THE facts in this case, which is known as the *Danbury Hatters' Case*, involving the validity of a verdict for damages resulting from a combination and conspiracy in restraint of trade under § 7 of the Anti-trust Act, are stated in the opinion.

Mr. Alton B. Parker, with whom *Mr. Frank L. Mulholland* was on the brief, for plaintiffs in error:

The trial court erred in refusing to instruct the jury as to the coercive character of the combination alleged in the complaint, as to the legality of the Hatters' Union label and as to the character of the boycott alleged.

The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes (*Loewe* v. *Lawlor*, 208 U. S. 274) and the requests for instructions to this effect should have been granted.

It was not unlawful to attempt to unionize, that is, establish union conditions in, the plaintiffs' factory, by

means of a strike. It is the absolute right of every workman to exercise his own option in regard to the persons with whom he will agree to work or with whom he will continue to work, and, therefore, union workmen may refuse to continue to work with those who are not members of their union. *Adair* v. *United States*, 208 U. S. 161, and cases cited in margin of page 175; *Allis-Chalmers Co.* v. *Iron Moulders' Union*, 150 Fed. Rep. 155, 172; *National Protective Ass'n* v. *Cumming*, 170 N. Y. 315; *Allen* v. *Flood* (1898), App. Cas. 1.

A strike does not become unlawful because it is the result of orders by the officers of a labor union to which the strikers belong. *Thomas* v. *Cincinnati &c. R. R.*, 62 Fed. 803, 817; *Wabash Ry.* v. *Hannahan*, 121 Fed. 563, 571; *Delaware &c. R. R.* v. *Switchmen's Union*, 158 Fed. Rep. 541, 544; *Aluminum Castings Co.* v. *Local No. 84*, 197 Fed. Rep. 221, 223; *Saulsberry* v. *Coopers' Union*, 147 Kentucky, 170, 174; *Jose* v. *Metallic Roofing Co.* (1908), App. Cas. 514, 518.

The union label of the United Hatters is, in the States where it is registered according to law, a statutory trade-mark, and the officers and agents of the United Hatters have the same right to solicit trade for hats bearing their label as any merchant has to solicit trade for goods bearing his trade-mark; and the plaintiffs cannot recover in this action for damages resulting from the loss or diminution of business due solely to an unusual demand for union-label hats. Laws for the registration and protection of trade-union labels are in force in at least forty-one States and Territories (Spedden on the Trade Union Label, p. 97), and the constitutionality of these statutes has uniformly been upheld. 7 Labbatt's Master and Servant, p. 8656, § 2786; *Perkins* v. *Heert*, 158 N. Y. 306. A voluntary withholding of patronage by members of labor unions and by those who sympathize with organized labor from all goods except those which bear the union

label is not unlawful and is not a boycott, in the legal sense of the term.

Members of a combination having a common interest to subserve may inform one another of the names of those whom they deem inimical; this does not constitute a threat or intimidation and does not amount to coercion. 7 Labbatt's Master and Servant, p. 8453; *Montgomery Ward & Co.* v. *South Dakota Ass'n*, 150 Fed. Rep. 413; Van Orsdel, J., in *American Federation* v. *Buck's Stove Co.*, 33 App. D. C. 83, 123; *Gray* v. *Building Trades Council*, 91 Minnesota, 171.

In the legal sense of the term, the word threat does not embrace every announcement of an intention to do an act which will result in an injury to another; it embraces only the announcement of an intention to do an unlawful act. 7 Labbatt's Master and Servant, pp. 8448, 8458; *National Protective Ass'n* v. *Cumming*, 170 N. Y. 315, 329; *Cote* v. *Murphy*, 159 Pa. St. 420, 431; *Macauley Bros.* v. *Tierney*, 19 R. I. 255; *Payne* v. *Western &c. R. Co.*, 81 Tennessee (13 Lea), 507, 521; dissenting opinion by Caldwell, J., in *Hopkins* v. *Oxley Stave Co.*, 83 Fed. Rep. 912, 924.

And coercion, in the legal sense of the term, does not embrace every constraint placed upon the free will of another, but only such constraint as results from the announcement of an intention to do, or from the doing of, an unlawful act to the prejudice of the person constrained. 7 Labbatt's Master and Servant, pp. 8448, 8458; *Parkinson Co.* v. *Building Trades Council*, 154 California, 581.

Since the defendants in this case, although members of local unions of hatters which were affiliated with the national organization known as the United Hatters of North America, did not participate in the acts of the officers and agents of the national association which are relied upon to establish the allegation of the complaint,

they can be held liable only on the ground that they had knowledge of, and, having knowledge, acquiesced in, those acts; membership in a local union and the payment of dues are not alone sufficient to make the defendants liable for the unlawful acts of the officers and agents of the national association. *Benton* v. *Minneapolis Tailoring Co.*, 73 Minnesota, 498; *United States* v. *Cohen*, 128 Fed. Rep. 615, affirmed, 145 Fed. Rep. 1, writ of error denied, 200 U. S. 618; *Lawlor* v. *Loewe*, 187 Fed. Rep. 522.

It was error for the trial court to permit the defendants who testified to be cross-examined as to whether they continued to pay dues after the service of the complaint, whether they investigated the truth of the matters therein alleged and whether they made any attempt to prevent the election of the same officers as before. *Lawlor* v. *Loewe*, 187 Fed. Rep. 522, 527.

It was error to admit in evidence articles and items from newspapers published in the vicinity in which the defendants resided for the purpose of proving knowledge of their contents by the defendants who were not shown to have read the newspapers. *Leeson* v. *Holt*, 1 Stark. 186; *Graham* v. *Hope*, Peake's N. P. Cas. 154; *Roberts* v. *Spencer*, 123 Massachusetts, 397; *Clark* v. *Ricker*, 14 N. H. 44, 48; *Milbank* v. *Dennistoun*, 10 Bosw. (N. Y.) 382, 393. Hence it was also error to admit in evidence items from the Journal of the United Hatters and from the American Federationist.

To make a newspaper publication admissible in evidence to show knowledge of their contents, the facts therein stated must be established by independent evidence.

Newspaper publications are not admissible to prove the truth of the statements therein contained. 13 Halsbury's Laws of England, p. 565, citing *Bossinore (Lord)* v. *Mowatt* (1850), 5 Jur. 238; 9 Am. & Eng. Enc. L., 2d ed.,

p. 885; *Child* v. *Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26, 43; *Fosgate* v. *Herkimer Mfg. Co.*, 9 Barb. (N. Y.) 287; *Downs* v. *N. Y. Cent. R. R.*, 47 N. Y. 83; *Riley* v. *St. John*, 11 New Bruns. 78.

The testimony of witness for the plaintiffs as to the reason given by retail dealers in hats, who bought hats from jobbers or wholesale dealers purchasing their goods from the plaintiffs, for withdrawing their patronage from these jobbers or wholesale dealers, was not admissible. *Tilk* v. *Parsons*, 2 C. & P. 202; *Lawlor* v. *Loewe*, 187 Fed. Rep. 522, 527.

Depositions containing no material nor relevant testimony but which merely disclosed the fact that the witnesses refused to answer questions on the ground that their testimony might incriminate them were inadmissible and their admission in evidence constitutes prejudicial error. *Philin* v. *Kenderline*, 20 Pa. St. 354; *Carne* v. *Litchfield*, 2 Michigan, 340; *Garrett* v. *St. Louis Transit Co.*, 219 Missouri, 65, 69.

The trial court erred in admitting evidence of, and allowing recovery for, damages accruing after the commencement of the action. The wrongful combination or conspiracy alleged in the case at bar is a continuing wrong of a temporary, removable character for which successive actions may be maintained from time to time as damages accrue. Obviously it is not distinguishable in this respect from trespasses and nuisances which are not of a permanent nature. The plaintiffs should therefore have been limited in their recovery to the damages which had accrued at the time when the action was commenced. *Denver City Water Co.* v. *Middaugh*, 12 Colorado, 432; *Savannah &c. Co.* v. *Bourquin*, 51 Georgia, 378; *Bailey* v. *Heintz*, 71 Ill. App. 189; *Catlin Coal Co.* v. *Lloyd*, 109 Ill. App. 122; *Gebhardt* v. *St. Louis &c. R. R.*, 122 Mo. App. 503; *Troy* v. *Chesshire R. R.*, 23 N. H. (3 Fost.) 83, 101; *Brewster* v. *Sussex R. R.*, 40 N. J. L. (11 Vroom)

57; *Church* v. *Paterson &c. R. R.*, 66 N. J. L. (37 Vroom) 218, 231; 68 N. J. L. (39 Vroom), 390; *Blunt* v. *McCormick*, 3 Denio (N. Y.), 283; *Uline* v. *N. Y. Cent. R. R.*, 101 N. Y. 98, 109–116; *Park* v. *Hubbard*, 134 App. Div. 468; 198 N. Y. 136; *Duncan* v. *Markley*, 1 Harper (S. Car.), 276; *Iron Mountain Ry.* v. *Bingham*, 87 Tennessee, 522, 536; *Cobb* v. *Smith*, 38 Wisconsin, 21, 36; *Hadler* v. *Griebew*, 61 Wisconsin, 500.

Mr. Walter Gordon Merritt and *Mr. Daniel Davenport* for defendants in error:

The court properly and adequately charged the jury as to what constituted an unlawful restraint of interstate trade under the Sherman Anti-Trust Act as applied to the allegations and issues in this case. The testimony clearly establishes a conspiracy in restraint of trade among the States, and any act, though otherwise innocent, done in carrying out that illegal conspiracy was unlawful and for the damage to their business caused thereby the plaintiffs are entitled to recover. *Loewe* v. *Lawlor*, 208 U. S. 274; *Aikens* v. *Wisconsin*, 195 U. S. 194. The attempted distinction between the primary and secondary boycotts is also not pertinent, because the prohibitions of the Sherman Anti-Trust Act extend to both alike. The act recognizes no such distinction. *Eastern States Lumber Dealers* v. *United States*, 234 U. S. 600. For the same reason the use of "unfair" and "we don't patronize" lists by the defendants was unlawful under the Sherman Act. As defendants used the union label as an instrument to carry out their conspiracy to restrain the plaintiffs' interstate trade, the plaintiffs can recover for the damages which resulted from such illegal use. And since the strike of the plaintiffs' workmen, ordered by the officers of the United Hatters, was a step in carrying out the conspiracy, it was unlawful and the damages which directly and proximately resulted to the plaintiffs' business there-

from are recoverable in this action, even though the defendants did not intend to resort to interstate boycotting, unless the same became necessary to accomplish their object of unionizing the plaintiffs' factory. *Davis* v. *United States*, 107 Fed. Rep. 754.

The charge of the court to the effect that the individual defendants, members of the union, were liable under the Sherman Anti-Trust Act, if they knew, or ought to have known, or were in duty bound to know, that their union and its officers were engaged in the conspiracy to restrain the plaintiffs' interstate trade, was under the circumstances of the case correct. *Rogers* v. *Vicksburg Ry.*, 194 Fed. Rep. 65; *Martin* v. *Webb*, 110 U. S. 7; *Jones* v. *Maher*, 116 N. Y. Supp. 180. Where an agent is enabled to commit unlawful acts through the negligence of his principal, the latter may even be held criminally liable. Clark & Sykes on Agency, p. 1141; *Commonwealth* v. *Morgan*, 107 Massachusetts, 199. The officers of the union, in carrying out the conspiracy, were acting within the scope of their employment and in furtherance of the organization's purposes, and the defendants' conduct warranted them in assuming that they were acting with the defendants' authority and approval. Defendants are liable under the rule of *respondeat superior*. Dicey on Parties, p. 170; Meacham on Agency, par. 72; Clark & Sykes on Agency, p. 61; *Willcox* v. *Arnold*, 162 Massachusetts, 577; *McDermott* v. *Wilhelmina*, 24 R. I. 535; *Supreme Lodge* v. *Knight*, 117 Indiana, 489. The individual members of these associations are liable as principals for what their officers did in the performance of their constitutional duty to unionize all the shops in the trade, even though they did not know of the particular acts done or may have disapproved of or have forbidden them. *New York Central* v. *United States*, 212 U. S. 481; *Phila. & Reading R. R.* v. *Derby*, 14 How. 468; *Lake Shore Ry.* v. *Prentice*, 147 U. S. 103; Holmes on Agency, 4 Harv.

Law Rev. 348; Wigmore, 7 Harv. Law Rev. 315, 384, 440. The Sherman Act is a highly remedial statute and on its face indicates an intent to apply those principles to all associations, which may violate it. Since the union was authorized to engage in strikes, neither it nor its members can escape responsibility for illegal strikes conducted in furtherance of its purposes. *Taff Vale Ry.* v. *Amalgamated Society* (1901), A. C., 426; *Giblan* v. *National Laborers' Union*, 2 K. B. 600 (1903); *Kinver* v. *Phœnix Lodge*, 7 Ont. Rep. 387; Permant on Trade Unions, p. 81; *Lucke* v. *Clothing Cutters*, 19 L. R. A. 408. If the union could be held liable, the members thereof, being unprotected by incorporation, are liable. *Vredenburg* v. *Behan*, 33 La. Ann. Rep. 627; *Patch Mfg. Co.* v. *Protection Lodge*, 77 Vermont, 294; *Patch Mfg. Co.* v. *Capeless*, 63 Atl. Rep. 939; *Ill. Cent. Ry.* v. *International Ass'n*, 190 Fed. Rep. 910; *Aluminum Castings Co.* v. *Local No. 84*, 197 Fed. Rep. 221; *Lawler* v. *Murphy*, 58 Connecticut, 294; 8 L. R. A. 112; *In re Peck*, 206 N. Y. 55; *Cheney* v. *Goodwin*, 88 Maine, 567; *Bennett* v. *Lathrop*, 71 Connecticut, 613; *Hodgson* v. *Baldwin*, 65 Illinois, 532; *Jenne* v. *Matlack*, 41 S. W. Rep. 11; *Crawley* v. *American Society*, 139 N. W. Rep. 734; *McKenney* v. *Bowie*, 94 Maine, 397; *Willcox* v. *Arnold*, 162 Massachusetts, 577; *Tyrrell* v. *Washburn*, 88 Massachusetts, 466; Bacon on Societies (1904), § 120; Niblack on Voluntary Societies (1888), §§ 98–100.

The rule of *respondeat superior* applies to conspiracies the same as to any other torts. *Schultz* v. *Frankfort Co.*, 139 N. W. Rep. 387. An agent has often no financial resources, and in order to approximate justice, it is necessary that the injured party should be allowed to resort to the principal in order to find a full purse. Under the statutes of Edward I, the injured party was required to exhaust his remedy against the agent and could only look to the principal for satisfaction of the deficiency.

This shows that the basis of imputed liability is the necessity of finding a responsible party, for the protection of society. 2 Pollock & Maitland, p. 533. The conditions surrounding the organization of a modern labor union call eloquently for the application of this line of reasoning. If an individual corporation can be held liable for the acts of ten thousand agents, there can be no reason why one hundred thousand members of a single labor union should not divide responsibility for the acts of ten agents. If they are actually innocent of wrongdoing, they can compel their fellow members to pro rate the liability. *Wooley* v. *Batte*, 2 C. & P. 417; *Horbach* v. *Elder*, 18 Pa. St. 33; *Vandiver* v. *Pollak*, 19 L. R. A. 628 (9 Cyc. 805).

The plaintiffs are entitled to recover all damages which are the proximate result of acts committed before the suit was commenced, even though such damages continued or resulted therefrom after suit was commenced. Proof of damage due to the acts complained of may extend to the date of the verdict. *Wilcox* v. *Plummer*, 4 Peters, 172; *New York* v. *Estill*, 147 U. S. 591; *Occidental Mining Co.* v. *Comstock Tunnel Co.*, 125 Fed. Rep. 244; *Joseph Schlitz Brewing Co.* v. *Comton*, 18 L. R. A. 390; *Ridley* v. *Seaboard R. R.*, 32 L. R. A. 708; *Jones* v. *Allen*, 85 Fed. Rep. 527; 1 Sutherland on Damages, § 113; *C. & N. W. Ry.* v. *Hoag*, 90 Illinois, 347; *Hicks* v. *Herring*, 17 California, 569; *Weston* v. *Barnicoat*, 175 Massachusetts, 456; *Cooper* v. *Stillers*, 30 App. D. C. 567; 23 Cyc. 446; *Troy* v. *Cheshire Railroad Co.*, 23 N. H. 101; *Powers* v. *Council Bluffs*, 45 Iowa, 652; *National Copper Co.* v. *Minnesota Mining Co.*, 57 Michigan, 83; *Lord* v. *Carbon Mfg. Co.*, 6 Atl. Rep. 812; 1 Joyce on Damages, par. 250; 1 Sedgwick on Damages, 9th ed., § 869.

The court properly left the jury to determine what portion of the continuing damages was due to acts prior to the date of suit for which recovery could be had, and

what portion was due to acts subsequent to date of suit for which recovery could not be had in this suit. *Jenkins* v. *Penn. R. R.*, 57 L. R. A. 309; *C. & N. W. Ry.* v. *Hoag* (*supra*); *Post* v. *Hartford St. Ry.*, 72 Connecticut, 362.

It was proper to cross-examine the defendants as to whether, after the suit was commenced, they continued paying dues and reëlected the same officers who committed the unlawful acts, since such evidence bore upon the intent and knowledge of the defendants relative to similar transactions, it could properly have been admitted on direct examination. *Exchange Bank* v. *Moss*, 149 Fed. Rep. 340; *Wood* v. *United States*, 16 Peters, 342; Wigmore on Evidence, §§ 316, 320, 325, 333, 363, 364, 370; *Moore* v. *United States*, 150 U. S. 60.

The subsequent conduct of the defendants toward their agents tended to prove the previous authority of those agents. *Fisher* v. *Campbell*, 9 Porter, 215 (Ala.); *Columbia Land Co.* v. *Tinsley*, 60 S. W. Rep. 10; *Cheshire Institution* v. *Vandergrift*, 95 N. W. Rep. 615; *Rice* v. *Ege*, 42 Fed. Rep. 663; *Elwell* v. *Russell*, 71 Connecticut, 465; 1 Greenleaf on Evidence, § 53.

It was proper for salesmen to testify as to the reasons given them by customers for refusing to purchase plaintiffs' hats. *Elmer* v. *Fessenden*, 151 Massachusetts, 361; *Hine* v. *N. Y. El. R. R.*, 149 N. Y. 154; *Casey* v. *Typographical Union*, 45 Fed. Rep. 135; *Maryland Lodge* v. *Adt*, 100 Maryland, 238; Wigmore on Evidence, § 1729, subd. 2; *Hadley* v. *Carter*, 8 N. H. 42; *Steketee* v. *Kimm*, 48 Michigan, 322; *Webb* v. *Drake*, 52 La. Ann. 290; *Weston* v. *Barnicoat*, 175 Massachusetts, 456; *Bausbach* v. *Reiff*, 91 Atl. Rep. 224 (Pa.).

Extracts from the Journal of the United Hatters and extracts from the daily newspapers of Danbury and Norwalk relative to the boycotting operations of the United Hatters were properly admitted in evidence to show that

the defendants had knowledge of the illegal acts which were being carried on by their organization. *Adams* v. *State*, 25 Oh. St. 584; *American Fire Ins. Co.* v. *Landfare*, 56 Nebraska, 482; 2 Taylor on Evidence, §§ 1656 and 1665–6; *Leeson* v. *Holt*, 1 Stark. 186 (1816); Wigmore on Evidence, §§ 251–255.

Extracts from the daily papers referring to the boycott, were admissible in evidence as showing the general publicity intentionally given to the boycott for the purpose of intimidating the plaintiffs' customers.

Mr. Justice Holmes delivered the opinion of the court.

This is an action under the act of July 2, 1890, c. 647, § 7, 26 Stat. 209, 210, for a combination and conspiracy in restraint of commerce among the States, specifically directed against the plaintiffs (defendants in error), among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in *Loewe* v. *Lawlor*, 208 U. S. 274, where it will be found set forth at length. The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other States and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other States. The case now has been tried,

the plaintiffs have got a verdict and the judgment of the District Court has been affirmed by the Circuit Court of Appeals. 209 Fed. Rep. 721; 126 C. C. A. 445.

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still further since the trial by the case of *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600. Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters made use of such lists, and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employés was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. *Loewe* v. *Lawlor*, 208 U. S. 274, 299. We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the

plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the 'We don't patronize' or 'Unfair' list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See *Gompers* v. *United States*, 233 U. S. 604. By the Constitution of the United Hatters the directors are to use 'all the means in their power' to bring shops 'not under our jurisdiction' 'into the trade.' The by-laws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell non-union hats. The Federation of Labor with which the Hatters were affiliated had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public especially among the members in every possible way. If the words of the documents on their face and without explanation did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the States. We think it unnecessary to repeat the evidence of the publicity of this par-

ticular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found to have known how the words of those constitutions had been construed in the act.

It is suggested that injustice was done by the judge speaking of 'proof' that in carrying out the object of the associations unlawful means had been used with their approval. The judge cautioned the jury with special care not to take their view of what had been proved from him, going even farther than he need have gone. *Graham* v. *United States*, 231 U. S. 474, 480. But the context showed plainly that proof was used here in a popular way for evidence and must have been understood in that sense.

Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct. *New York, Lake Erie & Western R. R.* v. *Estill*, 147 U. S. 591, 615, 616. We shall not discuss the objections to evidence separately and in detail as we find no error requiring it. The introduction of newspapers, etc., was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove an intended and detrimental consequence of the principal acts, not to speak of other grounds. The reason given by customers for ceasing to deal with sellers of the Loewe hats, including letters from dealers to Loewe & Co., were admissible. 3 Wigmore, Evidence, § 1729 (2). We need not repeat or add to what was said by the Circuit Court of Appeals with regard to evidence of the payment of dues after this suit was begun. And in short neither the ar-

gument nor the perusal of the voluminous brief for the plaintiffs in error shows that they suffered any injustice or that there was any error requiring the judgment to be reversed.

Judgment affirmed.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY *v.* CITY OF COVINGTON.

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

No. 28. Argued October 30, 1914.—Decided January 5, 1915.

Whether given commerce is of an interstate character or not is to be determined by what is actually done, and if really and in fact between States mere arrangements of billing and plurality of carriers do not enter into the conclusion.

An uninterrupted transportation of passengers between States, on the same cars, under practically the same management and for a single fare, constitutes interstate commerce although the track in each State is owned by a separate corporation. *Missouri Pacific R. R.* v. *Kentucky*, 216 U. S. 262, distinguished.

Although the State may not directly regulate or burden interstate commerce, it may, in the exercise of its police power, in the interest of public health and safety, and in the absence of legislation by Congress, enact regulations which incidentally or indirectly affect interstate commerce. *Minnesota Rate Cases*, 230 U. S. 352.

A municipal ordinance regulating the number of passengers to be carried in, temperature and method of loading and unloading, and other details regarding, cars used in interstate transportation, may be valid as to those regulations which are within the scope of the police power of the State and only incidentally or indirectly affect interstate commerce as to matters in regard to which Congress has not legislated, and invalid as to those regulations which directly affect, and are a burden on, interstate commerce.

Regulations in the ordinance involved in this case as to passengers

riding on platforms of motor cars and in regard to fumigation, ventilation and cleanliness, are, in the absence of legislation by Congress, within the scope of the police power of the State, and, as they only incidentally affect interstate commerce, are not void under the commerce clause of the Federal Constitution.

Regulations in the ordinance involved in this case as to number of cars to be run and the number of passengers allowed in each car, between interstate points, directly affect and are a burden on interstate commerce and void under the commerce clause of the Federal Constitution.

A regulation in a municipal ordinance requiring the temperature in motor cars never to be below 50° Fahrenheit, *held*, in this case, to be impracticable and unreasonable and void.

The various provisions in the ordinance of South Covington, Kentucky, in regard to motor cars running between that place and Cincinnati, Ohio, *held* to be separable; and the ordinance *held* to be a valid exercise of the police power as to those provisions which are reasonable and only incidentally affect interstate commerce, and void as to those which directly affect interstate commerce and those which are unreasonable.

146 Kentucky, 592, reversed.

THE facts, which involve the constitutionality under the commerce and due process clauses of the Federal Constitution of a municipal ordinance of Covington, Kentucky, regulating street cars running between that city and Cincinnati, Ohio, are stated in the opinion.

Mr. Alfred C. Cassatt, with whom *Mr. Richard P. Ernst* and *Mr. Frank W. Cottle* were on the brief, for plaintiff in error:

The ordinance is an unlawful interference with and regulation of interstate commerce.

It deprives plaintiff of its property without due process of law.

It is an impairment of the obligation of the contract between plaintiff and defendant.

Injunction is the proper remedy.

In support of these contentions see: *Adams Express Co.*

v. *New York*, 232 U. S. 14; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Central of Georgia Ry.* v. *Murphy*, 196 U. S. 194; *Chi., Mil. & St. P. Ry.* v. *Polt*, 232 U. S. 165; *C., N. O. & T. P. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184; *C., C., C. & St. L. R. R.* v. *Illinois*, 177 U. S. 514; *Cleveland* v. *City Ry.*, 194 U. S. 517; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Detroit* v. *Detroit Street Ry.*, 184 U. S. 368; *Eubank* v. *Richmond*, 226 U. S. 137; *Ex parte Young*, 209 U. S. 123; *Hall* v. *DeCuir*, 95 U. S. 485; *Herndon* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 135; *Houston & Tex. Cent. R. R.* v. *Mayes*, 201 U. S. 321; *Int. Com. Comm.* v. *Detroit & Grand Haven Ry.*, 167 U. S. 633; *Louisiana* v. *Tex. & Pac. Ry.*, 229 U. S. 336; *Louis. & Nash. R. R.* v. *Commonwealth*, 99 Kentucky, 132; *Louis. & Nash. R. R.* v. *Eubank*, 184 U. S. 27; *McNeill* v. *Southern Ry.*, 202 U. S. 543; *Minnesota Rate Cases*, 230 U. S. 352; *Mississippi* v. *Ill. Cent. R. R.*, 203 U. S. 335; *Mo. Pac. R. R.* v. *Tucker*, 230 U. S. 340; *Mo. Pac. R. R.* v. *Kansas*, 216 U. S. 262; *Norfolk & West. R. R.* v. *Pennsylvania*, 136 U. S. 114; *Omaha St. Ry.* v. *Int. Com. Comm.*, 230 U. S. 324; *Oregon Nav. Co.* v. *Fairchild*, 224 U. S. 510; *St. L., I. M. & S. Ry.* v. *Wynne*, 224 U. S. 354; *St. L., S. F. & T. R. R.* v. *Seale*, 229 U. S. 156; *So. Pac. R. R.* v. *Schuyler*, 227 U. S. 601; *Southern Ry.* v. *Commonwealth*, 107 Virginia, 771; *Swift & Co.* v. *United States*, 196 U. S. 375; *The Daniel Ball*, 10 Wall. 557; *Tex. & N. O. R. R.* v. *Sabine Tram. Co.*, 227 U. S. 111; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Yazoo & Miss. R. R.* v. *Greenwood Co.*, 227 U. S. 1.

Mr. Frederick W. Schmitz for defendant in error:

The provision in the contract whereby the Street Railway Company agreed to run its Cincinnati cars at specified intervals did not constitute a contract which deprived the city of the right, under its police power, to provide for reasonable accommodation of the public

by requiring the cars to be run at shorter intervals. *Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 653; *Tacoma* v. *Boutelle*, 61 Washington, 434; *Minneapolis Ry.* v. *Beckwith*, 129 U. S. 26; *Chicago Electric R. R.* v. *Illinois*, 200 U. S. 561; *C., B. & Q. R. R.* v. *Nebraska*, 170 U. S. 57; *Louis. & Nash. R. R.* v. *Kentucky*, 161 U. S. 699; *Georgia R. R.* v. *Smith*, 128 U. S. 174; *Mugler* v. *Kansas*, 123 U. S. 638; *Crescent City* v. *L. S. L. & L. H.*, 111 U. S. 746; *S. C. & C. H. Ry.* v. *Berry*, 98 Kentucky, 43; *Lexington Turnpike Co.* v. *Croztan*, 98 Kentucky, 739; *Kaw Valley* v. *Kansas City T. R.*, 87 Kansas, 272; *Mo. Pac. R. R.* v. *Kansas*, 216 U. S. 261; *Atlantic Coast Line Co.* v. *North Carolina*, 206 U. S. 1.

Even if the performance of the duty upon the street railway company of furnishing adequate facilities or accommodation to the public within the corporate limits of Covington required the company, as an alternative measure, to accord like treatment to its interstate passengers, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. *Mo. Pac. R. R.* v. *Kansas*, 216 U. S. 261; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *New York, N. H. & H. R.* v. *New York*, 165 U. S. 628; *Lake Shore & M. S. R.* v. *Ohio*, 173 U. S. 285.

It was the duty of the Street Car Company, as a common carrier, to furnish sufficient cars for the reasonable accommodation of the public, and it could not be said as a matter of law, that such duty was performed by a service resulting in a daily occurrence of overcrowded cars, so as to make a regulation by the municipality, limiting the number of passengers to be carried within a car to one-third as many more as its seating capacity, and requiring the operation of sufficient cars to reasonably accommodate the public, subject to such limitation, so arbitrary and unreasonable as to deprive of rights protected by the Constitution of the United States. *Mo.*

Pac. R. R. v. *Kansas*, 216 U. S. 262; *People* v. *St. Louis A. & T. H. R.*, 176 U. S. 512.

An ordinance of a city regulating a common carrier to perform its duty of furnishing sufficient cars for the reasonable accommodation of the public is not unreasonable because of difficulties within the control of the carrier. *Mo. Pac. R. R.* v. *Kansas* 216 U. S. 261; *North Jersey R. R.* v. *Jersey City*, 75 N. J. L. 349; *Minneapolis Street Ry.* v. *Minneapolis*, 189 Fed. Rep. 445; *Tacoma* v. *Boutelle*, 61 Washington, 434; *Mayor* v. *T. T. E. B. Electric Co.*, 133 N. Y. 108; *Chicago, R. I. & P. R.* v. *Arkansas*, 219 U. S. 453; 1 Nellis on Street Railways, 2d ed., § 143.

A provision of an ordinance, leaving it to the court or jury to determine what is reasonable, does not make the enactment invalid. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 85; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

A penalty of $5.00 to $100 for violating the provisions of an ordinance requiring reasonable accommodation and equipment from a street car company, is not so arbitrary and oppressive as to deprive the company of its property without due process of law. *Ex parte Young*, 209 U. S. 123; *Mo. Pac. R. R.* v. *Tucker*, 230 U. S. 340; *Mayor* v. *T. T. E. B. Co.*, 133 N. Y. 108.

Mr. Justice Day delivered the opinion of the court.

This case originated in a petition filed by the South Covington & Cincinnati Street Railway Company, a corporation of the State of Kentucky, having for its purpose to enjoin the City of Covington from enforcing a certain ordinance regulating the operation of the street cars of the company. The features of the ordinance essential to be considered here are found in its first seven sections, which are:

"Section 1. That it shall be unlawful for any person,

corporation or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the City of Covington, to permit more than one-third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same, provided that this section shall not apply to or be enforced on the days celebrated as Fourth of July, Decoration Day or Labor Day.

"Section 2. No such person, company or corporation shall suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car, and no one shall be permitted to stand in such place so provided for such ingress and egress but the same shall at all times be kept clear, free and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor and be subject to a fine of not less than five dollars nor more than fifty dollars, recoverable in the Police Court of said City.

"Section 3. No such person, company or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform; said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from the other person upon said platform, if any, and no person or passengers shall be ever permitted to stand by or remain within the enclosure thus provided for the motorman.

"Section 4. It shall be the duty of every such person,

company or corporation to at all times keep its cars thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant and the Board of Health of the City of Covington shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation and fumigation of such cars, and all such persons, companies or corporations shall comply with such reasonable rules.

"Section 5. The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

"Section 6. It is hereby made the duty of every company, person or corporation, operating street cars and the street car lines within the corporate limits of the City of Covington to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the General Council of the City of Covington, may by resolution at any time direct that the number of cars operated upon any line or route be increased to a sufficient number to so accommodate the public, if there is failure in that respect. Any such person, company or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by Section 2 hereof.

"Section 7. Any person, company or corporation violating either of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense, recoverable in the Police Court of the City of Covington and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all police officers of such city and others exercising police power, to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons

guilty of its infraction. And the Chief of Police is hereby directed to assign at least one Police Officer to the special enforcement of this ordinance. It shall be the duty of such officer to examine and observe street cars in operation and to make arrests and cause proper prosecutions to be started against offenders violating this ordinance."

The Circuit Court of Kenton County, Kentucky, refused the injunction and dismissed the petition, and this decree was affirmed by the Court of Appeals of Kentucky (146 Kentucky, 592), and the case is brought here.

It was set up in the petition and amended petition that the ordinance is an unlawful interference with interstate commerce, in violation of the Federal Constitution, Art. I, § 8, giving exclusive authority to Congress over that subject; that it deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment; and that it impairs the obligation of a certain contract previously entered into between the plaintiff and the City of Covington, in violation of art. I, § 10 of the Constitution.

The testimony shows that the plaintiff is a Kentucky corporation, and its principal occupation is the carrying of passengers in connection with an Ohio corporation which operates on the other side of the Ohio River, upon continuous and connecting tracks, and across a bridge from Covington to Cincinnati, which this court has held to be an instrument of interstate commerce (*Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204). This traffic is conducted by means of continuous trips and for a single fare, between points on the lines of the railway in Covington and Fourth Street or Fountain Square in the City of Cincinnati, or from any point between Fourth Street or Fountain Square in the City of Cincinnati to points in the City of Covington. Practically every car is thus engaged in going to or coming from Cincinnati, and from seventy-five to eighty per cent. of the passengers carried

in the City of Covington are being transported from Covington to Cincinnati, or from Cincinnati to Covington or farther in Kentucky. The cars operate without change of motormen or conductors, and under the direction of the same officers.

This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between States, the mere arrangements of billing or plurality of carriers do not enter into the conclusion. Here is an uninterrupted transportation of passengers between States, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce. *Texas & New Orleans R. R.* v. *Sabine Tram Co.*, 227 U. S. 111; *St. Louis, S. F. & T. R. R.* v. *Seale*, 229 U. S. 156; *Railroad Commission of Ohio* v. *Worthington*, 225 U. S. 101; *Omaha & Council Bluffs Street Ry.* v. *Interstate Commerce Commission*, 230 U. S. 324, 336. A contrary conclusion was reached in this case by the Kentucky Court of Appeals upon the authority of *Missouri Pacific R. R.* v. *Kansas*, 216 U. S. 262, but that case concerns an order under authority of the State of Kansas, requiring the running of a passenger train wholly within the State. It was pointed out in the course of the opinion that the order did not deal with an interstate train or put a burden upon such train, but simply required the operation within the State of a local train, the duty of operating such train arising from the charter obligation of the company.

Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the Federal Congress, the further question is presented: Does the case come within that class wherein the State may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitu-

tion? In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given much consideration in the *Minnesota Rate Cases*, 230 U. S. 352, and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the State to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce. Summing up the matter, it is there stated (p. 402):

"Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

In the light of the principles settled and declared, the various provisions of this ordinance must be examined.

That embodied in §§ 1 and 6 makes it unlawful for the Company to permit more than one-third greater in number of the passengers to ride or be transported within its cars over and above the number for which seats are provided therein, except this provision shall not apply or be enforced on the Fourth of July, Decoration Day or Labor Day, and by § 6 it is made the duty of the Company operating the cars within the City of Covington to run and operate the same in sufficient numbers at all times to reasonably accommodate the public, within the limits of the ordinance as to the number of passengers permitted to be carried, and the council is authorized to direct the number of cars to be increased sufficiently to accommodate the public if there is a failure in this respect. To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the Company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the Company, or controlled by it, in that City. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this Company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the State. We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business

might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall* v. *DeCuir*, 95 U. S. 485, 489, "commerce cannot flourish in the midst of such embarrassments."

We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of Federal regulation does not give the power to the State to make rules which so necessarily control the conduct of interstate commerce as do those just considered.

There are other parts of the ordinance which we are of opinion are within the authority of the State, and proper subject-matter for its regulation, at least until the Federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided, separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirement to keep the cars clean and ventilated, and fumigated. We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the travelling public, and to promote their comfort and convenience, only incidentally affecting the interstate business and not subjecting the same to unreasonable demands. *New York, N. H. & H. R. R.* v. *New York*, 165 U. S. 628; *Lake Shore & Michigan Southern Ry.* v. *Ohio*, 173 U. S. 285; *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 291, 292. As to the regulation affecting the temperature of the cars, and providing that they shall never be permitted to be below 50° Fahrenheit, the undisputed testimony

shows that it is impossible in the operation of the cars to keep them uniformly up to this temperature, owing to the opening and closing of doors, and other interferences that make it impracticable. We therefore think, upon this showing, this feature of the ordinance is unreasonable and cannot be sustained.

Our conclusion is that the Court of Appeals of Kentucky erred in refusing the injunction as against the provisions of the ordinance regulating the number of passengers to be carried in a car and the number of cars to be provided, and the requirement as to heating in view of the testimony as heretofore stated. In these respects its decision should be reversed. We think the other provisions of the ordinance separable and concerning them the plaintiff in error was not entitled to an injunction in the state court.

Judgment is reversed in part, and the case remanded to the state court for further proceedings not inconsistent with this opinion.

Reversed.

PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF CORNELL STEAMBOAT COMPANY *v.* SOHMER, AS COMPTROLLER OF THE STATE OF NEW YORK.

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

No. 62. Argued November 5, 1914.—Decided January 5, 1915.

A state tax on transmission and transportation corporations of the State imposing the tax for the privilege of carrying on such business in a corporate capacity within the State, based on the gross earnings on transportation originating and terminating within the State, and

expressly excluding earnings derived from business of an interstate character, is not violative of the commerce clause of the Federal Constitution, and so *held* as to § 184 of the Tax Laws of New York.

Such a tax is not, as to a corporation transporting merchandise on navigable waters, a license tax for the privilege of navigating public waters of the United States which is granted by Federal law, but merely a privilege for carrying on the business in a corporate capacity. *Harman* v. *Chicago*, 147 U. S. 396, distinguished.

While a State may not require a navigation license except in exceptional cases, as for compensation for improvements made by itself, it may, as to its own corporations having property within its borders, enforce its usual and customary system of taxation without infraction of the superior authority and laws of the United States concerning navigation.

Transportation between ports of a State is not interstate commerce to the extent of being excluded from the taxing power of the State because a part of the journey is over the territory of another State; and so *held* as to tows for various points in the State of New York from the harbor of New York and made up for convenience at a point in the Hudson River below Weehawken in New Jersey.

206 N. Y. 651, affirmed.

THE facts, which involve the constitutionality of § 184 of the Tax Law of New York imposing a tax on corporations based on gross earnings from transportation or transmission business originating and terminating within the State and the determination of what constitutes such interstate business, are stated in the opinion.

Mr. H. T. Newcomb, *Mr. Amos Van Etten* and *Mr. Lewis E. Carr* for plaintiff in error, submitted:

As to the nature of the tax imposed on the plaintiff in error, see §§ 180, 182, 184, New York Tax Law; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 599, 600; *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192, 201, 202.

The State of New York has no right to impose any tax or burden on earnings derived from business done on navigable waters of the United States with the means, instrumentalities and facilities provided by the United States.

The place where the business was done was on navigable waters of the United States. *Ex parte Boyer*, 109 U. S. 629; *Hardin* v. *Jordan*, 140 U. S. 371, 381; *Norfolk &c. R. R.* v. *Pennsylvania*, 136 U. S. 114, 119; *Minnesota Rate Cases*, 230 U. S. 352, 399; *The Daniel Ball*, 10 Wall. 557, 563; *The Montello*, 20 Wall. 430, 439, 443; *The Robert W. Parsons*, 191 U. S. 17, 26, 35.

The vessels with which the business was done were vessels of the United States. Rev. Stat., §§ 4131, 4311; *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 215; *North River Steamboat Co.* v. *Livingston*, 3 Cowen (N. Y.), 713, 747; *Ravesies* v. *United States*, 37 Fed. Rep. 447; *Sinnot* v. *Davenport*, 22 How. 227, 240.

The men employed on the vessels doing the business were licensed under the laws of the United States. Rev. Stat., § 4131, as amended by 5 Fed. Stat. Ann., p. 397; Rev. Stat., §§ 4401, 4430, 4439, 4440, 4441, 4442, 4443.

The vessels with which the business was done were operated under and in accordance with the rules and regulations of the United States. Rev. Stat., §§ 4400, 4401.

The business by the plaintiff in error was not subject to the dominion and control of the State of New York in any respect and that State therefore could not subject it to any tax or burden. *Galveston &c. R. R.* v. *Texas*, 210 U. S. 217, 227; *Gilman* v. *Philadelphia*, 3 Wall. 724; *Gibbons* v. *Ogden*, 9 Wheat. 1, 213; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Harmon* v. *Chicago*, 147 U. S. 396, 404; *Lord* v. *Steamship Co.*, 102 U. S. 541; *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Penna. R. R.* v. *Knight*, 171 N. Y. 354, 361; *St. Louis* v. *Consolidated Coal Co.*, 158 Missouri, 342; *Sinnot* v. *Davenport*, 22 How. 227, 241; *The Daniel Ball*, 10 Wall. 557, 564, 565; *The Belfast*, 7 Wall. 624, 640; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 19.

As to the basis of the right of the State to impose tax or other burden, see *Gibbons* v. *Odgen*, 9 Wheat. 1, 213; *Har-*

mon v. *Chicago*, 147 U. S. 396, 405; *McCullough* v. *Maryland*, 4 Wheat. 316, 436.

The business as done in part involved movement of the tows in the State of New Jersey as well as New York. New York State Law, § 7, New Jersey boundary line, 5 Consolidated Laws of New York, 5570; agreement as to jurisdiction of the waters of New York harbor, Art. I, 5 Consolidated Laws of New York, 5571; *Gibbons* v. *Ogden*, 9 Wheat. 214; *Norfolk &c. R. R.* v. *Pennsylvania*, 136 U. S. 114; *Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 57; *Fifth Ave. Building Co.* v. *Williams*, 198 N. Y. 238, 247; *N. Y. C. &c. Co.* v. *Morgan*, 57 App. Div. (N. Y.) 302, 304, aff'd 168 N. Y. 1, 5; *Southern Ry.* v. *United States*, 222 U. S. 20, 27.

Mr. Franklin Kennedy, with whom *Mr. Thomas Carmody*, Attorney General of the State of New York, was on the brief, for defendant in error:

A tax imposed under § 184 of the New York Tax Law on a domestic corporation for the privilege of exercising its corporate franchise, measured by the gross earnings of business done on navigable waters of the United States, is not an interference with Federal control of such waters. *Munn* v. *Illinois*, 94 U. S. 113, 135.

The tax imposed by § 184 is a tax upon the exercise of corporate franchises and not a tax directly on property or gross earnings. *Flint* v. *Tracy Co.*, 220 U. S. 108, 163; *People ex rel. C. T. R.* v. *Miller*, 170 N. Y. 194; *Penna. R. R.* v. *Knight*, 171 N. Y. 354; *People* v. *Home Ins. Co.*, 92 N. Y. 328; aff'd 134 U. S. 594; *People ex rel.* v. *Knight*, 174 N. Y. 475, overruling *People ex rel. Johnson Co.* v. *Roberts*, 159 N. Y. 70.

The power of Congress over navigable streams is derived from the commerce clause and the admiralty jurisdiction clause.

Within the limits set by these two clauses the power

of the Federal Government over navigable waters is absolute and exclusive. But that power relates to the subjects specified in the Constitution and is not determined by places in which it is to be exercised. It is a jurisdiction over the subject-matter of the traffic carried on over navigable streams, and only incidentally over the streams themselves in the interest of such traffic.

So long as the State does not regulate either interstate commerce or maritime jurisdiction its laws affecting business on the Hudson river are valid, and the mere fact that the Hudson is navigable does not preclude the State from regulating its use.

The Tax Law is not a regulation of the stream; it is a regulation of the business upon it and only of the business within the State. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 211.

The law of a State, which does not regulate interstate commerce or the use of the stream, does not trench upon the Federal powers. See *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217, and the following cases in which it has since been cited as authority: *Hanley* v. *Kansas City Railway*, 187 U. S. 617; *Mich. Cent. R. R.* v. *Powers*, 201 U. S. 245, 296; *Galveston, Harrisburg &c. Ry.* v. *Texas*, 210 U. S. 217, 226; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 165; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 301; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 335, 344; *Ewing* v. *Leavenworth*, 226 U. S. 464, 469; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 83.

All that is attempted in § 184 of the Tax Law is to tax a corporate franchise tax using the gross earnings of the company as a measure for the value of the exercise of such franchise. See *Annan* v. *Walsh*, and *Budd* v. *New York*, 143 U. S. 517.

The gross earnings by which the tax on the corporate franchises of the relator is measured were not derived from business of an interstate character.

The burden rests with the relator to show that the determination of the Comptroller is erroneous. *Roebling's Sons* v. *Wemple*, 138 N. Y. 582, 587; *Western Electric Co.* v. *Campbell*, 145 N. Y. 587; *Penn. R. R. Co.* v. *Knight*, 192 U. S. 21, 27; aff'g 171 N. Y. 354.

Under the treaty of 1833 the territorial boundary between the States of New York and New Jersey on the surface of the waters of the Hudson river up to Spuyten Duyvil creek and in New York bay, is the low-water mark on the New Jersey shore. On the surface of the water the jurisdiction of New York extends to the New Jersey shore. A boat on the surface, not attached to a wharf, is in New York. *Carlin* v. *Railroad Co.*, 135 App. Div. 876, 880; *Ferguson* v. *Ross*, 126 N. Y. 463.

Even if any of the tows passed through the State of New Jersey, for the west half of the Hudson for about ten miles north of Spuyten Duyvil creek is within New Jersey, and if they kept to the west of the center of the stream they were for those few miles in New Jersey, this does not, however, constitute interstate commerce.

Transportation of goods by railroad from one point within a State to another point within it, but passing through another State during transit, is not an interstate shipment and does not constitute interstate commerce. *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192; *Kellogg* v. *Lehigh Valley R. R.*, 115 Fed. Rep. 373; *Lord* v. *Steamship Co.*, 102 U. S. 541.

There is no distinction between transportation by rail and by water. In either case the transportation of goods between two points in the same State, but through another State, is not interstate commerce. *Pennsylvania R. R.* v. *Knight*, 171 N. Y. 364; *Hatch* v. *Reardon*, 184 N. Y. 452.

Shipment of goods from a point in the Hudson river off Weehawken which is within New York State, through

New Jersey, to another point in New York State, is not an interstate shipment and not an interference with the exclusive control of Congress over interstate commerce.

Even if the cargoes were ultimately destined for some other State than New York, the towing service was no part of a continuous carriage between States. *Int. Com. Comm.* v. *Chicago K. & S. R.*, 81 Fed. Rep. 783; *Chicago N. W. R. R.* v. *Osborne*, 10 U. S. App. 430; *Penna. R. R.* v. *Knight*, 171 N. Y. 364; aff'd, 192 U. S. 21; *Budd* v. *New York*, 143 U. S. 517.

Even if the gross earnings were derived from business of an interstate character, yet the State could constitutionally and legally measure its tax on the exercise of the franchises of its domestic corporations by such gross earnings. *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Ewing* v. *Leavenworth*, 226 U. S. 464, 469; *Hanley* v. *Kansas City Railway*, 187 U. S. 617; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 335; *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Penna. R. R.* v. *Wempel*, 138 N. Y. 1, 6; *Penna. R. R.* v. *Knight*, 171 N. Y. 354; *C. T. R. R. Co.* v. *Miller*, 178 N. Y. 194; *International Elevating Co.* v. *Roberts*, 116 App. Div. 30.

Mr. Justice Day delivered the opinion of the court.

The proceeding which resulted in the judgment here complained of originated in an application by the Cornell Steamboat Company to review by certiorari a decision of the Comptroller of New York, denying a petition for revision and readjustment of taxes imposed by the Comptroller on the Steamboat Company for the years 1902 and 1903. These taxes were imposed under § 184 of the Tax Laws of New York (c. 60, Consolidated Laws), which, so far as it is pertinent here, reads:

"Section 184. Additional franchise tax on transporta-

tion and transmission corporations and associations.—Every corporation . . . formed for . . . navigation . . . purposes . . . shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character."

In the years 1902 and 1903, the Comptroller of the State imposed upon the Steamboat Company taxes on its earnings for those years, and denied the application for a revision and readjustment. The writ of certiorari was afterwards issued from the Supreme Court of New York upon petition to review and correct the determination of the Comptroller. The matter was heard in the appellate division of the Supreme Court of New York, and that court affirmed the determination of the Comptroller. Appeal was taken to the Court of Appeals of New York, and that court affirmed the order appealed from, and remitted the case to the Supreme Court of the State. (206 N. Y. 651.) This writ of error is sued out to reverse the judgment.

Taxes were assessed upon the return of the Steamboat Company for the year 1902: "gross earnings, not interstate business, derived from all sources during the above period, $377,146.33;" also on the return for the year 1903: "gross earnings on business commenced and terminated in the territorial limits of New York, derived from towing charges upon the Hudson River (navigable waters of the United States), earned with vessels enrolled and licensed by the U. S. Government, i. e., business which is regulated by the U. S. Government, and which it is claimed is not taxable by the State of New York, $394,505.59;" which

return was followed by a supplemental return: "State of New York, County of Ulster, *ss.* George Coykendall, being duly sworn, says that he is the Vice-President of the Cornell Steamboat Company; that the report of gross earnings in the State of New York, of the Cornell Steamboat Company for the year ending June 30, 1903, verified by me on September 17, 1903, should be amended as follows: That the statement in such report of business commenced and terminated within the territorial limits of the State of New York, derived from towing charges upon the Hudson River, is made up largely of towing done in the following manner, as deponent knows from personal knowledge and information derived from the Superintendent of the company, to wit: Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the Territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State. Deponent further says that he desires to file this affidavit as a correction of the report verified September 17, 1903, by him, which report

was filed with the State Comptroller on or about the 17th day of September 1903."

These returns may be supplemented by a statement from the brief of plaintiff in error, derived from the record, as to the manner in which the towing business of the Company was done: "The tows were made up in the Hudson River at Albany, N. Y., or its vicinity, and the Steamboat Company, the plaintiff in error, thereupon attached a towing line connecting the tows with its tugs or steamers and moved the tows down or up the river, leaving the tows up-bound in the river at Albany or its immediate vicinity and those bound down the river in the bay at New York City or in the waters adjacent thereto."

It is apparent from a consideration of § 184 that the tax here imposed upon transmission and transportation corporations is for the privilege of carrying on the business in a corporate capacity within the State of New York, for which an annual excise tax or license fee is exacted equal to five-tenths of one per centum upon the gross earnings on transportation originating and terminating in the State of New York. By its express terms, the statute provides that the tax shall not include earnings derived from business of an interstate character.

It is contended that as the business of towing carried on by the plaintiff company is done upon the navigable waters of the United States, and under authority of a license granted by the United States, the State has no jurisdiction or authority to levy the tax in question, and that it is in reality and substance an attempt to enforce a license tax for the privilege of navigating the public waters of the United States, a privilege already granted under the general government. (See §§ 4400 and 4401 of the Revised Statutes of the United States, and also §§ 4438, 4439, 4440, 4441, 4442 and 4443, providing for the license of officers of vessels.)

The right of the Federal Government to regulate com-

merce, under Article 1, § 8, Subdivision 3, of the Federal Constitution, giving Congress control over interstate commerce, confers the supreme authority over navigable rivers and streams for the purpose of regulating navigation, and all that pertains thereto; and under this authority the Federal Government is supreme and may not be interfered with by the laws of the States. The subject is fully discussed in *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447. The tax here in question does not impose a license tax as a prerequisite to the navigation of the river, as was the case in *Harman* v. *Chicago*, 147 U. S. 396, cited and relied upon by the plaintiff in error, where an ordinance of the City of Chicago, imposing a license tax for the privilege of navigating the Chicago River and its branches by steam tugs licensed under the Federal authority, was held an unconstitutional exaction, as it required payment for a privilege which had already been granted within the authority of the Federal Government.

In the case now before the court, the tax, as was said by Chief Judge Cullen, in delivering an opinion in the Court of Appeals in New York in this case, concurring in the order affirming the court below without opinion, is levied upon the corporation for the privilege of carrying on its business in a corporate or organized capacity. As the Chief Judge says, if the parties beneficially interested in the company are dissatisfied with the price exacted by the State for this privilege they may carry on the business as individuals without paying any charge. In other words, the charge is not upon the navigation of the river, but is upon the doing of business as a corporation of the State within the State. While the State may not require a navigation license except in very exceptional cases, as for compensation for improvements which the State has made, a situation not presented here, it may, certainly as to a corporation of its own creation having

property within its borders enforce its usual and customary systems of taxation without infraction of the superior authority and laws of the United States concerning the navigation of rivers.

With this view of the tax now under consideration, we think the State did not exceed its authority in its imposition of a tax for the purpose stated.

But it is urged that this is a tax upon interstate commerce, and therefore beyond the power of the State, notwithstanding the statute undertakes to exempt the proceeds of interstate commerce from taxation. That interstate commerce is necessarily taxed is said to arise from the fact that the business of the Company is in fact interstate commerce, as shown by its additional return, from which it appears that vessels for up-river points on the Hudson River are taken by tows, which are made up at a stakeboat located at Weehawken, which is within the territorial limits of New Jersey, that these stakeboats are anchored in the river just below Weehawken ferry, and that the course up the river is in territory of New York and New Jersey. But transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State. *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192; *Ewing* v. *City of Leavenworth*, 226 U. S. 464, and see *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 183. Weehawken is opposite New York harbor, and the business upon which the tax is here imposed is all done between New York ports, and the record shows distinctly that no earnings were returned for tugs operated in New York harbor and ports outside the State. Such business was deducted as interstate business and not taxable under the terms of the statute. It is evident that the making up of the tows for the State ports in the river below Weehawken was for convenience in conducting domestic transportation.

We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the State, and that the return on which the tax was assessed did not involve the revenues of commerce among the States, and this contention must be rejected.

It follows that the decision of the Supreme Court of New York must be

Affirmed.

GILBERT, ADMINISTRATOR OF SELLECK, *v.* DAVID, ADMINISTRATRIX OF SELLECK.

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

No. 97. Argued December 4, 1914.—Decided January 5, 1915.

As § 37, Judicial Code, does not prescribe any particular mode by which the question of jurisdiction shall be raised, the method of raising that question may be left to the sound discretion of the trial judge; and, if the state practice admits, the issue may be raised by general denial in the answer.

While the trial court may submit the question of a party's residence to the jury, it is not bound to do so; and in this case the court properly exercised its privilege to dispose of that issue on the testimony.

In this case the defendant was not chargeable with laches because he did not force to trial the issue of plaintiff's citizenship.

The fact that delay in determining the issue of citizenship results in the statute of limitations applying, does not confer jurisdiction on the Federal court if diverse citizenship does not exist.

Where the record in a case dismissed by the District Court for want of jurisdiction on account of absence of diverse citizenship brings up the testimony, this court must consider it and determine whether the trial court rightly decided that plaintiff was a citizen of the same State as defendant.

If plaintiff, at the commencement of the action, be domiciled in a dif-

ferent State from that of defendant he is a citizen of that State within the meaning of the Judicial Code.

Change of domicile arises where there is a change of abode and the absence of any present intention to not reside permanently or indefinitely in the new abode; and this notwithstanding a floating intention of returning to the former place of domicile after completion of the object for which the change was made.

In this case *held* that the acts of the plaintiff in regard to his change of residence indicated a change of domicile to the State in which defendant resided prior to commencement of the action, and diverse citizenship did not then exist.

THE facts, which involve the jurisdiction of this court under § 238, Judicial Code, and the construction of § 37, Judicial Code, and the jurisdiction and duty of the District Court thereunder, are stated in the opinion.

Mr. Howard W. Taylor for plaintiff in error:

Under the pleadings as they stood the court was without power to dismiss the case for want of jurisdiction due to lack of diversity of citizenship, and the order or judgment of dismissal was a nullity.

Under the facts proven, the court erred in holding that the evidence showed the plaintiff to be a citizen of Connecticut.

The laches of the defendants in failing to raise the question of jurisdiction until after a period of three years had elapsed from the accrual of the cause of action and for over two years after the filing of the substituted complaint required the trial court, in the exercise of the proper discretion, to refuse to consider the question of jurisdiction after the lapse of so many years.

An analysis of the evidence shows that the court in its deductions therefrom applied a wrong principle of law in the consideration of the evidence and failed to apply the correct principle.

The judgment should be reversed and the trial court

directed to entertain jurisdiction and hear the case upon its merits, or proper issues should be framed as to the jurisdiction and a trial had thereon.

In support of these contentions, see *Adams* v. *Herald Publishing Co.*, 82 Cons. 448; *Adams* v. *Shirk*, 117 Fed. Rep. 805; *Briggs* v. *Trader's Co.*, 145 Fed. Rep. 254; *Brown* v. *Gillett*, 33 Washington, 74; *Chambers* v. *Price*, 75 Fed. Rep. 177; *Chase* v. *Wetzler*, 225 U. S. 79; *Cuthbert* v. *Galloway*, 35 Fed. Rep. 466; Conn. Statutes, Rev. 1902, § 2313; *Deputron* v. *Young*, 134 U. S. 252; Danbury City Charter, §§ 25, 27; *Every Evening Printing Co.* v. *Butler*, 144 Fed. Rep. 916; *Farmington* v. *Pillsbury*, 114 U. S. 138; *Fiske* v. *Hartford*, 69 Connecticut, 390; *Foster* v. *Railway Co.*, 56 Fed. Rep. 434; *Gaddie* v. *Main*, 147 Fed. Rep. 955; *Hedge* v. *Clapp*, 22 Connecticut, 262–270; *Hart* v. *Granger*, 1 Connecticut, 170; *Hartog* v. *Memory*, 116 U. S. 590; *Hill* v. *Walker*, 167 Fed. Rep. 248; *Howe* v. *Howe & O. B. B. Co.*, 154 Fed. Rep. 820; *Ill. Cent. R. R.* v. *Adams*, 180 U. S. 38; *Imperial Ref. Co.* v. *Wyman*, 38 Fed. Rep. 574; *In re Cleland*, 218 U. S. 122; *Jones* v. *League*, 18 How. 76; *Jones* v. *Subera*, 150 Fed. Rep. 462; *Kirven* v. *Virginia-Carolina Co.*, 145 Fed. Rep. 288; *Kilgore* v. *Norman*, 119 Fed. Rep. 1006; *Kuntz* v. *Davidson County*, 6 Lea (Tenn.), 65; *Lebensberger* v. *Schofield*, 139 Fed. Rep. 382; *National Accident Ass'n* v. *Sparks*, 83 Fed. Rep. 225; *Nichols* v. *Ansonia*, 81 Connecticut, 229; *On Yuen Co.* v. *Ross*, 14 Fed. Rep. 338, 37 Cyc. 811; *Opinion of the Justices*, 7 Massachusetts, 523; *Perkins* v. *Perkins*, 7 Connecticut, 565; *Pike County* v. *Spencer*, 192 Fed. Rep. 11; *Reckling* v. *McKinstry*, 185 Fed. Rep. 842; *Rucker* v. *Bolles*, 80 Fed. Rep. 504; *Railway Co.* v. *Ohle*, 117 U. S. 123; *State* v. *Ross*, 23 N. J. Law, 517; *Terry* v. *Day*, 107 Fed. Rep. 50; *Toledo Traction Co.* v. *Cameron*, 137 Fed. Rep. 55; *Wetmore* v. *Rymer*, 169 U. S. 120; *Wiemer* v. *Louisville Water Co.*, 130 Fed. Rep. 244; *Williamson* v. *Osenton*, 232 U. S. 619; *Wil-*

liams v. *Mairs*, 72 Connecticut, 430; 2 Wigmore on Ev., §§ 1028–1030.

Mr. Frederick H. Wiggin and *Mr. A. T. Bates* for defendants in error:

The plaintiff was domiciled in and was a citizen of Connecticut when the action was brought, and was not a citizen of Michigan.

It was not error to render judgment upon the pleadings as they stood.

The court did not err in ruling that the claimed running of the statute of limitations could not save this action, notwithstanding defendant's alleged failure to introduce evidence of plaintiff's citizenship until after the limitation period had expired.

The court committed no error in taking the question of jurisdiction from the jury.

The court committed no error in refusing to hear argument upon the question of jurisdiction.

The trial court did not err in admitting in evidence and considering the tax lists.

In support of these contentions, see *Anderson* v. *Watt*, 138 U. S. 694; *Barnes* v. *Benham*, 75 Pac. Rep. 1130; *Baker* v. *Lee*, 52 Connecticut, 145; *Banks* v. *Porter*, 39 Connecticut, 307; *Barry* v. *Edmunds*, 116 U. S. 550; *Butler* v. *Farnsworth*, Fed. Cas. § 2240; *Briscoe* v. *Dist. of Columbia*, 221 U. S. 547; *Burchett* v. *United States*, 194 Fed. Rep. 821; *Bradish* v. *Grant*, 119 Illinois, 606; *Chase* v. *Wetzlar*, 225 U. S. 79, 85; *Columbia Heights Co.* v. *Rudolph*, 217 U. S. 547; Conn. Gen'l Stats., §§ 609, 1110, 1114, 1127, 2313, 2323; Conn. Rules of Practice, §§ 155, 155a; Conn. Rules of Court, § 12; Conn. Public Acts 1913, ch. 206; *Comstock* v. *Waterford*, 85 Connecticut, 9; Const. Conn., Art. VIII; *Davis* v. *Dixon*, 184 Fed. Rep. 509; *Deering* v. *Halbert*, 12 Kentucky, 290; *Deputron* v. *Young*, 134 U. S. 241; *First National Bank* v. *Home Bank*, 21 Wall.

294; *Globe Co.* v. *Lauder Co.*, 190 U. S. 540; *Harrison* v. *Park*, 24 Kentucky, 170; *Hartog* v. *Memory*, 116 U. S. 588; *Hill* v. *Walker*, 167 Fed. Rep. 241, 261; *Jones* v. *Subera*, 150 Fed. Rep. 462; *Lloyd* v. *Chapman*, 93 Fed. Rep. 599; *Mast Co.* v. *Superior Co.*, 154 Fed. Rep. 45; *Mitchell* v. *United States*, 21 Wall. 352; *Morris* v. *Gilmer*, 129 U. S. 327; *Olmstead's Appeal*, 43 Connecticut, 110; *Pac. Mut. Ins. Co.* v. *Tompkins*, 101 Fed. Rep. 539; *Reckling* v. *McKinstry*, 185 Fed. Rep. 842; Rev. Stat., § 997; Rule 35, Supreme Court; *Roberts* v. *Lewis*, 144 U. S. 653; *Rosenbaum* v. *Bauer*, 120 U. S. 450, 459; *Sayles* v. *Fitzgerald*, 72 Conn. 391, 396; *Shelton* v. *Tiffin*, 6 How. 185; *Simpson* v. *First Nat'l Bank*, 129 Fed. Rep. 257; *Steigleder* v. *McQuestion*, 198 U. S. 141; 36 Stat., p. 1098, § 37; *Smithers* v. *Smith*, 204 U. S. 632; *Sullivan* v. *Iron Co.*, 143 U. S. 431; *Wells Co.* v. *Gastonia Co.*, 198 U. S. 177, 182; *Wetmore* v. *Rymer*, 169 U. S. 115; *Williamson* v. *Osenton*, 232 U. S. 619, 625; *Williams* v. *Nottawa*, 104 U. S. 209; *Wildman* v. *Ryder*, 23 Connecticut, 172; 2 Wigmore Ev., pp. 1216, 1220.

Mr. Justice Day delivered the opinion of the court.

This case is here upon writ of error and certificate presenting the question of jurisdiction of the District Court. It comes under § 238 of the Judicial Code, and presents to this court the question of jurisdiction only. The suit was begun on November 5, 1904, in the United States Circuit Court for the District of Connecticut. On May 24, 1905, a substituted complaint was filed. The object of the suit was to recover for alleged breaches of a certain indemnity contract set forth in the complaint. In this substituted complaint, as well as in the original complaint, the allegation as to diverse citizenship is that plaintiff is a citizen of the State of Michigan, and defendants are citizens of the State of Connecticut. On August 3, 1907, an answer was

filed, in which it was admitted that the defendants were citizens of the State of Connecticut, and it was averred that the defendants had no knowledge or information as to the citizenship of the plaintiff, and would "leave him to proof thereof." On April 27, 1911, the defendants filed a motion to dismiss the suit for want of jurisdiction. On October 5, 1911, defendants filed another motion to dismiss for want of jurisdiction. On October 6, 1911, the plaintiff filed a motion to strike the last-mentioned motion from the files. Both of the motions to dismiss were upon the ground that the plaintiff was not a citizen of the State of Michigan but was a citizen of the State of Connecticut. The motion of the plaintiff to strike the last-mentioned motion from the files was upon the ground, among others, that the motion was an improper and irregular method of raising the question of jurisdiction and because that matter was already in issue under the allegations of complaint and answer.

After the taking effect of the Judicial Code on January 1, 1912, the case was transferred to the District Court of the United States for the District of Connecticut. On August 26, 1912, a jury was impanelled, and the case came on for trial. The court directed that the trial should proceed upon the question of jurisdiction. Thereupon the parties proceeded to offer testimony upon the question of plaintiff's residence. At the conclusion of this testimony, the court found that the plaintiff and defendants were citizens of the State of Connecticut at the time the action was begun, and accordingly dismissed the suit upon the sole ground of want of jurisdiction, and ordered the jury discharged from further consideration of the case.

The act of March 3, 1875, c. 137, 18 Stat. 470, 472, § 5, now § 37 of the Judicial Code, provides:

"If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said dis-

trict court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This section defines the duty of the District Court of the United States when it shall appear to its satisfaction that the suit does not really and substantially involve a dispute or controversy properly within the court's jurisdiction. While this section gives the court the right to dismiss a suit when that situation appears, whether the parties raise the question or not, it is the duty of the defendant to bring the matter to the attention of the court, in some proper way, where the facts are known upon which a want of jurisdiction appears. *Deputron* v. *Young*, 134 U. S. 241, 251. Under the former practice, before the passage of the act of 1875, above quoted, it was necessary to raise the issue of citizenship by a plea in abatement, when the pleadings properly averred the citizenship of the parties. *Farmington* v. *Pillsbury*, 114 U. S. 138, 143; *Little* v. *Giles*, 118 U. S. 596, 604. The objection may be made now by answer before answering to the merits, or it may be made by motion. *Steigleder* v. *McQuestion*, 198 U. S. 141. The statute does not prescribe any particular mode by which the question of jurisdiction is to be brought to the attention of the court, and the method of raising the question may be left to the sound discretion of the trial judge. *Wetmore* v. *Rymer*, 169 U. S. 115, 121. It may be raised by a general denial in the answer, where the state practice permits of that course. *Roberts* v. *Lewis*, 144

U. S. 653. In the State of Connecticut, under the form of denial contained in this answer, the answer raised the issue. *Sayles* v. *FitzGerald*, 72 Connecticut, 391, 396. Moreover, the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court. The motion of the plaintiff to strike off the motion to dismiss for want of jurisdiction was based upon the ground that that issue was already made in the pleadings. The question was properly before the court.

It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject. *Wetmore* v. *Rymer*, 169 U. S. 115, *supra*.

It is urged that the delay in making the issue and bringing it to a hearing was such laches upon the part of the defendants as to preclude the consideration of the question. The issue was made when the answer was filed, but for some reason neither party forced the case to trial. Apart from the imperative duty of the court to dismiss the action under the statute, when it appears that the case is not within the jurisdiction of the court, we find nothing in the conduct of the parties to support the suggestion of laches. If it be true that the statute of limitations would prevent the beginning of a new action in the state court, that fact cannot confer jurisdiction upon a court of the United States in the absence of a showing of diverse citizenship.

As the record brings up the testimony upon which the court below decided the question, it becomes the duty of this court to consider it and determine whether the court rightly found that the plaintiff at the beginning of the suit was not a citizen of the State of Michigan. *Wetmore*

v. *Rymer*, 169 U. S. 115, *supra*. If the plaintiff was domiciled in the State of Michigan when this suit was begun, he was a citizen of that State within the meaning of the Judicial Code. *Morris* v. *Gilmer*, 129 U. S. 315. *Williamson* v. *Osenton*, 232 U. S. 619, 624. In this case it clearly appears that for some years prior to 1890 the plaintiff lived in Menominee, in the State of Michigan. He had there a home, and exercised the ordinary duties and privileges of citizenship. In February, 1890, his uncle died in Connecticut, and the plaintiff immediately went to Danbury, in that State, where he remained practically all the time until his death in 1911.

The question is, Had he lost his domicile in Michigan and acquired one in Connecticut, so that he was at the beginning of the suit in 1904 in reality a citizen of the last-mentioned State?

This matter of domicile has been often before this court, and was last under consideration in the case of *Williamson* v. *Osenton*, 232 U. S. 619, *supra*. In that case the definition of domicile, as defined by Mr. Dicey, in his book on "Conflict of Laws," 2d ed., 111, is cited with approval. There change of domicile is said to arise where there is a change of abode and "the absence of any present intention to not reside permanently or indefinitely in the new abode." Or, as Judge Story puts it in his work on "Conflict of Laws," 7th Ed., § 46, page 41, "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." "The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely." *Price* v. *Price*, 156 Pa. St. 617, 626.

Applying these definitions to the conduct of plaintiff, we have no doubt that the court was right in holding that he had acquired a new domicile in the State of Connecticut. He removed there with his family, and occupied a house to which he held the title. He owned other real estate in Connecticut, inherited from his uncle. He took a letter from his church in Michigan to a church in Danbury, Connecticut. For about ten years he was not back in Michigan, except for a short time, and then for a temporary purpose. The Michigan homestead and much of the furniture used there were sold upon the removal to Connecticut. For more than ten years he resided continuously with his family in the same house in Danbury, Connecticut. While the plaintiff did not vote in Connecticut, as far as the record shows, it is in evidence that he declared to another his intention of becoming a voter there. To some witnesses he declared his purpose to reside in Connecticut. As against this testimony, it appears that he left his desk with his brother-in-law in Michigan, which he declared was for the purpose of "holding his residence there." To some witnesses he declared his intention to live in Michigan and expressed his preference for that State as a dwelling-place. He continued to pay membership dues to orders to which he belonged in Michigan.

It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut should he succeed in disposing of it for what he considered it worth. But as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode which he had no present intention of changing, that is the essence of domicile.

We find no error in the conclusion of the District Court upon the question of jurisdiction, and its judgment is therefore

Affirmed.

JEFFREY MANUFACTURING COMPANY *v.* BLAGG.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 511. Argued December 1, 1914.—Decided January 5, 1915.

The negligence of a fellow servant is more likely to be a cause of injury in larger establishments than in smaller ones and assumption of risk is different in the former than in the latter. Classifications based on number of employés in a state statute abolishing the fellow servant and assumption of risk defenses under specified conditions are not so arbitrary as to amount to a denial of equal protection of the laws.

This court only hears objections to the constitutionality of a statute from those who are themselves affected by its alleged unconstitutionality in the feature complained of. Where the employer raises the question of denial of equal protection of the laws, arguments based on alleged discriminations against employés cannot be decisive.

The Fourteenth Amendment only takes from the State the right and power to classify subjects of legislation when the attempted classification is so arbitrary and unreasonable that the court can declare it beyond legislative authority. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

In a general Workmen's Compensation Act, establishing a state plan that all employers having five or more employés may enter on equal terms, a provision, abolishing the defense of contributory negligence as to such employers who do not come into the plan, is not unconstitutional as denying equal protection of the laws as to them because the defense is not abolished as to those having less than five employés; the classification is not arbitrary and unreasonable, and so *held* as to such provision in the Workmen's Compensation Law of Ohio.

THE facts, which involve the constitutionality under the due process and equal protection clauses of the Fourteenth

Amendment of certain provisions of the Workmen's Compensation Act of Ohio, are stated in the opinion.

Mr. H. B. Arnold, with whom *Mr. W. Wilson Carlile* was on the brief, for plaintiff in error.

Mr. Fred C. Rector and *Mr. James I. Boulger,* with whom *Mr. Timothy S. Hogan,* Attorney General of the State of Ohio, and *Mr. F. M. McSweeney* were on the brief, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This action was brought in the Court of Common Pleas of Franklin County, Ohio, to recover for injuries received by Harry O. Blagg, while in the service of The Jeffrey Manufacturing Company, a corporation engaged in manufacturing at Columbus, Ohio. The allegation was that the injury happened to the plaintiff because of the standing of certain freight cars upon a switch, with an opening left between them for the use of employés; that the plaintiff was directed by the defendant to assist in removing certain lumber from a point on the north side of the switch, and, in so doing, it was necessary for the plaintiff to pass, as directed and instructed by the defendant, through the opening between the fourth and fifth cars on the switch; that whilst he was so doing, defendant caused to run against the car standing on the east end of the switch a long cut of cars pushed by an engine, with the result that the cars on the switch were jammed and pushed together, and the plaintiff was caught and seriously injured. The negligence charged was (1) in causing said cut of cars to be pushed upon and against the car standing upon said switch while plaintiff was between said cars, (2) in failing to warn or notify the plaintiff of the intention of the defendant to push said cars into or upon said switch or

against the car on the east end thereof, and (3) in having an insufficient number of men or employés engaged in the handling and switching of said cut of cars. A recovery was had in the Court of Common Pleas, and the judgment was affirmed in the Court of Appeals, and in the Supreme Court of the State, and the case was brought here by writ of error.

The constitutionality of the Act of the General Assembly of the State of Ohio known as the Workmen's Compensation Law is brought in question because of the fact that manufacturing companies, employing five or more, who do not take advantage of its provisions, and the plaintiff in error did not, are deprived in negligence cases of certain defenses otherwise available: (1) negligence of fellow-servants, (2) defense of assumed risk, and (3) defense of contributory negligence.

The constitutionality of the act was sustained against many objections after full consideration by the Supreme Court of Ohio in *State ex rel. Yaple* v. *Creamer*, 85 Oh. St. 349. The validity of the act in a single feature is here brought in question. To decide it renders necessary some examination of its provisions, as outlined in §§ 1465, *et seq.*, of Vol. 1, Page & Adams' annotated General Code of Ohio. The act is intended to create a state insurance fund for the benefit of injured, and the dependents of killed, employés. The general scheme of the law is to provide compensation by means of procedure before a board, for injuries not wilfully self-inflicted, received by employés in the course of their employment. The employer who complies with the law is relieved from liability for injury or death of an employé who has complied with the terms of the act, except the injury arise from the wilful act of the employer, his officer or agent, or from failure to comply with laws enacted for protection of the employé, in which event the injured may sue for damages or recover under the act. It is one of the laws which has

become more or less common in the States, and aims to substitute a method of compensation by means of investigation and hearing before a board, for what was regarded as an unfair and inadequate system, based upon statutes or the common law. The purpose of the act, as appears from its title, is to provide a fund out of which reparation in such cases shall be made. For that purpose the employments are classified by the State Liability Board of Awards, with reference to their degree of hazard and risk, and rates of premiums fixed, based upon the total payroll and number of employés in each of the classes of employments, the purpose being to establish a fund adequate to provide for the compensation required in the act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year. (Section 1465–53, General Code.) Every employer who employs five workmen or more regularly in the same business or in the same establishment, who pays into the fund in accordance with the requirements of the act, is not liable to respond in damages at common law or by statute, save as in the act provided, for injuries or deaths of any such employés, provided the employés remain in the service with notice that the employer has paid into the state insurance fund the premiums required by the act. (Section 1465–57 General Code.) Section 1465–60 provides that "all employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employés for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employés, and also to the personal representatives of such employés where death results from such injuries and in such action the defendant

shall not avail himself or itself of the following common law defenses: The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence." There are provisions of the act concerning other features not necessary now to consider.

As the plaintiff in error, employing a large number of men, did not pay into the state insurance fund the premiums provided by the law, it was held not entitled to the defenses of the fellow-servant rule, the assumption of risk, or of contributory negligence. "The sole question presented," says the counsel for the plaintiff in error, "is whether the Ohio Workmen's Compensation Act contravenes the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the classification of employers and employés created by the act is arbitrary and unreasonable." This is said to result from the fact that in denying the defenses industries are classified by the number of employés,—those employing four or less are still privileged to make either or all of these defenses, while if the employer has five or more employés, and has not paid into the state insurance fund the premiums provided by the act, he is deprived of the benefit of such defenses. In other words, the legislature has selected for the application of this act only establishments employing five or more, and which comply with the terms of the act by paying the assessments required, and the law does not apply to establishments having less than five employés.

The fact that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones, is conceded in argument, and, is, we think, so obvious, that the state legislature cannot be deemed guilty of arbitrary classification in making one rule for large

and another for small establishments as to these defenses.

The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employé, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employé in a shop with five employés with those having less. No employé is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employés by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Railway* v. *King*, 217 U. S. 524, 534; *Engel* v. *O'Malley*, 219 U. S. 128, 135; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 648.

The question now is: Are employers who fail to come into the plan of the statute by complying with its requirements, who employ five men or more, arbitrarily discriminated against, because of the provisions of the act which deprive them of the benefit of the defense of contributory negligence of the employé, while the smaller employers, employing four or less, may still find such defense available?

This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amend-

ment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded. Classifications of industries with reference to police regulations, based upon the number of employés, have been sustained in this court. *St. Louis Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203. In that case, an inspection law of the State was sustained, which was applicable only to mines employing five men or more at any one time. This case was cited with approval, and its doctrine applied, in *McLean* v. *Arkansas*, 211 U. S. 539, where a law regulating the payment of wages in coal mines in Arkansas was sustained though made applicable only where not less than ten miners were employed.

Certainly in the present case there has been no attempt at unjust and discriminatory regulations. The legislature was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employés. It included, as we have said, all of that class of institutions in the State.

No employer is obliged to go into this plan. He may stay out of it altogether if he will. Not opening the door of the statute to those employing less than five, still leaving them to the obligations and rules of the common and existing statute law, the legislature may have believed

that, having regard to local conditions, of which they must be presumed to have better knowledge than we can have, such regulation covered practically the whole field which needed it and embraced all the establishments of the State of any size, and that those so small as to employ only four or less might be regarded as a negligible quantity and need not be assessed to make up the guaranty fund or covered by the methods of compensation which are provided by this legislation. This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers with five and more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the same conditions as those on the other side of it, but if the State has the right to pass police regulations based upon such differences,—and this court has held that it has,—we must look to general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours.

We are not prepared to say that this act of the legislature, in bringing within its terms all establishments having five or more employés, including the deprivation of the defense of contributory negligence where such establishments neglect to take the benefit of the law, and leaving the employers of less than five out of the act was

classification of that arbitrary and unreasonable nature which justifies a court in declaring this legislation unconstitutional.

It follows that the judgment of the Supreme Court of the State of Ohio is

Affirmed.

MERCELIS *v.* WILSON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 68. Submitted November 6, 1914.—Decided January 5, 1915.

While parties cannot give jurisdiction and may sometimes except to an erroneous ruling in their favor, in this case *held* that as the court had jurisdiction both of parties and subject-matter, the party invoking a ruling to change a bill for injunction to one to quiet title, cannot ask a reversal on the ground that the court had no power to grant such a motion.

As this case involved the fixing of a line, when that question was settled it was proper to quiet the title of each party as against the other; and as the findings support a decree in accord with the character of the proceedings asked for by appellant and which prevented a multiplicity of suits, such a decree was properly entered.

5 P. R. Fed. Rep. 492, affirmed.

THE facts, which involve the validity of a decree quieting title to property in Porto Rico, are stated in the opinion.

Mr. Hector H. Scoville and *Mr. Joseph Anderson, Jr.*, for appellants.

Mr. Felix Frankfurter, Mr. S T. Ansell and *Mr. Wolcott H. Pitkin, Jr.*, Attorney General of Porto Rico, for appellees.

MR. JUSTICE LAMAR delivered the opinion of the court.

On the north shore of the Island of Porto Rico, in the districts of Arecibo and Manati, there is a slough or swamp known as El Caño de Tiburones. It is 12 miles long, of varying width, and was supposed to contain about 7,000 acres, though that was a mere estimate since the exterior boundaries had not been established. Neither had it been authoritatively determined whether it was public land or private property. This uncertainty of boundary and title was the occasion of much litigation. *Catala* v. *Grahame*, 4 P. R. Fed. Rep. 538.

The Legislative Assembly of Porto Rico treated it as belonging to the public and, in December, 1907, leased it to Wenceslao Borda, Jr., with the right to drain, use and occupy the swamp as a sugar plantation. He was put in possession by the Porto Rican police, acting under the orders of the Commissioner and Assistant Commissioner of the Interior and other officials. For the purpose of establishing the boundaries they also took part in a survey which fixed a line running for a distance of about 2 miles through lands claimed by Mercelis and associates. Borda built a fence along this line and thereupon Mercelis and other land owners at once filed a bill in equity in the District Court of the United States for Porto Rico claiming that Borda and the Porto Rican officials had trespassed upon their property and, with force and arms, had taken possession of land on which were located valuable fresh water springs essential to the successful management and operation of their plantations. They alleged further that the trespass and marking of the line had already been the occasion of violent altercations between the respective parties; that the deprivation of the property and especially of the fresh water springs would occasion irreparable damage. For that reason, and to avoid a multiplicity of suits, the court was asked to enjoin Borda and the other defend-

ants from entering upon complainants' land, running lines, digging ditches, erecting fences or committing other trespasses. The defendants filed an answer in which they denied all of the material allegations of the bill and averred that they had only entered upon land belonging to the Government of Porto Rico by virtue of a lease from it. During the trial the defendants insisted that there was no equity in the bill, but the court, following *Hernandez* v. *Ochoa*, 4 P. R. Fed. Rep. 400, and *Catala* v. *Grahame*, 4 P. R. Fed. Rep. 538, held the remedy at law to be wholly inadequate and ruled that in view of the nature of the questions arising under the Spanish law, the case was of a nature which could not be tried by a jury. There was a trial lasting many days in which a multitude of witnesses were examined. There was an irreconcilable conflict in their testimony as to the boundaries of the swamp and whether it belonged to the public or to private individuals. "When the proofs were all in, counsel for the plaintiffs moved for leave to amend the prayer of their bill so as to make it conform to the proofs and, in effect, constitute it a bill to quiet title." The respondents objected, but the court granted the motion.

The evidence is not in the record but the court delivered an opinion (5 P. R. Fed. Rep. 492) in which he set out the facts as found by him. He thereupon made a decree that El Caño de Tiburones was public property; that the boundary of the adjacent land extended to the edge of the swamp and not to the channel or canal in the centre; that the springs, which were the main cause of the controversy, were the property of the plaintiffs; that wherever the line encroached upon high ground it should be relocated so as to run a few feet within the edge of the well defined swamp, and directed that a surveyor should mark and stake the line as designated in the decree. There was a motion and a supplemental motion for a rehearing which were denied and the case was brought to

this court on a record containing sixteen assignments of error, in which appellants complain of the findings against them; insist that the court erred in holding that equity had jurisdiction to decide the question of title, and in not sending that question to a court of law to be determined by a jury. They contend that it was error, in a proceeding involving title to what was claimed to be public land, to enter a decree in a case to which the Island of Porto Rico was not a party; that the court erred in establishing the line and in deciding the question of title adversely to the appellants; and that in a proceeding in which the sole relief prayed was an injunction, he erred in entering a decree in which he neither granted nor denied the injunction.

The original bill prayed for purely equitable relief by injunction, and if the case be treated as a suit in equity, which was to proceed "in the same manner as a circuit court" of the United States (April 12, 1900, c. 191, 31 Stat. 77, 84, § 34), then there was, of course, no right to demand a trial by jury, although, in its discretion, the court could have taken the verdict of a jury on any issue of fact upon which he desired their finding. On the other hand, if it be treated as a proceeding in a statutory court whose jurisdiction and form of procedure were to be in conformity with the Porto Rican law (31 Stat. 84, § 33), there was nothing to prevent the adoption and enforcement of rules by which relief could be afforded through the intervention of a jury or by the court itself. *Ely* v. *New Mexico R. R.*, 129 U. S. 291, 293; *Hornbuckle* v. *Toombs*, 18 Wall. 648, 654.

It is, however, not necessary to separately consider each of the sixteen assignments of error since they relate to rulings none of which is erroneous if the court, acting on the appellant's motion to amend, was justified in treating the proceeding as in the nature of a bill to quiet title. For in that event there was not only no right to a trial by jury but it was not error, as against the parties to the record, to

make a decree appropriate to such a bill instead of denying or granting the prayer of the original Bill for Injunction.

The appellants insist, however, that even with their consent, the court could not, without a cross-bill, make a decree quieting the title. In this view of the case they rely upon the assignment of error that "the court erred in suggesting and allowing the plaintiffs to amend their bill to conform to the proof after the trial of the issues, and the prayer of their bill in such a way as to change the nature and character of the bill from a bill for an injunction to a bill to quiet title."

The defendants did not appeal and the appellants cannot be heard to complain of the court's action in granting their own motion. Parties cannot give jurisdiction and may sometimes except to an erroneous ruling of the court in their favor. *Capron* v. *Van Noorden*, 2 Cranch, 126; *United States* v. *Huckabee*, 16 Wall. 414, 433; *Mansfield &c. Ry.* v. *Swan*, 111 U. S. 379, 382.

But in this case the court had jurisdiction of the subject-matter and of the parties before it, and therefore the appellants cannot ask for a reversal because of a ruling which, if not actually invoked, was voluntarily acted upon by them when they assented that the Bill should be converted into a proceeding to quiet title. *Cowley* v. *Northern Pacific R. R.*, 159 U. S. 569; *Perego* v. *Dodge*, 163 U. S. 160; *United States* v. *Memphis*, 97 U. S. 284; *Connell* v. *Smiley*, 156 U. S. 335; *Bethell* v. *Mathews*, 13 Wall. 1, 2. The case involved the fixing of a line. When that question was settled it was proper to quiet the title of each party as against the other up to the line thus established. The findings support the decree, which not only operated to prevent the multiplicity of suits referred to in the original bill, but was in accord with the character of the proceedings, which the appellants themselves asked the court to make. The decree is

Affirmed.

HULL *v.* DICKS.

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

No. 78. Argued November 12, 1914.—Decided January 5, 1915.

Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies after such adjudication and after the appointment, qualification and partial administration of the trustee, the estate vested in the trustee under § 70 of the Bankruptcy Act of 1898 is chargeable under § 8 of that law with the allowance for a year's support of the widow and minor children as provided by § 4041 of the Georgia Code.

The Bankruptcy Act of 1898 makes no exception to the rule that after proceedings have been commenced they are not to be abated by death of the bankrupt; and, under the proviso in § 8, the right of the widow and children in case of such death to an allowance out of what remains in the hands of the trustee, is as broad as the prohibition against abatement.

What the court may do pending the life of the bankrupt is binding on the bankrupt; and, as to such property as has been distributed prior to his death, the right of the widow and children to charge it with support under a state statute is defeated. Such allowance can only be made out of property remaining in the hands of the trustee on an order duly made in proceedings in which he, as representative of the creditors, has a right to be heard.

THE facts, which involve the construction of §§ 8 and 70 of the Bankruptcy Law of 1898 and § 4041 of the Georgia Code in regard to the allowance to be made for a year's support of the widow and children of a bankrupt dying during administration of the estate, are stated in the opinion.

Mr. William H. Barrett for Hull, trustee.

Mr. B. B. McCowen, with whom *Mr. Thomas W. Hardwick* was on the brief, for Mrs. Dicks.

MR. JUSTICE LAMAR delivered the opinion of the court.

In January, 1912, L. K. Dicks, a citizen and resident of Richmond County, Georgia, was adjudicated a bankrupt. James M. Hull, Jr., was elected Trustee and on February 5, 1912, took possession of all of the property of the bankrupt. Three weeks later L. K. Dicks died leaving a widow and four minor children. Thereafter the widow applied to the Court of Ordinary for the year's support to which the family was entitled by virtue of the provision in the Georgia Code (§ 4041) that "upon the death of any person . . . *leaving an estate,* solvent or insolvent . . . it shall be the duty of the Ordinary . . . to appoint . . . appraisers, . . . to set apart and assign to such widow and children . . . either in property or money, a sufficiency *from the estate* for their support and maintenance for the space of twelve months." . . .

Citation issued and thereafter the Ordinary duly set apart to the family a year's support to be made out of the estate of L. K. Dicks in the hands of the Trustee in Bankruptcy. The widow subsequently applied to the Referee for an order directing the Trustee to pay over the amount so set apart. Her application was denied and that ruling was reversed by the District Court. (198 Fed. Rep. 293.) The Trustee took the case to the Circuit Court of Appeals which certified to this court the following question:

"Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies after such adjudication and after the appointment, qualification and partial administration of the trustee, is the estate vested in the trustee under § 70 of the Bankruptcy Law of 1898 chargeable under § 8 of the same law, or otherwise, with the allowance for a year's support of the widow and minor children, as provided in the laws of Georgia?"

Counsel for the appellant contends that this question should be answered in the negative. He insists that § 8 [1] of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 549, does not create a right but, as in this case, merely preserves the right, given by the state law, to have a year's support "out of the estate" left by the husband and father. It was then argued that as the title to the property had vested in the Trustee before the death of the bankrupt, Dicks did not die "leaving an estate" and there was, therefore, no estate out of which, under the Code of Georgia, the year's support could be set apart.

This reasoning would be applicable if the widow and children were asserting rights of inheritance under the Statute of Distribution. Moreover, there would be no answer to the argument advanced if the title, which vested in the Trustee, was in its nature like that which would have been acquired if Dicks in his lifetime had made a Deed of Assignment to the Trustee. But such is not the case. For construing the statute as a whole it will be seen that while § 70 [2] (30 Stat. 565) of the Bankruptcy Act vested title in the Trustee primarily for the benefit of the creditors, there was an exception in favor of the bankrupt himself, and the transfer was also subject to a condition in favor of his family if he died before the

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[1] "§ 8. Death or Insanity of Bankrupts.—*a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."

[2] "§ 70. Title to Property.—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, . . ."

proceedings ended. If the Bankrupt elected to claim a homestead the exempt property, even though it had passed to the Trustee, would, after identification and appraisal, be turned back into his possession. *Chicago &c. R. R.* v. *Hall*, 229 U. S. 511, 515. The Trustee's title was also subject to the condition that if the bankrupt died during the pendency of the proceedings, the widow and children would be entitled to receive the allowance given them by the laws of the State of his residence. This latter limitation on the Trustee's title was in connection with legislation on the subject of abatement.

For the statute seems to assume that, in the absence of a statutory provision to the contrary, the death of the bankrupt would have abated the proceedings. In that event the property, although the title thereto had been previously vested in the Trustee, would have been surrendered to the bankrupt's personal representatives, who would then have been in possession of an *estate*, out of which, under the Georgia Code, a year's support could have been set apart to the widow and children. Congress need not have made any change in the general law but, as in the act of August 19, 1841, c. 9, 5 Stat. 440, could have allowed the suit to abate on the death of the bankrupt; Or, as in the act of March 2, 1867, c. 176, 14 Stat. 517, 522, § 12, it could have permitted without requiring, an abatement; Or, as in the act of April 4, 1800, c. 19, 2 Stat. 19, 27, § 19, it could have made a mandatory provision that the proceedings should continue if the bankrupt died "after commission sued out;" Or, it could have legislated, as in § 8 of the present statute (30 Stat. 549, § 8) where Congress went further than in any of the previous bankruptcy laws and made a universal and mandatory provision that "the death . . . of a bankrupt shall not abate the proceedings." That sweeping declaration, however, was coupled with the *Proviso* that "in case of death the widow and children shall be entitled to all

rights of dower and allowance fixed by the laws of the State of the bankrupt's residence."

Section 8 with these two clauses prevents, on the one hand, the loss and inconvenience to creditors resulting from an abatement,—while at the same time avoiding the hardship of depriving the widow and minor children of a right to which they would have been entitled, if the suit had abated on the death of the husband and father. The statute makes no exception or qualification—after the proceedings have been commenced they are not to be abated by death. And the *Proviso* clearly indicates an intention to make the preservation of the widow and children's right to the allowance as broad as the prohibition against the abatement of the suit. Inasmuch as the proceedings did not abate if the death of the bankrupt occurred after filing the petition and before the election of the Trustee, neither was the right to the allowance lost if the bankrupt died after such election and at a stage of the proceedings where the title had, by operation of law, vested in the Trustee. For such title, whenever it accrued, was subject to the condition that the assets, in the hands of the Trustee, should be charged with the payment of the allowance to which on the death of the bankrupt, the widow and children were entitled under the laws of the State of his residence.

It is claimed that, under this interpretation, if the bankrupt died after the Trustee had wholly or partially administered the estate the widow and children could still enforce their rights to a year's support out of the bankrupt estate, even if the property had passed into the hands of purchasers. But this loses sight of the fact that the family had nothing in the nature of a lien which, during his lifetime, prevented the bankrupt or the Trustee from disposing of his property. What was done by the court, while the bankrupt was in life and a party to the proceeding, was binding upon him, and therefore as effectual

to defeat the right to a year's support out of such property as if the sale and distribution had been made by the bankrupt himself or by his duly authorized agent.

The right to the year's support accrued at the date of the bankrupt's death and could be enforced out of property remaining in the hands of the Trustee,—and then only after the allowance had been duly made in proceedings, where he, as representative of the creditors, had the right to be heard.

There has been some conflict in the decisions dealing with the subject [*In re McKenzie*, 142 Fed. Rep. 383, 384 (6); *In re Slack*, 111 Fed. Rep. 523; *In re Newton*, 122 Fed. Rep. 103; *In re Seabolt*, 113 Fed. Rep. 766, 767; *In re Parschen*, 119 Fed. Rep. 976; *Thomas* v. *Woods*, 173 Fed. Rep. 585, 586; vacated, 178 Fed. Rep. 1005], but the foregoing considerations require that the question of the Circuit Court of Appeals should be answered, Yes.

BROWN, AND SCHERMERHORN, TRUSTEE UNDER WILL OF CUNNINGHAM, *v.* FLETCHER, TRUSTEE OF BRAKER.

PROVIDENT LIFE AND TRUST COMPANY AS EXECUTOR OF WOOD *v.* SAME.

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

Nos. 454, 455. Argued December 1, 1914.—Decided January 5, 1915.

The prohibition against the Federal court entertaining jurisdiction of actions brought by assignees to recover upon a promissory note or other chose in action, as now embodied in § 24, Judicial Code, does not apply to a suit to recover a specific thing or damages for its wrongful detention or caption.

Under § 294, Judicial Code, which is the statutory rule for construing that Code, the slight changes between the wording of the act of 1887 and that of § 24, Judicial Code, in regard to jurisdiction of the Federal court of suits by assignees was not intended to bring about any change in the law but merely the continuation of the existing statute.

Federal Statutes have always permitted the vendee or assignee to sue in the United States courts to recover property or an interest in property when the requisite value and diversity of citizenship existed. *Barney* v. *Baltimore*, 6 Wall. 280.

Section 24, Judicial Code, does not deprive the District Court of jurisdiction to enforce an interest under an assignment by the *cestui que trust* of an interest in the estate to which the latter has a fixed right in the future. Such an assignment is not a chose in action payable to the assignee within the prohibition of § 24, but an evidence of the assignee's right, title and estate in the property.

CONRAD BRAKER, JR., of New York, died testate July 21, 1890. The fifteenth item of his will provided that the sum of $50,000 should be held in trust and securely invested for the use of his son, Conrad Morris Braker, who was to receive the income until he attained the age of fifty-five, when the "principal should be paid to him and belong to him absolutely." If he failed to reach that age the property was to be held for the benefit of his wife for life with remainder to Henry Braker.

The sixteenth item directed that "one-half of all the rest, residue and remainder, both real and personal," of his estate should be held in trust for the use and benefit of Conrad Morris Braker, who was to receive the interest derived from said trust, until he attained the age of fifty-five when "the whole amount, less $25,000, shall be paid and belong to him absolutely." If he failed to reach that age then the property was to pass to another son.

The amount realized from the residuum, described in the sixteenth item, aggregated $120,000, and with the $50,000 described in the fifteenth item of the will, was invested in property (not described) which is now held by Austin B. Fletcher, the duly appointed Testamentary Trustee.

On April 18, 1901, Conrad Morris Braker assigned to

Frank L. Rabe "seven-tenths of all the estate, right, title and interest which he had in and to the principal sum of $50,000 described in the 15th item of the will." Thereafter Rabe transferred and assigned this interest to the New York Finance Company.

On February 25, 1902, Conrad Morris Braker executed an instrument in which, subject to the assignment of $35,000 above referred to, he "granted, bargained, sold, assigned, transferred and set over to the New York Finance Company all of his estate, right, title and interest of any kind, form or description whatsoever to the amount or extent of $35,000 in and to the legacy of $50,000, and also in and to a legacy of the part or share of the residuary estate to which he was entitled under and by virtue of the fifteenth and sixteenth paragraphs of the will of Conrad Braker, Jr., deceased."

By virtue of these two transfers the New York Finance Company claimed to be the owner of such interest in the fund or estates created under the fifteenth and sixteenth items of the will.

The Finance Company thereafter made a note for $15,000, payable to William Brewster Wood, and secured the same by a transfer of its interests under the sixteenth item. It also made another note for $10,000 to Brown, and Schermerhorn, Trustee for Clara Schermerhorn, and secured the same by a transfer of its interest under the fifteenth item.

These notes were not paid when they fell due and the New York Finance Company's equity of redemption was acquired by the respective holders of the two notes. In February, 1913, when Conrad Morris Braker attained the age of fifty-five, the respective holders of the notes and assignments demanded that the Trustee should pay over to them that to which they were entitled by virtue of the instruments aforesaid. The Trustee refused to comply and thereupon the Executors of Wood and the

Trustees of Clara Schermerhorn (all of whom were citizens and residents of Pennsylvania) brought suit in the United States District Court for the Southern District of New York against Fletcher, Trustee, and Conrad Morris Braker, beneficiary, both being citizens and residents of New York.

The two Bills were each prepared by the same counsel and were identical except that the Trustees of Schermerhorn sued for what had been assigned them under the fifteenth item. The Executors of Wood sued for the interest assigned them in the money or property mentioned in the fifteenth and sixteenth items of the will. In both suits it was alleged that the Complainants had acquired title by virtue of the sale, transfer and assignment executed by Conrad Morris Braker, and subsequent mesne conveyance. It was alleged that Complainants had been informed that he claimed the transfers signed by him to be void because made to secure usurious debts. Both Bills prayed that Braker should be enjoined from litigating the question of title in any other court; that the complainants' right under the assignments should be established by final decree, and that Fletcher, the Testamentary Trustee, should be ordered to pay over to the complainants what was due them by virtue of the respective assignments from Braker.

The court dismissed both bills and in each case gave a certificate that the order was based "solely on the ground that no jurisdiction of the District Court existed."

From that order the complainants appealed to this court.

Mr. Charles H. Burr, with whom *Mr. Frederic W. Frost, Mr. Perry D. Trafford* and *Mr. H. Gordon McCouch* were on the brief, for appellants:

The interpretation placed upon the provisions of § 629, Rev. Stat. (now § 24, 1st subd. Jud. Code) by this court in *Ingersoll* v. *Coram,* 211 U. S. 335, is decisive of the jurisdictional questions in this case.

An interest in a distributive share of an estate (*a fortiori* in a trust fund) is not within the statute.

The prohibition is against suits by "an assignee" and neither an administrator nor an executor are regarded as assignees within the statute.

In support of these contentions see *Ambler* v. *Eppinger*, 137 U. S. 480; *Bertha Zinc & Mineral Co.* v. *Vaughan*, 88 Fed. Rep. 566; *Brown* v. *Fletcher*, 206 Fed. Rep. 461; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Chappedelaine* v. *Dechenaux*, 4 Cr. 308; *Coal Company* v. *Blatchford*, 11 Wall. 172; *Croxall* v. *Shererd*, 5 Wall. 268; *Deshler* v. *Dodge*, 16 How. 622; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634; *Rice* v. *Houston*, 13 Wall. 66; *Sere* v. *Pitot*, 6 Cr. 333.

Mr. William P. S. Melvin, with whom *Mr. Safford A. Crummey* was on the brief, for appellees:

The present statute fixing the jurisdiction of District Courts is unqualified in its expression that they cannot take cognizance of a suit to recover upon a chose in action in favor of any assignee unless such suit might have been prosecuted in the court if no assignment had been made. See § 24, Jud. Code, 1st subd.; § 11, Judiciary Act, 1789, 1 Stat. 78; Act of March 3, 1887; Act of August 13, 1888; *Sere* v. *Pitot*, 6 Cr. 335; *Corbin* v. *Black Hawk Co.*, 105 U. S. 659; *Shoecraft* v. *Bloxham*, 124 U. S. 730; *Deshler* v. *Dodge*, 16 How. 622; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Ambler* v. *Eppinger*, 137 U. S. 480; and *Bertha Zinc Co.* v. *Vaughan*, 88 Fed. Rep. 566.

This court early defined what is a "chose in action" as the term is used in the statute, and the term has a familiar meaning in our law literature and decisions.

The term is one of comprehensive import. It includes all the infinite varieties of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money by action. *Sheldon* v. *Sill*, 8 How. 441; *Bushnell* v. *Kennedy*, 9 Wall. 387;

United States v. *Moulton*, 27 Fed. Cas. 11, 12; *Mercantile Trust Co.* v. *Gumbernat*, 143 N. Y. App. Div. 308; Bouvier's Law Dictionary; 2 Blackstone Comm. 389, 397; *Ayers* v. *West R. R.*, 48 Barb. 135; *Gillett* v. *Fairchild*, 4 Den. 80; *Haskell* v. *Blair*, 57 Massachusetts, 534, 536; *Prudential Life Ins. Co.* v. *Hann*, 21 Ind. App. 525; *Steele* v. *Gablin*, 115 Georgia, 929; 3 Am. & Eng. Ency., 1st ed. Sub. Tit. "Choses in Action," 236; *Brown* v. *Fletcher*, 206 Fed. Rep. 461.

Equitable assignments of choses in action, as well as legal assignments, are comprehended within the application of the statute. *Sere* v. *Pitot*, 6 Cr. 333; *Corbin* v. *Black Hawk County*, 105 U. S. 659.

Ingersoll v. *Coram*, 211 U. S. 335, is not adverse to the appellees' contention. The circumstances are totally different.

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

The appellants brought suit in the United States District Court for the Southern District of New York for the purpose of recovering from the Trustee an interest in a trust estate which had been sold, transferred and assigned by Conrad Morris Braker, the beneficiary. The complainants were citizens and residents of Pennsylvania. Both defendants were citizens and residents of New York. Notwithstanding the diversity of citizenship, the court dismissed the bill on the ground that, as the assignor Braker, a citizen of New York, could not in the United States District Court, have sued Fletcher, Trustee and citizen of the same State, neither could the Complainants, his assignees, sue therein, even though they were residents of the State of Pennsylvania.

The appeal from that decision involves a construction of § 24 of the Judicial Code, which limits the jurisdiction of

the United States District Court when suit is brought therein . . . "to recover upon any promissory note or other chose in action in favor of any assignee. . . ."[1]

This section of the Judicial Code is the last expression of a policy intended to prevent certain assignees from proceeding in the United States courts.

The restriction was imposed not only to prevent fraudulent transfers, made for the purpose of conferring jurisdiction, but in apprehension that promissory notes and like papers might be transferred in good faith by the citizens of one State to those of another, and thus render the maker liable to suit in the Federal court. *United States Bank* v. *Planters' Bank*, 9 Wheat. 904, 909.

Except for a short time when the act of March 3, 1875, c. 137, 18 Stat. 470, restricted suits "founded on a contract in favor of an assignee," the several statutes on the subject, in force prior to the adoption of § 24, made this limitation on the jurisdiction of United States courts apply to "any suit to recover the contents of any promissory note or other chose in action in favor of any assignee" (Act of September 24, 1789, c. 20, 1 Stat. 73, 78, § 11; Rev. Stat., § 629; Act of March 3, 1887, c. 373, 24 Stat. 552; Act of August 13, 1888, c. 866, 25 Stat. 433, 434). These were technical terms of variable meaning. They might have been given a literal construction, in which case the act would not have wholly remedied the evil intended to be corrected. They were also susceptible of a construction so broad as to include subjects far beyond the congressional policy. For a "chose in action embraces in

[1] ". . . No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made." 36 Stat. 1091.

one sense all rights of action." *Dundas* v. *Bowler*, 3 McLean, 204, 208. So that if the words of the statute had been given their most comprehensive meaning every assignee or vendee would have been prevented from suing in the United States court unless the assignor could have maintained the action. It is evident, however, that there was no intent to prevent assignees and purchasers of property from maintaining an action in the Federal court to recover such property, even though the purchaser was an assignee and the deed might, in a sense, be called a chose in action.

On the other hand, to construe the statute so as to only prohibit suits in such courts by the assignees of notes, drafts and written promises to pay, would have left open a wide field and enabled assignees of accounts and of claims arising out of breaches of contracts to proceed in the Federal courts, although the parties to the original agreement could not have there sued.

While, therefore, it was admitted in *Sere* v. *Pitot*, 6 Cranch, 332, that suits to recover the "contents of a chose in action" referred to "assignable paper," yet, in view of the general policy of the Act, these words were given a construction so broad as to include suits on accounts and on claims other than those containing written promises to pay.

That ruling, though criticized in *Bushnell* v. *Kennedy*, 9 Wall. 387, 393, was constantly followed (*Sheldon* v. *Sill*, 8 How. 441; *Shoecraft* v. *Bloxham*, 124 U. S. 730), and it has been settled that the prohibition applied not only to suits on instruments which might be said to have "contents," but also to suits for the recovery of "all debts, and all claims for damages for breach of contract, or for torts connected with a contract . . . but . . . not to suits to recover the specific thing or damages for its wrongful caption or detention." *Bushnell* v. *Kennedy*, 9 Wall. 387, 390, 391. *Ibid.* 392. Neither did it apply to suits

for damages for neglect of duty. *Deshler* v. *Dodge*, 16 How. 622, 631; *Ambler* v. *Eppinger*, 137 U. S. 480.

Such is still the law under § 24; for, according to the statutory rule for construing the Judicial Code [1] it may be assumed that the slight difference in language between the act of 1887 ("contents of a chose in action in favor of the assignee") and § 24 ("suits upon a chose in action in favor of an assignee") was not intended to bring about any change in the law, but merely as a continuation of the existing statute. In continuing the statute Congress also carried forward the construction that the restriction on jurisdiction applied to suits for damages for breach of contract, but did not apply to suits for a breach of duty nor for a recovery of things. It therefore becomes necessary to determine whether these proceedings by Bill in Equity are suits by assignees on a chose in action; or, suits for the recovery of an interest in property by the transferee or assignee.

From the allegations of the two bills it appears that the $50,000, mentioned in the fifteenth item, and the $120,000, proceeds of the residuum of the estate referred to in the sixteenth item, had each been invested by the Trustee—but whether in real estate, tangible personal property, stocks or bonds is not stated.

If the trust estate consisted of land it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of § 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the *Bushnell Case*, nothing in § 24 to prevent the holder

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[1] "SEC. 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest." 36 Stat. 1167.

by virtue of a bill of sale from suing for the "recovery of the specific thing or damages for its wrongful caption or detention." And if the funds had been converted into cash, it was still so far property—in fact instead of in action—that the owner, so long as the money retained its earmarks, could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the Trustee,—not in opposition to the *cestui que trust* so as to give him a chose in action, but—in possession for his benefit in accordance with the terms of the testator's will.

It is said, however, that this case does not relate to the sale of land, or of things, or even to a transfer of a definite fund, but to two assignments of $35,000,—to be made out of money or property in the hands of a trustee. It is claimed that this was an assignment of a chose in action within the meaning of § 24 of the Judicial Code. Giving the words of the statute the most extensive construction authorized by previous decisions, they can only refer to a chose in action based on contract. *Kolze* v. *Hoadley*, 200 U. S. 76, 83. The restriction on jurisdiction is limited to cases where A is indebted to B on an express or implied promise to pay; B assigns this debt or claim to C, and C as assignee of such debt sues A thereon or to foreclose the security. Or where A has contracted with B and B assigns the contract to C who sues to enforce his rights, by Bill for specific performance or, by an action for damages for breach of the contract. *Shoecraft* v. *Bloxham*, 124 U. S. 730, 735.

But here there was no contract and this is not a suit for a breach of a contract. For whatever may have been the earlier view of the subject (Holmes Common Law, 407, 409) the modern cases do not treat the relation between Trustee and *cestui que trust* as contractual. The rights of the beneficiary here depended not upon an agreement

between him and Braker, but upon the terms of the will creating the trust and the duty which the law imposed upon the Trustee because of his fiduciary position. And a proceeding by the beneficiary or his assignee for the enforcement of rights in and to the property, held—not in opposition to but—for the benefit of the beneficiary, could not be treated as a suit on a contract, or as a suit for the recovery of the contents of a chose in action, or as a suit on a chose in action. *Upham* v. *Draper*, 157 Massachusetts, 292; *Herrick* v. *Snow*, 94 Maine, 310. See also *Edwards* v. *Bates*, 7 Man. & G. 590; *Nelson* v. *Howard*, 5 Maryland, 327.

The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. *Ham* v. *Van Orden*, 84 N. Y. 257, 270; *Stringer* v. *Young, Trustee*, 191 N. Y. 157; *Lawrence* v. *Bayard*, 7 Paige, 70; *Woodward* v. *Woodward*, 16 N. J. (Eq.) 83, 84. The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title, and estate in and to property. Assuming that the transfer was not colorable or fraudulent, the Federal statutes have always permitted the vendee or assignee to sue in the United States courts to recover property or an interest in property when the requisite value and diversity of citizenship existed. *Barney* v. *Baltimore*, 6 Wall. 280. The equity jurisdiction of such courts extends to suits by heirs against executors and administrators (*Security Co.* v. *Black River Bank*, 187 U. S. 211, 228) and to suits against

Trustees for the recovery of an interest in the trust property by the beneficiary or his assignee.

The conclusion that § 24 of the Judicial Code did not deprive the District Court of jurisdiction, to enforce complainants' interest under the assignments executed by the *cestui que trust*, was foreshadowed in *Ingersoll* v. *Coram*, 211 U. S. 335, 361. That was a proceeding by an assignee to enforce an equitable lien on an heir's interest in an estate. In that case it was claimed that because the assignor could not have sued in the United States court, neither could the assignee maintain his Bill therein. The case was disposed of on another ground but the court said that "it is certainly very disputable if an interest in a distributive share of an estate is within the statute."

That language was used in reference to a suit for the recovery of part of a fund in the hands of an executor, who held primarily for the payment of the testator's debts. There the legatees, distributees and assignees had no such vested interest in specific property as is the case here, where all of the property in the hands of the Trustee was held for the purpose of paying the income to Braker until he reached the age of fifty-five, when the corpus was to be delivered to him [or to his assignees] in fee. That interest was transferable and the purchaser was not precluded by § 24 from suing in the United States court for the interest so transferred.

This view of the record makes it unnecessary to discuss the question as to whether the Executors of Wood could in any event be treated as assignees of the character referred to in § 24 (*Chappedelaine* v. *Dechenaux*, 4 Cranch, 305, 306), since their title was cast upon them by operation of law. The nature of the case is also such that we cannot consider the effect of an assignment of $35,000 out of the $50,000, if it shall appear that the trust estate in the hands of the Trustee consists of property and not of money. These are questions which the United States District

Court for the Southern District of New York has jurisdiction to hear and determine between these residents and citizens of different States.

Decrees reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* FINN AND OTHERS AS RAILROAD COMMISSION OF KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 546. Argued December 11, 14, 1914.—Decided January 5, 1915.

Where the jurisdiction of a Federal court is invoked because of questions raised under the Federal Constitution it extends to the determination of all questions presented, irrespective of the disposition that may be made of the Federal questions or whether it is necessary to decide them at all. *Ohio Tax Cases*, 232 U. S. 576.

While the rule applicable to the Interstate Commerce Commission that an order made indisputably contrary to the evidence, or without any evidence, is arbitrary and subject to be set aside, may also be applicable to orders of the Kentucky Railroad Commission, in this case *held*, that there was substantial evidence to support the order establishing rates and the Commission had jurisdiction under the McChord Act to make the order rëstablishing a former rate.

Where the evidence shows that special rates on a particular commodity were voluntarily established and were maintained for many years after the avowed reason for introducing them had ceased to exist, and the carrier's reason for an advance was not because they were inadequate but because they gave rise to discrimination, there is a reasonable inference that the advanced rates are unreasonably high which is sufficient to give jurisdiction to the Kentucky Railroad Commission under the McChord Act to make an order reëstablishing the original rates and to support the conclusion that such rates were remunerative and should be reëstablished.

Where, in a proceeding before a state Railroad Commission, complaining shippers specified the amount of extortionate charges for which

reparation was prayed and the carrier admitted the rates had been charged and denied liability for reparation solely on the ground that the rates were reasonable, and there was evidence to support the charges that the rates were extortionate, and the record does not show that the carriers were denied an opportunity to introduce evidence, this court will not declare that an order of reparation was contrary to the due process provision of the Fourteenth Amendment, either because of lack of evidence on which to base the amounts ordered to be paid or because, under the statutory procedure, there was no formal issue, or because the statute does not provide for compulsory production of evidence either before the Commission or in any subsequent trial before the court.

This court does not pass upon moot questions, and one seeking to strike down a state statute as unconstitutional must show that he is within the class with respect to whom it is unconstitutional, and that he has been injured by the unconstitutional feature.

Where the record does not show that the party complaining suffered for lack of compulsory process or that he will be prevented in a subsequent trial from producing evidence, he cannot be heard to object to a statute as unconstitutional because it does not provide for compulsory process or contains restrictions on admission of evidence.

214 Fed. Rep. 465, affirmed.

THE facts, which involve the validity of orders of the Kentucky Railroad Commission establishing rates and awarding reparation and the constitutionality of the statute under which the orders were made, are stated in the opinion.

Mr. Edward S. Jouett and *Mr. William A. Colston*, with whom *Mr. Henry L. Stone* was on the brief, for appellant.

Mr. Edward W. Hines, with whom *Mr. J. V. Norman*, *Mr. James Garnett*, Attorney General of the State of Kentucky, and *Mr. Charles C. McChord* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case was here on a former occasion (*Louisville & Nashville R. R.* v. *Garrett*, 231 U. S. 298), when an order

denying a motion for an interlocutory injunction was affirmed. The suit was brought by the Railroad Company to enjoin the enforcement of two orders made August 10, 1910, by the Railroad Commission of Kentucky, one of which prescribed maximum rates of freight upon certain intrastate traffic, and the other awarded specified amounts in reparation for payments previously exacted by the carrier for freight transportation in excess of the rates thus established by the Commission as reasonable. One of the grounds of attack upon the rate order was that the Commission had acted arbitrarily, in that there was no evidence before it tending to establish that the rates which the company had maintained were unreasonable. Upon the former appeal we held that since it appeared that there had been a hearing before the Commission with evidence adduced on each side, and since this was not produced before the court, the general allegations of the bill respecting the effect of the evidence, and the statements contained in the affidavits submitted upon the application for injunction, were insufficient to justify the court in enjoining the rates upon the ground that the Commission either had denied the hearing which the statute contemplated, or by its arbitrary action had been guilty of an abuse of power. With respect to the reparation order we sustained the action of the court below in declining to determine its validity, upon the ground that the persons in whose favor the award was made had not been brought in as parties.

After our decision, appellant filed an amended and supplemental bill bringing in as defendants the parties in whose favor reparation was awarded, stating with more particularity the grounds upon which that order was attacked, and, with respect to the rate order, setting out as an exhibit a transcript of the evidence introduced before the Commission. Upon this amended and supplemental bill appellant again moved for an interlocutory injunction.

The motion was heard before three judges, under § 266, Judicial Code (36 Stat. 1162, c. 231), the application for injunction was denied (214 Fed. Rep. 465), and the case comes here by direct appeal taken pursuant to the provisions of the same section.

The jurisdiction of the Federal court was invoked because of questions raised under the Constitution of the United States, and not because of diversity of citizenship; but it extends, of course, to the determination of all questions presented, irrespective of the disposition that may be made of the Federal questions, or whether it is necessary to decide them at all. *Ohio Tax Cases*, 232 U. S. 576, 587, and cases cited.

The action of the Commission was based upon Kentucky Statutes (Carroll): § 816, defining what shall be deemed extortion by a railroad corporation in charging toll or compensation for intra-state transportation; § 820*a* (the "McChord Act"), authorizing the Commission, upon complaint made against a railroad company for charging extortionate freight or passenger rates, to hear the matter and, if it determines that the company has been guilty of extortion, then to establish a just and reasonable rate for services thereafter to be rendered; and § 829, authorizing the Commission to hear and determine complaints under § 816 and to render such award as may be proper.

It appears that for many years prior to March 25, 1910, the railroad company had voluntarily maintained special rates for the transportation of corn, rye, barley, and malt, and empty barrels, boxes, etc., from three points of origin upon the Ohio River—Louisville, Covington, and Newport—to points of destination in the interior of the State; these rates being allowed only to owners of distilleries, when the commodities in question were used as raw materials or supplies. On the date mentioned, the carrier withdrew these special rates and substituted what are

described as the "standard rates," being the same that had been theretofore charged to others than distillers. Thereupon numerous distillery companies complained to the Commission, insisting that the new rates were exorbitant and that the former rates were just and reasonable. After a hearing the Commission sustained the contention of the petitioners and established the maximum rates now in question, these being the same as the special rates, which, prior to March 25, 1910, the carrier had given to the distillery companies; but by the Commission's order they were made to apply to the commodities mentioned, without regard to the use that was to be made of them.

The McChord Act, under which the rate order was made, is set forth in *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175, 178. It provides for notice to the carrier, stating the nature of the complaint or matter to be investigated, and the time and place of hearing it, and requires the Commission to hear such statements, argument, or evidence offered by the parties as the Commission may deem relevant. Section 829 likewise requires notice of the hearing to be given to the company; the evidence is to be reduced to writing together with the award, and they are to be filed in the office of the clerk of a designated court, and a summons is to be issued requiring the company to appear and show cause why the award should not be satisfied. If the parties fail to appear, judgment is rendered by default; but if trial is demanded, the case is to be tried as ordinary cases are, except that no evidence shall be introduced by either party other than that heard by the Commission or such as the court shall be satisfied could not have been produced before the Commission by the exercise of reasonable diligence. The judgment and proceedings thereon are to be the same as in ordinary cases. Since the case was here before, the Court of Appeals of Kentucky, in *Illinois Central R. R.* v. *Paducah*

Brewery Co., 157 Kentucky, 357, has passed upon § 829, upholding its validity under the state and Federal constitutions, and construing it as authorizing the Commission to award reparation in money.

The contentions now made by appellants are reducible to two; first, that the rate order is invalid because not supported by substantial evidence; and, second, that the reparation order is invalid for the same reason, and also because the statute pursuant to which it was made violates the "due process" clause of the Fourteenth Amendment.

To deal first with the rate order. In cases arising under the Interstate Commerce Act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91, 92. It is contended that the "due process" provision of the Fourteenth Amendment imposes a like rule of procedure upon the States with respect to their exercise of the legislative power of rate-making.

We find it unnecessary to pass upon this question. The McChord Act, like the Interstate Commerce Act, contemplates that the Commission bases its determination upon the evidence adduced before it; and it may at least be assumed that the rate order must be held invalid unless it was founded upon substantial evidence. But we agree with the court below that there was substantial evidence to support the order. At the hearing, a Mr. Goodwyn was produced by the company, and made a statement of the facts in its behalf—not under oath, but it was received as evidence in behalf of the company—in substance

that the special rates maintained prior to March 25, 1910, had been introduced more than thirty years before in order to encourage the distillery business along the line of the railroad; that the rates were not raised when the business of the distilleries became prosperous, but were continued as long as the railroad company could continue them with justice to itself, that is to say, to the point where prosecution was threatened by the Interstate Commerce Commission for alleged discrimination, and that in order to remove the discrimination the company had raised the rates charged on grain for distillery purposes in order to make them correspond with those charged on grain used for other purposes. These grain rates were the chief bone of contention. There was some other evidence, but not very much, that bore directly upon the question of the reasonableness of the rates; but it should be said that full opportunity was afforded to the railroad company to adduce such evidence as it desired. And since it appeared that the company, long prior to March 25, 1910, had voluntarily established the comparatively low rates upon a substantial part of their traffic, had maintained them for many years after the reason assigned for originally introducing them had ceased to exist, and had then withdrawn them, not upon the ground that they were inadequate, but because they gave rise to discrimination, and in so doing had introduced rates very much greater, it seems to us that the conduct of the carrier, in the absence of some explanation more conclusive than any that was made, was sufficient basis for a reasonable inference that the special rates in force prior to March 25 upon the distillery supplies were reasonable and adequate compensation for that and other similar traffic, and that the rates thereafter charged were unreasonably high to the extent of being extortionate. *Interstate Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 99. This was sufficient to give jurisdiction to the Commission under the

McChord Act, and to support the conclusion that it reached.

As to the reparation order, it is further insisted (a) that there was no evidence before the Commission to show that the several parties to whom reparation was awarded had paid freights based upon the rates complained of, or to show the amounts of their payments, or to show that the difference in the freight payments represented damages to which they were entitled; and (b) that so much of the statute (§ 829) as undertakes to provide the procedure for recovering reparation is contrary to the "due process" provision of the Fourteenth Amendment, because in the proceeding before the Commission there is no formal issue and no method of requiring the production of evidence, while in the subsequent trial before the court based upon the Commission's award there is no right to adduce evidence other than such as was presented to the Commission, unless the court shall first be satisfied that the evidence is such as could not have been produced before the Commission with the exercise of reasonable diligence.

From the record, however, it appears that in the petition filed by the distillers and distillery companies before the Commission it was alleged that since March 25, 1910, each of the petitioners had been subjected to extortionate charges collected from them by the railroad company, and for which an award of reparation was prayed; the respective amounts thus claimed being particularly specified. The answer of the company admitted that the rates mentioned had been charged, collected, and received by it, but denied that they were extortionate, unjust, or unreasonable, and upon this ground, and no other, denied liability to make reparation. The transcript of the testimony taken before the Commission shows that the several reparation claims were presented, and the following colloquy occurred respecting them: "Mr. McChord (counsel for petitioners): 'Is there any question made as to

the amount of those claims?' Mr. Goodwyn: 'We never checked them.' Mr. Dearing (counsel for the railroad company): 'My idea is that the Commission can easily check them, and you and I can check them if we come to the position that they are entitled to the reparation.' Mr. McChord: 'You deny it all?' Mr. Dearing: 'Yes.' Mr. McChord: 'I will put all these claims in as exhibits. Some of these have not been made up by the complainants, and we will want to fill them in later.' Mr. Dearing: 'That will be all right.' Mr. McChord: 'Shall I put them in now?' Mr. Siler: 'Yes, or at any time.'" In short, the record shows that the only question made respecting the reparation claims was the general contention that the rates charged by the company were in fact not unreasonable or extortionate; and that it was in effect conceded that the particular amounts claimed were proper to be awarded as reparation, if the rates charged were determined to be unreasonable and extortionate.

We have already seen that there was evidence to support the Commission's affirmative finding upon the latter point. And this leaves no basis, as we think, for appellant's present attack upon § 829 as repugnant to the due process provision of the Fourteenth Amendment. In the proceeding before the Commission there were pleadings sufficiently formal, and appellant was permitted to raise such issues and introduce such evidence as it desired. There is nothing to show that it suffered for lack of compulsory process against witnesses. As to its right to adduce evidence before the court in the action to enforce payment of the award, its complaint in this regard seems to us at least premature. There is nothing to show that it has or could have any defence to the payment of the reparation that it has not already either interposed or waived in the proceeding before the Commission, or to show that it has any evidence to be adduced before the court that it would be prevented from introducing by the

effect of the restriction contained in § 829. This court does not sit to pass upon moot questions; and, as has been often pointed out, it is incumbent upon one who seeks an adjudication that a state statute is repugnant to the Federal Constitution to show that he is within the class with respect to whom it is unconstitutional, and that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Constitution. *Hatch* v. *Reardon*, 204 U. S. 152, 161; *Southern Railway* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544.

The order of the District Court should be, and it is *Affirmed.*

HENDRICK *v.* STATE OF MARYLAND.

ERROR TO THE CIRCUIT COURT OF PRINCE GEORGE'S COUNTY, STATE OF MARYLAND.

No. 77. Argued November 11, 12, 1914.—Decided January 5, 1915.

Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke the jurisdiction of this court in respect thereto.

Where a state statute provides as a prerequisite to the use of the highways of a State without cost by residents of other States compliance with the highway laws of their respective States, one who does not show such compliance cannot set up a claim for discrimination in this particular.

Quœre, and not now decided, whether the Motor Vehicle Law of Maryland so discriminates against residents of the District of Columbia as to be an unconstitutional denial of equal protection of the laws in that respect. This court will assume, in the absence of a definite and authoritative ruling of the courts of a State to the contrary, that

when a statute shall be construed by the highest court, discrimination against the residents of a particular State or Territory will be denied.

The movement of motor vehicles over highways being attended by constant and serious dangers to the public and also being abnormally destructive to the highways is a proper subject of police regulation by the State.

In the absence of national legislation covering the subject, a State may prescribe uniform regulations necessary for safety and order in respect to operation of motor vehicles on its highways including those moving in interstate commerce.

A reasonable graduated license fee on motor vehicles when imposed on those engaged in interstate commerce does not constitute a direct and material burden on such commerce and render the act imposing such fee void under the commerce clause of the Federal Constitution.

A State may require registration of motor vehicles; and a reasonable license fee is not unconstitutional as denial of equal protection of the laws because graduated according to the horse power of the engine. Such a classification is reasonable.

The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress.

A State which, at its own expense, furnishes special facilities for the use of those engaged in interstate and intrastate commerce may exact compensation therefor; and if the charges are reasonable and uniform they constitute no burden on interstate commerce. The action of the State in such respect must be treated as correct unless the contrary is made to appear.

A state motor vehicle law imposing reasonable license fees on motors, including those of non-residents, does not interfere with rights of citizens of the United States to pass through the State. *Crandall* v. *Nevada*, 6 Wall. 35, distinguished.

THE facts, which involve the construction and constitutionality of certain provisions of the Motor Vehicle Law of Maryland and their application to citizens of the District of Columbia, are stated in the opinion.

Mr. Jackson H. Ralston and *Mr. Osborne I. Yellott*, with whom *Mr. Clement L. Bouve* and *Mr. William E. Richardson* were on the brief, for plaintiff in error:

The act is an illegal attempt to regulate interstate commerce.

Passing into or through States of the Union in automobiles is an act of interstate commerce.

The matter of interstate transportation of passengers is one capable of uniform regulation and legislation, and is thus exclusively within the domain of Congress and wholly apart from regulation or interference on the part of the States.

Where, in subjects requiring uniformity of legislation, such as interstate transportation of passengers, the state law comes into direct conflict with the commerce clause, it is illegal, although a *bona fide* attempt to exercise the police power of the State.

The exaction of license and registration fees as conditional to the privilege of the use of the roads of the State of Maryland is an attempt to regulate interstate commerce directly, and imposes a burden on such commerce.

The Maryland law is unconstitutional, as violative of the rights of citizens of the United States to pass into and through Maryland.

The Motor Vehicle Law discriminates unconstitutionally against the residents of the District of Columbia.

The Motor Vehicle Law is further unconstitutional, in that it is not a *bona fide* exercise of the police power of the State, but an unlawful attempt to collect revenue for the State.

The law is unconstitutional in that the registration fees provided for and graded according to differing scales of payment have no relation to the necessary expense of identification or control of motor vehicles, and constitutes arbitrary, unequal, unfair, and class legislation, and does not insure to the citizens of the United States equal protection of the laws.

The tax imposed is not laid as compensation for the use of the roads.

In support of these contentions see *Adams Express Co.* v. *The Auditor*, 166 U. S. 976; *Bowman* v. *C. & N. W. R. R.*, 125 U. S. 465; *Brennan* v. *Titusville*, 153 U. S. 289; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Covington Bridge* v. *Kentucky*, 154 U. S. 204; *Crandall* v. *Nevada*, 6 Wall. 35; *Fargo* v. *Stevens*, 121 U. S. 230; Fed. Cas., No. 18260; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Henderson Bridge Co.* v. *Mayor*, 141 U. S. 679; *Hendrick* v. *Maryland*, 115 Maryland, 552; *Int. Text Book Co.* v. *Pigg*, 217 U. S. 91; *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Leisy* v. *Hardin*, 100 U. S. 135; *Leloup* v. *Mobile*, 127 U. S. 640; *License Cases*, 5 How. 504, 592; *Mobile Co.* v. *Kimball*, 102 U. S. 691; *Moran* v. *New Orleans*, 112 U. S. 69; *Paul* v. *Virginia*, 8 Wall. 75; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Pullman Co.* v. *Twombly*, 29 Fed. Rep. 667; *Railroad Co.* v. *Hasen*, 95 U. S. 465; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Slaughter House Cases*, 16 Wall. 394; *State Freight Tax*, 15 Wall. 232; *United States* v. *Col. & N. W. R. R.*, 157 Fed. Rep. 325; *Welton* v. *Missouri*, 91 U. S. 295; *Williams* v. *Fears*, 50 L. R. A. 685; Cooley on Const. Lim., 5th ed., p. 501; Cooley on Taxation, 2d ed., p. 99; 8 Cyc., p. 1042; Miller on Const. Law, p. 260; Public General Laws of Maryland, 1910, ch. 207, §§ 131, 132, 133, 136, 137, 138, 140*a*, 140*o*, 140*p*, 140*r*.

Mr. Enos S. Stockbridge and *Mr. Edgar Allan Poe*, Attorney General of the State of Maryland, for defendant in error:

The act of 1910 is a valid exercise of police power by the State of Maryland.

There are not any new or unusual principles involved in this case, but simply the application of doctrines long recognized, and at this late date thoroughly crystallized. Since *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, this court has rec-

ognized the right of the States to regulate and control their highways under what is termed "the police power." *Cardwell* v. *Bridge Co.*, 113 U. S. 205; *Phillips* v. *Mobile*, 208 U. S. 472; *Minnesota Rate Cases*, 230 U. S. 352, 411; *New York* v. *Miln*, 11 Pet. 102; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *New Orleans Gas Co.* v. *Louisiana*, 115 U. S. 650, 661; *Jones* v. *Brim*, 165 U. S. 180, 182; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; *Slaughter House Cases*, 16 Wall. 36, 63; *Escanaba Trans. Co.* v. *Chicago*, 107 U. S. 678; *Lake Shore* v. *Ohio*, 173 U. S. 285, 303; *Robbins* v. *Shelby Co.*, 120 U. S. 489.

Since the automobile came into more or less common use, this precise question has not been before this court; but see decisions in state courts, holding such regulations to be a proper exercise of this power. *Ruggles* v. *State*, 120 Maryland, 553, 561; *Ayres* v. *Chicago*, 239 Illinois, 237; *Commonwealth* v. *Kingsbury*, 199 Massachusetts, 542, 544; *State* v. *Mayo*, 106 Maine, 62; *Brazier* v. *Philadelphia*, 215 Pa. St. 297; *Bozeman* v. *State*, 7 Ala. App. 151; *Unwen* v. *New Jersey*, 73 N. J. L. 529, aff'd 75 N. J. L. 500; *Kane* v. *Titus*, 81 N. J. L. 594.

Although regulation by the States may incidentally affect interstate commerce, nevertheless, such regulation is valid until Congress does act. *Minnesota Rate Cases*, 230 U. S. 352, 411; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 333; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Huse* v. *Glover*, 119 U. S. 543.

Legislation having for its purpose the regulation of highways and the protection of life and property against those using the highways, is a matter of local concern and not national in its character. *Mobile Co.* v. *Kimball*, 102 U. S. 691, 697.

In the absence of any light on the question from the record, the court cannot pass on the question as to whether the amount of the licenses prescribed by the act in ques-

tion bears any relation to the necessary expense of identification or control of motor vehicles operated in the State of Maryland. *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Atl. & Pac. Tel. Co.* v. *Philadelphia*, 190 U. S. 165; *West. Un. Tel. Co.* v. *New Hope*, 187 U. S. 419; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 354; *Packet Co.* v. *St. Louis*, 100 U. S. 423, 429; *Foote* v. *Maryland*, 232 U. S. 494, 504.

The mere fact that the funds received by the Commissioner of Motor Vehicles are to be turned over to the State Treasurer for the benefit of a road fund, does not render this law invalid as a tax under the guise of the police power. *Morgan* v. *Louisiana*, 118 U. S. 455; *Huse* v. *Glover*, 119 U. S. 543, 549; *Cleary* v. *Johnston*, 79 N. J. L. 49; *Hardin Storage Co.* v. *Chicago*, 235 Illinois, 58, 68.

The fact that the law operates only on motor vehicles does not create an unreasonable classification of vehicles using the roads, and is not an unlawful discrimination against a particular class. *Jones* v. *Brim*, 165 U. S. 180; *State* v. *Mayo*, 106 Maine, 62; *Christy* v. *Elliott*, 216 Illinois, 31; *State* v. *Swagerty*, 203 Missouri, 517.

The Fourteenth Amendment was never intended to abridge the police power of the State. If the act in question is properly within the police power of the State, this court will not inquire further. *Lochner* v. *New York*, 198 U. S. 45, 53; *Barbier* v. *Connolly*, 113 U. S. 27; *Minn. Rwy.* v. *Beckwith*, 129 U. S. 26, 33; *L'Hote* v. *New Orleans*, 177 U. S. 587, 596; *House* v. *Mays*, 219 U. S. 270, 282; *Broadnax* v. *Missouri*, 219 U. S. 285, 292; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 700.

Plaintiff in error was not engaged in interstate commerce. *Hatch* v. *Reardon*, 204 U. S. 152, 161; *Williams* v. *Walsh*, 222 U. S. 415, 422; *Gibbons* v. *Ogden*, 9 Wheat. 1, 189; *Mobile Co.* v. *Kimball*, 102 U. S. 691, 702; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Hoke* v. *United*

States, 227 U. S. 308, 320; *Wabash &c. Ry.* v. *Illinois*, 118 U. S. 556, 572.

In order to say that a person or thing is moving in interstate commerce, the movement must be continuous. *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665.

The right of the citizens to go to and from the States of the Union is not based upon the theory that by so doing they are engaged in interstate commerce. It is expressly put upon another ground in *Crandall* v. *Nevada*, 6 Wall. 35, 44.

The act is not in conflict with the commerce clause, although commerce between a State and the District of Columbia is interstate commerce. *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Hanley* v. *Kansas &c. Ry.*, 187 U. S. 617.

The States or their agents, municipal or private, may make and collect a charge for facilities rendered, and such a charge is not a tax or burden on or interference with interstate commerce, although it may incidentally affect interstate commerce. In return for the additional facilities and improved conveniences provided, States are permitted to charge and collect reasonable compensation.

As to toll charges for the use of improved navigable streams see *Kellogg* v. *Union Co.*, 12 Connecticut, 7; *Huse* v. *Glover*, 119 U. S. 543, 548; *Gloucester Ferry* v. *Pennsylvania*, 114 U. S. 196, 214; *Sands* v. *Manistee River*, 123 U. S. 288; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 333; *Thames Bank* v. *Lovell*, 18 Connecticut, 500.

As to bridges over navigable streams see *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *The Binghamton Bridge*, 3 Wall. 51; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 221.

As to use of wharves or docks see *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100

U. S. 430; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Packet Co.* v. *Aiken*, 121 U. S. 444; *Huse* v. *Glover*, 119 U. S. 543; *Atl. & Pac. Tel. Co.* v. *Pennsylvania*, 190 U. S. 160, 163.

As to the use of roads or streets see *Tomlinson* v. *Indianapolis*, 144 Indiana, 142; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 333; *Cleary* v. *Johnston*, 79 N. J. L. 49; *Kane* v. *Titus*, 81 N. J. L. 594.

The police power is a very extensive one, and is frequently exercised where it also results in raising a revenue. *Phillips* v. *Mobile*, 208 U. S. 472, 478; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699; *Packet Co.* v. *Aiken*, 121 U. S. 444, 449; *Huse* v. *Glover*, 119 U. S. 543, 549.

Citizens of the States and United States have the right to go into and leave any State of this Union without hindrance. *Crandall* v. *Nevada*, 6 Wall. 35; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Slaughter House Cases*, 16 Wall. 36, 75.

A State may protect its own citizens and property, although the exercise of this right by the State may incidentally or remotely affect the right. *Railroad Co.* v. *Husen*, 95 U. S. 465, 473; *Minnesota Rate Cases*, 239 U. S. 352, 406.

A State is justified in requiring those, who elect to use on its highways a mode of travel that is abnormally destructive to that road, to compensate it for such use. *Kane* v. *Titus*, 81 N. J. L. 594.

The act constitutes no unlawful discrimination against residents of the District of Columbia. It is a proper exercise by the State of its police power. The alleged discrimination cannot be complained of under the Fourteenth Amendment. The Act could only be invalid under the privileges and immunities clause, or the equal protection of the laws clause. These clauses go no further than to prohibit the States from imposing greater restrictions or burdens on citizens of other States or the United States

than it does on its own citizens. The act conforms to this. *Ward* v. *Maryland*, 12 Wall. 418, 430; *Slaughter House Cases*, 16 Wall. 36, 77; *Blake* v. *McClung*, 172 U. S. 239, 249, 256.

Residents of the District of Columbia are classified differently from the residents of other States except Maryland. This classification is a reasonable one, and rests upon a well founded ground of distinction of which the court will take judicial notice. The court will also take judicial notice of the fact that there is no large city in any other State so situated with respect to the borders of Maryland. This is conclusive of the justness of the classification. *Heath* v. *Worst*, 207 U. S. 338, 355; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Osan Lumber Co.* v. *Bank*, 207 U. S. 251; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiff in error was tried before a Justice of the Peace, Prince George's County, Maryland, upon a charge of violating the Motor Vehicle Law. A written motion to quash the warrant because of conflict between the statute and the Constitution of the United States was denied; he was found guilty and fined. Thereupon an appeal was taken to the Circuit Court—the highest in the State having jurisdiction—where the cause stood for trial *de novo* upon the original papers. It was there submitted for determination by the court upon an agreed statement of facts grievously verbose but in substance as follows:

The cause was originally brought July 27, 1910, before a Justice of the Peace for Prince George's County by the State against John T. Hendrick for violating § 133 of the Motor Vehicle Law effective July 1, 1910. He is and then was a citizen of the United States, resident and commorant

in the District of Columbia. On that day he left his office in Washington in his own automobile and drove it into Prince George's County and while temporarily there was arrested on the charge of operating it upon the highways without having procured the certificate of registration required by § 133 of the Motor Vehicle Law. He was brought before a Justice of the Peace and fined fifteen dollars after having been found guilty of the charge set out in a warrant duly issued—a motion to quash having been denied. Whereupon he filed his appeal. At the time and place aforesaid he had not procured the certificate of registration for his automobile required by § 133. Upon the foregoing the court shall determine the questions and differences between the parties and render judgment according as their rights in law may appear in the same manner as if the facts aforesaid were proven upon the trial. Either party may appeal.

The Maryland legislature, by an act effective July 1, 1910 (c. 207, Laws 1910, 168, at p. 177), prescribed a comprehensive scheme for licensing and regulating motor vehicles. The following summary sufficiently indicates its provisions:

The Governor shall appoint a commissioner of motor vehicles, with power to designate assistants, who shall secure enforcement of the statute. Before any motor vehicle is operated upon the highways the owner shall make a statement to the commissioner and procure a certificate of registration; thereafter it shall bear a numbered plate. This certificate and plate shall be evidence of authority for operating the machine during the current year (§ 133). Registration fees are fixed according to horse-power—six dollars when 20 or less; twelve dollars when from 20 to 40; and eighteen dollars when in excess of 40 (§ 136). No person shall drive a motor vehicle upon the highway until he has obtained at a cost of two dollars an operator's license, subject to revocation for cause

(§ 137). Any owner or operator of an automobile, non-resident of Maryland, who has complied with the laws of the State in which he resides requiring the registration of motor vehicles, or licensing of operators thereof, etc., may under specified conditions obtain a distinguishing tag and permission to operate such machine over the highways for not exceeding two periods of seven consecutive days in a calendar year without paying the ordinary fees for registration and operator's license (§ 140*a*); but residents of the District of Columbia are not included amongst those to whom this privilege is granted (§ 132). Other sections relate to speed, rules of the road, accidents, signals, penalties, arrests, trials, fines, etc. All money collected under the provisions of the Act go to the commissioner, and except so much as is necessary for salaries and expenses must be paid into the state treasury to be used in construction, maintaining, and repairing the streets of Baltimore and roads built or aided by a county or the State itself. Section 140*a* is copied in the margin.[1]

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[1] "140*a*. Any owner or operator not a resident of this State who shall have complied with the laws of the State in which he resides, requiring the registration of motor vehicles or licensing of operators thereof and the display of identification or registration numbers on such vehicles, and who shall cause the identification numbers of such State, in accordance with the laws thereof, and none other, together with the initial letter of said State, to be displayed on his motor vehicle, as in this subtitle provided, while used or operated upon the public highways of this State, may use such highways not exceeding two periods of seven consecutive days in each calendar year, without complying with the provisions of Sections 133 and 137 of this subtitle; if he obtains from the Commissioner of Motor Vehicles and displays on the rear of such vehicle a tag or marker which the said Commissioner of Motor Vehicles shall issue in such form and contain such distinguishing marks as he may deem best; provided, that if any non-resident be convicted of violating any provisions of Sections 140*b*, 140*c*, 140*d*, 140*e* and 140*l* of this subtitle, he shall thereafter be subject to and required to comply with all the provisions of said Sections 133 and 137 relating to the registration of

Plaintiff in error maintains that the act is void because —It discriminates against residents of the District of Columbia; attempts to regulate interstate commerce; violates the rights of citizens of the United States to pass into and through the State; exacts a tax for revenue—not mere compensation for the use of facilities—according to arbitrary classifications, and thereby deprives citizens of the United States of the equal protection of the laws.

If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the State we will not assume that upon a proper showing this will be denied. The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland commissioner for an identifying tag or marker—prerequisites to a limited use of the highways without cost by residents of other States under the plain terms of § 140*a*. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction in respect thereto. *Hatch* v. *Reardon*, 204 U. S. 152, 161; *Williams* v. *Walsh*, 222 U. S. 415, 423; *Collins* v. *Texas*, 223 U. S. 288, 295, 296; *Missouri*,

motor vehicles and the licensing of operators thereof; and the Governor of this State is hereby authorized and empowered to confer and advise with the proper officers and legislative bodies of other States of the Union and enter into reciprocal agreements under which the registration of motor vehicles owned by residents of this State will be recognized by such other States, and he is further authorized and empowered, from time to time, to grant to residents of other States the privilege of using the roads of this State as in this section provided in return for similar privileges granted residents of this State by such other States."

Kansas & Texas Ry. v. *Cade,* 233 U. S. 642, 648, and cases cited.

The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the State put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the State's action is always subject to

inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress. *Barbier* v. *Connolly*, 113 U. S. 27, 30, 31; *Smith* v. *Alabama*, 124 U. S. 465, 480; *Lawton* v. *Steele*, 152 U. S. 133, 136; *N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 628, 631; *Holden* v. *Hardy*, 169 U. S. 366, 392; *Lake Shore & Michigan Southern Railway* v. *Ohio*, 173 U. S. 285, 298; *Chicago, B. & Q. R. R.* v. *McGuire*, 219 U. S. 549, 568; *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 291.

In *Smith* v. *Alabama*, *supra*, consideration was given to the validity of an Alabama statute forbidding any engineer to operate a railroad train without first undergoing an examination touching his fitness and obtaining a license for which a fee was charged. The language of the court, speaking through Mr. Justice Matthews, in reply to the suggestion that the statute unduly burdened interstate commerce and was therefore void, aptly declares the doctrine which is applicable here. He said (p. 480):

"But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States."

The prescribed regulations upon their face do not appear to be either unnecessary or unreasonable.

In view of the many decisions of this court there can be

no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699; *Huse* v. *Glover*, 119 U. S. 543, 548, 549; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329, 330; *Minnesota Rate Cases*, 230 U. S. 352, 405; and authorities cited. The action of the State must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facilities supplied by the State, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed; and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable.

There is no solid foundation for the claim that the statute directly interferes with the rights of citizens of the United States to pass through the State, and is consequently bad according to the doctrine announced in *Crandall* v. *Nevada*, 6 Wall. 35. In that case a direct tax was laid upon the passenger for the privilege of leaving the State; while here the statute at most attempts to regulate the operation of dangerous machines on the highways and to charge for the use of valuable facilities.

As the capacity of the machine owned by plaintiff in error does not appear, he cannot complain of discrimination because fees are imposed according to engine power. Distinctions amongst motor machines and between them and other vehicles may be proper—essential indeed—and those now challenged are not obviously arbitrary or oppressive. The statute is not a mere revenue measure

and a discussion of the classifications permissible under such an act would not be pertinent.

There is no error in the judgment complained of and it is accordingly

Affirmed.

NORFOLK & WESTERN RAILWAY COMPANY *v.* HOLBROOK.

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

No. 516. Argued December 1, 2, 1914.—Decided January 5, 1915.

Under the Employers' Liability Act, where death is instantaneous the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same. In every instance, however, the award must be based on money values, the amount of which can be ascertained only upon a view of the peculiar facts presented.

While it is proper for the trial court to instruct the jury to take into consideration the care, attention, instruction, guidance and advice which a father may give his children and to include the pecuniary value thereof in the damages assessed, it is not proper to give the jury occasion for indefinite speculation by comparing the rights of the actual beneficiaries with those of the supposed dependents who are mere next of kin.

Where the facts are adequate to constitute a strong appeal to the sympathy of the jury the charge should be free from anything which the jury can construe into a permission to go outside of the evidence.

It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion or prejudice or any other violation of lawful rights. *Pleasants* v. *Fant*, 22 Wall. 116.

215 Fed. Rep. 687, reversed.

THE facts, which involve the construction of the Federal Employers' Liability Act of 1908, are stated in the opinion.

Mr. F. Markoe Rivinus, with whom *Mr. Theodore W. Reath* was on the brief, for plaintiff in error.

Mr. William H. Werth for defendant in error:

Substantial pecuniary damage is presumed as a matter of law in favor of a widow and children; the presumption is *prima facie*, of course, and it may be shown that the deceased husband and father was a burden, but in the absence of such rebutting evidence the presumption prevails. This presumption is recognized and applied in the following cases: *Balt. & Pot. R. R.* v. *Mackey*, 157 U. S. 72; 2 Sedgwick on Dam., 9th ed., § 584a; *Atchison &c. Ry.* v. *Wilson*, 48 Fed. Rep. 57; *Spiro* v. *Felton*, 73 Fed. Rep. 91; *S. C.*, 78 Fed. Rep. 576; *Peden* v. *Am. Bridge Co.*, 120 Fed. Rep. 523; *Fithian* v. *Railroad Co.*, 188 Fed. Rep. 842; *Chicago &c. R. R.* v. *Woolridge*, 51 N. E. Rep. 701; *Dukeman* v. *Cleveland R. R.*, 86 N. E. Rep. 712; *Louis. & Nash. R. R.* v. *Buck*, 19 N. E. Rep. 453; *Korrady* v. *Railroad Co.*, 29 N. E. Rep. 1069; *Haug* v. *Gr. Nor. R. R.*, 77 N. W. Rep. 97; *Hays* v. *Hogan*, 165 S. W. Rep. 1125.

In the case of mere next of kin the contrary presumption prevails. 2 Sedgwick on Dam., 9th ed., § 584a; *Burk* v. *Arcata R. R.*, 57 Pac. Rep. 1065; *Rhoades* v. *Chicago &c. R. R.*, 81 N. E. Rep. 371; *Garrett* v. *Louis. & Nash. R. R.*, 197 Fed. Rep. 715, 722; *In re Cal. Nav. Co.*, 110 Fed. Rep. 670, 677, and see Case Note, 11 L. R. A. (N. S.) 623.

Mr. Justice McReynolds delivered the opinion of the court.

W. T. Holbrook, a bridge carpenter, aged thirty-eight and employed by plaintiff in error at a wage of $2.75 per day, was killed by a passing train while at his work in McDowell County, West Virginia, January 4, 1913. He left a widow, thirty-two years old, and five children of

one, four, seven, eleven, and fourteen years. The widow qualified as administratrix and instituted this suit under the Employers' Liability Act, approved April 22, 1908, c. 149, 35 Stat. 65, in behalf of herself and children in the United States District Court, Western District of Virginia. She charged that the accident resulted from negligence of agents and employés of the Railway Company and at the trial introduced evidence tending to establish this fact. The jury returned a verdict for $25,000 in her favor; judgment thereon was affirmed by the Circuit Court of Appeals (215 Fed. Rep. 687); and the cause was brought here.

The only assignment of error now relied upon goes to a single sentence in instruction No. 5, wherein comparison is made between the pecuniary injuries of a widow and infant children and those of adults or mere next of kin. At the instance of the administratrix, the court told the jury (instruction No. 4) that if Holbrook's own negligence contributed proximately to his death only proportionate damages could be recovered and then gave instruction No. 5, in the following words:

"The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

"However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary

injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding $40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

"(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed; and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

"(2) The jury will also take into consideration the care, attention, instruction, training, advice and guidance which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

The Railway Company duly excepted because "the court tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the

case of persons suing who were more distantly related." The exception was overruled, and this action is now relied on as material error requiring a reversal.

Under the Employers' Liability Act, where death is instantaneous, the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same. The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from those demanding examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented. *Michigan Central Railroad* v. *Vreeland,* 227 U. S. 59, 68, 72, 73; *American Railroad of Porto Rico* v. *Didricksen,* 227 U. S. 145, 149; *Gulf, Colorado &c. Ry.* v. *McGinnis,* 228 U. S. 173, 175, 176; *North Carolina Railroad* v. *Zachary,* 232 U. S. 248, 256, 257.

In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed. But there was nothing—indeed there could be nothing—to show the hypothetic injury which might have befallen some unidentified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased

husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts. *Insurance Co.* v. *Baring*, 20 Wall. 159, 161.

The facts brought out during the course of the trial were adequate to constitute a strong appeal to the sympathy naturally engendered in the minds of jurors by the misfortunes of a widow and her dependent children. In such circumstances it was especially important that the charge should be free from anything which they might construe as a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion or prejudice, or from any other violation of lawful rights. *Pleasants* v. *Fant*, 22 Wall. 116, 121.

Considering the whole record we feel obliged to conclude that the probable result of the indicated language in Instruction No. 5 was materially to prejudice the rights of the Railway Company. The judgment of the Circuit Court of Appeals is accordingly reversed and the cause remanded to the District Court for the Western District of Virginia for further proceedings in conformity with this opinion.

Judgment reversed.

Mr. Justice McKenna, with whom Mr. Justice Day and Mr. Justice Hughes concur, dissenting.

I am unable to concur in the opinion and judgment of the court. I think the criticism that the railway company makes of the charge of the court to the jury is too severe in inference and makes a single sentence in a charge which

occupies a page of the record exclusively dominant, pushing aside all qualifications and particulars. I do not think this is permissible. The charge of a court to a jury must be considered as a whole, not by isolated sentences, and a jury as one of the tribunals of the country must be presumed to have some sense.

The court in the case at bar was confronted with the difficulty with which courts are often confronted and which no court has yet been able completely to surmount by any form of words—of bringing home to itself or to a jury the loss to wife and infant children through the death of the husband and father. The court in the present case ventured to say that these relations had something more in them and their destruction had something more of "pecuniary injury" than the injury to "the mere next of kin" and that there might be a loss to infant children greater than to adults. Would any one like to deny it? Would not its denial upset all that is best, in sentiment and duty, in life? And must that sentiment and duty, so potent in motive and conduct, be illegal to emphasize in a court of justice as an interference with the strict standards of the law?

By these standards, I admit, the charge of the court must be determined, and, therefore, let us turn to them as applied by the district court. The court said the amount of recovery must "be measured by the pecuniary injury suffered by the widow and infant children as the *direct result* of the death of the husband and father, it not being *permissible for the jury* to go beyond the *pecuniary loss* and give damages for the *loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.*" (Italics mine.) Can there be any mistake in the standard declared by the court? Not love, not sorrow, not mental anguish, not sentiment, but loss in money "as the direct result of the

death," and beyond that money loss "it not being permissible for the jury to go." The standard then is money loss, or, to use the court's words, "the pecuniary injury suffered." No prompting to or excuse for impulse or passion was given, nor was imagination left any sway. The judgment of the jury was brought and held to the money value of the life destroyed to wife and children dependent upon it. And the elements in the computation were not left undefined. They were enumerated as follows: (1) Earning capacity at time of death and the probability of its continuance. In estimating the latter, and hence the value of it to wife and children, the jury were told to consider the age, health, habits, industry, intelligence and character of the deceased and his expectancy of life, as shown by the evidence—all, I may say in passing, strictly legal elements and none found fault with. (2) Regarding those qualities and his devotion to his parental duties or indifference thereto, as shown by the evidence, the jury were instructed to take into consideration "the care, attention, instruction, training, advice and guidance" which "he would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

A money standard with careful iteration, it will be observed, is declared throughout, and there is no dispute as to the elements to which it is to be applied; and of which the law assigns to the jury the duty of estimating. I repeat, no error is asserted of these elements or of the estimate of their pecuniary value by the jury, but counsel say that they were made vicious and might have been exaggerated or misunderstood by the comparison made by the court between the widow and children and dependents who were mere next of kin and between infants and adults. It may be well to give the court's language.

After stating that the amount recovered should be measured by the pecuniary injury suffered, the court added, "However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages." It is objected that the instruction was error because the court told the jury that the widow and children of the deceased were entitled to "larger damages" than would have been allowable to persons suing who were more distantly related. The first impulse of the mind is against the objection, and the impulse is supported by the deliberate resolution of cases. In *Balt. & Pot. R. R.* v. *Mackey*, 157 U. S. 72, and *Michigan Central R. R.* v. *Vreeland*, 227 U. S. 59, the same distinctions are expressed. In explanation of those cases counsel say this court announced "the general proposition of law that the rule for damages must differ as the degree of the *proven* dependence of the beneficiary differs," and add, "but matter suitable in an opinion of an *appellate* court may be inappropriate in a charge to a jury." The latter statement is rather intangible. It cannot be that the law declared by an appellate court is unsuitable to be followed by a trial court. The court besides in the pending case did no more than express the elements of damages as dependent upon the relationship of the deceased to the beneficiaries. The distinction is a natural one, based on the realities of life, and I cannot conceive of a mistake by the jury in its application. There may be, indeed, special cases, and counsel imagines there may be, of crippled or diseased adults or infirm next of kin who, on account of their condition, may be entitled to a special considera-

tion, but the possibility of their existence did not make the instruction of the court erroneous, or that the jury in some way might have made a "comparison between beneficiaries who were before the court and hypothetical beneficiaries who were not in the case at all." In other words, the contention is that the jury was left or invited to conjecture the injury in an extreme example of imaginary dependent next of kin as necessarily below the limit of the injury to the widow or infant children, and this notwithstanding the careful enumeration of the elements of damage contained in the charge of the court. I am unable to yield to the contention. The court only expressed a general distinction, a natural one based on general experience and supported by a difference in legal obligations. It is a distinction recognized by the statute by virtue of which the action was brought as determining the order of precedence of its beneficiaries. The law, therefore, recognizes the fact, and it is not to be put out of view, that there is a difference in the relation of a widow and children to a deceased husband and father and the relation of the next of kin, whatever be the degree of the dependence of the latter. But, granting I am mistaken in this and that there may be exceptional cases of dependent next of kin, they do not constitute the rule, and the objection to the charge of the court was too general. The objection was that the instruction took in elements of damage improper to be considered by the jury because the court told "the jury that the widow and infant children of decedent" were "entitled to larger damages than would be the case of persons suing who were more distantly related." It was not pointed out, therefore, that the court was wrong in its generality on account of exceptional instances which were left to the jury to imagine, but universally wrong. In other words, the objection was not, as it now is, that the court committed the case to the imagination of the jury or made the "relationship

itself" of the plaintiff and her children to the deceased a factor to be considered in fixing the amount of pecuniary damages. If the objection had been so special and explicit it might have been yielded to. At any rate, it was wrong because of its generality and should not now be regarded. The judgment, therefore, should be affirmed.

I am authorized to say that MR. JUSTICE DAY and MR. JUSTICE HUGHES concur in this dissent.

WATHEN v. JACKSON OIL & REFINING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 79. Submitted November 9, 1914.—Decided January 11, 1915.

The right to restrain the enforcement of a statute as an unconstitutional deprivation of its property is a right existing in the corporation itself, and a stockholder is not entitled to maintain such an action without clearly showing that he has exhausted the means within his reach to obtain action by the corporation in conformity to his wishes.

Under Equity Rule No. 27 (formerly No. 94) in order to confer jurisdiction upon a Federal court of a suit by a stockholder to enforce a remedy belonging to the corporation the bill must allege not only that the suit is not a collusive one for the purpose of conferring jurisdiction but that unsuccessful efforts have been made to induce the corporation to bring the suit or the reasons for not making such efforts.

A bare assertion, by a stockholder in a suit to enjoin the officers of a corporation from complying with a statute alleged to be unconstitutional, that the officers and directors do not wish to comply with it but intend to for fear of incurring penalties, without stating any ground for dispensing with efforts to procure action by the corporation, is not sufficient under Equity Rule No. 27.

THE facts, which involve the constitutionality of certain provisions of the ten-hour labor law of Mississippi and

the right of a stockholder of a corporation to enjoin the corporation from complying with those provisions, are stated in the opinion.

Mr. Marcellus Green and *Mr. Garner Wynn Green* for appellant:

Chapter 157, Laws of Mississippi, 1912, unconstitutionally restrains the liberty of contract. Undue elevation of state police power at the expense of private constitutional right is a fundamental error. The State is without power to prohibit the making of a purely personal contract. *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161; *Muller* v. *Oregon*, 208 U. S. 412; *Chicago &c. R. R.* v. *McGuire*, 219 U. S. 565; *Allegeyer* v. *Louisiana*, 165 U. S. 578; *Smith* v. *Texas*, 233 U. S. 630; *Riley* v. *Massachusetts*, 232 U. S. 671; *Sturges* v. *Beauchamp*, 231 U. S. 320; *Central Lumber Co.* v. *State*, 226 U. S. 157; *Rosenthal* v. *People*, 226 U. S. 260; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Eubank* v. *Richmond*, 226 U. S. 370; *Chicago &c. Ry.* v. *Hackett*, 228 U. S. 559.

Gundling v. *Chicago*, 177 U. S. 183, and *Holden* v. *Hardy*, 169 U. S. 366, rightly hold that protection of the health and morals, as well as the lives, of citizens, is within the police power of the state legislature, but those cases are inapplicable here. And see *Buckeye Oil Co.* v. *State*, 60 So. Rep. 776.

The business of a cotton oil mill has not that which brought the law of New York into favor with the minority opinion of this court in *Lochner* v. *New York, supra.* This statute is purely a labor law and not a health measure. And see *Ex parte Fred Martin*, 26 L. R. A. (N. S.) 246.

In determining whether an act, limiting the hours of labor in any occupation, is in violation of the provisions of the Federal Constitution, the primary consideration is whether or not the occupation possesses such characteristics of danger to the health of those engaged in it

as to justify the legislature in concluding that the welfare of the community demands a restriction. *New York* v. *Williams*, 12 L. R. A. (N. S.) 1130.

This act attempts to legislate upon a subject over which the State is without power. See *Milsicek* v. *State*, 225 Missouri, 561; *People* v. *Williams*, 189 N. Y. 131; *S. C.*, 116 App. Div. 397; *In re Ten Hour Law*, 24 R. I. 603; *Eight Hour Bill*, 21 Colorado, 29; *Low* v. *Reese Printing Co.*, 41 Nebraska, 454; *Wheeling Bridge Co.* v. *Gilmore*, 8 Ohio C. C. 658.

The act arbitrarily classifies manufacturers and repairers, without regard to health or hazard, excluding from its operation persons and corporations whose employés perform services of identical character, and so violates the Federal Constitution. *Hing* v. *Crowley*, 113 U. S. 709; *Gulf &c. R. R.* v. *Ellis*, 165 U. S. 159; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283.

The act violates the Federal Constitution, in that, in the fines imposed and obedience thereby obtained, it is confiscatory. *Ex parte Young*, 209 U. S. 123, 163; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241.

Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. *Smyth* v. *Ames*, 169 U. S. 466.

Mr. Frank Johnston and *Mr. Ross A. Collins*, Attorney General of the State of Mississippi, for appellees:

The complainant, a shareholder in the Jackson Oil & Refining Company, has no right to file, or maintain, the bill in this case. The United States court at Jackson has no jurisdiction of the case.

Section 266, Judicial Code, does not extend the jurisdiction of the Federal courts, but only gives authority for the issuance of injunctions in already pending cases in the mode and manner prescribed in this statute, and where the

jurisdiction exists in a Federal court. And a court of equity, neither state nor Federal, has any criminal jurisdiction, and the Federal court of equity having no jurisdiction in respect to criminal cases, § 266 does not apply to injunctions in such cases.

The Mississippi statute of 1912, regulating the hours of labor in the State in manufacturing establishments, is valid and constitutional.

MR. JUSTICE HUGHES delivered the opinion of the court.

The appellant brought this suit in the District Court to restrain the Jackson Oil & Refining Company, its manager and officers, from complying with a statute of Mississippi prohibiting employment in described occupations for more than ten hours a day, except in cases of emergency or public necessity (Chapter 157, Laws of Mississippi, 1912, p. 165) and to enjoin the other defendants (certain public officers) from enforcing its provisions as against that company.

It was alleged in the bill, in substance, that the defendant corporation was engaged in operating a cotton seed oil mill of the value of $100,000; that the complainant owned five hundred and two shares of its stock of the par value of one hundred dollars each and of the actual value of $60,000; that the business required that the mill should be operated continuously, both day and night, two shifts of laborers being employed; that the employment was under wholesome conditions, without any detriment to the physical, mental and moral well-being of those employed; that the statute, if enforced, would work a deprivation of liberty of contract and of property, and an arbitrary discrimination, contrary to the Fourteenth Amendment; that compliance with the statute would involve greatly increased cost of operation and render the corporation insolvent and its property valueless, to the

complainant's injury; that the statute had been sustained by the Supreme Court of Mississippi in a suit against another manufacturing company; that, although the officers of the defendant corporation desired to disobey the statute, they were complying therewith being constrained to obedience through fear of the enormous penalties imposed; and that these penalties were so severe that no owner or operator in the position of the defendant corporation could invoke the jurisdiction of a court to test the validity of the statute, except at the risk of confiscation.

Those defendants who were public officers demurred to the bill upon the grounds (among others) that the complainant as a stockholder of the corporation had no right to sue; that the bill could not be maintained to restrain the enforcement of the criminal law of the State; and that the statute was constitutional.

An application for a preliminary injunction was heard on the bill and demurrer and was denied, and from the order entered to this effect the complainant appeals to this court. Judicial Code, § 266.

The objection urged below, and repeated here, that the complainant has failed to show any right to maintain this suit must be sustained. The right of action to restrain the enforcement of the statute as an unconstitutional deprivation of the liberty and property of the corporation was a right existing in the corporation itself, and a stockholder was not entitled to sue without showing to the satisfaction of the court that he had exhausted the means within his reach to obtain action by the corporation in conformity with his wishes. *Hawes* v. *Oakland*, 104 U. S. 450, 460, 461; *Detroit* v. *Dean*, 106 U. S. 537, 541, 542; *Quincy* v. *Steel*, 120 U. S. 241, 248; *Doctor* v. *Harrington*, 196 U. S. 579, 588. The former equity rule (Rule 94, 210 U. S. 541) provided not only that the bill must allege that the suit was 'not a collusive one to confer upon a

court of the United States jurisdiction of a case of which it would not otherwise have cognizance,' but that the bill 'must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action.' The present rule (Rule 27, 226 U. S. Appx., p. 8) adds to this provision the words,—'or the reasons for not making such effort'; and these reasons, of course, must be adequate. The rule embraces those cases where the wrong to the corporation arises from unconstitutional legislation. *Corbus* v. *Alaska Gold Mining Co.*, 187 U. S. 455; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 220; *Ex parte Young*, 209 U. S. 123, 143. Here, while it is averred that the suit is not a collusive one in order to confer a jurisdiction which would not otherwise exist, there is no allegation that the complainant has made any request that the corporation should bring the suit to prevent the alleged invasion of its rights; nor does it appear that, by reason of antagonistic control of the corporation, such a request would be futile. Although apparently the holder of a majority of its stock, the complainant does not show any effort whatever to induce the corporation to sue. He contents himself with asserting in effect that, though the directors and officers do not wish to comply with the statute, they will do so through fear of its penalties. But this reason is palpably inadequate inasmuch as the corporation itself would be entitled to protection against the imposition of such penalties as would virtually deny access to the courts for the protection of rights guaranteed by the Federal Constitution. *Ex parte Young*, 209 U. S., p. 147; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Missouri Pacific Rwy.* v. *Tucker*, 230 U. S. 340, 351; *Ohio Tax Cases*, 232 U. S. 576, 587; *Wadley Southern Rwy.* v. *Georgia*, decided this day, *post*, p. 651. The allegations of the bill show no

ground for dispensing with efforts to procure action by the corporation; and in this view, without discussing the merits of the case, we are of the opinion that the complainant was not entitled to the injunction sought.

Order affirmed.

DOWAGIAC MANUFACTURING COMPANY *v.* MINNESOTA MOLINE PLOW COMPANY.

DOWAGIAC MANUFACTURING COMPANY *v.* SMITH.

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

Nos. 6, 7. Argued April 15, 16, 1913.—Decided January 11, 1915.

Where a patent is infringed by selling machines embodying improvements covered by the patent and the value of the machines as marketable articles is attributable in part to the patented improvements and in part to unpatented parts or features, the profits arising from the infringing sales belong to the owner of the patent in so far as they are attributable to the patented improvements, and in so far as they are due to the other parts or features they belong to the seller.

Upon an accounting in a suit for such infringement the commingled profits resulting from selling the machines in completed and operative form should be separated or apportioned between what was covered by the patent and what was not covered by it.

If the plaintiff's patent covered only a part of the infringing machine and created only a part of the profits, he is required to take the initiative in presenting evidence looking to an apportionment.

In an apportionment of profits mathematical exactness is not indispensable, reasonable approximation being what is required, and it usually may be attained through the testimony of experts and persons informed by observation and experience.

The result to be accomplished by an apportionment is a rational

separation of the net profits so that neither party may have what rightfully belongs to the other.

Where damages are sought for infringing sales and it does not appear that the plaintiff thereby lost the sale of a like number of machines or of any definite or even approximate number, no adequate basis is laid for an assessment of damages upon the ground of lost sales.

As the exclusive right conferred by a patent is property and infringement of it is a tortious taking of a part of that property, the normal measure of damages is the value of what was taken; and this may be shown by proof of an established royalty, if there be such, and, if not, by proof of what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved. *Coupe* v. *Royer*, 155 U. S. 565, explained.

The right conferred by a patent under our law is confined to the United States and its Territories, and infringement cannot be predicated of acts wholly done in a foreign country.

In the particular circumstances of this case the decree, although ordinarily requiring affirmance, is reversed in order that there may be an opportunity to produce further evidence upon the accounting and to take other proceedings in conformity with this court's opinion.

183 Fed. Rep. 314, reversed.

THE facts, which involve the construction and application of certain provisions of the patent laws of the United States in regard to liability for infringement, are stated in the opinion.

Mr. Fred L. Chappell for petitioner.

Mr. Thomas A. Banning for respondents.

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

We have here to review two decrees dealing with an accounting of profits and an assessment of damages resulting from the infringement of a patent granted

February 10, 1891, for certain "new and useful improvements in grain-drills, commonly known as 'shoe-drills.'" The suits wherein these decrees were rendered were both brought by the same plaintiff but were against different defendants charged with separate infringement. The plaintiff, besides owning the patent, was manufacturing and selling drills embodying the patented improvements; and the defendants, who were wholesale dealers in agricultural implements, were selling drills embodying substantially the same improvements. The drills made by the plaintiff were sold under the name "Dowagiac," and the names "McSherry" and "Peoria" were applied to most of the others. The defendants purchased from manufacturers who, as has since been settled, were infringing the plaintiff's rights. At an early stage in the litigation the validity of the patent was sustained, the defendants were held to be infringers, further infringement by them was enjoined, and the cases were referred in the usual way for an accounting of profits and an assessment of damages. 108 Fed. Rep. 67; 118 Fed. Rep. 136. Upon the evidence submitted the masters reported that the recovery should be limited to nominal damages and their reports were confirmed by the Circuit Court. Its action was affirmed by the Circuit Court of Appeals. 183 Fed. Rep. 314.

The conclusion that the recovery should be thus restricted was rested upon these grounds: First, that the patent was not for a new and operative drill, but only for designated improvements in a type of drill then in use and well known; second, that the value of drills embodying this invention, as marketable machines, was not wholly attributable to the designated improvements, but was due in a material degree to other essential parts which were not patented; third, that the plaintiff failed to carry the burden, rightly resting upon it, of submitting evidence whereby the profits from the sale of the infringing drills

could be apportioned between the patented improvements and the unpatented parts; and, fourth, that, although the number of sales made by the defendants was disclosed, the evidence did not present other data essential to an assessment of the damage sustained by the plaintiff by reason of the defendants' infringement.

Partly because another Circuit Court of Appeals seemingly had reached a different conclusion in other litigation arising out of this patent (see *McSherry Co.* v. *Dowagiac Co.*, 160 Fed. Rep. 948; 163 Fed. Rep. 34; *Brennan & Co.* v. *Dowagiac Co.*, 162 Fed. Rep. 472) and partly because of the importance of the questions involved, writs of certiorari were granted requiring that these cases be certified here for review and determination. See Judicial Code, § 240.

Since the writs were granted the rules bearing upon the apportionment of profits in such cases, the relative obligations of the parties to submit evidence looking to an apportionment, and the character of evidence which may be submitted, have been extensively considered and comprehensively stated in *Westinghouse Co.* v. *Wagner Co.*, 225 U. S. 604. What was said there materially lessens our present task.

At the outset it should be observed that, while the defendants were infringers and bound to respond as such to the plaintiff, their infringement was not wanton or wilful. The masters and the courts below expressly so found and the evidence sustained the finding. The defendants, therefore, were not in the situation of the infringing manufacturer in *Brennan & Co.* v. *Dowagiac Co.*, 162 Fed. Rep. 472, of whom the Circuit Court of Appeals for the Sixth Circuit said (p. 476): "It has made and sold these infringing drills with a purpose to imitate the patentee's construction."

It is quite plain, as we think, that the patent was not for a new and operative grain-drill, but only for particular

improvements in a type of grain-drill then in use and well known. The invention was so described in the specification forming part of the patent. The inventor there said:

"This invention relates to new and useful improvements in grain-drills commonly known as 'shoe-drills;' and it consists in a certain construction and arrangement of parts, as hereinafter more fully set forth, the essential features of which being pointed out particularly in the claims.

"The object of the invention is to provide an independent spring-pressure for each of the shoes and covering-wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering-wheels may be raised from the ground when the implement is not in use or when transporting it from one field to another."

In keeping with this statement the claims in the patent were limited to a suitable construction and arrangement of spring-pressure rods in combination with certain correlated elements of the seeding part of a grain-drill—the part which opens the furrows, guides the seed into them and then closes them. Of course, this was an important part, but it was only that; for other parts were required to complete the machine and make it operative. Some of these were simple and easily supplied, such as the tongue and attachments to which the horses were hitched. Others were complex and required careful adjustment. This was especially true of the feeding mechanism whereby the grain was fed from the feed box or reservoir into the several hoppers in continuous, uniform and precisely measured streams, so that it might be deposited in the furrows evenly and in suitable quantity. Only when all the parts were present and so adjusted as to perform their respective functions was the drill a practical and successful machine. In this respect no change resulted from the invention covered by the patent. It effected material

improvements in one part, but did not obviate or diminish the necessity for the others.

We think the evidence, although showing that the invention was meritorious and materially contributed to the value of the infringing drills as marketable machines, made it clear that their value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features. The masters and the courts below so found and we should hesitate to disturb their concurring conclusions upon this question of fact, even had the evidence been less clear than it was.

In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. But as the drills were sold in completed and operative form the profits resulting from the several parts were necessarily commingled. It was essential therefore that they be separated or apportioned between what was covered by the patent and what was not covered by it, for, as was said in *Westinghouse Co.* v. *Wagner Co.*, *supra* (225 U. S. 615): "In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains." In the nature of things the profits pertaining to the patented improvements had to be ascertained before they could be recovered by the plaintiff, and therefore it was required to take the initiative in presenting evidence looking to an apportionment. Referring to a like situation, it was said in the case just cited (p. 617): "The burden of apportionment was then logically on the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention." But the plaintiff did not conform to this rule. It neither submitted evidence calculated to effect an apportionment nor attempted to show that one was impossible; and this, although the

evidence upon the accounting went far towards showing that there was no real obstacle to a fair apportionment. Certainly no obstacle was interposed by the defendants. It well may be that mathematical exactness was not possible, but, as is shown in *Westinghouse Co.* v. *Wagner Co.*, *supra* (pp. 617, 620, 621, 622), that degree of accuracy is not required but only reasonable approximation, which usually may be attained through the testimony of experts and persons informed by observation and experience. Testimony of this character is generally helpful and at times indispensable in the solution of such problems. Of course, the result to be accomplished is a rational separation of the net profits so that neither party may have what rightfully belongs to the other, and it is important that the accounting be so conducted as to secure this result, if it be reasonably possible. As was said in *Tilghman* v. *Proctor*, 125 U. S. 136, 145, "it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged."

Coming to the question of damages,[1] we think the masters and the courts below were right in holding that the evidence did not present sufficient data to justify an assessment of substantial damages.

[1] Rev. Stat., § 4921, provides that "upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case." See *Birdsall* v. *Coolidge*, 93 U. S. 64, 69; *Tilghman* v. *Proctor*, 125 U. S. 136, 148.

While the number of drills sold by the defendants was shown, there was no proof that the plaintiff thereby lost the sale of a like number of drills or of any definite or even approximate number. During the period of infringement several other manufacturers were selling drills in large numbers in the same localities in direct competition with the plaintiff's drill, and under the evidence it could not be said that, if the sales in question had not been made, the defendants' customers would have bought from the plaintiff rather than from the other manufacturers. Besides, it did not satisfactorily appear that the plaintiff possessed the means and facilities requisite for supplying the demands of its own customers and of those who purchased the infringing drills. There was therefore no adequate basis for an assessment of damages upon the ground of lost sales.

As the exclusive right conferred by the patent was property and the infringement was a tortious taking of a part of that property, the normal measure of damages was the value of what was taken. So, had the plaintiff pursued a course of granting licenses to others to deal in articles embodying the invention, the established royalty could have been proved as indicative of the value of what was taken, and therefore as affording a basis for measuring the damages. *Philp* v. *Nock*, 17 Wall. 460, 462; *Birdsall* v. *Coolidge*, 93 U. S. 64, 70; *Clark* v. *Wooster*, 119 U. S. 322, 326; *Tilghman* v. *Proctor*, 125 U. S. 136, 143. But, as the patent had been kept a close monopoly, there was no established royalty. In that situation it was permissible to show the value by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved. Not improbably such proof was more difficult to produce, but it was quite as admissible as that of an established royalty. In *Suffolk Co.* v. *Hayden*, 3 Wall. 315, 320, where a like situation was presented, this court

said that "in order to get at a fair measure of damages, or even an approximation of it, general evidence must necessarily be resorted to." See also *Packet Co.* v. *Sickles*, 19 Wall. 611, 617; *Root* v. *Railway Co.*, 105 U. S. 189, 198. And in many cases in the other Federal courts the damages have been assessed upon proof of a reasonable royalty. The practice is illustrated by the following extract from the opinion in *Hunt* v. *Cassiday*, 12 C. C. A. 316, 318, 64 Fed. Rep. 585, 587: "The plaintiff was clearly entitled to damages for the infringement. If there had been an established royalty, the jury could have taken that sum as the measure of damages. In the absence of such royalty, and in the absence of proof of lost sales or injury by competition, the only measure of damages was such sum as, under all the circumstances, would have been a reasonable royalty for the defendant to have paid. This amount it was the province of the jury to determine. In so doing, they did not make a contract for the parties, but found a measure of damages." True, some courts have regarded *Coupe* v. *Royer*, 155 U. S. 565, as impliedly holding that this practice was not permissible, but the decision does not admit of such an interpretation. In that case—an action at law—there was no proof of what would have been a reasonable royalty but only of what the defendant had made or might have made out of the infringement; and all that the court held was (a) that the damages were not to be measured by what the defendant had gained or might have gained but by what the plaintiff had lost, and (b) that, as the evidence disclosed (p. 583) "no license fee, no impairment of the plaintiff's market, in short, no damages of any kind," the verdict could not exceed a nominal sum. In *Cassidy* v. *Hunt*, 75 Fed. Rep. 1012, where the scope of that decision was carefully considered by one of the Circuit Judges for the Ninth Circuit, the conclusion was reached that it did not militate against an assessment of damages upon the basis of what would have been

a reasonable royalty; and a like view was expressed and applied by the Circuit Court of Appeals for the Third Circuit in *McCune* v. *Baltimore & O. R. R.*, 154 Fed. Rep. 63, and *Bemis Car Co.* v. *Brill Co.*, 200 Fed. Rep. 749, 762, and by the Circuit Court of Appeals for the Sixth Circuit in *United States Frumentum Co.* v. *Lauhoff*, 216 Fed. Rep. 610. But, although the plaintiff was entitled to prove what would have been a reasonable royalty, and thereby to show a proper basis for an assessment of damages, no proof upon that subject was presented.

There are still other grounds upon which damages may be assessed in infringement cases, as where hurtful competition is shown, but the present record does not require that they be specially noticed.

Some of the drills, about 261, sold by the defendants were sold in Canada, no part of the transaction occurring within the United States, and as to them there could be no recovery of either profits or damages. The right conferred by a patent under our law is confined to the United States and its Territories (Rev. Stat., § 4884) and infringement of this right cannot be predicated of acts wholly done in a foreign country. See *United Dictionary Co.* v. *Merriam Co.*, 208 U. S. 260, 265. The case of *Manufacturing Co.* v. *Cowing*, 105 U. S. 253, is cited as holding otherwise but is not in point. There the defendant made the infringing articles in the United States. Here, while they were made in the United States, they were not made by the defendants. The latter's infringement consisted only in selling the drills after they passed out of the makers' hands. The place of sale is therefore of controlling importance here.

Ordinarily what has been said would lead to an affirmance of the decrees below. But there are special reasons why a final disposition of the cases should not be made upon the present record at this time. The patent was valid and the invention meritorious. The infringing sales

covered 2500 or more drills, the profits were substantial, and the damages, if rightly measured, were evidently more than nominal. The hearings before the masters were had prior to the decision in *Westinghouse Co.* v. *Wagner Co.*, *supra*, at a time when the decisions bearing upon the apportionment of profits, as also upon the admeasurement of damages, were not harmonious; and this resulted in the evidence being so imperfectly presented as not to afford the data requisite to a final adjustment of the matters in controversy according to their merits.

The decrees are accordingly reversed, without costs, with directions to recommit the cases to a master in order that the questions involved in the original reference may be heard anew upon the evidence heretofore taken and such further evidence as may be submitted, and for further proceedings in conformity with this opinion.

Decrees reversed.

MR. JUSTICE MCREYNOLDS did not participate in the consideration or decision of these cases.

WADLEY SOUTHERN RAILWAY COMPANY *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 27. Argued January 30, 1914.—Decided January 11, 1915.

The general common-law rule that a carrier has the option of demanding freight in advance or on delivery applies not only to the shipper but also to the connecting carrier; but *quære* how far this rule may be or has been modified by statutes prohibiting discrimination.

This court, being bound by the construction given by the highest state court to a statute of the State, *holds* that the statute of Georgia involved in this case gives power to the State Railroad Commission to require a railroad to treat all connecting carriers alike in regard to payment of freight in advance or on delivery, and the only question

here is whether an order requiring a railroad company to cease demanding payment in advance from one carrier and not from another violates the due process provisions of the Fourteenth Amendment.

Although the particular section which authorizes an order of a state railroad commission may not provide for a hearing, if the state court has construed that section as part of the law establishing the commission and which does require hearings, that section is not unconstitutional under the Fourteenth Amendment as denying an opportunity to be heard; and so *held* as to the Georgia Railroad Commission Law.

An order of the Georgia State Railroad Commission, requiring a railroad to desist from demanding freight in advance on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment, being otherwise legal, is not so arbitrary and unreasonable as to be violative of the due process clause of the Fourteenth Amendment.

A State has power to impose penalties sufficiently heavy to secure obedience to orders of public utility commissions after they have been found lawful or after the parties affected have had ample opportunity to test the validity of administrative orders and failed so to do.

A party affected by a statute passed without his having an opportunity to be heard is entitled to a safe and adequate judicial review of the legality thereof. It is a denial of due process of law if such review can be effected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law. *Ex parte Young*, 209 U. S. 123.

Where, after reasonable notice of the making of an administrative order, a carrier fails to resort to the safe, adequate and available remedy of testing its validity in the courts and makes an unsuccessful defense by attacking such validity when sued for the penalty, it is subject to the penalty.

137 Georgia, 497, affirmed.

ADRIAN, Georgia, a station on the Wadley Southern Railway, is 10 miles from Rockledge, where the road connects with the Macon & Dublin R. R., and 27 miles from Wadley, where it connects with the Central of Georgia Railway. In consequence of this connection with both roads, goods could be shipped from Macon to Adrian, over either route. It was, however, to the interest of the

Wadley Southern to have such freight routed via the Central, because it thereby secured the haul of 27 miles from Wadley to Adrian instead of the 10-mile haul when goods were routed via Rockledge. In addition to this, the Central owned all of the stock in the Wadley Southern and allowed it more than a mileage proportion in the division of the through rate. For these reasons, the Wadley made the Central its preferred connection and received from it goods for Adrian without requiring the prepayment of freight, while refusing at Rockledge, to receive goods shipped from Macon over the Macon & Dublin R. R. unless the charges to Adrian were prepaid. Merchants shipping via Rockledge contended that this was an unjust discrimination and made complaint to the Railroad Commission, which, after "hearing evidence and argument of counsel," passed an order, dated March 12, 1910, requiring "the Wadley Southern to desist from such discrimination, and on and after the receipt of the order, to afford shippers via Rockledge, the same facilities for the interchange of freight that was afforded shippers over the line of the Central, via Wadley." On March 14, 1910, a copy of this order was received by the Wadley Southern, which however did not institute any proceeding to test its validity in the courts of Fulton County having jurisdiction of "suits against the Commission or its orders" (Ga. Code, § 2625). Instead, the company, on April 4, 1910, notified the Commission that it would decline to comply with the order on the ground that it was void. Accordingly, on May 26, 1910,—more than two months after the order was served,—a penalty suit was brought against the carrier by the State, in which it was alleged that, on *divers* days, the Wadley Southern had violated the order of the Commission and asking that a *single* penalty "not to exceed $5,000" should be imposed under the terms of the act of August 26, 1907 (Laws, 1907, p. 72). That statute provides (§ 12, p. 79) that all corporations

and persons subject to the public utility law "shall comply with every order made by the Commission *under authority of law*," and any corporation or person which neglects to comply with such order shall "forfeit to the State of Georgia not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge. Every violation . . . of any such order shall be a separate and distinct offense" and, "*in case of the continued violation, every day the violation thereof takes place shall be deemed a separate and distinct offense.*"

In its answer to this penalty suit the Wadley Southern denied that it had been guilty of any unjust discrimination and contended that the order of the Commission, and the statute, on which it was based, in violation of the provisions of the Fourteenth Amendment, took property without due process of law, and also that the penalty statute operated to deny the carrier the equal protection of the law. In the trial before a jury there was testimony on the question as to whether there had been any discrimination and whether any difference in treatment was not justified by the difference in conditions. There was also evidence tending to show that the business of some shippers, through Rockledge, had suffered in consequence of the delay and expense incident to the requirement that freight on goods consigned to Adrian should be prepaid at Wadley. The jury returned a verdict in favor of the State and the judge imposed a fine of $1,000 on the defendant. The case was then taken to the Supreme Court of Georgia, where the judgment was affirmed (137 Georgia, 497), and the case is here on a writ of error, which raises the question as to whether the order and the statute under which it was made violate the provisions of the Fourteenth Amendment.

Mr. T. M. Cunningham, Jr., with whom *Mr. A. R. Lawton* was on the brief, for plaintiff in error:

The statutes of the State of Georgia which impose the penalties and punishments for violation of an order of the Railroad Commission are contrary to the Fourteenth Amendment, as denial of due process of law and equal protection of the law. *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

The constitutionality of a statute is to be determined not according to the grace or favor of the officials who act under it, but according to terms of the statute itself. *Security Trust Co.* v. *Lexington*, 203 U. S. 323; *Georgia Railway* v. *Wright*, 207 U. S. 127, 138; *Roller* v. *Holly*, 176 U. S. 409.

The order of the Railroad Commission is contrary to the Fourteenth Amendment, in that it is an arbitrary and unreasonable exercise of the police power of the State and beyond the same, and in substance and effect deprives the plaintiff in error of its property without due process of law and denies it the equal protection of law. *Oregon Ry. & N. Co.* v. *Fairchild*, 224 U. S. 510, 528; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611.

The case is not one of unjust discrimination. *Gamble-Robinson Co.* v. *C. & N. W. Ry.*, 168 Fed. Rep. 161; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry.*, 59 Fed. Rep. 400; *S. C.*, aff'd, 63 Fed. Rep. 775; *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 Fed. Rep. 407; *Randall* v. *Richmond & D. R. Co.*, 108 N. Car. 612, 13 S. E. Rep. 137; *Oregon Short Line* v. *Northern Pac.*, 51 Fed. Rep. 465; *S. C.*, aff'd, 61 Fed. Rep. 158; *Coles* v. *Central R. R.*, 86 Georgia, 251, 255; *State of Georgia* v. *W. & T. R. R.*, 104 Georgia, 437. And see *Central R. R.* v. *Augusta Brokerage Co.*, 122 Georgia, 646, 650.

There are constitutional limits to what can be required of the owners of railroads under the police power. Requiring the expenditure of money takes property whatever may be the ultimate return for the outlay. *Missouri Pac. Ry.* v. *Nebraska*, 217 U. S. 196; *Oregon Ry. & N. Co.* v.

Fairchild, 224 U. S. 510; *Missouri Pac. Ry.* v. *Nebraska*, 164 U. S. 403; *Louisville & Nashville R. R.* v. *Central Stock Yards*, 212 U. S. 132. See also *Central Stock Yards* v. *L. & N. R. R.*, 192 U. S. 568.

The denial of due process of law and the taking of property in this case consists of compelling the plaintiff in error to act in a fiduciary capacity and as a collecting agent for the other roads and compels its clerks, which it pays, to work in the interest of its own and against the interest of other roads; or, if the charges are advanced, it takes money out of the pocket of the plaintiff in error to pay the other road freight charges. This is a direct and substantial taking of property.

The order of the Railroad Commission cannot be justified under the guise of the police power. It subserves no real public interest.

Mr. James K. Hines, with whom *Mr. T. S. Felder*, Attorney General of the State of Georgia, was on the brief, for defendant in error.

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

1. As a general rule, the carrier has the option to demand payment of freight in advance or on delivery. And, as there is a lien on the goods to secure the payment of charges, it is often a matter of indifference whether the freight is collected at the beginning or at the end of the transportation. The law has therefore always recognized that the company could exercise the one option or the other according to the convenience of the parties, the course of trade, the sufficiency of the goods to pay the accruing charges, and other like considerations.

2. What was true between carrier and shipper was

likewise true between carrier and its connections. But there is a conflict in the authorities as to how far this common-law right has been modified by those statutes, which, while not requiring absolute uniformity, do prohibit unjust discrimination. On the one hand, it is argued that the carrier has the right to make connections, establish joint routes and through rates for the purpose of facilitating and increasing its business. As an incident of this right it is said that the carrier may enforce the common-law rule and accept goods with or without the prepayment of freight, its decision being determined by the relation between the two companies, the amount of business interchanged, the solvency of the carrier against which the balance generally exists, the latter's promptness in settlement, and other like matters which, while aiding some of the carriers, do not increase the rates charged to the shipper in whose interest the laws against discrimination have been passed. Among the cases which hold that such difference in treatment is not an unjust discrimination, prohibited by statute, is *Gulf, Col. &c. Ry.* v. *Miami Steamship Co.*, 86 Fed. Rep. 407. There the Circuit Court of Appeals for the Fifth Circuit held that, under the Interstate Commerce Law, a common carrier might demand prepayment from one connection and not from another. *Cf. Atchison &c. R. R.* v. *Denver &c. R. R.*, 110 U. S. 667. A different view of the question has been taken by other courts (*Adams Express Co.* v. *State*, 161 Indiana, 328), including the Supreme Court of Georgia, which, in the present case, held that the statute, requiring railroads to furnish customary facilities for the interchange of freight empowering the Commission to prevent unjust discrimination, authorized that body to pass an order directing the Wadley Southern Railroad to discontinue the practice of requiring the Macon & Dublin Railroad to prepay freight to Adrian, while making no such demand from the Central Railway. This construction of the state statute is binding

here and leaves for consideration the question as to whether such an order violated the provisions of the Fourteenth Amendment.

3. On that branch of the case the Wadley Southern has made many assignments of error. It contends, in effect, that without due process of law the order deprives it of the liberty of contract; takes from it a valuable right of property and deprives it of the profit it could have made in the exercise of the long-recognized common-law right to demand prepayment of freight from one connection without being compelled to make a similar demand from all other connections.

The section of the Code under which the order was made did not expressly provide for notice and an opportunity to be heard; but the Supreme Court of Georgia held that it must be construed in connection with other parts of the Railroad Commission law which did contain such provisions. As said in *Louis. & Nash. R. R.* v. *Garrett*, 231 U. S. 298, 313, "It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted, and a determination by the Commission" as to whether the discrimination complained of was unjust. "But, on these conditions being fulfilled . . . the appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the Legislature . . . ; whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements." The Georgia court has likewise held that where the statute gave the Commission jurisdiction of the subject, its orders are binding unless shown to have been unreasonable, or to have violated some statutory or constitutional right. *Railroad Commission* v. *Louis. & Nash. R. R.*, 140 Georgia, 817 (6a), 836.

In this case the Commission dealt with a practice found to be unjustly discriminatory, but the order did not, as claimed, interfere with the carrier's legitimate right of management nor deprive it of any right of contract. It did not require the Wadley road, either at Rockledge or at Wadley, to receive, without prepayment of freight, goods whose value was insufficient to pay charges if the consignee should decline to accept them on arrival. Neither did it deprive the Wadley Southern of the right to solicit and encourage shipments via the Central. The order only prohibited a practice which had proved so preferential to some shippers and communities and so harmful to others as to amount to unjust discrimination. And while the Wadley Southern had the right to increase its earnings by encouraging shipments over the Central Railway so as to secure the longer haul and greater than mileage proportion of the joint rate, yet that right had to be exercised in subordination to the command of the statute prohibiting unjust discrimination. The Supreme Court of Georgia has ruled that the order was made in compliance with the requirements of the statute and was not unreasonable or arbitrary. That decision is controlling so far as the state law is concerned, and, there is, of course, nothing in the provisions of the Federal Constitution which prevents the States from prohibiting and punishing unjust discrimination of its patrons by a public carrier.

4. The Wadley Southern insists, however, that even if the Commission had the power to make the order, the judgment imposing a fine of $1,000 for its violation should nevertheless be set aside for the reason that the statute—authorizing so enormous a penalty as $5,000 a day for violating lawful orders of the Commission—operated to prevent an appeal to the courts by the carrier for the purpose of determining whether the order was lawful and, therefore, binding; or arbitrary and unreasonable, and therefore invalid. In support of this contention it

cites *Ex parte Young*, 209 U. S. 123, 163; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53.

It is, however, contended that those cases related to penalties for charging rates higher than those which had been established by the legislature without any hearing having been given to the carriers as to what were reasonable rates and are not applicable to a case like this, where the order was made after a full hearing had been given by the Commission to the Wadley Southern.

This contention would have been well founded if this and other hearings of a like nature before the Commission had resulted in orders which had the characteristics of a final judgment. But this was not so, for they were not conclusive. *Chicago &c. Ry.* v. *Minnesota*, 134 U. S. 418, 458. Their lawfulness was treated by the Georgia court in the present case as open to inquiry, when the Company was sued for the penalty. The question of their validity was also open to inquiry, in equity proceedings, in the state court, where they would have been set aside if found to be arbitrary and unreasonable, or to have violated some statutory or constitutional right. *Railroad Commission* v. *Louis. & Nash. R. R.*, 140 Georgia, 817 (6a), 836; *State of Georgia* v. *Western & Atlantic R. R.*, 138 Georgia, 835; *Southern Ry.* v. *Atlanta Sand Co.*, 135 Georgia, 35, 50. Such orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property. *Louis. & Nash. R. R.* v. *Garrett*, 231 U. S. 298, 313 and cases cited. And this right to a judicial determination exists whether the deprivation is by a rate statute—passed without a hearing (as in the *Young* and *Consolidated Gas Cases*); or by administrative orders of a Commission made after a hearing (as in the *Garrett Case, supra*). For rates made by the General Assembly or administrative orders made by a Commission are both legislative in their nature (*Garrett Case, supra; Grand Trunk R. R.* v. *Indiana Railroad Com-*

mission, 221 U. S. 400, 403) and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution. *Chicago &c.* v. *Minnesota*, 134 U. S. 418, 458; *Chicago &c. Ry.* v. *Tompkins*, 176 U. S. 167, 174; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, 207; *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *San Joaquin Co.* v. *Stanislaus County*, 233 U. S. 459; *Bacon* v. *Rutland R. R.*, 232 U. S. 134; *Detroit &c. R. R.* v. *Michigan R. R. Com.*, 235 U. S. 402.

The methods by which this right to a judicial review are secured vary in different jurisdictions. In some States there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the Commission. *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *State ex rel. Railroad Commission* v. *Oregon R. R. & Nav. Co.*, 68 Washington, 160, 167; *Seward* v. *Denver & R. G. R. R.*, 17 New Mex. 557; 131 Pac. Rep. 980. *Cf. Oregon R. R. & Nav. Co.* v. *Campbell*, 173 Fed. Rep. 957, 989. In others by proceedings in equity. In the Federal courts the method of procedure, when administrative orders are attacked as unconstitutional, is now regulated by § 266 of the Judicial Code as amended (March 4, 1913, c. 160, 37 Stat. 1013, 1014). But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.

5. As statutes establishing Railroad Commissions and providing penalties for violations of legislative orders are of recent origin the cases discussing the subject are

comparatively few. See *Mercantile Trust Co.* v. *Tex. & Pacif. Ry.*, 51 Fed. Rep. 529 (4), 549 (14–15) (1892); *Louis. & Nash. R. R.* v. *McChord*, 103 Fed. Rep. 216, 225 (1900); *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 101 (1901); *Consolidated Gas Co.* v. *Mayer*, 146 Fed. Rep. 150, 154 (1906); *Ex parte Wood*, 155 Fed. Rep. 190 (1907); *Consolidated Gas Co.* v. *New York*, 157 Fed. Rep. 849 (1907); *Ex parte Young*, 209 U. S. 123 (1908); *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 (1909); *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, 207 (1910) (building spur tracks); *Missouri Pacific Ry.* v. *Tucker*, 230 U. S. 340, 349 (1913); *Bonnett* v. *Vallier*, 136 Wisconsin, 193 (15, 16); *Coal & Coke Ry.* v. *Conley*, 67 West Va. 129, 132, and the present case of *Wadley Southern Ry.* v. *State of Georgia*, 137 Georgia, 497.

These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders but depends upon a showing of extrinsic facts. A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands

of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid.

The first case which deals with the question, is *Mercantile Trust Co.* v. *Tex. & Pac. Ry.*, 51 Fed. Rep. 529 (4), 549 (14–15), decided in 1892. There statutory provisions imposing penalties tending to embarrass a party in appealing for protection against taking property without due process of law were held to be void. In *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 101 (1901), it was pointed out that an act which opened the doors of the courts but placed upon the litigant a penalty for failure to make good his defence, which was so great as to deter him from asserting that which he believed to be his right, was tantamount to a denial of the equal protection of the law.

Later the matter was elaborately discussed, most carefully considered and finally decided in *Ex parte Young*, 209 U. S. 123, where a statute fixed rates and, though it afforded no opportunity for a judicial hearing to determine whether the rates were confiscatory, yet imposed heavy and cumulative penalties for collecting other than those statutory rates—Those rates had not been established in pursuance of a plenary power of the legislature, but in view of constitutional limitations, the rates were valid only if they were found to be reasonable. Whether they were reasonable or not was not apparent on the face of the statute, but was dependent upon the proof of extrinsic facts. How doubtful and uncertain that then was, is illustrated by the fact that in the *Minnesota Rate Cases* (230 U. S. 352, 472, 473), these legislative rates were subsequently held to be confiscatory as to some carriers and as to others not confiscatory.

It was in the light of the fact that the penalty was im-

posed for charging other than those statutory rates, whose reasonableness was a matter of doubt and uncertainty, that this court in the *Young Case*, speaking through Mr. Justice Peckham, pointed out that a law which in terms or by the operation of deterrent penalties made statutes or orders of a Commission conclusive as to the sufficiency of rates would be unconstitutional. He summed up the discussion as follows (209 U. S. p. 147): "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the Company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the Company from seeking judicial construction of laws which deeply affect its rights." Like views were expressed as to the invalidity of the heavy penalties involved in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53. But the penalty provisions were separable and their invalidity did not defeat the balance of the statute (54).

The *Young* and *Consolidated Gas Cases* both related to rate statutes while in *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, 207, the statute imposed a fine for the carrier's failure, on demand, to construct spur tracks to elevators. After showing that if the absolute requirement of the statute to build, was to be construed as being applicable only when the demand was reasonable, this court said that even on that construction the railroads must refrain from paying "at the peril of a fine, if they turn out wrong in their guess that in the particular case the court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act."

In *Missouri Pacific Ry.* v. *Tucker*, 230 U. S. 340, 349, the

question was presented in still a different aspect. The statutory rate on the shipment of oil involved in that case was $12 a barrel. The act provided that if the carrier charged in excess of such rates it should be liable to any person injured in the sum of $500 as liquidated damages, to be recovered by an action in any court of competent jurisdiction. The carrier instead of charging the statutory rate of $12 charged the old rate of $15.02 and the shipper sued to recover $500 as damages for collecting $3.02 too much. The act made no provision for a hearing in advance to determine whether the statutory rate of $12 was reasonable. The state court, however, held that as the statute did not forbid such judicial investigation the carrier had the right, when sued for a penalty, to defend by showing that the statutory rates were unreasonable. But, as was pointed out in the decision of this court, the right to a hearing by way of defense after the $15.02 had been collected, failed to recognize "the real plight of the carrier" (349). For, when the oil was tendered for shipment it had to be accepted at the rate of $12—and thus be illegally deprived of $3.02 if the statutory rate of $12 was confiscatory; or else, the carrier had to charge its existing rate of $15 and run the risk of having to pay more than a hundred times the amount of the overcharge if the new $12-rate was ultimately sustained. Of course the right to make a defense, at the risk of having to pay such an enormous penalty, was merely illusory. For, if such penal statutes were indeed constitutional, the carrier, in every instance, would submit to the deprivation of some of its property, under a rate of doubtful validity, rather than run the risk of paying out all of its property by way of penalties imposed in the event the rate should ultimately be sustained.

The Supreme Court of Wisconsin in *Bonnet* v. *Vallier*, 136 Wisconsin, 193 (15, 16), for the same reason, held a penalty statute void which imposed cumulative fines for

failing to comply with indefinite and uncertain regulations as to the construction of tenement houses.

The question also was carefully considered in *Coal & Coke Ry.* v. *Conley*, 67 W. Va. 129, 132, where it was held that enormous and accruing penalties could not be imposed for charging more than statutory rates of uncertain reasonableness.

6. In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself.

In considering that question in the present case, the constitutionality of the act involved, is not to be decided by the conduct of the plaintiff in error, nor by the fact that the State only asked a penalty for one day's disobedience instead of many. Neither can the statute be construed as a single legislative act. It must be treated as part of a system of laws creating the Railroad Commission, defining its powers and subjecting it to suit.

This point is brought out in the statement of the Brief of the Attorney General and counsel for the State, wherein it is said that "the safeguards thrown around persons and corporations affected by this [penalty statute] are such as to rob it of the charge of imposing such enormous and grossly excessive penalties as to render it unconstitutional. In the first place, such persons and corporations are entitled to a hearing before the Commission [a contention already discussed]. And, in the second place, provision is made for the institution of suits against the Railroad Commission of Georgia when its acts are illegal or unconstitutional (Civil Code of Georgia, 1911, § 2625)." From an examination of that section of the Code it is quite clear that it recognizes the right to a judicial review

of administrative orders. Until it has been given a contrary construction by the state court, it must be here construed in such a way as to leave it valid and as conferring that sort of right which furnishes the adequate and available remedy which meets the requirement of the Constitution. Any other construction would not only impute to the legislature an intent to deny the equal protection of the law and to permit the carrier to be deprived of property without due process of law, but it would operate to nullify the penalty section as a whole. Giving then § 2625 that construction which makes it constitutional and it appears that the laws of Georgia gave to the Wadley Southern R. R. Co. the right to a judicial review of the order of March 12, 1910, by a suit against the Commission.

7. The only question then left for determination is whether in view of such right, the penalty can be collected for the violation of an order not known to be valid at the date of the disobedience sought to be punished. On that question, little can be found in the books. But on principle, and on the authority of all that has been said on the subject, there is no room to doubt the power of the State to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do.

In *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, Justice Brewer first pointed out that there might be a distinction between punishing for acts done before and for those done after the validity of the rate statute had been settled, saying (p. 102):

"It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has

been a final determination of the validity of the statute, the question would be very different from that here presented."

Another case dealing more directly with the question is that of *Railroad Commission of Oregon* v. *Oregon R. R. & Nav. Co.*, 68 Washington, 160. The act there under consideration imposed a punishment for violating orders of the Commission but gave the carrier adequate and available remedy by conferring upon it the right to a hearing in court as to their legality, otherwise it was to be treated as conclusive. *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510. In a suit for the recovery of the statutory penalty for failing to build a station, as required by the Commission, the court said "the railroad company having failed to review the order as it was permitted to do under the act, the order became, in the language of the statute, 'final and conclusive.' . . ."

Coal & Coke Ry. v. *Conley*, 67 W. Va. 129, 132, contains a very full discussion of the subject. In that case the statute imposed a penalty for charging rates other than those prescribed in a legislative act, which, however, was altogether silent upon the subject of a judicial review as to the reasonableness of the rates. The court recognized that if that silence was to be construed into a denial of the right to a hearing in court the penalty provision would be void. It held however that the failure of the penalty statute to say anything about the right of review could not be construed into a denial of that right. That conclusion, and the further holding that penalties could not accrue while the question of the validity of the rates was being determined in appropriate judicial proceedings instituted in a Court of Equity for that purpose, is specially applicable here. For the Georgia Code, instead of being silent on the subject, contains a section which punishes a violation of "lawful orders," and another provision, in the same Chapter, which expressly contemplates that proceedings

may be brought against the Commission to test the validity of its orders.

If the Wadley Southern Railroad Company had availed itself of that right and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.

But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful.

The judgment of the Supreme Court of Georgia is

Affirmed.

ARIZONA & NEW MEXICO RAILWAY COMPANY *v.* CLARK.

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

No. 347. Argued December 1, 1914.—Decided January 11, 1915.

Where an action under the Employers' Liability Act of 1908 was pending in an inferior territorial court of Arizona prior to statehood, such action being one of which the Federal and state courts have concurrent jurisdiction, the voluntary appearance of defendant in the Federal

court after statehood without interposing any objection to the jurisdiction of that court, *held*, to amount to a waiver of the objection (based upon § 33 of the Arizona Enabling Act) that upon the commencement of statehood the action should have been transferred to the proper state court, subject to removal to the Federal court upon application made in due form for that purpose.

Under Rev. Stat. Arizona, § 2535, subd. 6, providing that a physician or surgeon cannot be examined without consent of his patient as to any communication made by the patient with reference to a disease or as to any knowledge obtained by personal examination of such patient unless such patient has offered himself as a witness and voluntarily testified in regard to such communications, evidence of physicians respecting the results of a personal examination of plaintiff was in this case properly excluded because plaintiff had not testified with reference to communications made by him to the physician, although he had voluntarily testified with respect to his injuries and had introduced other evidence respecting them.

207 Fed. Rep. 817, affirmed.

THE facts, which involve the construction of certain provisions of the Federal Employers' Liability Acts of 1908 and 1910 and of the Arizona Enabling Act and of a statute of Arizona relating to the admission of evidence of physicians of the plaintiff in actions for personal injuries, are stated in the opinion.

Mr. John A. Garver, with whom *Mr. William C. McFarland* was on the brief, for plaintiff in error:

The action was not removable. See § 33, Arizona Enabling Act, and express prohibition in amendment of § 6 of the Employers' Liability Act of April 5, 1910, as reënacted, § 28, Jud. Code; *Lee* v. *Toledo &c. Ry.*, 193 Fed. Rep. 685; *McChesney* v. *Ill. Cent. R. R.*, 197 Fed. Rep. 85.

Even if the action were removable, the requirements of the removal statute were not complied with. This case does not fall under *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Steamship*

Co. v. *Tugman*, 106 U. S. 118, but under *Stone* v. *South Carolina*, 117 U. S. 430; *Crehore* v. *Ohio &c. Ry.*, 131 U. S. 240.

The Federal court never acquired jurisdiction. *United States* v. *Alamogordo Lumber Co.*, 202 Fed. Rep. 700.

No certified copy of the record was entered in the Federal court, and there is no evidence that any copy of the record in the state court was ever entered in the Federal court. *Blitz* v. *Brown*, 7 Wall. 693; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509.

While the failure to file the record within thirty days may be waived, *St. Paul &c. Ry.* v. *McLean*, 108 U. S. 212, it cannot be waived altogether, and the court cannot proceed with the action until the record has been filed. *Railroad Co.* v. *Koontz*, 104 U. S. 5.

The question of jurisdiction was not waived and the railway company was not precluded from raising the point for the first time in this court. *Crehore* v. *Ohio &c. Ry.*, 131 U. S. 240.

If the plaintiff in error had not raised the point, the court itself would have done so, on its own motion, if its attention had been called to it. *Mansfield &c. Ry.* v. *Swan*, 111 U. S. 379; *Metcalf* v. *Watertown*, 128 U. S. 586; *Parker* v. *Ormsby*, 141 U. S. 81.

It was error to exclude the deposition of plaintiff's attending physician under Rev. Stat. Arizona, 1901, § 2535, subd. 6, on the ground that his knowledge was privileged because obtained in a professional capacity. The privilege, if any, was waived. It was so held under a similar statute in New York. *Capron* v. *Douglass*, 193 N. Y. 11.

The principle is similar to that which is recognized in the case of attorney and client, where, if the communication is made in the presence of a third person, the privilege is waived. *Doheny* v. *Lacy*, 168 N. Y. 213; *Thompson* v. *Cashman*, 181 Massachusetts, 36.

Under the Arizona statute it is expressly provided, that, if a person offers himself as a witness and voluntarily testifies to the facts communicated to the physician, he is deemed to consent to the testimony of the physician. That is what the plaintiff below did in the present case. See also *Holloway* v. *Kansas City*, 82 S. W. Rep. 89; *Fearnley* v. *Fearnley*, 98 Pac. Rep. 819; *Capron* v. *Douglas*, 85 N. E. Rep. 827; *Sanpere* v. *Sanpair*, 107 Pac. Rep. 369; *San Fran. Cred. House* v. *MacDonald*, 122 Pac. Rep. 964; *Studebaker* v. *Faylor*, 98 N. E. Rep. 318; *Glover* v. *Patten*, 165 U. S. 394; *Hunt* v. *Blackburn*, 128 U. S. 464; *Un. Pac. Ry.* v. *McMican*, 194 Fed. Rep. 393.

Mr. William M. Seabury for defendant in error, submitted.

Mr. Justice Pitney delivered the opinion of the court.

This action, brought by Clark against the Railway Company, was commenced in January, 1912, in the District Court of the Fifth Judicial District of the then Territory of Arizona. It was based upon the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291. The complaint alleged that while defendant was engaging in commerce between the Territories of Arizona and New Mexico as a common carrier by railroad, and while plaintiff was employed by defendant in such commerce, he sustained certain personal injuries through the negligence of defendant and its employés, for which he claimed damages in the amount of $40,000. After the action was commenced, and on February 14, 1912, the Territory of Arizona became a State, and the further proceedings (improperly, it is said), were conducted in the District Court of the United States for the District of Arizona. In that court plaintiff filed a first and a second amended complaint, and defendant, having unavailingly moved to strike the latter from the files, upon grounds not necessary to be specified, answered upon

the merits, without interposing any objection to the jurisdiction of the court. A trial by jury was had, resulting in a verdict and judgment for plaintiff, and this was removed by defendant's writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment was affirmed (207 Fed. Rep. 817). The present writ of error was then sued out.

Two matters only require particular discussion. The Enabling Act of June 20, 1910, under which Arizona was admitted as a State (c. 310, § 33, 36 Stat. 557, 577), provided in effect that actions which, at the date of admission were pending in the territorial courts (other than the Supreme Court) should be transferred to and proceed in the proper Federal court in cases where, if they had been begun within a State, the Federal court would have had exclusive original jurisdiction, and that where the cause of action was one of which the state and Federal courts would have concurrent jurisdiction, the action should be transferred to and proceed in the appropriate state court, but in this case might be transferred to the Federal court upon application of any party, to be made as nearly as might be in the manner provided for removal of causes from state to Federal courts.

The present action being one of which the Federal and state courts have concurrent jurisdiction, it is insisted that upon the commencement of statehood it should have been transferred to the proper state court, subject to removal to the Federal court upon application made in due form for that purpose; that in fact the files and records in the territorial court were never transferred to the proper state court, or to any state court; and that a certain petition of plaintiff, which appears in the record, wherein he prayed for the removal of the cause from the state to the Federal court, was insufficient and inefficacious for the purpose, for want of compliance with certain of the requirements of the removal statute. It is further insisted

that in the Enabling Act it was the intention of Congress to provide for the removal of actions from the state to the Federal courts only in case they might have been removed if the action had not been commenced until after the admission of the Territory as a State; and that under the express prohibition contained in the amendment of § 6 of the Employers' Liability Act, passed April 5, 1910, c. 143, 36 Stat. 291, shortly before the passage of the Enabling Act, and which declares that "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," (reënacted as § 28, Judicial Code), actions of this character were not removable under the general provisions of § 33 of the Enabling Act.

We need spend no time upon these questions, since there is no ground for denying the jurisdiction of the District Court of the United States over the subject-matter, the objections urged are of such a nature that they might be waived, and the record shows that they were waived by the action of defendant in permitting the cause to proceed in the Federal court, and answering there upon the merits, without objection based upon the grounds now urged or any jurisdictional grounds. The action being one arising under a law of the United States, and the requisite amount being in controversy, the Federal District Court had original jurisdiction under § 24, Judicial Code. The removal proceedings were in the nature of process to bring the parties before that court, and the voluntary appearance of the parties there was equivalent to a waiver of any formal defects in such proceedings. *Mackay* v. *Uinta Development Co.*, 229 U. S. 173, 176. The case of *United States* v. *Alamogordo Lumber Co.*, 202 Fed. Rep. 700, cited by plaintiff in error, is clearly distinguishable, for timely objection was there made.

The second matter requiring mention is the alleged error of the trial court in excluding the evidence of two

physicians called by defendant for the purpose of testifying to the results of a personal examination of plaintiff shortly after he received the injuries for which damages were claimed. The trial court based the rulings upon an Arizona statute (R. S. 1901, § 2535, subdivision 6), which reads as follows:

"6. A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient: *Provided,* That if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney (*sic*)."

A material part of the injury complained of was the loss of the sight of plaintiff's left eye, and because this was set forth in the pleadings, and upon the trial plaintiff testified personally in regard to his injuries, mentioning the loss of sight and pain in the eye, and called as a witness a nurse who attended him after the accident, and who testified as to the condition of the eye, it is insisted that plaintiff in effect consented to the examination of the physicians with respect to his condition. The argument is that the statute was intended to protect persons in the confidential disclosures that may be necessary in regard to their physical condition, but was not intended to close the lips of physicians where the patient voluntarily publishes the facts to the world. In support of this, plaintiff in error cites two cases from the New York Court of Appeals, *Morris* v. *New York &c. Ry.*, 148 N. Y. 88, and *Capron* v. *Douglass,* 193 N. Y. 11. But the New York statute [1] is materially different from that of Arizona.

[1] Extracts from the New York Code of Civil Procedure.

"Sec. 834. A person duly authorized to practice physic or surgery, . . . shall not be allowed to disclose any information which

The purpose of the latter enactment is very clearly expressed in its language. Without the consent of the patient, the physician's testimony is excluded with respect to two subjects: (a), any communication made by the patient with reference to any physical or supposed physical disease, and (b), any knowledge obtained by personal examination of such patient. And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies "with reference to such communications." We would have to ignore the plain meaning of the words in order to hold, as we are asked to do, that the testimony of other witnesses offered by the patient, or the testimony of the patient himself with reference to other matters than communications to the physician, or any averments contained in the pleadings but not in the testimony, amount to a waiver of the privilege. The enactment contemplates that the physician receives in confidence what his patient tells him and also what the physician learns by a personal examination of the patient. It contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent

The express object is to exclude the physician's testimony, at the patient's option, respecting knowledge

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he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity. . . ."

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"SEC. 836. The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the . . . patient. . . . The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. . . ."

gained at the bedside, in view of the very delicate and confidential nature of the relation between the parties. The statute recognizes that they do not stand on equal terms. The patient is more or less suffering from pain or weakness, distracted by it, ignorant of the nature or extent of his injury or illness, driven by necessity to call in a professional adviser, sometimes with little freedom of choice; he relies, perforce, upon the physician's discretion, as well as upon his skill and experience, and is obliged by the circumstances of his own condition not only to make an explanation of his ailment or injury, so far as it may be within his knowledge and may be communicable by word of mouth, but also to submit to the more intimate disclosure involved in a physical examination of his person. The physician, on the other hand, is in the full possession of his faculties, and of that knowledge which is power. Manifestly, the patient occupies, for the time, a dependent position. The chief policy of the statute, as we regard it, is to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences. The question of dealing justly as between the patient and third parties is a secondary consideration.

It is a mistake, we think, to regard the patient's disclosures—whether verbal or physical—as voluntary in the full sense; they are believed by him to be necessary for the restoration of health or the preservation of life or limb. But, at least, if he has command of his mind and memory, the patient may somewhat control the extent of his disclosures by word of mouth, and may be able afterwards to testify respecting them; while, if he submits himself to a physical examination at the hands of the physician, he cannot know in advance the nature or extent of what the physician will learn, cannot confine the disclosure to the present ailment or injury, and cannot afterwards testify respecting its results, excepting as the physician may in-

form him of them. And, in many cases, the physician may, with perfectly proper motives, withhold from the patient the results of the physical examination and his deductions therefrom.

We cannot, therefore, without encroaching upon the domain of legislation, declare that there is no substantial ground for a distinction between the information the physician gains from verbal communications made by the patient and the far wider knowledge that he derives from his personal examination of the patient. Certainly it cannot be said that when the patient afterwards has occasion to make averments and adduce evidence respecting the nature of the ailment or injury, he thereby necessarily publishes to the world the facts as disclosed to the physician through the physical examination. In many cases this must be very far from true; the patient having no access to the facts as thus disclosed excepting with the consent of the physician. The language of the statute, as we think, shows a recognition of this, and also of the fact that when the patient himself has occasion to testify respecting his ailment or disease, he often must do so without knowing the range or the character of the testimony that might be given by the physician, and without any means of contradicting it. In order to prevent the patient from being subjected to this disadvantage, the Act gives him the option of excluding the physician's evidence entirely by himself refraining from testifying voluntarily as to that respecting which alone their knowledge is equal, namely, what the patient told the physician with reference to the ailment.

The framer of the Act was careful to choose language that recognizes the distinction between (a) communications made by the patient and (b) knowledge obtained by the doctor through a personal examination of the patient. The New York statute, which, so far as we have observed, was the first to establish a privilege with respect

to the knowledge gained by a physician while attending a patient in a professional capacity, recognizes no such distinction. Nor does it define with precision what conduct on the part of the patient shall constitute a waiver of the privilege. Hence the courts of that State deemed themselves at liberty to determine this question upon general principles, derived from the supposed policy of the law. Not only, therefore, are the decisions of the courts of that State, and of other States having statutes formed upon the same model, valueless as guides to the meaning of the statute here in question, but the very fact that the Legislature of Arizona departed from the form of the New York statute indicates that it did so because it had a different purpose to express. We are unable to see anything that would justify us in refusing judicial recognition to a distinction thus laid hold of by the lawmaking body in defining the extent and conditions of the privilege.

To construe the Act in accordance with the contention of plaintiff in error would not only be a departure from its language, but would render it inapplicable in all cases where the "physical or supposed physical disease" is the subject of judicial inquiry, and where any averment respecting it is made in pleading or evidence upon the subject is introduced at the trial in behalf of the patient. This would deprive the privilege of the greater part of its value, by confining its enjoyment to the comparatively rare and unimportant instances where the patient might have no occasion to raise an issue or introduce evidence on the subject, or where the patient's disease might happen to be under investigation in a controversy between other parties. We are constrained to reject this construction.

The other questions that are raised require no special mention. It is sufficient to say that we find no error warranting a reversal of the judgment.

Judgment affirmed.

MR. JUSTICE HUGHES, with whom MR. JUSTICE DAY concurred, dissenting.

I am unable to agree to the approval of the ruling which excluded the physicians' testimony. It should be supposed that it was the legislative intent to protect the patient in preserving secrecy with respect to his ailments and not to give him a monopoly of testimony as to his condition while under treatment. Here, not only did the plaintiff introduce the evidence of his nurse, describing in detail his bodily injuries and the medical treatment, but the plaintiff offered himself as a witness and voluntarily testified as to his bodily condition. His testimony covered the time during which he was under the physician's examination, and it was upon this testimony that he sought to have the extent of his injuries determined by the jury and damages awarded accordingly. To permit him, while thus disclosing his physical disorders, to claim a privilege in order to protect himself from contradiction by his physician as to the same matter, would be, as it seems to me, so inconsistent with the proper administration of justice that we are not at liberty to find a warrant for this procedure in the statute unless its language prohibits any other construction. [See *Hunt* v. *Blackburn*, 128 U. S. 464, 470; *Epstein* v. *Railroad*, 250 Missouri, 1, 25; *Roeser* v. *Pease*, 37 Oklahoma, 222, 227; *Forrest* v. *Portland Ry. L. & P. Co.*, 64 Oregon, 240; *Capron* v. *Douglass*, 193 N. Y. 11; 4 Wigmore on Evidence, § 2389 (2).]

As I read the Arizona statute it was framed not to accomplish, but to prevent, such a result. We have not been referred to any construction of it by either the territorial or state court, and we must construe it for ourselves. To my mind, its meaning is that if the patient voluntarily testifies as to his physical condition at the time of the examination, he cannot shut out his physician's testimony as to the same subject. To reach the contrary

conclusion, emphasis is placed on the words 'such communications' in the proviso, and it is insisted that the proviso was to apply only if the plaintiff testifies as to what he *told* the physician. I think that this is altogether too narrow. When the patient submits himself to an examination, he as truly communicates his condition to the physician as if he tells him in words. Although the patient were dumb, his submission to inspection in order that he might be treated would be none the less a communication of what is thus made known. That is the very ground of the privilege. Nor does the fact that the statute, with unnecessary diffuseness, refers in the sentence defining the privilege to 'any communication' or 'any knowledge obtained by personal examination' limit the natural meaning of the proviso. In saying that 'if a person offer himself as a witness and voluntarily testify with reference to such communications,' it is to be deemed 'a consent' to the physician's testifying, the proviso may be, and I think should be, taken to embrace implied as well as express communications. I can find no reasonable basis for a distinction. It is said that the plaintiff may not know what the physician has observed or what testimony he may give. But when the plaintiff testifies he invites analysis and contradiction, and in contemplation of law he asks to have his statement judged by what is shown to be the truth of the matter. If the plaintiff testifies as to what he told the physician, it is conceded that the physician may be examined, and the obvious reason is that the plaintiff is not to be permitted to insist upon his privilege as to what he himself is disclosing. This is the policy of the statute—and it governs equally, as I read it, when the plaintiff testifies as to his physical condition at the time he submits himself to the physician's examination. The words 'such communications' are broad enough to cover all communications for the purpose of treatment, whether by utterance or by what is usually more revealing—the

yielding of one's body to the scrutiny of the practitioner. To repeat, it seems to me that the statute was intended to make it impossible for the plaintiff to claim the privilege when he himself has testified as to the subject of it.

As in this view competent, and presumably important, evidence was excluded, I think that the judgment should be reversed.

I am authorized to say that MR. JUSTICE DAY concurs in this dissent.

OPINIONS PER CURIAM, ETC., FROM OCTOBER 12, 1914, TO JANUARY 11, 1915.

No. ——. Original. *Ex parte:* In the Matter of Jared Flagg, Petitioner. Submitted October 19, 1914. Decided October 26, 1914. Motion for leave to file petition for writ of prohibition or mandamus denied. *Mr. Robert C. Beatty* and *Mr. Wade H. Ellis* for the petitioner. *The Attorney General, The Solicitor General,* and *Mr. Assistant Attorney General Wallace* opposing.

No. 73. F. W. Ritterbusch, as County Treasurer, etc., et al., Appellants, *v.* The Atchison, Topeka & Santa Fe Railway Company. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss and the merits submitted October 19, 1914. Decided October 26, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Bagley* v. *General Fire Extinguisher Co.,* 212 U. S. 477; *Weir* v. *Rountree,* 216 U. S. 607; *Shulthis* v. *McDougal,* 225 U. S. 561, 569. *Mr. Charles West* for the appellants. *Mr. S. T. Bledsoe* for the appellee.

No. 302. The United States Fidelity & Guaranty Company of Baltimore, Md., Plaintiff in Error, *v.* Fred H. Poetker, Receiver, etc. In error to the Supreme Court of the State of Indiana. Motion to dismiss or affirm or place on the summary docket submitted October 13, 1914. Decided October 26, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of

(1) *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *May* v. *Illinois*, 232 U. S. 720; (2) *McCorquodale* v. *Texas*, 211 U. S. 432, 437; *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 326, 334; *City of Lewiston* v. *Chamberlain*, 234 U. S. 751. *Mr. Charles Martindale* for the plaintiffs in error. *Mr. Frank S. Roby* and *Mr. Ward H. Watson* for the defendant in error.

No. 629. Henry D. Hotchkiss, as Trustee, etc., Appellant, *v.* Irving L. Ernst et al., as Trustees, etc. Appeal from the United States Circuit Court of Appeals for the Second Circuit. Motion to dismiss submitted October 13, 1914. Decided October 26, 1914. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Coder* v. *Arts*, 213 U. S. 223, 234, 235; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 118; *James* v. *Stone & Co.*, 227 U. S. 410, 411; *Synnott* v. *Mines Co.*, 234 U. S. 749. *Mr. Abram I. Elkus* and *Mr. Wm. A. Barber* for the appellant. *Mr. Daniel P. Hays* for the appellee.

No. 115. Russell Sage Raphael, Appellant, *v.* The Wasatch & Jordan Valley Railroad Company et al. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 19, 1914. Decided October 26, 1914. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477, 479; *Weir* v. *Rountree*, 216 U. S. 607; *Shulthis* v. *McDougal*, 225 U. S. 561, 569. *Mr. Delos McCurdy* and *Mr. Thomas Bracken* for the appellant. *Mr. Joel F. Vaile, Mr. Waldemar Van Cott, Mr. E. M. Allison, Jr., Mr. Henry McAllister, Jr.*, and *Mr. William D. Riter* for the appellees.

No. 520. MOHAWK OVERALL COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* HOOKER, CORSER & MITCHELL COMPANY. In error to the Supreme Court of the State of New York. Motion to dismiss or affirm submitted October 20, 1914. Decided October 26, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *May* v. *Illinois*, 232 U. S. 720; (2) *Barron* v. *Baltimore*, 7 Pet. 243; *Jack* v. *Kansas*, 199 U. S. 372, 379–380; *Twining* v. *New Jersey*, 211 U. S. 78, 93. *Mr. William Dewey Loucks* for the plaintiffs in error. *Mr. Clarke C. Fitts* and *Mr. Robert C. Bacon* for the defendant in error.

No. 526. COMMONWEALTH TRUST COMPANY, PLAINTIFF IN ERROR, *v.* ALBERT A. TROCON ET AL. In error to the Supreme Court of the State of Kansas. Motion to dismiss or affirm and for damages submitted October 20, 1914. Decided October 26, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Mallers* v. *Commercial Loan & Trust Co.*, 216 U. S. 613; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *Appleby* v. *Buffalo*, 221 U. S. 524, 529; *City of Lewiston* v. *Chamberlain*, 234 U. S. 751; (2) *Eustis* v. *Bolles*, 150 U. S. 361; *Yazoo & Miss. R. R.* v. *Brewer*, 231 U. S. 245; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536. *Mr. Carr W. Taylor* for the plaintiff in error. *Mr. William C. Scarritt* for the defendants in error.

No. 564. ATLANTIC COAST LUMBER CORPORATION, PLAINTIFF IN ERROR, *v.* O. G. MINSHEW. In error to the Supreme Court of the State of South Carolina. Motion to dismiss or affirm submitted October 19, 1914. Decided

October 26, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Consol. Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 599–600; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658. *Mr. P. A. Willcox* for the plaintiff in error. *Mr. J. J. Darlington* for the defendant in error.

No. 409. The United States, Plaintiff in Error, *v.* Holland-American Line. In error to the United States Circuit Court of Appeals for the Second Circuit. Argued October 21, 1914. Decided November 2, 1914. Judgment affirmed by an equally divided court, and cause remanded to the District Court of the United States for the Southern District of New York. *The Attorney General* and *Mr. Assistant Attorney General Wallace* for the plaintiff in error. *Mr. Lucius H. Beers* for the defendant in error.

No. 61. Antonio Maria Peralta et al., Appellants, *v.* The State of California et al. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted October 21, 1914. Decided November 2, 1914. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of (1) *Castro* v. *United States*, 3 Wall. 46, 49–50; *Caillot* v. *Deetken*, 113 U. S. 215; *Richardson* v. *Green*, 130 U. S. 104, 111; *Green* v. *Elbert*, 137 U. S. 615, 621; (2) *Villabolos* v. *United States*, 6 How. 81, 90–91; *Hewitt* v. *Filbert*, 116 U. S. 142, 145; *Jacobs* v. *George*, 150 U. S. 415, 417. *Mr. William H. H. Hart* for the appellants. *Mr. J. P. Blair*, *Mr. C. H. Bates*, *Mr. A. B. Browne*, *Mr. E. S. Pillsbury*, *Mr. A. A. Moore*, *Mr. Alfred Sutro* and *Mr. Oscar Sutro* for the appellees.

No. 343. Eliza M. Britton, etc., Plaintiff in Error, *v.* Augustin B. Wheeler. In error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted October 19, 1914. Decided November 2, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Spies* v. *Illinois*, 123 U. S. 131, 181; *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, 154; (2) *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *John* v. *Paullin*, 231 U. S. 583; *McDonald* v. *Oregon Navigation Co.*, 233 U. S. 665. *Mr. Charles Louque* for the plaintiff in error. *Mr. George Denegre* and *Mr. Victor Leovy* for the defendant in error.

No. 20. Melvin W. Mills, Appellant, *v.* The Territory of New Mexico. Appeal from the Supreme Court of the Territory of New Mexico. Submitted for appellee October 26, 1914. Decided November 2, 1914. *Per Curiam.* Decree affirmed with costs, and cause remanded to the Supreme Court of the State of New Mexico. *Treat* v. *Grand Canyon Ry.*, 222 U. S. 448, 452; *Straus* v. *Foxworth*, 231 U. S. 162, 169–170; *Phœnix Ry.* v. *Landis*, 231 U. S. 578, 579–580; *Work* v. *United Globe Mines*, 231 U. S. 595, 599; *Arizona* v. *Copper Queen Mining Co.*, 233 U. S. 87, 93–94. No brief filed for the appellant. *Mr. Frank W. Clancy* for the appellee.

No. 26. C. J. Rixey, an Insane Person, by C. J. Rixey, Jr., Appellant, *v.* Robert H. Cox, Sergeant of the City of Alexandria, Va. Appeal from the District Court of the United States for the Eastern District of Virginia. Submitted October 26, 1914. Decided November 2, 1914. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of (1) *Farrell* v. *O'Brien*, 199

U. S. 89, 100; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Cassidy* v. *Colorado*, 223 U. S. 707; (2) *In re Converse*, 137 U. S. 624, 632; *Compagnie Francaise &c.* v. *Board of Health*, 186 U. S. 380, 393; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25–27. *Mr. John L. Jeffries* and *Mr. Jas. R. Caton* for the appellant. *Mr. J. Garland Pollard* and *Mr. Christopher B. Garnett* for the appellee.

No. 16. Washington Dredging & Improvement Company, Plaintiff in Error, *v.* The State of Washington, E. V. Bussell et al. In error to the Supreme Court of the State of Washington. Argued October 26 and 27, 1914. Decided November 2, 1914. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Washington Dredging & Improvement Company* v. *The State of Washington, E. V. Bussell*, 231 U. S. 742, and cases there cited. *Mr. Hannis Taylor, Mr. W. F. Hays* and *Mr. Charles E. Shepard* for the plaintiff in error. *Mr. Alfred Battle, Mr. Richard A. Ballinger, Mr. George B. Cole, Mr. E. C. Lindley, Mr. W. V. Tanner, Mr. Jas. B. Metcalf, Mr. Geo. E. DeSteiguer, Mr. Ira Bronson, Mr. Jas. A. Kerr, Mr. Corwin S. Shank, Mr. Louis Henry Legg* and *Mr. Frank P. Lewis* for the defendants in error.

No. 33. William Rabb, Plaintiff in Error, *v.* The State of Louisiana. In error to the Supreme Court of the State of Louisiana. Submitted for the defendant in error October 30, 1914. Decided November 2, 1914. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Kansas City Star Co.* v. *Julian*, 215 U. S. 589; *Adams* v. *Russell*, 229 U. S. 353; *Holden Land Co.* v. *Inter-State Trading Co.*, 233

U. S. 536. No brief filed for the plaintiff in error. *Mr. R. G. Pleasant* for the defendant in error.

No. 35. J. A. Miller, Trustee, etc., Appellant, *v.* The First National Bank of Albuquerque. Appeal from the Supreme Court of the Territory of New Mexico. Submitted October 27, 1914. Decided November 2, 1914. *Per Curiam.* Decree affirmed with costs, upon the authority of *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91; *Bryant* v. *Swofford Bros.*, 214 U. S. 279, 290–291, and cause remanded to the Supreme Court of the State of New Mexico. *Mr. O. N. Marron* and *Mr. Francis E. Wood* for the appellant. *Mr. A. B. McMillan* for the appellee.

No. 13. Mound City Company, Appellant, *v.* Robert H. Castleman et al. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Argued for the appellant October 23 and 26, 1914. Decided November 9, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Weir* v. *Rountree*, 216 U. S. 607; *Shulthis* v. *McDougal*, 225 U. S. 561, 569. *Mr. Ben T. Castleman* and *Mr. Chester H. Krum* for the appellant. No brief filed for the appellees.

No. 23. People of the State of Illinois, Suing by the Canal Commissioners, Plaintiffs in Error, *v.* Pittsburgh, Fort Wayne & Chicago Railway Company et al. In error to the Supreme Court of the State

of Illinois. Argued October 29, 1914. Decided November 9, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Yazoo & Miss. R. R.* v. *Brewer*, 231 U. S. 245, 249; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 541. *Mr. William Ritchie* and *Mr. Samuel B. King* for the plaintiffs in error. *Mr. Timothy J. Scofield, Mr. Frank J. Loesch, Mr. Charles F. Loesch* and *Mr. James Stillwell* for the defendants in error.

No. 36. Twin Falls Canal Company, Plaintiff in Error, *v.* The State of Idaho et al. In error to the Supreme Court of the State of Idaho. Argued October 30 and November 2, 1914. Decided November 9, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Yazoo & Miss. R. R.* v. *Brewer*, 231 U. S. 245, 249; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 541. *Mr. Arthur M. Bowen* for the plaintiff in error. *Mr. J. H. Peterson* and *Mr. Edwin G. Davis* for the defendants in error.

No. 41. J. F. Smith et al., Plaintiffs in Error, *v.* George Leavenworth. In error to the Supreme Court of the State of Mississippi. Argued November 3, 1914. Decided November 9, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Rogers* v. *Jones*, 214 U. S. 196, 204; *Wood* v. *Chesborough*, 228 U. S. 672, 677; (2) *Castillo* v. *McConnico*, 168 U. S. 674; *de Bearn* v. *Safe Deposit Co.*, 233 U. S. 24, 34; *McDonald* v. *Oregon Navigation Co.*, 233 U. S. 665, 670; (3) *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 344; *Gring* v. *Ives*, 222 U. S. 365, 370; *Ennis Water Works* v. *Ennis*, 233 U. S.

652. *Mr. John W. Cutrer* and *Mr. O. G. Johnston* for the plaintiffs in error. *Mr. Gerald FitzGerald* and *Mr. Edward Mayes* for the defendant in error.

No. 57. JOHN JENKINS, APPELLANT, *v.* MAXWELL LAND GRANT COMPANY. Appeal from the Supreme Court of the Territory of New Mexico. Argued for the appellant and submitted for the appellee November 5, 1914. Decided November 9, 1914. *Per Curiam.* Judgment affirmed with costs upon the authority of *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573; *Harrison* v. *Perea*, 168 U. S. 311, 323; *Wm. W. Bierce, Ltd.*, v. *Hutchins*, 205 U. S. 340, 344, and cause remanded to the Supreme Court of the State of New Mexico. *Mr. F. T. Cheetham* for the appellant. *Mr. Chas. A. Spiess* for the appellee.

No. 105. OSWALD WEST, AS GOVERNOR, ET AL., PLAINTIFFS IN ERROR, *v.* CORVALLIS & EASTERN RAILROAD COMPANY. In error to the Supreme Court of the State of Oregon. Motion to dismiss or affirm submitted November 9, 1914. Decided November 16, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Preston* v. *Chicago*, 226 U. S. 447, 450; *McDonald* v. *Oregon Navigation Co.*, 233 U. S. 665; *People ex rel. Hastings* v. *Jackson*, 112 U. S. 233, 236; (2) *Marshall, Governor*, v. *Dye*, 231 U. S. 250. *Mr. A. M. Crawford* for the plaintiffs in error. *Mr. Joseph Paxton Blair* and *Mr. Wm. D. Fenton* for the defendant in error.

No. 264. EDWARD S. GARD, 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 November 9, 1914. Decided November 16, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Gring* v. *Ives*, 222 U. S. 365, 370; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658. *Mr. James Hartnett* for the plaintiff in error. *Mr. Patrick J. Lucey* and *Mr. Lester H. Strawn* for the defendants in error.

No. 64. Peter H. Anderson et al., Appellants, *v.* The Swedish Evangelical Mission Covenant of America et al. Appeal from the District Court of the United States for the Northern District of Illinois. Argued November 6, 1914. Decided November 30, 1914. *Per Curiam.* Decree affirmed with costs, upon the authority of *White Star Mining Co.* v. *Nels O. Hultberg; Claes W. Johnson* v. *White Star Mining Co.; Peter H. Anderson* v. *White Star Mining Co.*, 205 U. S. 540. *Mr. Axel Chytraus, Mr. E. Allen Frost* and *Mr. John J. Healy* for the appellants. *Mr. Silas H. Strawn, Mr. John Barton Payne* and *Mr. Harris F. Williams* for the appellees.

No. 90. William R. Cowan, Plaintiff in Error, *v.* The People of the State of Illinois ex rel. John E. W. Wayman, State's attorney. In error to the Supreme Court of the State of Illinois. Argued November 13, 1914. Decided November 30, 1914. *Per Curiam.* Dismissed for the want of jurisdiction, upon the authority of *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 107; *Consol. Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 599, 600. See *Shedd* v. *People*, 217 U. S. 597. *Mr. Harry S. Mecart-*

ney for the plaintiff in error. *Mr. Patrick J. Lucey* and *Mr. L. H. Strawn* for the defendant in error.

No. 596. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* LENA HANSON, AS EXECUTRIX, ETC. In error to the Circuit Court of Ozaukee County, State of Wisconsin. Motion to dismiss or affirm submitted November 16, 1914. Decided November 30, 1914. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Spies* v. *Illinois*, 123 U. S. 131, 181; *Erie Railroad* v. *Purdy*, 185 U. S. 148, 154; *Louisville & Nashville R. R.* v. *Woodford*, 234 U. S. 46; *Willoughby.* v. *Chicago* (decided at this term), *ante*, p. 45. *Mr. C. H. Van Alstine* for the plaintiff in error. *Mr. Geo. D. Van Dyke* for the defendant in error.

No. 109. OREGON SHORT LINE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* CHARLOTTE A. HOMER. In error to the Supreme Court of the State of Utah. Submitted for the plaintiff in error December 4, 1914. Decided December 7, 1914. *Per Curiam.* Judgment reversed with costs, and case remanded for further proceedings upon the authority of *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97. *Mr. Geo. H. Smith* and *Mr. Henry W. Clark* for the plaintiff in error. No appearance for the defendant in error.

No. 424. JOHN F. DOYLE AND JOHN F. DOYLE, JR., INDIVIDUALLY AND AS COPARTNERS, TRADING AS JOHN F. DOYLE & SON, APPELLANTS, *v.* GEORGE J. SCHMIDHEISER, TRUSTEE, ETC. Appeal from the United States Circuit

Court of Appeals for the Third Circuit. Motion to dismiss submitted November 30, 1914. Decided December 7, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Holden* v. *Stratton*, 191 U. S. 115; *Duryea Power Co.* v. *Sternbergh*, 218 U. S. 299; *Pennsylvania* v. *York Silk Manufacturing Co.*, 232 U. S. 718. *Mr. John P. Connolly* for the appellants. *Mr. Otto Wolff, Jr.*, for the appellees.

No. 488. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., Plaintiff in Error, *v.* Joseph Leora, by John Leora, his Guardian ad litem. In error to the Supreme Court of the State of Wisconsin. Argued December 1, 1914. Decided December 7, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Spies* v. *Illinois*, 123 U. S. 131, 181; *Erie R. R.* v. *Purdy*, 185 U. S. 148, 154; *Louisville & N. R. R.* v. *Woodford*, 234 U. S. 46; *Willoughby* v. *Chicago*, *ante*, p. 45 (decided this term). (See *Chicago, Milwaukee & St. Paul Ry.* v. *Hanson*, *ante*, p. 693, decided this term.) *Mr. Wm. A. Hayes* and *Mr. L. K. Luse* for the plaintiff in error. *Mr. Walter L. Gold* and *Mr. W. P. Crawford* for the defendant in error.

No. —. Original. *Ex parte;* In the Matter of Leo M. Frank, Petitioner. Submitted November 30, 1914. Decided December 7, 1914. Application for the allowance of a writ of error denied. *Mr. Henry A. Alexander* for the petitioner.

No. 83. State of Missouri ex rel. St. Joseph Water Company, Plaintiffs in Error, *v.* The City of Seattle.

In error to the Supreme Court of the State of Missouri. Submitted December 2, 1914. Decided December 14, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Thomas* v. *Iowa*, 209 U. S. 258, 262, 263; *Bowe* v. *Scott*, 233 U. S. 658, 663, 664; (2) *Kansas City Star Co.* v. *Julian*, 215 U. S. 589; *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 326, 334; *City of Lewiston* v. *Chamberlain*, 234 U. S. 751. *Mr. John E. Dolman* for the plaintiff in error. *Mr. Vinton Pike* for the defendant in error.

No. 476. THE STATE OF WASHINGTON EX REL. GRANT SMITH ET AL., PLAINTIFFS IN ERROR, *v.* THE CITY OF SEATTLE. In error to the Supreme Court of the State of Washington. Motion to dismiss or affirm submitted December 7, 1914. Decided December 14, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Yazoo & Mississippi R. R.* v. *Adams*, 180 U. S. 41, 44; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142; *Cleveland & Pittsburg R. R.* v. *Cleveland*, 235 U. S. 50, decided November 16, 1914. *Mr. Harold Preston*, *Mr. Geo. Donworth* and *Mr. Elmer E. Todd* for the plaintiffs in error. *Mr. Howard A. Hanson* for the defendant in error.

No. 523. DAVID LAMAR, APPELLANT, *v.* MAURICE SPLAIN, UNITED STATES MARSHAL, ETC., ET AL. Appeal from the Court of Appeals of the District of Columbia. Motion to dismiss submitted December 7, 1914. Decided December 14, 1914. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Jones* v. *Montague*, 194 U. S. 147; *Security Life Ins. Co.* v. *Prewitt*, 200 U. S. 446; *Richardson* v. *McChesney*, 218 U. S. 487, 492. *Mr. Henry E. Davis* for the appellant. *The Attorney General* and *The Solicitor General* for the appellees.

Decisions on Petitions for Writs of Certiorari from October 12, 1914, to January 11, 1915.

No. 620. RUSSO-CHINESE BANK, PETITIONER, *v.* THE NATIONAL BANK OF COMMERCE OF SEATTLE. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. W. H. Chickering, Mr. George H. Whipple* and *Mr. Warren Cranston Gregory* for the petitioner. No appearance for the respondent.

No. 624. THE UNITED STATES, PETITIONER, *v.* NORTHERN PACIFIC RAILWAY COMPANY. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. No appearance for the respondent.

No. 630. THE UNITED STATES, PETITIONER, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Underwood* for the petitioner. *Mr. O. M. Spencer, Mr. William Warner, Mr. O. H. Dean* and *Mr. H. M. Langworthy* for the respondent.

No. 518. MAX G. COHEN, PETITIONER, *v.* THE UNITED STATES. October 19, 1914. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas Mannix* and *Mr. Frederic D. McKenney* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

Nos. 528 and 529. EMANUEL C. DREW, PETITIONER, v. THE UNITED STATES. October 19, 1914. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. E. Smitherman* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 565. PARIS JARRELL ET AL., PETITIONERS, *v.* JAMES O. COLE ET AL. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John E. Blake, pro se,* and for petitioners. No appearance for respondents.

No. 574. OSCAR J. WEEKS, ETC., PETITIONER, *v.* THE UNITED STATES. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter Jeffreys Carlin* for the petitioner. No brief filed for the respondent.

No. 633. THE LAGONDA MANUFACTURING COMPANY, PETITIONER, *v.* ELLIOTT COMPANY. October 19, 1914.

Petition for a writ of certiorari to the United States Circuit of Appeals for the Third Circuit denied. *Mr. J. E. Bowman*, *Mr. Border Bowman*, *Mr. Paul A. Staley* and *Mr. Charles Neave* for the petitioner. *Mr. George H. Parmelee* and *Mr. Clarence P. Byrnes* for the respondent.

No. 639. ARTHUR S. PERRY ET AL., PETITIONERS, *v.* WEED CHAIN TIRE GRIP COMPANY. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Obed C. Billman* and *Mr. Frank E. Rapp* for the petitioners. *Mr. Frederick S. Duncan* for the respondents.

No. 641. FORTER-MILLER ENGINEERING COMPANY ET AL., PETITIONERS, *v.* THE MORGAN CONSTRUCTION COMPANY ET AL. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Melville Church* and *Mr. Clarence P. Byrnes* for the petitioners. *Mr. Marshall A. Christie*, *Mr. J. Nota McGill* and *Mr. Frederick P. Fish* for the respondents.

No. 650. LAURA G. ROGERS, PETITIONER, *v.* THE NATIONAL CITY BANK OF CHICAGO ET AL. October 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. B. C. Bachrach* and *Mr. A. R. Hulbert* for the petitioner. *Mr. Joseph H. Defrees* and *Mr. Marquis Eaton* for the respondents.

No. 623. CHARLES W. ANDERSON, COLLECTOR, ETC., PETITIONER, *v.* THE FORTY-TWO BROADWAY COMPANY. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the petitioner. *Mr. Roger S. Baldwin* for the respondent.

No. 648. JOPLIN MERCANTILE COMPANY ET AL., PETITIONERS, *v.* THE UNITED STATES. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. C. H. Montgomery* and *Mr. Paul A. Ewert* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 646. THE NELSON LAND & CATTLE COMPANY, PETITIONER, *v.* GEORGE H. SMITH. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Carr W. Taylor* and *Mr. William H. Thompson* for the petitioner. No appearance for the respondent.

No. 649. WILLIAM L. NORTON, PETITIONER, *v.* THE UNITED STATES. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Delbert J. Haff, Mr. William C. Dennis* and *Mr. Frederic D. McKenney* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 651. The Stafford Company, Petitioner, *v.* Coldwell-Gildard Company et al. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Benjamin Phillips* and *Mr. Wilmarth H. Thurston* for the petitioner. *Mr. William K. Richardson* for the respondents.

No. 654. Champion Fibre Company, Petitioner, *v.* R. E. Russell. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alfred S. Barnard* for the petitioner. *Mr. Mark W. Brown* and *Mr. Robert Ransom Williams* for the respondent.

No. 657. Roy S. Anderson, as Trustee, etc., Petitioner, *v.* J. O. and N. B. Chenault. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. S. Wimberly* for the petitioner. *Mr. J. O. Chenault* and *Mr. N. B. Chenault pro se.*

No. 540. Isidor Straus et al., Trading, etc., as R. H. Macy & Company, Appellants, *v.* Notaseme Hosiery Company. Petition for writ of certiorari and motion to dismiss or affirm submitted October 13, 1914. Decided October 26, 1914. Appeal dismissed, and writ of certiorari granted. *Mr. Edmond E. Wise* for the appellants and petitioners. *Mr. James H. Griffin* and *Mr. E. Hayward Fairbanks* for the appellee and respondent.

No. 115. Russell Sage Raphael, Petitioner, *v.* The Wasatch & Jordan Valley Railroad Company et al. October 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Delos McCurdy* and *Mr. Thomas Bracken* for the petitioner. *Mr. Joel F. Vaile, Mr. Waldemar Van Cott, Mr. E. M. Allison, Jr., Mr. William D. Riter* and *Mr. Henry McAllister, Jr.*, for the respondents.

No. 652. Minerals Separation, Limited, et al., Petitioners, *v.* James M. Hyde. November 2, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Frederic D. McKenney, Mr. Henry D. Williams, Mr. John H. Miller* and *Mr. O. W. McConnell* for the petitioners. *Mr. Thos. F. Sheridan, Mr. K. R. Babbitt, Mr. Walter A. Scott, Mr. J. Bruce Kremer* and *Mr. George L. Wilkinson* for the respondent.

No. 655. H. B. Borland, Petitioner, *v.* Central Trust Company of Illinois, Trustee, etc. November 2, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Allen G. Mills* and *Mr. Fred E. Newton* for the petitioner. *Mr. Alvin H. Culver* for the respondent.

No. 666. Marie H. Kelly, Petitioner, *v.* Illinois State Trust Company. November 2, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William*

S. Oppenheim and *Mr. Harrison Musgrave* for the petitioner. *Mr. Lindorf O. Whitnel* for the respondent.

No. 660. GEORGE D. HOWELL, PETITIONER, *v.* MECHANICS & METALS NATIONAL BANK ET AL. November 9, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. F. Henney* and *Mr. Wm. Edmond Curtis* for the petitioner. *Mr. Walter C. Noyes* and *Mr. Jos. M. Hartfield* for the respondents.

No. 681. CLAUDE M. DEAN, PETITIONER, *v.* R. BEALE DAVIS, JR., TRUSTEE, ETC., ET AL. November 16, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. C. V. Meredith* for the petitioner. *Mr. Richard B. Davis* for the respondents.

No. 684. THE BANKERS SURETY COMPANY, PETITIONER, *v.* ELKHORN RIVER DRAINAGE DISTRICT. November 16, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wm. C. Prentiss* and *Mr. Walter L. Clark* for the petitioner. No appearance for the respondent.

No. 677. FLORENCE S. BACHE, PETITIONER, *v.* THE UNITED STATES. November 30, 1914. Petition for a writ of certiorari to the United States Court of Customs Ap-

peals denied. *Mr. Henry Wollman* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 693. L. D. George Lumber Company, Inc., Petitioner, *v.* L. L. Daugherty et al. November 30, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John A. Lamb* and *Mr. Claude A. Swanson* for the petitioner. No appearance for the respondents.

No. 682. Lucius E. Judson, as Trustee, etc., Petitioner, *v.* William A. Nash, as Trustee, etc., et al. December 7, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Oscar A. Lewis* for the petitioner. *Mr. John M. Bowers* for the respondent.

No. 689. Ogden M. Reid, Petitioner, *v.* James C. Fargo, as President of the American Express Company et al. December 7, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Oscar R. Houston* and *Mr. Howard S. Harrington* for the petitioner. *Mr. Walter F. Taylor* and *Mr. Chas. C. Burlingham* for the respondents.

No. 674. Mahlon Groo, Petitioner, *v.* Charlotte Anita Whitney. December 7, 1914. Petition for a writ of certiorari to the Court of Appeals of the District of

Columbia denied. *Mr. Wm. M. Lewin* for the petitioner. No appearance for the respondent.

No. 699. W. H. BORDEN, PETITIONER, *v.* ARCTIC LUMBER COMPANY. December 14, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. C. Campbell* for the petitioner. *Mr. James A. Kerr* for the respondent.

No. 708. MARY F. RAINEY, AS ADMINISTRATRIX, ETC., PETITIONER, *v.* W. R. GRACE & COMPANY. December 14, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. H. Gorham* for the petitioner. No appearance for the respondent.

No. 711. UNIVERSAL FILM MANUFACTURING COMPANY, PETITIONER, *v.* S. COPPERMAN, DOING BUSINESS AS THALIA MUSIC HALL, ET AL. December 14, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Waldo G. Morse* for the petitioner. *Mr. Samuel F. Frank* for the respondents.

No. 714. PORTER L. PAYLOR, PETITIONER, *v.* THE UNITED STATES. December 14, 1914. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Daniel W. Baker* and *Mr. Thos. C.*

Bradley for the petitioner. No brief filed for the respondent.

No. 703. NEW YORK LIFE INSURANCE COMPANY, PETITIONER, *v.* EFFIE J. GOULD DUNLEVY. December 21, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Jas. H. McIntosh* and *Mr. Edward J. McCutchen* for the petitioner. No brief filed for the respondent.

No. 728. STANLEY BROWN, PETITIONER, *v.* PACIFIC COAST COAL COMPANY. January 5, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Charles F. Consaul* and *Mr. Charles C. Heltman* for the petitioner. No appearance for the respondent.

No. 732. E. I. DU PONT DE NEMOURS POWDER COMPANY, PETITIONER, *v.* WILLIAM H. SCHLOTTMAN. January 5, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick DeC. Faust, Mr. Wm. H. Button* and *Mr. J. P. Laffey* for the petitioner. *Mr. L. Laflin Kellogg* and *Mr. Abram J. Rose* for the respondent.

No. 733. LEHIGH VALLEY COAL COMPANY, PETITIONER, *v.* STANISLAW YENSAVAGE. January 5, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles W.*

Pierson and *Mr. Allan McCulloh* for the petitioner. *Mr. George C. Holt* and *Mr. Alvin C. Cass* for the respondent.

No. 717. THE DENVER CHEMICAL MANUFACTURING COMPANY, PETITIONER, *v.* THOMAS LILLEY ET AL. January 11, 1915. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry D. Estabrook* for the petitioner. No appearance for the respondents.

No. 721. CHARLES C. MOORE ET AL., PETITIONERS, *v.* F. L. DONAHOO ET AL. January 11, 1915. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. E. J. McCutchen, Mr. Alexander Britton, Mr. Evans Browne, Mr. A. Crawford Greene* and *Mr. F. W. Clements* for the petitioners. *Mr. Jeremiah F. Sullivan* for the respondents.

No. 730. JAMES J. FLETCHER ET AL., PETITIONERS, *v.* THE UNITED STATES. January 11, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry E. Davis* and *Mr. James A. O'Shea* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 739. THE UNITED STATES, PETITIONER, *v.* MRS. RUDOLPH H. THEURER ET AL. January 11, 1915. Peti-

tion for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. Henry P. Dart* for the respondents.

No. 750. DAVID P. CLARK, PETITIONER, *v.* THE SCHIEBLE TOY & NOVELTY COMPANY. January 11, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. A. Toulmin* and *Mr. Melville Church* for the petitioner. *Mr. William R. Wood* for the respondent.

No. 754. EMERSON & NORRIS COMPANY, PETITIONER, *v.* SIMPSON BROTHERS CORPORATION. January 11, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. R. A. Parker* for the petitioner. *Mr. Frederick L. Emery* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 12, 1914, TO JANUARY 11, 1915.

No. 210. HENRY H. FAY ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES. In error to the United States Circuit Court of Appeals for the First Circuit. October 13, 1914. Judgment reversed and cause remanded for further proceedings in conformity to law, per stipulation of counsel, and on motion of *Mr. Solicitor General Davis* for the

defendant in error. *Mr. John L. Hall* for the plaintiffs in error. *The Attorney General* for the defendant in error.

No. 21. The Pennsylvania Railroad Company, Appellant, *v.* Interstate Commerce Commission et al. Appeal from the United States Commerce Court. October 13, 1914. Dismissed with costs, on motion of *Mr. Frederic D. McKenney* for the appellant, and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania. *Mr. Francis I. Gowen* and *Mr. Frederic D. McKenney* for the appellant. *Mr. P. J. Farrell* and *Mr. A. M. Liveright* for the appellees.

No. 22. James Hamilton Lewis and Rose Lewis, his Wife, Plaintiffs in Error, *v.* Edith Krieg. In error to the Supreme Court of the State of Washington. October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. James B. Howe* for the plaintiffs in error. No appearance for the defendant in error.

No. 32. Clark Ruffcorn et al., Plaintiffs in Error and Appellants, *v.* The Board of Supervisors of Harrison County, Iowa, et al. In error to and appeal from the District Court of the United States for the Southern District of Iowa. October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error and appellants. *Mr. William R. Green* for the plaintiffs in error and appellants. No appearance for the defendants in error and appellees.

No. 182. BENJAMIN MEISNER ET AL., PLAINTIFFS IN ERROR, *v.* THE PEOPLE OF THE STATE OF MICHIGAN. In error to the Recorder's Court of the city of Detroit, State of Michigan. October 13, 1914. Dismissed per stipulation. *Mr. Fred A. Baker* for the plaintiffs in error. *Mr. Richard I. Lawson* for the defendant in error.

No. 211. THE PACIFIC STATES SUPPLY COMPANY, APPELLANT, *v.* THE CITY AND COUNTY OF SAN FRANCISCO ET AL. Appeal from the District Court of the United States for the Northern District of California. October 13, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Samuel M. Shortridge* for the appellant. *Mr. Percy V. Long* and *Mr. Jesse H. Steinhart* for the appellees.

No. 282. GERMAN BANK OF CARROLL COUNTY, IOWA, ET AL., PLAINTIFFS IN ERROR, *v.* WILLIAM R. LEE, RECEIVER, ETC. In error to the District Court of the United States for the Southern District of Iowa. October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. B. I. Salinger* for the plaintiffs in error. No appearance for the defendant in error.

No. 299. STEPHEN CANAVAN, APPELLANT, *v.* JESUS ROMERO, SHERIFF, ETC. Appeal from the District Court of the United States for the District of New Mexico. October 13, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Edward A. Mann* for the appellant. No appearance for the appellee.

No. 314. Southern Railway Company, Plaintiff in Error, *v.* Deaver-Jeter Company. In error to the Supreme Court of the State of South Carolina. October 13, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Benjamin L. Abney* and *Mr. John K. Graves* for the plaintiff in error. No appearance for the defendant in error.

No. 319. The Citizens Trust Company et al., Appellants, *v.* Edgar M. Tilt, Trustee, etc. Appeal from the United States Circuit Court of Appeals for the Third Circuit. October 13, 1914. Dismissed with costs, on motion of counsel for the appellants. *Mr. Fred W. Van Blarcom* and *Mr. Wayne Dumont* for the appellants. No appearance for the appellee.

No. 530. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Plaintiff in Error, *v.* The State of Indiana. In error to the Supreme Court of the State of Indiana. October 13, 1914. Dismissed with costs per stipulation. *Mr. Samuel O. Pickens* for the plaintiff in error. *Mr. Thomas M. Honan* for the defendant in error.

No. 296. Carl Oliver, Plaintiff in Error, *v.* The State of Texas. In error to the Court of Criminal Appeals of the State of Texas. October 13, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Cecil H. Smith, Mr. Aldis B. Browne, Mr. Alexander Britton* and *Mr. Evans Browne* for the plaintiff in error. *Mr. B. F. Looney* for the defendant in error.

No. 359. Northern Pacific Railway Co., Plaintiff in Error, *v.* Wilfred L. Gifford. In error to the Supreme Court of the State of Idaho. October 16, 1914. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. James E. Babb* and *Mr. Charles W. Bunn* for the plaintiff in error. No appearance for the defendant in error.

No. 38. Citizens Insurance Company, of Missouri, Appellant, *v.* Matt C. Clay et al. Appeal from the District Court of the United States for the Eastern District of Kentucky. October 21, 1914. Dismissed with costs, per stipulation of counsel. *Mr. Seymour Edgerton, Mr. John G. Johnson* and *Mr. Thomas Bates* for the appellant. *Mr. James Garnett* for the appellees.

No. 137. The Western Union Telegraph Company, Plaintiff in Error, *v.* J. C. Major, Jr. In error to the Supreme Court of Appeals of the State of Virginia. October 21, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Rush Taggart, Mr. George H. Fearons, Mr. Robert M. Hughes* and *Mr. Francis Raymond Stark* for the plaintiff in error. No appearance for the defendant in error.

No. 24. Alois B. Renehan et al., Appellants, *v.* Tina Haffner Retsch. Appeal from the Supreme Court of the Territory of New Mexico. October 23, 1914. Dismissed with costs on motion of counsel for the appellants, and cause remanded to the Supreme Court of the

State of New Mexico. *Mr. A. B. Renehan* for the appellants. *Mr. T. B. Catron* for the appellee.

No. 114. J. A. FOLGER, PETITIONER, *v.* KATE C. PUTNAM, ADMINISTRATRIX, ETC., ET AL. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. October 26, 1914. Dismissed with costs, on motion of counsel for the petitioner. *Mr. Walter D. Mansfield* for the petitioner. *Mr. Edward M. Cleary* for the respondent.

No. 2. JUAN M. CEBALLOS AND JOHN M. FISKE *v.* ANDERSON C. WILSON. On a certificate from the United States Circuit Court of Appeals for the Third Circuit. October 26, 1914. Stricken from the docket. *Mr. Richard V. Lindabury* for Ceballos and Fiske. *Mr. William Osgood Morgan* for Wilson.

No. 42. THE NATIONAL DISCOUNT COMPANY, APPELLANT, *v.* JOHN S. SHEPPARD, JR., TRUSTEE, ETC., ET AL. Appeal from the United States Circuit Court of Appeals for the Second Circuit. October 29, 1914. Dismissed per stipulation. *Mr. Wm. J. Wallace, Mr. S. C. Sugarman* and *Mr. Charles H. Fuller* for the appellant. *Mr. Sol. M. Stroock* and *Mr. Daniel P. Hays* for the appellees.

No. 60. JEHU H. CLENDANIEL, PLAINTIFF IN ERROR, *v.* HONORABLE HENRY C. CONRAD, ASSOCIATE JUDGE OF THE STATE OF DELAWARE, ET AL. In error to the Supreme

Court of the State of Delaware. November 2, 1914. Dismissed with costs pursuant to the fifteenth rule. *Mr. Jas. L. Wolcott* for the plaintiff in error. *Mr. J. J. Darlington* and *Mr. Robert H. Richards* for the defendants in error.

No. 65. CLARENCE H. VENNER, APPELLANT, *v.* CHICAGO CITY RAILWAY COMPANY ET AL. Appeal from the United States Circuit Court of Appeals for the Seventh Circuit. November 5, 1914. Dismissed per stipulation. *Mr. Elijah N. Zoline* and *Mr. Wm. R. Harr* for the appellant. *Mr. Harry P. Webber, Mr. George W. Miller, Mr. Wm. H. Sexton, Mr. John W. Beckwith* and *Mr. John Maxey Zane* for the appellees.

No. 695. UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *v.* THEODORE WEISBERGER, MAUDE WEISBERGER, HIS WIFE, AND THE EMPIRE STATE SURETY COMPANY. In error to the United States Circuit Court of Appeals for the Ninth Circuit. November 16, 1914. Docketed and dismissed on motion of *Mr. George A. King* for the defendants in error. *Mr. Geo. A. King* for the defendants in error. No one opposing.

No. 128. CONCEPCION VEVE DE BELAVAL ET AL., APPELLANTS, *v.* THE FAJARDO SUGAR GROWERS ASSOCIATION. Appeal from the Supreme Court of Porto Rico. November 30, 1914. Dismissed with costs, on motion of *Mr. Frederick S. Tyler* for the appellants. *Mr. Frederick S. Tyler* and *Mr. Frank Antonsanti* for the appellants. No appearance for the appellee.

No. 215. The F. B. Williams Cypress Company, Ltd., Plaintiff in Error, *v.* The State of Louisiana. In error to the Supreme Court of the State of Louisiana. November 30, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Carlton R. Beattie* for the plaintiff in error. No appearance for the defendant in error.

No. 301. William Knapp et al., Partners, etc., Plaintiffs in Error, *v.* Everett P. Holden. In error to the Supreme Court of the State of Ohio. November 30, 1914. Judgment affirmed with costs, per stipulation of counsel. *Mr. Constant Southworth* for the plaintiffs in error. *Mr. Charles M. Cist* for the defendant in error.

No. 108. Edward J. Robison et al., Plaintiffs in Error, *v.* Frank S. Fishback. In error to the Supreme Court of the State of Indiana. December 4, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Merrill Moores* for the plaintiffs in error. No appearance for the defendant in error.

No. 366. Chan Kum, Appellant, *v.* Samuel W. Backus, Commissioner of Immigration. Appeal from the District Court of the United States for the Northern District of California. December 14, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Corry M. Stadden* for the appellant. *The Attorney General* for the appellee.

No. 111. MARIE CARDONNEL, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Northern District of California. December 18, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Marshall B. Woodworth, Mr. Chas. H. Merillat* and *Mr. Chas. J. Kappler* for the appellant. *The Attorney General* for the appellee.

No. 178. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* W. H. ATON PIANO COMPANY. In error to the Circuit Court of Sauk County, State of Wisconsin. January 5, 1915. Dismissed, on motion of counsel for the plaintiff in error. *Mr. C. H. Van Alstine* for the plaintiff in error. No appearance for the defendant in error.

No. 179. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* CHARLES G. UBER ET AL. In error to the Supreme Court of the State of Wisconsin. January 5, 1915. Dismissed, on motion of counsel for the plaintiff in error. *Mr. C. H. Van Alstine* for the plaintiff in error. No appearance for the defendants in error.

No. 176. PHILADELPHIA & READING RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* J. GOLDMAN. In error to the Court of Law and Chancery of the city of Norfolk, State of Virginia. January 6, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Theo-*

dore W. Reath and *Mr. Robert M. Hughes, Jr.*, for the plaintiff in error. No appearance for the defendant in error.

No. 113. Vicksburg Water Works Company, Plaintiff in Error, *v.* E. Ford. In error to the Supreme Court of the State of Mississippi. January 7, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. J. C. Bryson* for the plaintiff in error. No appearance for the defendant in error.

No. 123. Twin City Separator Company et al., Plaintiffs in Error, *v.* Chicago, Milwaukee & St. Paul Railway Company et al. In error to the Supreme Court of the State of Minnesota. January 11, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. Frank Healy* for the plaintiffs in error. *Mr. Amasa C. Paul* and *Mr. Daniel Fish* for the defendants in error.

CASES DISPOSED OF IN VACATION.

No. 324. Isidor Straus et al., Copartners, etc., Plaintiffs in Error, *v.* American Publishers Association et al. In error to the United States Circuit Court of Appeals for the Second Circuit. July 18, 1914. Dismissed pursuant to the twenty-eighth rule. *Mr. Edmond E. Wise* and *Mr. Wallace Macfarlane* for the plaintiffs in error. *Mr. Stephen H. Olin* for the defendants in error.

No. 207. Mobile and Ohio Railroad Company, Plaintiff in Error, *v.* Greenwald and Champenois, a Partnership, etc. In error to the Supreme Court of the State of Mississippi. August 17, 1914. Dismissed pursuant to the twenty-eighth rule. *Mr. L. E. Jeffries* and *Mr. S. R. Prince* for the plaintiff in error. *Mr. A. S. Bozeman* for the defendant in error.

INDEX.

ABATEMENT: PAGE

Bankruptcy proceedings do not abate by death of bankrupt. *Hull* v. *Dicks*. 584

ACCOUNTS AND ACCOUNTING:

For infringing a patent. See **Judgments and Decrees; Patent.**

ACTIONS:

Form of and change of form of. See **Jurisdiction.**
By assignee, of chose in action. See **Assignee.**
By alien for death of relative. See **Alien; Treaty.**
Under § 7 of Anti-trust Act. See **Anti-trust Act.**
What constitutes suit against State. See **Constitutional Law.**
Immunity of State. See **Appearance; Porto Rico.**
Abatement. See **Abatement.**
To try question of title to land acquired by treaty. See **Parties.**

ACTS OF CONGRESS. See **Congress, Acts of.**

ADEQUATE REMEDY AT LAW. See **Injunction.**

AFRICAN RACE:

Entitled to equal accommodations in respect to all classes of car if separate cars for white and African races are required as in Oklahoma Separate Coach Act. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

ALASKA:

The provision in § 3 of the Alaska Act of August 24, 1912, providing that all laws passed by Congress establishing executive and judicial departments should remain in force until amended or repealed by Congress, related to the laws establishing such departments and not merely regulating procedure. The form of indictment was left open to amendment by the territorial legislature, and the act of the Alaska legislature of April 26, 1913, so amending § 43 of Title II, Alaska Code of Civil Procedure of March 3, 1899, that several charges can be joined in same indictment for similar offenses, is within power delegated by Congress to terri-

ALASKA—*Continued.* PAGE
torial legislature under act of August 24, 1912. *United States* v. *Wigger* 276

ALIEN:
Weight of authority in this country and England is that alienage does not affect right to maintain action for death of relative and so *held* as to an action under Employers' Liability Act and distinguishing *Maiorano* v. *Balt. & Ohio R. R.*, 213 U. S. 268. *McGovern* v. *Phila. & Reading R. R.* . . . 389
See **Treaty.**

ALIENATION OF ALLOTTED LANDS. See **Indians.**

ALLOTMENTS TO INDIANS. See **Indians.**

AMENDMENT OF PLEADINGS. See **Pleading.**

AMENDMENT OF STATUTE. See **Criminal Appeals Act.**

ANTI-TRUST ACT OF JULY 2, 1890:
Action of unions and associations of which defendants were members in regard to use and circulation of " unfair " and " we don't patronize " lists, boycotts, strikes, union labels, etc., *held* to have amounted to a combination and conspiracy under the act. *Lawlor* v. *Loewe* 522
Circulation of such lists intended to put ban on those named therein among possible customers combined with view to joint action and intended to restrain, and which does restrain, interstate commerce is within the act. *Id.*
Verdict for damages in action under § 7 of the act may include those accruing after commencement of the action but as consequence of acts done before and constituting part of the cause of action. *Id.*
Introduction of newspapers and letters allowed in an action under § 7 of the act to bring home to defendants notice and to show direct results of their actions. *Id.*

APPEAL AND ERROR:
Frivolous Appeal: Contention that § 4180, Snyder's Comp. Laws Oklahoma, repugnant to Commerce Clause of Federal Constitution is frivolous; this court has no jurisdiction under § 237, Jud. Code. *Overton* v. *Oklahoma* 31
—— Unless the record justifies assumption that conclusion of guilt only has been reached by disregarding proof, this court has no jurisdiction under § 237, Jud. Code. *Id.*
Power of Circuit Court of Appeals after its writ of error has

APPEAL AND ERROR—*Continued.* PAGE

issued: After writ of error has issued from Circuit Court of Appeals to District Court in a criminal case the former can issue prohibition to the latter against entering order allowing new trial after end of term at which final judgment was entered. *United States* v. *Mayer*. 55

Practice on appeals from Court of Appeals of District of Columbia: Alleged sums not of fundamental or jurisdictional character which were waived expressly or by implication cannot be regarded as before this court. *Magruder* v. *Drury* 106

On appeals taken prior to adoption of Judicial Code, this court reviews only decree of the Court of Appeals and objections in lower court not brought forward in Court of Appeals are not reviewable here. *Id.*

Where writ is directed: When not allowed until after the record has been sent by the state Appellate Court to the trial court the writ of error from this court is directed to the trial court. *Sioux Remedy Co.* v. *Cope*. 197

Appeals from Porto Rico: Territorial Practice Act of 1874 governs appeals taken under § 35 of the Foraker Act from the District Court of the United States for Porto Rico and review by this court in actions at law as well as in equity are by appeal and not by writ of error unless there was a jury trial. *Porto Rico* v. *Emmanuel*. 251

Reviewing judgments in actions under Employers' Liability Act: If meaning of act not questioned and Circuit Court of Appeals affirmed District Court, this court only determines if plain error was committed in relation to the principle of general law involved; if record shows nothing supporting contention of plaintiff in error, judgment must be affirmed. *Yazoo & Miss. Valley R. R.* v. *Wright*. 376

Methods of review by this court: There is ample opportunity for review by this court of any judgment or decree of a lower court contemplated by the Circuit Court of Appeals Act of 1891, now embodied in the Judicial Code; but in the distribution of jurisdiction this court cannot review a judgment of the Circuit Court of Appeals other than by proceedings addressed to that court. *Shapiro* v. *United States*. 412

—— This court cannot take a case in fragments; and, if reviewable on direct writ of error by reason of a constitutional question the whole case must come here. *Id.*

——Right of recourse to this court. *Sage* v. *Hampe*. 96

See **Criminal Appeals Act; Habeas Corpus; Jurisdiction, of this Court; New Trial; Removal of Causes.**

APPEARANCE: PAGE

Where state statute does not authorize waiver of State's exemption from suit, an appearance by an attorney for members of a state board does not amount to such a waiver; but *quære*, to what extent does the decree bind the board as to matters adjudicated in the suit between the other parties. *Farish* v. *State Banking Board*. 498

Voluntary appearance in Federal court in a suit of which state and Federal courts have concurrent jurisdiction may amount to waiver if no objection is interposed to the Federal court being proper tribunal under § 33 of the Arizona Enabling Act. *Arizona & New Mexico Ry.* v. *Clark* 669

Validity of rule of State making special appearance under certain conditions general. *Western Indemnity Co.* v. *Rupp* 261

APPORTIONMENT OF PROFITS. See **Patents.**

ARIZONA:

Under § 2535, subd. 6, Rev. Stat. Arizona, testimony of attending physician of plaintiff in suit for damages for personal injuries properly excluded because plaintiff had not testified with reference to communications made by him to attending physician. *Arizona & New Mexico Ry.* v. *Clark* 669

Construction of § 33 of the Enabling Act. See **Appearance.**

ARKANSAS:

Act of Congress of April 28 putting laws of Arkansas in force in Indian Territory construed. *Taylor* v. *Parker* 42

Annual Franchise Tax statute of 1911 not unconstitutional as to provisions involved in *St. Louis S. W. Ry.* v. *Arkansas* 350

In putting laws of Arkansas in force in Indian Territory Congress intended them to have same force and meaning that they had in Arkansas and that they should be construed as they had theretofore been by the highest court of that State; though put into effect by different Acts of Congress they were adopted not as unrelated but as a system. *Adkins* v. *Arnold* 417

Laws of Arkansas as to descent and distribution applied to lands under the Original and Supplemental Creek Agreements. *Washington* v. *Miller* 422

Sizemore v. *Brady*. 441

See **Constitutional Law; Indian Territory; Indians.**

ASSESSMENTS FOR BENEFITS. See **Taxes and Taxation.**

ASSIGNEE: PAGE

Of interest of *cestui que trust* in estate not assignee of chose in action within meaning of Judicial Code, § 24. *Brown* v. *Fletcher*.... 589

ASSOCIATIONS:

Members of labor unions and associations are bound to know the constitutions of their societies and may be liable for the acts of the officers delegated by them to act for them. *Lawlor* v. *Loewe*.... 522

See **Anti-trust Act.**

ASSUMPTION OF RISK:

When question for jury. See **Employers' Liability Act.**

Validity of classification relative to. See **Ohio Workmen's Compensation Act.**

AUTOMOBILES. See **Maryland Motor Vehicle Law.**

BANK, OKLAHOMA GUARANTY FUND. See **Eleventh Amendment.**

BANKRUPTCY ACT OF 1898:

Trustees subrogated to liens acquired by creditors on assets of the bankrupt within four months of the petition. *Fallows* v. *Continental Savings Bank*.... 300

When propriety of the subrogation of the trustee to liens so acquired is sustained by the referee and both courts below this court accepts their action as correct. *Id.*

Bankruptcy proceedings once started do not abate, and under § 8 (proviso) in case bankrupt dies, widow and children have right to allowance from the portion of the estate remaining in hands of trustee. *Hull* v. *Dicks*.... 584

The action of the court during the life of the bankrupt is binding on him and as to part of the estate distributed prior to his death the right of his widow and children to charge it with an allowance under § 8 is defeated. Such an allowance can only be made for property remaining at his death undistributed. *Id.*

The order for allowance must be duly made by the court in proceedings in which trustee as representing creditors has right to be heard. *Id.*

Allowance made for one year's support of widow and children from estate of a resident citizen of Georgia dying after adjudication and appointment, qualification and partial administration of trustee from the estate vested in the

BANKRUPTCY ACT of 1898—*Continued.* PAGE
trustee under § 70 of the act pursuant to § 8 as provided by § 4041 of the Code of Georgia. *Hull* v. *Dicks* 584
See **Judgments and Decrees.**

BILL OF EXCEPTIONS.
Effect of absence of, on questions of evidence. *Porto Rico* v. *Emmanuel* 251

BILL OF REVIEW:
Relief prayed in bill of review for newly discovered evidence is a matter of sound discretion and not absolute right; even though evidence persuasive of error in former decree relief not allowed if resulting in mischief to innocent parties. *Hopkins* v. *Hebard* 287
Function of such a bill is to relieve meritorious complainant from clear miscarriage of justice where court can see remedy applied without mischief to rights of innocent parties or unduly jeopardizing stability of judgments. *Id.*
Bill refused in regard to decree establishing title to land under Tennessee patent, notwithstanding this court has decided it to be situated in North Carolina, but court should not make new decree in view of rights of innocent parties acquired under former decree. *Id.*
Bills of review granted on two grounds: first, error of law apparent on the face of the record without further examination of matter of fact, second, new facts discovered since the decree which should materially affect it and probably induce a different result. *Scotten* v. *Littlefield* 407
An aspect of the claim involved cannot be held back when the case is presented to the court, and later made the subject of a bill of review. *Id.*
In this case a later decision decided upon principles different from those which determined the case sought to be reviewed held not to lay the foundation for bill of review on either of the grounds on which the bill should be granted. *Id.*

BOUNDARIES:
Between states: Slick Rock and Tellico Basin sections of boundary between North Carolina and Tennessee determined. *North Carolina* v. *Tennessee*. 1
—— Marks on trees given weight as evidence in establishing a boundary line. *Id.*
Between land of private parties. See **Jurisdiction.**

BOYCOTTS. See **Anti-trust Act.**

BURDEN OF PROOF: PAGE

Statute of Mississippi making happening of certain classes of accidents presumptive evidence of negligence simply shifts burden of proof and is a mere regulation of practice in regard to evidence, does not cut off substantial rights, is not denial of due process of law even when applied in a case involving an accident happening prior to its enactment. *Easterling Lumber Co.* v. *Wright*. 380

CARRIER. See **Common Carrier.**

CHANGE OF DOMICIL. See **Domicil.**

CHICAGO:

Assessment for street benefit held not unconstitutional. *Willoughby* v. *Chicago*. 45

CHICKASAW INDIANS. See **Indians.**

CHILDREN:

Of bankrupt entitled to allowance. See **Bankruptcy Act.**

CHOCTAW INDIANS. See **Indians.**

CHOSE IN ACTION. See **Assignee.**

CIRCUIT COURT OF APPEALS. See **Appeal and Error; Jurisdiction; Mandate.**

CITIZEN AND CITIZENSHIP:

May not be held for custody where there is no provision of common law or statute making an offense of the act charged. *Henry* v. *Henkel*. 219

Rights of citizens to pass through State in motor vehicles not interfered with by reasonable license fees imposed on motors. *Hendrick* v. *Maryland*. 610

Diverse giving Federal courts jurisdiction. See **Domicil; Jurisdiction; Jury; Laches; Practice.**

CLASSIFICATION:

Of subjects for police regulation and taxation. See **Constitutional Law; Equal Protection of the Law; Fourteenth Amendment.**

CLERK, FEES OF:

Provision in act of February 13, 1911, in regard to clerk's fees for supervising record apply to certain classes of interlocutory decrees. *Lovell-McConnell Co.* v. *Auto Supply Co.* 383

COAL MINES: PAGE

Taxes on lessees of United States of mines in Oklahoma. See **Taxes and Taxation.**

CODES. See **Criminal Code; Judicial Code.**

COLLATERAL ATTACK. See **Judgments and Decrees.**

COMBINATION IN RESTRAINT OF TRADE. See **Anti-trust Act.**

COMMERCE COURT. See **Interstate Commerce Commission; Jurisdiction.**

COMMERCE. See **Anti-trust Act; Constitutional Law; Interstate Commerce.**

COMMISSIONS OF TRUSTEES OF ESTATE:

This court will not disturb allowance made by auditor of District of Columbia and affirmed by both courts of the District. *Magruder* v. *Drury*. 106

Trustee cannot participate in commissions made by his firm on sales of investment to the estate. *Id.*

COMMON CARRIER:

May be required by State to furnish separate but equal accommodations to the white and African races—as in Oklahoma. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

A receiver of a railroad corporation who carries on the business is in regard thereto a common carrier. *United States* v. *Nixon*. 231

Right to primarily determine whether a higher rate should be charged for a shorter than a longer distance was taken from the carrier by the amendment of § 4 of the Act to Regulate Commerce by the act of June 18, 1910, and primarily vested in the Interstate Commerce Commission. *United States* v. *Louisville & Nashville R. R.* 314

Common-law rule that carrier has option of demanding freight in advance or on delivery applies not only to shippers but also to connecting carriers; but this right may be modified by statutes preventing discrimination. *Wadley Southern Ry.* v. *Georgia*. 651

Order of Georgia Railroad Commission directing carrier cease discriminating by demanding freight in advance from some connecting carriers and not from others, not unconstitutional. *Id.*

See **Interstate Commerce Commission; Railroad.**

COMMON LAW: PAGE

Even if contract is unenforceable at common law if Federal statute broad enough to prohibit it, this court has jurisdiction to review under § 237, Jud. Code. *Sage* v. *Hampe* 99

Common-law rule as to right of carrier to demand freight in advance. See **Common Carrier; Pleading.**

COMPENSATION ACTS. See **Ohio Workmen's Compensation Act.**

COMPETITION:

When use of later manufacturer's name on goods manufactured by earlier established person of same name results in mistake and confusion, later man must take reasonable precaution to prevent such results. *L. E. Waterman Pen Co.* v. *Modern Pen Co.*. 88

Only protection manufacturer can get against later person of same name manufacturing similar goods is to require latter to so use name in marking goods that they cannot be confused with goods manufactured by the former. *Id.*

CONDITIONS PRECEDENT:

Franchise based on carrying out of proposed plan which proved abortive fails and cannot be basis of declaring subsequent ordinances invalid as impairing obligation of contract. *Louisiana Ry. & Nav. Co.* v. *New Orleans* 164

See **Public Lands; Taxes; Taxes and Taxation.**

CONFLICT OF LAWS. See **Statutes; United States.**

CONGRESS:

Acts of, Construed and Applied: Alaska Code of March 3, 1899. *United States* v. *Wigger* 276

Arizona Enabling Act. *Arizona & New Mex. Ry.* v. *Clark* .. 669

Arkansas laws in Indian Territory. *Taylor* v. *Parker* 42

Anti-trust Act of 1890. *Lawlor* v. *Loewe* 522

Bankruptcy Act of 1898. *Hull* v. *Dicks*..... 584

Circuit Court of Appeals Act. *Shapiro* v. *United States*..... 412

See **Appeal and Error.**

Copyright Act. *Dejonge* v. *Breuker*..... 33

Creek Indian Allotment Acts. See **Indians**..... 417

Criminal Appeals Act. See **Criminal Appeals Act**..... 625

Employers' Liability Acts of 1908 and 1910.

Garrett v. *Louis. & Nash. R. R.*..... 308

Yazoo & Miss. R. R. v. *Wright* 376

CONGRESS.—*Continued.* PAGE
McGovern v. *Phila. & Reading R. R.* ... 389
Norfolk & West. Ry. v. *Holbrook* ... 625
Arizona & New Mex. Ry. v. *Clark* ... 669
Fee Bill Amendment. *Lovell Co.* v. *Auto Supply Co.* ... 383
Foraker, Porto Rico Act. *Porto Rico* v. *Emmanuel* ... 251
Indians, Acts affecting. *Taylor* v. *Parker* ... 42
Skelton v. *Dill.* ... 206
Adkins v. *Arnold.* ... 417
Washington v. *Miller.* ... 422
Sizemore v. *Brady.* ... 441
Interstate Commerce Acts. *United States* v. *Louis. & Nash. R. R.* ... 314
Berwind-White Co. v. *Chicago & Erie R. R.* ... 371
Judicial Code, § 24. *Brown* v. *Fletcher* ... 589
§ 37. *Gilbert* v. *David* ... 561
§ 237. See **Appeal and Error.**
§ 238. *Gilbert* v. *David* ... 561
§ 294. *Brown* v. *Fletcher* ... 589
Land Grant Act of 1866. *Mo., Kans. & Tex. Ry.* v. *United States* ... 37
Materialmen's Acts. *A. Bryant Co.* v. *N. Y. Steam Co.* ... 327
Meat Inspection Act. *United States* v. *Lewis* ... 282
Penal Code, § 195. *United States* v. *Erie R. R.* ... 513
Quarantine Acts of 1904 and 1913. *United States* v. *Nixon* 231
Tariff Act of 1907, § 28. *United States* v. *Salen* ... 237
Territorial Practice Act of 1874. *Porto Rico* v. *Emmanuel* . 251
White Slave Traffic Act. *United States* v. *Portale* ... 27
Acts Cited, Construed and Applied: See Table of Statutes Cited at front of volume.
Consent of Congress not necessary: Under Art. I, § 10, Cl. 3, of Federal Constitution to agreement between States made under provision of North Carolina deed of cession. *North Carolina* v. *Tennessee* ... 1
Construction of Acts of Congress: A provision in act of Congress removing restrictions may indicate the understanding of Congress that such restrictions existed under earlier acts. *Taylor* v. *Parker* ... 42
Power of Congress: Quære whether Congress has power to require witness in congressional inquiry to make material and non-criminatory disclosures and punish him for refusal so to do; that question should be decided by the trial court and not in *habeas corpus* proceedings on removal. *Henry* v. *Henkel* ... 219

CONGRESS.—*Continued.* PAGE

—— Over Indians. See **Indians.**

Validity of Acts: Every act of Congress is presumptively valid and should be so treated by a committing magistrate when it establishes an offense unless it is palpably void. *Id.*

Power of States to act in absence of legislation by Congress: State may prescribe uniform regulations for motor vehicles operating on its highways including those moving in interstate commerce. *Hendrick* v. *Maryland* 610

Reasonableness of State's action so far as it affects interstate commerce is always subject to inquiry, and is subordinate in that respect to will of Congress. *Id.*

CONSENT:

Effect of on judgments. *United States* v. *Mayer*..... 55

Magruder v. *Drury*..... 106

See **Judgments and Decrees.**

Of sovereignty to suit. See **Eleventh Amendment; Porto Rico.**

CONSPIRACY, CRIME OF:

A State may enact that a conspiracy to accomplish what an individual is free to do shall be a crime. *Drew* v. *Thaw*.... 432

CONSPIRACY IN RESTRAINT OF TRADE:

Under Anti-trust Act. *Lawlor* v. *Loewe*..... 522

CONSTITUTIONAL LAW:

I. General Principles:

1. *Determination of constitutionality:* The validity of a system of state law will be judged by its operation and effect upon rights secured by the Federal Constitution and offenses punished by Federal statutes. *United States* v. *Reynolds*..... 133

—— Extent to which this court follows construction by state court of state statute and to which it exercises its independent judgment. *United States* v. *Reynolds*..... 133

St. Louis S. W. Ry. v. *Arkansas*..... 350

In determining the nature of a state tax and the constitutionality of the statute imposing it, this court regards substance rather than form and the controlling test is found in the operation and effect of the statute as employed and enforced. *St. Louis S. W. Ry.* v. *Arkansas* 350

2. *Who can raise question of constitutionality:* In order to raise question party must be personally affected and the bill

CONSTITUTIONAL LAW—*Continued.* PAGE

must definitely allege how. This court does not pass on moot questions of law. *McCabe* v. *Atchison, Topeka &c. Ry.* 151
Louisville & Nashville R. R. v. *Finn* 601
Jeffrey Mfg. Co. v. *Blagg* 571
Hendrick v. *Maryland* 610

3. *How question raised:* This court cannot take a case in fragments; and if reviewable here on direct error by reason of a constitutional question, the whole case must come here. *Shapiro* v. *United States* 412

4. *Constitutionality favored.* If statute will bear two constructions, one within and the other beyond constitutional limitations, courts adopt the former. *Id.*

Statute may be sustained as to one part and not as to other parts, as constitutional if the provisions are independent and separable. *South Covington Ry.* v. *Covington* 537

—— Statute will not be struck down as entirely unconstitutional if part that is unconstitutional is separable, nor will this court hold a part of the statute inseparable in advance of such a holding by the state court, if possible. *St. Louis S. W. Ry.* v. *Arkansas* 350

—— Where an ordinance has been held valid by state court as within the power of the municipality, this court can only hold it unconstitutional under the due process clause of the Fourteenth Amendment if it is a clear and unmistakable case of abuse of power. *Missouri Pacific Ry.* v. *Omaha* 121

Nor will such an ordinance be held invalid under Fourteenth Amendment because penalties for non-compliance are excessive and time allowance too short; if compliance physically impossible, court of equity will relieve. *Id.*

II. **Congress, Powers and Duties of.**

Whether Congress has power to compel witness in congressional inquiry to make material and non-criminatory disclosures and punish him for refusal so to do, *Quære;* that question should be decided by the trial court and not on *habeas corpus* proceedings. *Henry* v. *Henkel* 219

Consent of Congress not necessary under Art. I, § 10, Cl. 3, to agreement between States as to boundary entered into under provision of deed of cession of North Carolina of 1789. *North Carolina* v. *Tennessee* 1

See **Congress.**

III. **States.**

1. *Status on admission to Union:* Oklahoma was admitted to

CONSTITUTIONAL LAW—*Continued.* PAGE

Union on equal footing with other States and has same power to enact public legislation not in conflict with the Federal Constitution. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.*. 151

2. *Powers of:* See Commerce Clause; Fourteenth Amendment, *infra;* States.

3. *Suits against:* See Eleventh Amendment, *infra.*

IV. **Contract Clause.**

The impairment must be by subsequent legislation and not mere change in judicial decision to bring the question before this court. *Cleveland & Pittsburgh R. R.* v. *Cleveland* 50

An ordinance containing a suspensive condition and not granting any rights except in connection with a prepared plan which proved abortive confers no rights; and subsequent legislation cannot impair it. *Louisiana Ry. & Nav. Co.* v. *New Orleans*. 164

This court determines for itself whether a contract existed and whether later legislation impaired its obligation. *N. Y. Electric Lines* v. *Empire City Subway*. 179

V. **Commerce Clause.**

1. *What constitutes interstate commerce:* Whether given commerce is or is not interstate determined by actual facts and not mere arrangements of billing and plurality of carriers. *South Covington Ry.* v. *Covington* 537

—— Uninterrupted transportation of passengers between States on same cars practically under same management and for single fare constitutes interstate commerce although tracks in each State owned by separate corporation. *Id.*

2. *State interference:* Oklahoma Separate Coach Law construed, in absence of different construction by state court, as relating exclusively to intrastate commerce and therefore not unconstitutional under commerce clause. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.*. 151

—— State may not adopt such police measures as will exclude foreign corporations and other persons engaged in interstate commerce, or impose such conditions as will better their right to carry it on or subject them to unreasonable requirements in regard thereto. *Sioux Remedy Co.* v. *Cope* 197

—— The right to demand and enforce payment of goods sold in interstate commerce is directly connected with, and essential, thereto. A State cannot impose unreasonable conditions as to recourse to courts of the State to enforce such

CONSTITUTIONAL LAW—*Continued.* PAGE

payments. Some of the conditions imposed by South Dakota are unreasonable. *Id.*

—— State may tax foreign or domestic corporation doing interstate or foreign business in form of privilege tax for exercising franchise if measured only by property within State, enforced only by ordinary means of collection, and payment be not made condition precedent for carrying on business including interstate. *St. Louis S. W. Ry.* v. *Arkansas* 350

—— Provision for forfeiture of right to do any business, including interstate, for non-payment of privilege tax although measured by property within State, might render the statute imposing the tax unconstitutional under the commerce clause unless it were severable. *Id.*

—— This court will not, in advance of decision of state court to that effect, construe such a provision as including interstate business or as not being severable. *Id.*

—— Although State may not directly burden interstate commerce, it may, in exercise of police power and in absence of action by Congress, impose reasonable regulations for public health and safety. *Id.*

—— A state or municipal ordinance regulating railway transportation may be constitutional under the commerce clause as to some provisions and not as to others. *Id.*

—— Regulations requiring safety rails and prohibiting riding on platform only incidentally affect interstate commerce and are not unconstitutional. *Id.*

—— Regulations limiting number of passengers, specifying number of cars to be run and temperature to be maintained do affect and burden interstate commerce and the last is unreasonable. *Id.*

—— In absence of regulation by Congress, State may require registration of motor vehicles and impose reasonable license tax thereon without violation of commerce clause. *Hendrick* v. *Maryland* 610

—— Reasonableness of State's action so far as it affects interstate commerce is always subject to inquiry and is subordinate in that respect to will of Congress. *Id.*

VI. **Full Faith and Credit Clause.**

Where validity of act of another State is not in question and controversy turns merely upon its interpretation and construction, no question arises under full faith and credit clause. *Western Indemnity Co.* v. *Rupp* 261

—— State court recognizing validity of statute of another

CONSTITUTIONAL LAW—*Continued.* PAGE

State, but, in absence of any decision of courts of that State holding otherwise, construing the statute as not having extraterritorial effect, does not deny it full faith and credit. *Id.*

—— Party setting up statute of another State and intending to rely upon an authoritative judicial construction thereof in the State of origin, must prove it as matter of fact. *Id.*

—— Rule that what is matter of fact in the state court is matter of fact here applies in such a case. *Id.*

—— If state court has not denied full faith and credit to the statute of another State, this court has not jurisdiction to determine whether the interpretation given to such statute is or is not erroneous. *Id.*

VII. **Eleventh Amendment.**

A suit against the state Banking Board of Oklahoma to compel payments from and assessments for the Depositors' Guaranty Fund is a suit against the State within meaning of the Eleventh Amendment. *Lankford* v. *Platte Iron Works* .. 461
Am. Water Co. v. *Lankford* 496
Farish v. *State Banking Board* .. 498

—— If state statute does not authorize waiver of exemption from suit, appearance for members of a state board does not amount to such a waiver. *Farish* v. *State Banking Board* ... 498

—— In such case, *quære* as to how far board is bound by its appearance as to matters adjudicated between private parties to the action. *Id.*

VIII. **Thirteenth Amendment.**

Peonage defined, and statutes of Alabama providing for compulsory service of one confessing crime to liquidate claim of surety paying fine imposed, held to be within prohibition of Thirteenth Amendment. *United States* v. *Reynolds* 133

IX. **Fourteenth Amendment.**

1. *Generally:* The constitution of the State is not taken up into the Fourteenth Amendment. *Pullman Co.* v. *Knott* ... 23

—— While State may restrict right of foreign corporation to sue in courts and engage in business within its limits, its power in this respect must, like all other state powers, be exercised within limits of the Federal Constitution and it may not impose unreasonable burdens. *Sioux Remedy Co.* v. *Cope* 197

2. *Due process of law:* Requirement in Florida statute that proper state officer fix amount of gross receipts on which tax

CONSTITUTIONAL LAW—*Continued.* PAGE

based in case party fails to make required report not deprivation of property without due process of law. *Pullman Co.* v. *Knott*. 23

—— Where assessment for past improvement could be levied against original owners, purchasers take subject to same liability and assessment not deprivation of property without due process of law. *Willoughby* v. *Chicago* 45

—— Overruling its earlier decisions by state court does not amount to deprivation of property without due process of law where no vested rights are interfered with. *Id.*

—— Railway company may be required by State, or municipality authorized by State, to construct overhead crossing at its own expense; consequent expense being compensated by public benefit is *damnum absque injuria* and not taking property without due process of law. *Mo. Pac. Ry.* v. *Omaha* 121

—— Such an ordinance does not deprive company of its property without due process of law, because it requires work done in somewhat more expensive, or in a different, manner from that by which the object sought could be accomplished. *Id.*

—— Due process provision has regard not to matters of form but substance of right, and State may prescribe rules as to effect of special appearances in its courts even to the extent of making special appearances for the purpose of objecting to the jurisdiction amount under specified conditions to general appearance. *Western Indemnity Co.* v. *Rupp* 261

—— Annual Franchise Tax of Arkansas, being measured exclusively on property within the State used in intrastate commerce, not deprivation of property without due process of law as being in effect a tax on property beyond the State. *St. Louis S. W. Ry.* v. *Arkansas*. 350

—— State statute making happening of certain classes of accidents presumption of negligence, cuts off no substantial defense but is simply a rule of evidence and does not deny due process of law even if applied in trial of action for injuries sustained prior to enactment. *Easterling Lumber Co.* v. *Pierce* 380

—— Regulation in municipal ordinance requiring temperature in motor cars never to be below 50° Fahrenheit, held to be unreasonable and void. *South Covington Ry.* v. *Covington* 537

—— *Quære* whether order establishing rates made by state

CONSTITUTIONAL LAW—*Continued.* PAGE

railroad commission without substantial evidence to support it is unconstitutional as depriving the company of its property without due process of law for want of opportunity to be heard. *Louis. & Nash. R. R.* v. *Finn* 601

—— Order of reparation for extortionate rates is not a deprivation of property without due process of law for lack of opportunity to be heard or as made without evidence if the carrier is not refused right to introduce evidence and does not deny the statements of the shippers as to amounts but simply denies all liability on the ground that the established rates were reasonable. *Id.*

—— This court will not hold McChord Act establishing the Kentucky State Railroad Commission unconstitutional as denying due process of law because it does not provide compulsory process for production of evidence, it not appearing in this action that the complaining carrier was deprived of any evidence by reason of such omission. *Id.*

—— Although particular section of a state statute giving commission power to make orders does not provide for hearing, if the state court has construed that section as part of the law establishing the commission and which does provide for hearings, the statute is not unconstitutional as denying due process of law. *Wadley Southern Ry.* v. *Georgia* 651

—— State may impose such penalties for violations of orders properly made by a duly appointed Commission as will enforce obedience thereto after they have been found lawful or the parties affected have had an opportunity to test their validity by judicial review, and unless unreasonably excessive they do not make the statute unconstitutional under the due process clause of the Fourteenth Amendment. *Id.*

—— A statute, imposing such heavy penalties for noncompliance, that carrier cannot safely test it by judicial review, is unconstitutional; but if carrier does not seek judicial review and simply refuses compliance and defends a suit for penalty on the ground that it is void, it cannot in that suit set up the claim that the excessive penalties provision renders the statute and all orders made thereunder unconstitutional on that account. *Id.*

—— Order of the State Railroad Commission of Georgia requiring a railroad to cease from demanding freight in advance from one connecting carrier when under similar conditions it does not require freight in advance from another carrier

CONSTITUTIONAL LAW—*Continued.* PAGE

does not violate the due process clause of the Fourteenth Amendment. *Id.*

3. *Equal protection of the laws: Quære* whether classification of sleeping and parlor car companies, excluding carriers operating their own sleeping and parlor cars is so arbitrary as to be an unconstitutional denial of equal protection of the laws. *Pullman Co.* v. *Knott* 23

—— State tax good on existing facts will not be held unconstitutional upon hypothetical or unreal possibilities as denying equal protection of the laws. *Id.*

—— Essence of constitutional right to equal protection of the law is that it is a personal one and does not depend upon number of persons affected. Any individual deprived under state authority by a common carrier of facilities equal to those furnished to another under the same circumstances is denied equal protection of the laws. *McCabe* v. *Atchison Topeka & Santa Fe Ry.* 151

—— State statute fair on its face may be so administered by public authorities as to amount to denial of equal protection of the law to a particular class. *Id.*

—— No such discrimination appears to have been exercised in enforcing the Oklahoma Separate Coach Act. *Id.*

—— Oklahoma Separate Coach law held unconstitutional in some respects. *Id.*

—— State may require of carriers separate accommodations for white and African races to and from points wholly within the State, but all classes of accommodations must be equal for both races. *Id.*

—— Equal accommodations must be provided for both African and white races as to dining, sleeping and chair cars even though demand be small from African race. *Id.*

—— Equal protection clause does not impose an ironclad rule upon the States with respect to internal taxation or prevent double taxation not based on arbitrary distinctions. *St. Louis S. W. Ry.* v. *Arkansas.* 350

—— Classification of employers based on use of engines, locomotives, etc., in state statute abolishing fellow servant defense not denial of equal protection of law in Ch. 194, Mississippi Laws 1908. *Easterling Lumber Co.* v. *Pierce* 380

—— Classification based on number of employés employed in manufacturing establishment reasonable in statute abolishing defense of negligence of fellow servant. *Jeffrey Mfg. Co.* v. *Blagg* 571

CONSTITUTIONAL LAW—*Continued.* PAGE

—— Classification based on number of employés proper in a compensation act open to all employers of the number specified and abolishing defense of contributory negligence as to those not entering it and is not denial of equal protection of the law. *Id.*

—— Ohio Compensation Act not unconstitutional in respects involved in this action as denying equal protection of law. *Id.*

—— Graduated license fee in Maryland Motor Law on motor vehicles based on horse power not a denial of equal protection of the law. *Hendrick* v. *Maryland* 610

——Such a classification in Maryland Motor Law is not unreasonable. *Id.*

X. **Privileges and Immunities of Citizens.**

A state motor vehicle law imposing reasonable fees on motors including those of non-residents does not interfere with rights of citizens of the United States to pass through the State. *Hendrick* v. *Maryland*..... 610

CONSTRUCTION:

General principles of: Grants from the government are strictly construed against the grantee. *Missouri, Kansas & Texas Ry.* v. *United States* 37

—— Although statute may be ambiguous and repel accommodation the court must try to give coherence to its conflicting provisions and give effect to the intent of the legislature; so as to Federal Materialmen's Act. *A. Bryant Co.* v. *N. Y. Steam Fitting Co.*..... 327

—— If statute will bear two constructions, one within, and the other beyond, constitutional limitations, courts should adopt the former as legislatures are presumed to act within their authority. *St. Louis S. W. Ry.* v. *Arkansas* 350

—— To construe later statute as repealing earlier one by implication is not favored. *Washington* v. *Miller* 422

—— Statute should not be so construed as to defeat the purpose for which it is passed. *United States* v. *Lewis* 282

—— While public grants should be given fair and reasonable construction, courts should not extend them by implication beyond their clear intent. *Louisiana Ry. & Nav. Co.* v. *New Orleans* 164

See **Treaties.**

Of Penal Statutes. See **Criminal Law.**

Of Federal Statutes: Acts of Congress based on interna-

CONSTRUCTION—*Continued.* PAGE

tional agreement and which requires performance of acts to assist the contracting Governments should be liberally construed. *United States* v. *Portale*. 27

—— Act of Congress granting lands not construed as including Indian lands if that construction would impute bad faith on part of United States Government in dealing with lands affected by a treaty. *Missouri, Kansas & Texas Ry.* v. *United States* 37

—— Subsequent acts of Congress removing restrictions may indicate understanding by Congress that such restrictions existed under earlier statutes. *Taylor* v. *Parker* 42

—— Provisions of Tariff Act relating to entries of merchandise should be construed in light of its purpose and of custom regulations applicable to the entry. *United States* v. *Salen* 237

—— Sub-sec. 10 of § 28 of Tariff Act of 1909 construed under rule that one of a number of acts required will not be held to relate to undefined extraneous matters when all of the others relate to defined subjects of the importation. *Id.*

—— *Quære*, whether § 184, Penal Code, prohibiting carriage of letters otherwise than in the mail by carriers on post routes except under certain specified conditions is penal or remedial or should be construed liberally or strictly. *United States* v. *Erie R. R.* 513

—— Exception in § 184, Penal Code, construed as not including letters of officers of railroad company to officers of the telegraph company with which it has a contract and in whose profits it participates relating to immediate and day by day action is current, as distinguished from exceptional, business. *Id.*

—— Congress in putting laws of Arkansas in effect in Indian Territory intended they should have same effect and be construed the same as they had thereupon been construed by the highest court of Arkansas. *Adkins* v. *Arnold* 417

Of State Constitutions and Statutes: This court, in absence of other construction by the state court, construes the Oklahoma Separate Coach Act as relating exclusively to intrastate commerce and therefore not unconstitutional under the Commerce Clause of the Federal Constitution. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

—— Highest court of State in construing state statute may depart from its former decisions if it deems them untenable.

CONSTRUCTION—*Continued.* PAGE

—— In that event, this court accepts latest construction and confines its attention to determining whether the statute as so construed is or is not unconstitutional. *Sioux Remedy Co.* v. *Cope*. 197

—— In determining nature of state tax and constitutionality of statute imposing it, this court regards substance rather than form, and the controlling test is in the operation and effect of the statute as applied and enforced. *St. Louis S. W. Ry.* v. *Arkansas* 350

—— This court is not bound by characterization given by the state court to a scheme of state taxation if it is not what the tax actually is in operation. *Id.*

—— This court, in advance of construction to that effect by the state court, will not treat a provision in a state statute as inseparable if it might render the entire statute unconstitutional. *Id.*

—— Where the state court in construing a state statute held that the establishment of rules for public utility corporations is a legislative function, this court, in the absence of a clear decision to the contrary, assumes that the same principle applies to rates and so construes the statute. *Detroit & Mackinac R. R.* v. *Mich. R. R. Comm.* 402

—— Where ordinance enacted by municipality under state authority contains several provisions, some of which are, and some of which are not, unconstitutional as burdens on interstate commerce, the court can construe the provisions as separable and only strike down those that violate the constitutional prohibitions on state action. *South Covington Ry.* v. *Covington* 537

—— State police statute imposing license fees must be construed as correct unless the contrary clearly appears. *Hendrick* v. *Maryland*. 610

—— This court is bound by construction given to a state statute by the highest court of that State. *Wadley Southern Ry.* v. *Georgia* 651

Of agreements between States: States entering into agreement to appoint commissioners to fix disputed section of boundary presumed to know that commissioners will exercise judgment and when exercised the judgment will be binding. *North Carolina* v. *Tennessee*. 1

See **Congress, Acts of, Construed; Constitutional Law; Criminal Law; Criminal Appeals Act; Judicial Code; Jurisdiction; Public Policy.**

CONTRACTS: PAGE

Nature of: Probative force necessary in order that evidence may show that the transaction was not conditional sale but mortgage. *Monagas* v. *Albertucci*. 81

Legality of: A contract tending to bring improper influence on or induce attempts to mislead an officer of United States is void as contrary to public policy. *Sage* v. *Hampe* 99

Liability on: While one may contract that a future event over which he has no, or only limited, power, may come to pass, he is not liable for, nor can he be required to perform a contract which on its face required an illegal act on the part either of himself or another. *Id.*

—— A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. *Id.*

Illegal under Federal statute: Even if contract affecting Indian lands might be unenforceable at common law, if this court condemns it under a Federal statute by a construction of such statute, this court has jurisdiction under § 237, Jud. Code. *Id.*

Impairment of Contract under Constitution: Mere change of judicial decision does not amount to impairment. It must be by subsequent legislation. *Cleveland & Pittsburgh R. R.* v. *Cleveland*. 50

—— Franchise lost by non-user not impaired by subsequent ordinance of revocation. *N. Y. Electric Lines* v. *Empire City Subway*. 179

—— Franchise depending on general scheme of improvements which proved abortive held not to have been a contract within the protection of the contract clause of the Constitution. *Louisiana Ry. & Nav. Co.* v. *New Orleans*. 164

See **Constitutional Law; Franchises; Jurisdiction of this Court.**

Contracts with Government:

Time of essence: Although parties may agree that time is of the essence and stipulate for liquidated damages for delay, they may subsequently so modify those requirements that performance within time stipulated becomes unimportant. *Maryland Steel Co.* v. *United States*. 451

Liability for delay: Where there was no culpable delinquency on contractor's part in building a vessel for the United States or any detriment to the Government, but vessel was delivered, approved and paid for without protest on account of delay and Quartermaster General had orally waived time

CONTRACTS—*Continued.* PAGE

limit, Government cannot recover damages for delay on stipulation in original contract. *Id.*

Modification by officer of United States: Where contract necessarily entered into and conducted by officers of United States, they have power to make it effective in its progress as well as in its beginning and Quartermaster General had discretion and power in this case to waive time limit in contract. *Id.*

See **Materialmen's Act.**

CONTRIBUTORY NEGLIGENCE:

See **Ohio Workmen's Compensation Act.**

COPYRIGHT:

Under §§ 4592, 4970, Rev. Stat., as they were prior to act of March 4, 1909, every reproduction of copyrighted work must bear statutory notice, even if several reproductions on sheet. *Dejonge* v. *Breuker*. 33

—— Although a painting may be patentable as a design, if owner elects to copyright he must repeat the copyright notice on every reproduction. *Id.*

CORPORATIONS:

General: There is no distinction between corporations and natural persons in respect to necessity for taking precautions to prevent confusion in regard to use of name in similar goods manufactured by persons or corporations of the same name. *L. E. Waterman Co.* v. *Modern Pen Co.*. 88

Power of State over Foreign Corporation: A corporation authorized by the State of its creation to engage in interstate commerce may not be prevented from coming into limits of another State for all legitimate purposes of interstate commerce including the enforcement in the courts of payment for goods sold in interstate commerce. *Sioux Remedy Co.* v. *Cope* 197

—— A State may impose reasonable restrictions on foreign corporations to sue in its courts in regard to security for costs and procedure, but may not impose restrictions which will prevent the enforcement of payment for goods sold in interstate commerce, such as filing its certificate, paying recording fees and appointing resident agent as required by §§ 883–5, Rev. Codes, South Dakota, which amount to burdens on interstate commerce. *Id.*

—— Arkansas Annual Franchise Tax not unconstitutional as to intrastate business. *St. Louis S. W. Ry.* v. *Arkansas*. . 350

CORPORATIONS—*Continued.* PAGE

Taxation of by State of origin: New York state tax on transportation companies of the State for privilege of exercising corporate functions based on gross earnings of intrastate earnings exclusively held not violation of commerce clause. *Cornell Steamboat Co.* v. *Sohmer* 549

Receiver of: Receiver of corporation is not a corporation within the penal terms of the Quarantine Act of March 3, 1905, but is a carrier within the terms of the act after amendment in 1913. *United States* v. *Nixon* 231

Right of stockholder to sue: The right to restrain enforcement of a statute as unconstitutional is the right existing in the corporation itself, and stockholder cannot maintain it without clearly showing that he has exhausted all means within his power to obtain action by the corporation itself, and see Equity Rules. *Wathen* v. *Jackson Oil Co.* 635

See **Removal of Causes.**

COSTS:

Costs equally divided on affirmance of cross-appeals. *L. E. Waterman Co.* v. *Modern Pen Co.* 88

State may subject foreign corporation resorting to its courts to compliance with reasonable conditions relating to question of costs and procedure. *Sioux Remedy Co.* v. *Cope* 197

Where practice had not been established as to evidence in suit infringing a patented part of a machine where profits should be apportioned, case reversed and remanded for further action in accord with newly established practice without costs to either party. *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.* 641

COURTS:

Exercise of legislative functions: Courts cannot exercise legislative functions in Michigan. *Detroit & Mackinac R. R.* v. *Michigan R. R. Comm.* 402

Right to resort to: State cannot impose such restrictions on foreign corporations engaged in interstate commerce as will prevent them from enforcing payment for goods sold in interstate commerce; but may impose reasonable conditions as to costs and procedure. *Sioux Remedy Co.* v. *Cope* 197

—— Non-resident aliens may maintain suit under Employers' Liability Act for death of relative: *Quære* whether this is also a treaty right as to citizens of Italy and Great Britain. *McGovern* v. *Phila. & Reading R. R.* 389

—— Decisions of state tribunals in regard thereto important

COURTS—*Continued.* PAGE
element to be considered by this court in determining the intent of the State in a fund administered by a state board. *Lankford* v. *Platte Iron Works* 461
Validity of judgment rendered by courts of former sovereignty and effect of. *John Ii Estate* v. *Brown*. 342
Stability of judicial decree. See **Bill of Review.**
Discretion. Granting Bill of Review is in discretion of the court. *Hopkins* v. *Hebard* 287
Effect of judicial decree. See **Res Judicata; Stare Decisis.**
Relations of court to jury. See **Jury.**
Appellate courts. See **Appeal and Error.**
What subject to judicial review and effect of want of opportunity. See **Judicial Review.**
Generally. See **Jurisdiction.**

COVINGTON, KENTUCKY:
Ordinance regulating traffic between Covington and Cincinnati, Ohio, held constitutional in part and unconstitutional in part as attempt to regulate interstate commerce. *South Covington Ry.* v. *Covington* 537

CREEK INDIANS. See **Indians.**

CRIMINAL APPEALS ACT:
Appeals taken under this act by United States: Indictment based on White Slave Traffic Act. *United States* v. *Portale* 72
—— On Peonage Acts. *United States* v. *Reynolds* 133
—— On Quarantine Act. *United States* v. *Nixon*. 231
—— On Tariff Act of 1909. *United States* v. *Salen* 237
—— On Alaska Territorial Code. *United States* v. *Wigger* . . 276
—— On Meat Inspection Law. *United States* v. *Lewis* 282
—— On § 184, Penal Code. *United States* v. *Erie R. R.* . . . 513
Construction of: When writ taken on single ruling, reversal is based on that alone without prejudice. *United States* v. *Portale* 27
—— Statute on which indictment is based may be misconstrued not only by misinterpretation, but also by failing to apply its provision to an indictment which sets out facts constituting a violation of its terms. *United States* v. *Nixon* . . 231
—— Error on part of the trial judge in dismissing indictment by construing the statute which as amended covered the offense while in its original form it did not cover it cannot be cured, nor can his decision be sustained, because the amendment was not called to his attention. *Id.*

CRIMINAL APPEALS ACT—*Continued.* PAGE

—— Right of the Government to an appeal cannot be defeated by trial court entering a general order of dismissal without referring to the statute involved or giving its reasons on which the decision is based. *Id.*

CRIMINAL CODE:

Section 184, construed in *United States* v. *Erie R. R.* 513

Section 269 relating to peonage construed in *United States* v. *Reynolds* 133

CRIMINAL LAW:

Unless record justifies assumption that conclusion of guilt could only have been reached by disregarding proof, this court has no jurisdiction to review the judgment of the state court on writ of error; it is frivolous. *Overton* v. *Oklahoma* 31

Every act of Congress is presumptively valid and committing magistrate cannot treat as invalid a statutory declaration of what constitutes an offense unless the act is palpably void. *Henry* v. *Henkel* 219

Meaning of words is affected by their context and in a highly penal statute words will be interpreted in a narrower sense as referring to things of same nature as those described in an enumerated list, although standing alone they might have a wider range; so as to subd. 10 of § 28 of Tariff Act of 1909. *United States* v. *Salen* 237

Nor will such a penal statute be interpreted so as to spread a net for the unwary as well as the guilty by making it relate to unenumerated matters as well as those enumerated, thus fixing no standard by which to draw the line between innocent silence and felonious concealment. *Id.*

—— A State may enact that conspiracy to accomplish what an individual is free to do shall be a crime. *Drew* v. *Thaw* .. 432

Quære, whether § 184, Penal Code, prohibiting carrying letters otherwise than in the mail by carriers on post routes except under specified conditions is penal or remedial or whether it be liberally or strictly construed. *United States* v. *Erie Railroad* 513

The indictment: The statute on which the indictment is based must, as matter of law, be determined from facts charged, and the offense may be within one existing statute, even though not mentioned and another statute be referred to in the caption and on back of indictment. *United States* v. *Nixon* 231

CRIMINAL LAW—*Continued.* PAGE

—— While entries in caption and on back of indictment are convenient means of reference and of assistance in cases of doubt in determining what statute has been violated, they form no part of indictment itself. *Id.*

—— Indictment must set out the facts and not the law. *Id.*

—— As to form of indictment in Alaska, see *United States* v. *Wigger*. 276

Who is criminal: A receiver of a railroad corporation is not a corporation within the terms of a penal statute relating only to corporations, but is subject to its terms if such a statute includes common carriers. *United States* v. *Nixon* 231

When citizens may not be held for custody. *Henry* v. *Henkel* 219

Vacation of judgment. *United States* v. *Mayer* 55

See **Appeal and Error; Conspiracy; Criminal Appeals Act; Indictment; Interstate Rendition; Judgments and Decrees; Mandate; Peonage; Tariff Act of 1909; White Slave Traffic Act.**

CUSTOM. See **Jury, Instructions to.**

CUSTOMS. See **Tariff.**

DAMAGES:

Damages accruing after commencement of suit in consequence of acts done before and constituting part of the cause of action allowed in action under § 7 of the Anti-trust Act. *Lawlor* v. *Loewe*. 522

Normal measure of damages for infringing a patent is the value of what was taken and this may be shown by evidence of established royalties, or, if none, by what would be reasonable royalty. *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.* 641

For suits for damages for injuries and for death of relatives, see **Employers' Liability Act.**

Liquidated damages for delay. See **Contract; Evidence; Pleadings.**

DAMNUM ABSQUE INJURIA:

Rule applied to compelling railroad company to construct viaduct over thoroughfare at its own expense. *Missouri Pacific Ry.* v. *Omaha*. 121

DANBURY HATTERS CASE:

See **Anti-trust Act.** *Lawlor* v. *Loewe*. 522

DE BACA:

Suits involving De Baca claims for lands within Territory acquired under Gadsden Treaty. *Lane* v. *Watts* 17

DECREE. See **Judgments and Decrees.** PAGE

DEFENSES. See **Employers' Liability Act; Mississippi; Ohio Workmen's Compensation Act.**

DEFINITIONS. See **Words and Phrases.**

DELEGATION OF POWER:
By Congress to territorial legislature of Alaska, extent of, construed. *United States* v. *Wigger* 276

DEMURRAGE ON RAILROAD CARS. See **Interstate Commerce Commission; Railroads.**

DEPOSITORS' GUARANTY FUND. See **Eleventh Amendment.**

DESCENT AND DISTRIBUTION:
Provisions as to descent and distribution of lands of Creek Indians in Original and Supplemental Creek Agreements and statutes relating thereto construed. *Taylor* v. *Parker.* 42
Adkins v. *Arnold* 417
Washington v. *Miller* 422
Sizemore v. *Brady* 441
There is no incompatibility between a general statute purporting to regulate descent and distribution of all lands within a Territory and a special statute directly regulating descent and distribution of a particular class of Indian lands therein. *Washington* v. *Miller.* 422

DESIGNS. See **Copyright.**

DISCRETION OF COURT. See **Bill of Review.**

DISCRIMINATIONS AND PREFERENCES.
Against race. See **Oklahoma.**
Denial of equal protection of the law. See **Common Carrier; Constitutional Law; Fourteenth Amendment; Georgia; Interstate Commerce Commission.**

DISTRICT COURT. See **Jurisdiction; Mandate.**

DISTRICT OF COLUMBIA:
Commissions allowed to trustees of estates in. *Magruder* v. *Drury* 106
Resident of, cannot claim discrimination against, in the motor vehicle law of another State, if he has not complied with the provisions of the law of the District in regard to

DISTRICT OF COLUMBIA—*Continued.* PAGE
motors if the citizens of all other States are required to conform to the provisions of the law of their respective States. *Hendrick* v. *Maryland*. 610
Quære, whether Maryland Motor Vehicle law does discriminate against the District of Columbia and is unconstitutional as denying equal protection of the law. *Id.*
Appeals from Supreme Court of the District of Columbia. See **Appeal and Error.**

DOMESTIC RELATIONS:
Widow and children of bankrupt resident of Georgia and dying pending proceeding entitled to allowance for year's support from the fund. *Hull* v. *Dicks*. 584
See **Employers' Liability Act.**

DOMICIL:
Change of domicil arises where there is a change of abode and absence of any present intention not to reside permanently or indefinitely in the new abode, even though there be a floating intention of returning to the former domicil. *Gilbert* v. *David*. 561

DOUBLE TAXATION:
Power of State to impose. *St. Louis S. W. Ry.* v. *Arkansas* 350

DUE PROCESS OF LAW. See **Constitutional Law; Fourteenth Amendment; Interstate Commerce Commission.**

ELEVENTH AMENDMENT:
A suit against the State Banking Board of Oklahoma to compel payments from and assessments for the Depositors' Guaranty Fund is a suit against the State. *Lankford* v. *Platte Iron Works*. 461
American Water Co. v. *Lankford*. 496
Farish v. *State Banking Board*. 498
Where the state statute does not authorize waiver of exemption from suit, appearance for members of a state board does not amount to such a waiver. *Farish* v. *State Banking Board* 498
Quære, extent to which such appearance binds the board as to matters adjudicated in the suit between the individual parties. *Id.*

EMPLOYER AND EMPLOYÉ. See **Constitutional Law; Employers' Liability Act; Mississippi; Ohio Workmen's Compensation Law; Peonage.**

EMPLOYERS' LIABILITY ACTS: PAGE

Suits under the act in this volume:

Garrett v. *Louis. & Nash. R. R.* 308

Yazoo & Miss. R. R. v. *Wright.* 376

McGovern v. *Phila. & Reading R. R.* 389

Norfolk & Western Ry. v. *Holbrook* 625

Arizona & New Mex. Ry. v. *Clark* 669

Construction of: The acts declare two distinct and independent liabilities resting on common foundation of wrongful injury (1) liability to injured employé for which he alone could recover; (2) liability in case of death of employé to his personal representative for benefit of surviving widow or husband and children, and if none, then of the parents, but only for pecuniary loss and damage resulting by reason of the death. *Garrett* v. *Louis. & Nash. R. R.* 308

—— Scope of review where meaning of act not called in question and Circuit Court affirmed by Circuit Court of Appeals. *Yazoo & Miss. Valley R. R.* v. *Wright* 376

—— Alienage is not a condition affecting right of recovery under the act. *McGovern* v. *Phila. & Reading R. R.* 389

—— Where there is conflict of evidence as to circumstances under which employé was killed question of assumption of risk was properly presented to the jury. *Id.*

—— While trial court may instruct jury to take into consideration care and guidance father may give child and include pecuniary value thereof in verdict, it is not proper to give jury occasion for indefinite speculation by comparing right of actual beneficiaries with those of supposed plaintiffs who are merely next of kin. *Norfolk & Western Ry.* v. *Holbrook* 625

—— Where death is instantaneous, beneficiaries can recover their pecuniary loss and nothing more. *Id.*

—— Evidence of physician excluded under applicable statute of Arizona. *Arizona & New Mex. Ry.* v. *Clark* 669

—— Effect of voluntary appearance of parties in suit under Employers' Liability Act removed after statehood from an inferior Arizona territorial court to the Federal court. *Id.*

—— Jurisdiction of Federal and state courts of cases under. *Id.*

EQUAL PROTECTION OF THE LAW. See **Constitutional Law; Fourteenth Amendment.**

EQUITY:

Court of equity may relieve party required to erect viaduct of unwarranted penalties for non-completion within pre-

EQUITY—*Continued.* PAGE

scribed time if too short a time is allowed. *Missouri Pacific Ry.* v. *Omaha* 121

See **Hawaii; Injunction; Pleadings.**

EQUITY RULES:

Under Equity Rule No. 27 (formerly No. 94) in order to confer jurisdiction on Federal courts of a suit by stockholder to enforce a remedy belonging to the corporation, the bill must allege not only that suit is not collusive for purpose of conferring jurisdiction, but that unsuccessful efforts have been made to induce corporation to bring the suit; a bare assertion that officers do not wish to obey a statute alleged to be unconstitutional, but fear excessive penalties is not sufficient. *Wathen* v. *Jackson Oil Co.* 635

ERROR AND APPEAL. See **Appeal and Error.**

EVIDENCE:

Marks on trees given weight as evidence in establishing boundary. *North Carolina* v. *Tennessee* 1

Must have probative force to be admitted to show that a transaction was not a conditional sale but mortgage. *Monagas* v. *Albertucci* 81

Common experience may be taken as a guide in teaching that financial damage is not always necessary consequence to the parent as result of death of adult son, and if such damage is not pleaded proof cannot be offered in regard thereto. *Garrett* v. *Louis. & Nash. R. R.* 308

When proofs go to matters not set up in bill the court cannot act upon them as grounds for decision. They are not put in contestation by the pleadings. *Id.*

In rebuttal, testimony properly admitted to disprove evidence of defendant as to equipment of locomotives with spark consumers. *Texas & Pacific Ry.* v. *Rosborough* 429

Newspapers and letters admitted under certain conditions in action for damages under § 7 of the Anti-trust Act to bring home to defendants notice and to show direct results of their acts. *Lawlor* v. *Loewe* 522

The cautious use of the word " proof " by trial judge in his charge in the popular way for evidence, not prejudicial in this case. *Id.*

One who cannot show that he is suffering from lack of compulsory process or that he will be prevented from providing evidence in a subsequent trial of the case cannot question the constitutionality of a statute because it does not provide

EVIDENCE—*Continued.* PAGE

for such compulsory process or because it restricts admission of evidence. *Louis. & Nash. R. R.* v. *Finn* 601

What evidence proper to establish value of what was taken by infringement of patent. *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*. 641

Admissibility of evidence of attending physician excluded in action for personal injuries under applicable statute of Arizona. *Arizona & New Mexico Ry.* v. *Clark* 669

Newly discovered. See **Bill of Review; Burden of Proof; Pleadings.**

EXECUTION:

When execution delivered to sheriff amounts to levy. *Fallows* v. *Continental Savings Bank* 300

Duty of sheriff to levy. *Id.*

EXCEPTIONS. See **Jurisdiction.**

EXTRADITION. See **Interstate Rendition.**

EXTRA-TERRITORIALITY OF STATUTE. See **Statutes.**

FACTS. See **Jury.**

FAIR TRADE. See **Competition.**

FATHER AND CHILD. See **Employers' Liability Act; Bankruptcy.**

FAVORED NATION CLAUSE. See **Treaty.**

FEDERAL INSTRUMENTALITIES. See **Taxes and Taxation; United States.**

FEDERAL QUESTION. See **Jurisdiction of this Court.**

FELLOW-SERVANT DEFENSE:

Abolished in Mississippi as to certain classes of employers. *Easterling Lumber Co.* v. *Pierce* 380

See **Constitutional Law; Ohio Workmen's Compensation Law.**

FIFTH AMENDMENT:

Action by Congress modifying or changing Original Creek Agreement not deprivation of property without due process of law as to allotments subsequently made. *Sizemore* v. *Brady* 441

See **Constitutional Law.**

FLORIDA: PAGE

Statutes of 1907 and 1913 imposing tax on sleeping car and parlor car companies not unconstitutional under Federal or state constitutions. *Pullman Co.* v. *Knott* 23

FOOD STUFFS. See **Meat Inspection Act.**

FORFEITURE FOR NON-PAYMENT OF TAX. See **Taxes.**

FOUNTAIN PEN CASE:

Involving use of name of Waterman in connection with fountain pens by rival manufacturers of same name. *L. E. Waterman Co.* v. *Modern Pen Co.* 88

FOURTEENTH AMENDMENT:

Cases involving due process and equal protection provisions: Florida tax on sleeping and parlor car companies. *Pullman Co.* v. *Knott.* 23

Omaha, Nebraska, Ordinance. *Missouri Pacific Ry.* v. *Omaha.* 121

Oklahoma Separate Coach Law. *McCabe* v. *Atchison, Topeka & Santa Fé Ry.* 151

Kentucky rule of practice as to effect of special appearance. *Western Indemnity Co.* v. *Rupp.* 261

Mississippi Statute abolishing fellow-servant defense under certain conditions. *Easterling Lumber Co.* v. *Pierce.* 380

Covington, Kentucky, ordinance in regard to cars. *South Covington Ry.* v. *Covington* 537

Ohio Workmen's Compensation Law. *Jeffrey Mfg. Co.* v. *Blagg* 571

Kentucky Railroad Act. *Louis. & Nash. R. R.* v. *Finn* ... 601

Maryland Motor Vehicle Law. *Hendrick* v. *Maryland* ... 610

Mississippi Eight Hour Law. *Wathen* v. *Jackson Oil Co.* ... 635

Georgia Railroad Law. *Wadley Southern Ry.* v. *Georgia* ... 651

The constitution of the State is not taken up into the Fourteenth Amendment. *Pullman Co.* v. *Knott* 23

Municipal ordinance otherwise valid and in exercise of police power can only be declared unconstitutional under due process clause in unmistakable case of arbitrary abuse of power. *Missouri Pacific Ry.* v. *Omaha* 121

Fourteenth Amendment only takes from the State the right and power to classify subjects of legislation when the attempted classification is so arbitrary that the court can declare it beyond legislative authority. *Jeffrey Mfg. Co.* v. *Blagg* 571

FOURTEENTH AMENDMENT—*Continued.* PAGE

The due process provision of the Fourteenth Amendment has regard not to matters of form but of substance. *Western Indemnity Co.* v. *Rupp* 261

See **Constitutional Law; Fourteenth Amendment.**

FRANCHISES:

Franchises are given to be exercised for public good and failure to so exercise is ground for revocation. *N. Y. Electric Lines* v. *Empire City Subway*..... 179

A street franchise which becomes operative on consent of the city is a property right but is not a nude pact; it rests upon the obligations to carry on the undertaking. *Id.*

Franchises are made and received with the understanding that the recipient is protected by contractual right from the moment the grant is accepted and during the course and after performance. *Id.*

Indefeasible interest only becomes vested under a franchise duly granted and actually exercised in conformity with the conditions, otherwise later legislation is not unconstitutional as impairing the obligation of the contract. *Id.*

Whether in case of non-user proper course is to repeal franchise by subsequent ordinance, and test its validity in proceedings at law or by *quo warranto* is a matter of state law. *Id.*

Effect of non-user on validity of subsequent ordinances. *Louisiana Ry. & Nav. Co.* v. *New Orleans*..... 164

See **Ordinance.**

FRIVOLOUS APPEALS. See **Appeal and Error.**

FUGITIVE FROM JUSTICE. See **Interstate Rendition.**

FULL FAITH AND CREDIT:

Case involving full faith and credit clause of the Federal Constitution. *Western Indemnity Co.* v. *Rupp*..... 261

See **Jurisdiction.**

GADSDEN TREATY. See **Treaties.**

GEORGIA:

Construction of the State Railroad Act of Georgia by the Supreme Court of the State followed, and the act held not unconstitutional as not providing for a hearing; also *held* commission has right to make order to prevent discrimination by enjoining carrier from refusing to accept goods from

GEORGIA—*Continued.* PAGE
one carrier without payment in advance while accepting them from other carriers under similar conditions without such payment. *Wadley Southern Ry.* v. *Georgia* 651
Under § 4041, Georgia Code, widow and children of bankrupt dying pending proceedings, entitled to year's allowance from estate undistributed in hands of trustee pursuant to § 8 of the Bankruptcy Act. *Hull* v. *Dicks* 584

GOVERNMENT:
Contracts with. See **Contracts with Government.**
Immunity from suit. See **Eleventh Amendment.**
Instrumentalities of. See **United States.**
Of Michigan. See **Michigan; Taxes.**
Of Porto Rico. See **Porto Rico.**

GRANTS. See **Construction.**

GRANTS OF FRANCHISES. See **Franchises; Ordinances.**

GREAT BRITAIN:
Subject of Great Britain may maintain action under Federal Employers' Liability Act, and *quære*, whether it is not also a treaty right under favored nation clause and treaty with Italy. *McGovern* v. *Phila. & Reading R. R.* 389

GUARANTY, OKLAHOMA BANK. See **Eleventh Amendment.**

HABEAS CORPUS:
This court has not, as yet, announced any hard and fast rule as to how far it will go in passing on questions in *habeas corpus* proceedings. *Henry* v. *Henkel* 219
Barring exceptional cases, the hearing in *habeas corpus* proceedings is confined to the single question of jurisdiction and even that is not decided in every case. *Id.*
The rule that the hearing on *habeas corpus* is not in the nature of writ of error, and that the writ is not intended as a substitute for the functions of the trial court applies to a proceeding based on warrant for removal to another district. *Id.*
Whether Congress has power to compel witness in congressional inquiry to make material and non-criminatory disclosures and punish him for refusal to answer, are questions for the trial court and not on *habeas corpus* proceedings. *Id.*
Writ refused in intrastate rendition. *Drew* v. *Thaw* 432
See **Interstate Rendition; Indictment; Jurisdiction.**

HATTERS, THE DANBURY, CASE: PAGE
Lawlor v. *Loewe*. 522

HAWAII:
The decision of Supreme Court of the Hawaiian Islands during the former independent sovereignty in a case construing a will, that a devise of lands was in fee and not in trust, should not be pronounced void or disturbed by the courts of the Territory on grounds mainly of form and procedure. *John Ii Estate* v. *Brown*. 342
Even if under the statute of the former sovereignty of Hawaii questions in equity cases could not be reserved, if the highest court did act on questions so reserved and entertained the cause it had authority to decide and its judgment cannot subsequently be attacked collaterally. *Id.*

HEARING:
Opportunity to be heard. See **Constitutional Law; Fourteenth Amendment; Due Process.**

HEIRS. See **Indians.**

HIGHWAYS:
A State may prescribe conditions for use of its highways by motor vehicles. *Hendrick* v. *Maryland*. 610
See **Maryland Motor Vehicle Law.**

HOMESTEADS. See **Public Lands.**

HUDSON RIVER:
Tow Boat Tax Case. *Cornell Steamboat Co.* v. *Sohmer*. . . . 549

HUSBAND AND WIFE:
Right of widow of bankrupt to allowance. See **Bankruptcy.**

ILLINOIS:
Lien of mortgage on personal property expires three years after record subject to one extension for twelve months. *Fallows* v. *Continental Savings Bank*. 300

IMMUNITY FROM SUIT. See **Eleventh Amendment; Porto Rico.**

INDIAN TERRITORY:
Land Grant Act of July 25, 1866, construed as to Indian lands and conditions regarding extinguishment of Indian title. *Missouri, Kansas & Texas Ry.* v. *United States*. . . . 37
Act of April 28, 1904, putting laws of Arkansas in effect in Indian Territory construed. *Taylor* v. *Parker*. 42

INDIAN TERRITORY—*Continued.* PAGE

Provisions of the Original and Supplemental Creek Agreements in regard to descent and distribution of Creek lands under Creek laws and laws of Arkansas as put into effect in Indian Territory applied and construed. *Skelton* v. *Dill*. . . . 206
Adkins v. *Arnold* . . . 417
Washington v. *Miller* . . . 422
Sizemore v. *Brady* . . . 441

INDIANS:

Statute granting public lands or Indian lands which may become public lands will not be construed as including Indian lands afterwards allotted in severalty under a treaty made immediately before enactment of statute. To do so would impute bad faith of Government towards Indians. *Missouri, Kansas & Texas Ry.* v. *United States*. . . . 37
Restrictions on alienation of allotments under Choctaw and Chickasaw agreement ratified by Act of July 1, 1902, extended to devise by will. *Taylor* v. *Parker* . . . 42
Restriction on alienation of lands allotted under Act of May 27, 1908, terminated by lapse of time as contemplated by law imposing them, were removed within meaning of excepting clause. *United States* v. *Bartlett* . . . 72
One relying unsuccessfully as a defense to a contract to convey that an act of Congress restricting alienation on Indian lands made the conveyance invalid is entitled to come to this court. *Sage* v. *Hampe* . . . 99
Restrictions upon alienation of allotments to Creek Indians under acts of March 1, 1901, and June 30, 1902, apply only to allotments made to citizens in their own right and do not apply to those made on behalf of deceased members of the tribe. *Skelton* v. *Dill*. . . . 206
Adkins v. *Arnold* . . . 417
Quære, who are the true heirs of a Creek Indian child of mixed parentage who was born prior to March 1, 1901, and died before receiving his allotment? *Skelton* v. *Dill* . . . 206
Provisions of the Original and Supplemental Creek Agreements in regard to descent and distribution construed in *Skelton* v. *Dill* . . . 206
Adkins v. *Arnold* . . . 417
Washington v. *Miller* . . . 422
Sizemore v. *Brady* . . . 441
Congress possesses plenary power to deal with Indian tribal lands and funds. *Sizemore* v. *Brady*. . . . 441

INDIANS—*Continued.* PAGE

Original Creek Agreement was not grant *in præsenti* and until carried out, Congress had power to deal with it; and as to subsequent allotments could alter it without violating due process clause of Fifth Amendment. *Id.*

Exertion of administrative control of the Government over tribal property of tribal Indians is subject to change by Congress at any time before plan is carried into effect and while tribal relations last. *Id.*

State cannot place occupation tax or privilege tax on lessees of coal mines under loans made by United States pursuant to Choctaw and Chickasaw agreement of April 23, 1897; the lessees are instrumentalities of Federal Government. *Choctaw, Okla. & Gulf R. R.* v. *Harrison* 292

See **Contract; Public Policy.**

INDICTMENT:

Several offenses of similar nature may be included in one indictment under the Alaska Criminal Code. *United States* v. *Wigger* 276

Questions as to sufficiency of indictment demanded in interstate rendition are for the trial court of the demanding State and not for courts of surrendering State on *habeas corpus*, and this even though indictment shows person indicted is insane. *Drew* v. *Thaw* 432

See **Criminal Appeals Act; Criminal Law.**

INFRINGEMENT OF PATENT. See **Patents.**

INHERITANCE. See **Descent and Distribution; Indians.**

INJUNCTION:

In order to justify granting injunction, complainants must show personal need of it and absence of adequate remedy at law. It is not sufficient that others of same class may be injured. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

INSANE PERSON OR LUNATIC:

The courts of the State demanding surrender of a fugitive from justice, and not the courts of another State in *habeas corpus* proceedings, have jurisdiction to determine questions relating to sufficiency of indictment charging an admittedly insane person with crime. *Drew* v. *Thaw* 432

INSPECTION. See **Meat Inspection Act.**

INSTRUCTIONS TO JURY. See **Jury.**

INTENT: PAGE

As to change of domicil. See **Domicil.**

INTERSTATE COMMERCE:

Cases involving construction and application of the commerce clause of the Federal Constitution in relation to, § 4180, Snyder's Comp. Laws, Oklahoma. *Overton* v. *Oklahoma*. 31

Oklahoma Separate Coach Law. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

South Dakota restrictions on foreign corporations. *Sioux Remedy Co.* v. *Cope* 197

Interstate Commerce Act. *United States* v. *Louis. & Nash. R. R.* 314

Arkansas state franchise tax. *St. Louis S. W. Ry.* v. *Arkansas*. 350

Anti-trust Act of 1890. *Lawlor* v. *Loewe* 522

Covington, Kentucky, ordinance regulating cars, etc. *South Covington Ry.* v. *Covington* 537

New York transportation corporation tax. *Cornell Steamboat Co.* v. *Sohmer*. 549

Maryland Motor Vehicle Act. *Hendrick* v. *Maryland* 610

Payment of state franchise tax cannot be made condition precedent for carrying on interstate commerce. *St. Louis S. W. Ry.* v. *Arkansas* 350

Municipal ordinance relating to matters properly within police power constitutional as these matters only incidentally affecting interstate commerce and unconstitutional as to those which are a direct burden on and regulation of interstate commerce. *South Covington Ry.* v. *Covington* 537

What is interstate commerce: Defined as to suburban road between points in different States. *Id.*

—— Transportation between two points in same State not interstate commerce to the extent of being excluded from taxing power of State because a part of the journey is through another State—so as to barges towed between New York and other New York State points although tows made up at a point in the harbor in New Jersey for convenience. *Cornell Steamboat Co.* v. *Sohmer* 549

State's action affecting interstate commerce: Reasonableness always subject to inquiry and is subordinate in that respect to will of Congress. *Hendrick* v. *Maryland*. 610

—— State has power to impose reasonable license fees for motor vehicles using its highways including those moving in

INTERSTATE COMMERCE—*Continued.* PAGE

interstate commerce; if reasonable, such license fees are not a burden on interstate commerce. *Id.*

See **Anti-trust Act; Constitutional Law; Interstate Commerce Commission; Police Power; Public Policy.**

INTERSTATE COMMERCE COMMISSION:

The purpose of establishing the Commission was to create a body which from its peculiar character would be most fitted to primarily decide from facts, disputed or undisputed, in a given case whether perference or discrimination existed or not. *United States* v. *Louis. & Nash. R. R.*..... 314

The application of the principle of public policy embodied in the long and short haul clause as amended by the act of June 18, 1910, is to be determined by the substance of things, not names—otherwise statute would be wholly inefficacious. *Id.*

Where evidence is undisputed and shows discrimination between localities, a finding by the Commission that such discrimination is rendered is one of fact, not subject to review by the Commerce Court. *Id.*

After amendment of 1910 the authority of the carriers to determine primarily for themselves the propriety of charging a higher rate for the shorter distance was taken from them and vested in the Commission. *Id.*

Quære, whether method of Interstate Commerce Commission of considering and basing opinion on matters gathered in general in investigations regarding the subject-matter in controversy, but not produced in the particular proceeding against particular carriers in which orders are made requiring them to desist from certain practices amounts to denial of hearing and results in due process of law. *Id.*

Posting rates: Filing with the Commission without objection book of rules as to demurrage of the Car Service Association to which it belongs with statement as to what its rates will be is compliance with the rate filing provisions of the act. *Berwind-White Co.* v. *Chicago & Erie R. R.*..... 371

INTERSTATE RENDITION:

A party to a crime who afterwards leaves the State is a fugitive from justice and for purposes of interstate rendition his motive for departure is immaterial. *Drew* v. *Thaw*..... 432

Federal Constitution peremptorily requiring surrender of fugitive upon proper demand, no discretion is allowed nor

INTERSTATE RENDITION—*Continued.* PAGE
any inquiry into motive; the summary process of *habeas corpus* in the surrendering State should not interfere; questions as to sufficiency of indictment even as to person admittedly insane are for the trial court. *Id.*

INTOXICATING LIQUORS:
Contention that § 4180, Snyder's Comp. Laws, Oklahoma, repugnant to commerce clause of Federal Constitution, *held* too frivolous to base writ of error on for review of judgment in this court. *Overton* v. *Oklahoma* 31

INVOLUNTARY SERVITUDE:
As to what constitutes peonage. See *United States* v. *Reynolds* 133

IRRIGATION PROJECT:
Right of railroad company to acquire rights of way through. *Minidoka R. R.* v. *United States*..... 211

ITALY:
Right of citizen to maintain action for death of citizen under treaty. *McGovern* v. *Phila. & Reading R. R.*.. 389

JUDGMENTS AND DECREES:
In absence of statute, general rule is that courts may not set aside or alter final judgments after expiration of term when entered except on proceedings commenced during that term. *United States* v. *Mayer*..... 55
Consent of United States attorney will not confer jurisdiction on District Court to vacate judgment in a criminal cause after expiration of term when entered or debar United States from subsequently varying question of jurisdiction. *Id.*
Decree of court having jurisdiction of estate settling account of trustees there and turning estate over to trustees in another State where testator resided cannot be attacked collaterally. *Magruder* v. *Drury*..... 106
Decree passing verified account presented to and passed on by court not based on consent and cannot be attacked collaterally in courts of another State. *Id.*
As between holders of judgment within four months of bankruptcy and the holder of a mortgage on personal property in Illinois, *held* that as the mortgage lien had expired the judgment lien attached unless fraudulently obtained and could be preserved and the trustee subrogated under § 67b

JUDGMENTS AND DECREES—*Continued.* PAGE

of the bankruptcy act. *Fallows* v. *Continental Savings Bank* 300

Where the constitution and statutes of the former sovereignty, as in Hawaii, permitted the highest court to fill a vacancy by calling in a member of the bar and it was the practice for years to fill more than one vacancy, validity of a judgment of that court should not be questioned long after change of sovereignty. *John Ii Estate* v. *Brown* 342

A duly filed written decision of the highest court of the former sovereignty must be regarded as an adjudication if at that time it was the recognized practice that the papers actually filed constituted the record. *Id.*

Bill of review should not be granted if stability of judgment disturbed. *Hopkins* v. *Hebard*..... 287

Interlocutory judgment or decree included in certain cases in term decree. *Lovell-McConnell Co.* v. *Auto Supply Co.*.. 383

See **Clerk, Fees.**

Decree may bind members of state board who have appeared as to matters adjudicated between the private parties although the board is itself exempt from suit under the Eleventh Amendment. *Farish* v. *State Banking Board*..... 498

Review of judgments by this court. See **Appeal and Error; Bill of Review; Hawaii; Jurisdiction; Pleadings; Res Judicata; Sovereignty; Stare Decisis.**

JUDICIAL CODE:

Circuit Court of Appeals Act is now embodied in the Judicial Code. *Shapiro* v. *United States* 412

Section 24 regarding suits in Federal court by assignees of choses in action does not include assignees of interest of *cestui que trust* in an estate. *Brown* v. *Fletcher*..... 589

Section 294, statutory rule of construction of Judicial Code, is § 294 of the Code and under it slight changes in wording are not intended to bring about any change, but merely continuance of existing statute law. *Id.*

For all sections of the Judicial Code cited in opinions in this volume, see Table of Statutes, cited at the front of this volume.

See **Jurisdiction.**

JUDICIAL DISCRETION. See **Bill of Review; Jurisdiction; Practice.**

JUDICIAL POWER. See **Courts; Michigan; Rates.** PAGE

JUDICIAL REVIEW:

The fact that a state fund is to be used to satisfy claims of beneficiaries does not take its administration from the officers of the State and subject them to judicial review. *Lankford* v. *Platte Iron Works* 461

Statute imposing heavy penalties without affording any opportunity for judicial review may be unconstitutional in that respect. *Wadley Southern Ry.* v. *Georgia* 651

See **Georgia.**

JURISDICTION:

I. **Generally.**

1. *Of Courts Generally:* Courts of demanding State have jurisdiction to determine sufficiency of indictment of an admittedly insane person charged with crime according to the law of the State; it is not to be determined on *habeas corpus* in interstate rendition proceedings in Federal court in the surrendering State. *Drew* v. *Thaw* 423

—— While parties cannot give jurisdiction and may sometimes except to erroneous ruling in their own favor where the court has jurisdiction over parties and subject-matter, a party invoking ruling to change a bill of injunction to one to quiet title cannot ask reversal on ground of lack of power in the court to grant such a motion. So held in a case in Porto Rico. *Mercelis* v. *Wilson* 579

Voluntary appearance may confer jurisdiction with certain conditions. *Arizona & New Mex. Ry.* v. *Clark* 669

—— In a case involving fixing of a line it is proper when that is done to quiet title of each party as against the other, and if the findings support it, a decree may be entered in accord with the character of proceedings and which will prevent multiplicity of suits. *Mercelis* v. *Wilson* 579

—— Courts of State and United States have concurrent jurisdiction over cases under Employers' Liability Act. *Arizona & New Mex. Ry.* v. *Clark* 669

2. *Of Federal Courts Generally:* Whether Federal court can grant new trial after end of term is question of power and not of procedure and state statutes do not apply. *United States* v. *Mayer* 55

—— In absence of statute, general rule is court has no jurisdiction to set aside or alter final judgment after expiration

JURISDICTION—*Continued.* PAGE

of term when entered except on proceedings commenced during that term. *Id.*

—— Neither state courts nor legislatures by giving tax particular name can take from the Federal court its duty to consider its real nature and effect. *Choctaw, Okla. & Gulf R. R.* v. *Harrison* 292

—— Where jurisdiction of Federal court invoked because of questions under Federal Constitution, it extends to all questions presented irrespective of the disposition of the Federal questions or whether it is necessary to decide them at all. *Louis. & Nash. R. R.* v. *Finn* 601

—— Only those having rights directly affected can properly invoke the jurisdiction of the courts to declare a statute unconstitutional. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151
Hendrick v. *Maryland* 610

See **Moot Case.**

II. **Jurisdiction of this court.**

1. *Over judgments of Circuit Court of Appeals:* This court has jurisdiction and must determine for itself whether the contract claimed to have been impaired existed and in determining whether, and what if any, effect was given to later legislation it is not limited to mere consideration of the language of the state court. *Louisiana Ry. & Nav. Co.* v. *New Orleans* 164

—— This court cannot take case in fragments; if reviewable here by reason of a constitutional question, the whole case must come up. *Shapiro* v. *United States* 412

—— This court is not required under § 239, Judicial Code, to pass on questions of fact or mixed question of law and fact or accept transfer of whole case, but definite question of law may be submitted even if decisive of whole controversy. *United States* v. *Mayer* 55

This court cannot review the Circuit Court of Appeals on writ of error to the District Court acting upon the mandate of the former, even though new constitutional questions were raised in the latter after the case had been remanded. *Shapiro* v. *United States* 412

See **Appeal and Error.**

2. *Over judgments of District Court:* Where District Court understood controversy involved its jurisdiction and dismissed the case because publication under the Material-

JURISDICTION—*Continued.* PAGE

men's Act was insufficient and so certified, the issue of jurisdiction is involved and the case, therefore, can come here under § 238, Jud. Code. *A. Bryant Co.* v. *N. Y. Steam Fitting Co.* 327

—— Even if District Court errs in holding failure to perform prerequisite condition to commencing action raises question of jurisdiction and dismisses for that ground instead of on merits, this court has jurisdiction to review and correct under § 238, Jud. Code. *Id.*

—— When appellant, plaintiff below, had a verdict which District Court set aside on motion in which that court discussed and ruled adversely on questions arising under treaty and on second trial ruled adversely under the Federal statute, this court will presume that the trial court also considered the treaty question on the second trial and has jurisdiction under § 238, Jud. Code. *McGovern* v. *Phila. & Reading R. R.*.. 389

—— Where record in a case here under § 238, Jud. Code, brings up testimony on which the District Court dismissed for lack of diverse citizenship this court must consider the testimony and determine whether the decision was right. *Gilbert* v. *David* 561

3. *Over judgments of United States Court for Porto Rico:* On appeals from Supreme Court of Porto Rico, power of this court is confined to determining whether error of law was committed in admitting or rejecting evidence and whether findings of fact adequate to sustain conclusion based on them. *Monagas* v. *Albertucci.* 81

—— Under § 35, Foraker Act, jurisdiction of this court of appeals from District Court of the United States for Porto Rico confined to determining whether the facts found support the judgment, and whether there was material and prejudicial error in admission or rejection of evidence manufactured by exceptions properly certified. *Porto Rico* v. *Emmanuel* 251

—— In absence of bill of exceptions questions of admissibility of evidence are excluded. *Id.*

4. *Over judgments of state courts:* This court cannot review a judgment of the state court on writ of error which is frivolous. *Overton* v. *Oklahoma* 31

When constitutional question is obvious from beginning and not open in the highest court of the State unless taken on

JURISDICTION—*Continued.* PAGE

trial, it cannot be considered here unless so taken. *Willoughby* v. *Chicago*. 45

This court, on writ of error based on total lack of power in the municipality to make assessment, cannot inquire into the facts found by the state court as to value, benefits, etc. *Id.*

The Federal right claimed to have been denied must be set up and adjudicated against claimant by state court and the contention passed on cannot be enlarged by assignments of error bringing the case to this court. *Cleveland & Pittsburg R. R.* v. *Cleveland* 50

—— Nor can certificate of the state court bring additional questions into the record, if the record does not otherwise show them to exist. *Id.*

—— Defendant unsuccessfully relying as defense to contract to convey that Federal statute makes conveyance invalid can come to this court under § 237. *Sage* v. *Hampe* 99

—— Even if contract unenforceable at common law if this court condemns it under Federal statute by construction of the latter it has jurisdiction under § 237. *Id.*

—— If state court held municipality had power to pass ordinance this court on review under § 237, Jud. Code, can only declare it unconstitutional under the due process clause of the Fourteenth Amendment in case of a clear and unmistakable abuse of power. *Missouri Pacific Ry.* v. *Omaha* 121

—— Although this court may not have jurisdiction under § 237, Jud. Code, in case state court gave no effect to subsequent legislation claimed to have impaired contract, if state court did give effect thereto this court has jurisdiction to determine for itself whether contract existed and whether subsequent legislation did impair it even if state court held there was no contract originally existing. *Louisiana Ry. & Nav. Co.* v. *New Orleans*. 164

—— If plaintiff in error raised question of constitutionality of later legislation repealing that on which its franchise rested and state court gave effect thereto, this court has jurisdiction on review under § 237, Jud. Code, to determine whether the contract was impaired within the meaning of the Federal Constitution. *N. Y. Electric Lines* v. *Empire City Subway*. 179

—— If state court has not denied full faith and credit to the

JURISDICTION—*Continued.* PAGE

statute of another State, this court has not jurisdiction on review under § 237, Jud. Code, to determine whether the interpretation given to such statute is or is not correct. *Western Indemnity Co.* v. *Rupp*..... 261

—— In exercising jurisdiction under § 237, Jud. Code, this court should wait until state court has construed the statute attacked rather than assume that the latter will so construe it as to make it unconstitutional. *St. Louis S. W. Ry.* v. *Arkansas*..... 350

III. **Of Circuit Court of Appeals:** Jurisdiction of Circuit Court of Appeals is exclusively appellate but that court may issue writs properly auxiliary to appellate power. *United States* v. *Mayer*..... 55

May revise writ of prohibition against District Court entering order for new trial on newly discovered evidence in case where writ of error has issued from Circuit Court of Appeals. *Id.*

IV. **Of District Courts:** Consent of United States attorney will not give jurisdiction to District Court to entertain motion for leave to vacate judgment in criminal cause after end of term when entered and again have case heard on merits, nor debar United States from raising question of jurisdiction. *Id.*

—— Section 37, Jud. Code, does not prescribe any particular method for raising question of jurisdiction; and such method can be left to sound discretion of trial judge. If state practice admits it may be raised by general denial in answer. *Gilbert* v. *David*..... 561

—— Whether District Judge has jurisdiction to commit a witness under statutory definition of crime is for trial court to determine, not the court to which witness has applied in *habeas corpus* proceedings to prevent removal. *Henry* v. *Henkel*..... 219

—— Provisions of the Materialmen's Acts of 1894 and 1905 in regard to giving notice to other creditors before commencing suit are ambiguous and compliance therewith is not of the essence in order to give the District Court jurisdiction of a case otherwise properly commenced. *A. Bryant Co.* v. *N. Y. Steam Fitting Co.*..... 327

—— Where issue of plaintiff's citizenship has been raised by answer, trial court may submit question to the jury or in its discretion may dispose of the case on the testimony. *Gilbert* v. *David*..... 561

JURISDICTION—*Continued.* PAGE

—— Delay in determining question of citizenship even if it results in state statute of limitations having run, does not confer jurisdiction on the District Court, if diverse citizenship does not exist. *Id.*

—— Section 24, Jud. Code, does not prevent assignee of interest of *cestui que trust* in an estate from maintaining action in District Court if diverse citizenship exists. He is not assignee of a chose in action. *Brown* v. *Fletcher* 589

—— Suit by stockholder to enforce right or remedy belonging to the corporation. See **Equity Rules.**

—— Effect of change of domicil of plaintiff before commencement of suit. *Gilbert* v. *David* 561

V. **Of Commerce Court:** When court cannot review findings of Interstate Commerce Commission that discrimination exists between localities. *United States* v. *Louis. & Nash. R. R.* 314

See **Appeal and Error; Michigan; Practice.**

JURY:

Having properly instructed the jury in regard to contributory negligence, it was not error for the trial court to refuse to instruct that a railway company was not liable for damages by fire caused by its own negligence, because it had not consented to the storage of the goods burned on its platform, it appearing there had been a long continued custom for such storage. *Texas & Pacific Ry.* v. *Rosborough.* 429

Determination of question of diverse citizenship is proper for jury if trial judge so decides. *Gilbert* v. *David* 561

Where facts are adequate to constitute strong appeal to sympathy of jury charge should be free from anything that jury can construe as persuasive to go outside the evidence. *Norfolk & Western Ry.* v. *Holbrook* 625

It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion or prejudice or any other violation of lawful rights. *Id.*

See **Employers' Liability Act; Pleadings.**

KENTUCKY:

Under the McChord Act the Kentucky Railroad Commission has jurisdiction to make an order reëstablishing former rates if the evidence shows that they maintained for many years after the avowed reason for establishing them had ceased to exist and the carrier claims that the basis of the

KENTUCKY—*Continued.* PAGE

advance was not because of inadequacy but because of discrimination. *Louis. & Nash. R. R.* v. *Finn* 601

The rule of practice in Kentucky that appearance of defendant in appellate court under certain conditions operates as general appearances, not denial of due process of law. *Western Indemnity Co.* v. *Rupp* 261

LABOR UNIONS:

Members of labor unions and associations bound to know constitutions of their societies and if they pay dues and continue to delegate authority to their officers to unlawfully interfere with interstate commerce the other parties are jointly liable with such officers for the damages sustained by reason of such acts. *Lawlor* v. *Loewe* 522

See **Anti-trust Act.**

LACHES:

A defendant who raised the issue of plaintiff's residence and that diverse citizenship does not exist to give District Court jurisdiction is not chargeable with laches because he does not force that issue to trial. *Gilbert* v. *David* 561

LAND DEPARTMENT. See **Public Lands.**

LAW AND FACT, QUESTIONS OF. See **Full Faith and Credit; Interstate Commerce Commission.**

LEGISLATION:

Every act of Congress presumptively valid and should be so treated by a committing magistrate unless palpably void. *Henry* v. *Henkel* 219

Action of State in regard to matters under its control must be treated as correct unless the contrary is made to appear. *Hendrick* v. *Maryland* 610

If a statute will bear two constructions, one of which is within and the other beyond constitutional limitations the courts should adopt the former, as legislatures are presumed to act within their authority. *St. Louis S. W. Ry.* v. *Arkansas* 350

A police ordinance containing several provisions regulating interstate traffic may be constitutional as to some of the provisions and unconstitutional as to the others and in that event should be sustained as to those provisions which are constitutional if separable. *South Covington Ry.* v. *Covington* 537

LEGISLATION—*Continued.* PAGE

State legislation construed, in following cases:

Florida Sleeping Car Tax Statute. *Pullman Co.* v. *Knott* .. 23

Omaha, Nebraska, Ordinance. *Missouri Pacific Ry.* v. *Omaha* 121

Chicago, Illinois, Ordinance. *Willoughby* v. *Chicago*..... 45

Alabama statutes declared unconstitutional as constituting peonage. *United States* v. *Reynolds*..... 133

Oklahoma Separate Coach Law. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.*..... 151

New Orleans Belt Railroad Ordinance. *Louisiana Ry. & Nav. Co.* v. *New Orleans*..... 164

New York City Electric Lines Ordinances. *N. Y. Electric Lines* v. *Empire City Subway*..... 179

South Dakota, §§ 883–885, Rev. Codes, 1903. *Sioux Remedy Co.* v. *Cope*..... 197

Oklahoma Gross Revenue Tax on Coal Mining. *Choctaw, Okla. & Gulf R. R.* v. *Harrison*..... 292

Arkansas annual franchise tax. *St. Louis S. W. Ry.* v. *Arkansas*..... 350

Mississippi acts abolishing fellow-servant defense and making certain classes of accidents presumptive of negligence. *Easterling Lumber Co.* v. *Pierce*..... 380

Michigan Railroad Commission Law. *Detroit & Mackinac Ry.* v. *Michigan*..... 402

Arkansas, § 4621, Mansfield's Digest and § 648, *id.* *Adkins* v. *Arnold*..... 417

Oklahoma Bank Depositors' Guaranty Fund Act. *Lankford* v. *Platte Iron Works*..... 461

Am. Water Co. v. *Lankford*..... 496

Farish v. *State Banking Board*..... 498

Covington, Kentucky, Ordinance. *South Covington Ry.* v. *Covington*..... 537

New York Act taxing transportation companies. *Cornell Steamboat Co.* v. *Sohmer*..... 549

Ohio Workmen's Compensation Act. *Jeffrey Mfg. Co.* v. *Blagg*..... 571

Kentucky Railroad Act. *Louis. & Nash. R. R.* v. *Finn*..... 601

Maryland Motor Vehicle Law. *Hendrick* v. *Maryland*... 610

Mississippi Eight Hour Law. *Wathen* v. *Jackson Oil Co.*.. 635

Georgia Railroad Act. *Wadley Southern Ry.* v. *Georgia*.... 651

Arizona, Rev. Stat., § 2535, relative to testimony of physicians. *Arizona & New Mex. Ry.* v. *Clark*..... 669

See **Constitutional Law; Fourteenth Amendment.**

LEGISLATION—*Continued.* PAGE
For Acts of Congress, construed and applied, see **Congress, Acts of, Construed.**

LEGISLATIVE AND JUDICIAL POWERS. See **Congress; Courts; Michigan; Rates.**

LETTERS:
Relating to current business within meaning of § 184, Penal Code. *United States* v. *Erie R. R.* 513
When allowed in evidence. *Lawlor* v. *Loewe* 522

LEVY. See **Execution.**

LICENSE:
Not required for navigating waters of United States. *Cornell Steamboat Co.* v. *Sohmer*. 549
License to use name. See **Name.**

LIENS:
The validity and privity of mortgages depend upon the law of the State. *Fallows* v. *Continental Savings Bank* 300
As to law in Illinois. *Id.*
Right of trustees in bankruptcy to subrogation. See **Bankruptcy; Judgments and Decrees.**

LIMITATIONS AND PRESCRIPTION. See **Laches; Porto Rico.**

LIQUIDATED DAMAGES:
When Government cannot recover for delay. *Maryland Steel Co.* v. *United States*. 451

LOCAL LAW:
See **Pleadings; Practice; Stare Decisis; Captions of Various States.**

LONG AND SHORT HAUL CLAUSE. See **Common Carrier; Interstate Commerce Commission.**

LUNATIC. See **Insane Person.**

McCHORD ACT. See **Kentucky.**

MAILS:
Construction of § 184, Penal Code. *United States* v. *Erie R. R.* 513

MANDATE: PAGE

Lower court must follow the mandate of the appellate court. Where mandate of Circuit Court requires District Court to reject plea of *nolo contendere* on the only counts on which the Government stood and proceed with the case it must in obedience to the mandate set aside the plea. *Shapiro* v. *United States*. 412

See **Jurisdiction of this Court under § 238, Jud. Code: New Trial.**

MARYLAND MOTOR VEHICLE LAW:

The motor vehicle law grants to all residents of other States who have complied with the motor vehicle law of their respective States certain free use of the Maryland highways, but excepts residents of District of Columbia. *Quære*, whether the law is unconstitutional so far as it discriminates against residents of the District; but question cannot be determined at instance of one who does not show compliance with motor vehicle law of the District. *Hendrick* v. *Maryland* 610

The Maryland Motor Vehicle Law is not unconstitutional so far as it prescribes reasonable conditions and license fees for use of the State's highways. *Id.*

MASTER AND SERVANT. See **Constitutional Law; Employers' Liability Act; Ohio Workmen's Compensation Law; Mississippi; Peonage.**

MATERIALMEN'S ACTS OF 1894 AND 1905:

The acts are highly remedial; their purpose, simple and beneficial, is to give a remedy to materialmen and laborers on the bond of the original contractor, a reasonable time to enforce it and to unite all claimants in a single proceeding. *A. Bryant Co.* v. *N. Y. Steam Fitting Co.* 327

Provisions of the act are so ambiguous and conflicting in regard to notice that court holds time of notice to other creditors is not of essence in order to give District Court jurisdiction of suit otherwise properly brought by a claimant. *Id.*

MEASURE OF DAMAGES. See **Employers' Liability Act.**

MEAT INSPECTION ACT:

Plain object of the prohibition in the act against alteration and destruction of tags and labels is to safeguard food products against alteration and substitution so as to render process of inspection effective and the statute will not be

MEAT INSPECTION ACT—*Continued.* PAGE
construed so as to defeat purpose for which it was enacted. The prohibition is as broad as its language and applies to any and all persons, firms or corporations, or officer, agent or employé thereof. *United States* v. *Lewis* 282

MICHIGAN:
Railroad Commission Act: Under Railroad Commission Act, as construed in the light of the constitution of Michigan, the function of the Supreme Court of the State in reviewing orders of the Commission fixing rates is judicial, not legislative, and its final decree sustaining a rate established by the Commission as not confiscatory is *res judicata* and can be so pleaded in another action brought in the Federal court to prevent the Commission from enforcing the rate. *Detroit & Mackinac Ry.* v. *Michigan R. R. Commission* 402
—— This court will not construe the act in absence of decision to that effect by state court as clothing the courts with legislative power by granting them power to review orders of the Commission. *Id.*
—— The constitution of Michigan separates legislative and judicial powers and forbids giving the judicial department legislative power. The provisions in this respect are different from the provisions of the constitution of Michigan construed in *Prentis* v. *Atlantic Coast Line*. *Id.*
—— Whether Railroad Commission of Michigan did or did not exceed its jurisdiction in making orders establishing rates, the Supreme Court of the State had jurisdiction, and one seeking to review the orders is barred by the decree of that court. *Id.*

MINIDOKA IRRIGATION PROJECT:
Settlers can give rights of way over their claims to railroad companies. *Minidoka R. R.* v. *United States*. 211

MISSISSIPPI:
Chapter 194, Laws of 1908, abolishing fellow-servant defense as to certain claims of employers is not unconstitutional as denying equal protection of the law. *Id.*
Chapter 215, Laws 1912, making happening of certain classes of accidents *prima facie* presumptive of negligence cuts off no substantive defense and does not deny due process of law. *Easterling Lumber Co.* v. *Pierce* 380
Not even when applied in the trial of an action for damages sustained prior to enactment. *Id.*

MISSISSIPPI—*Continued.* PAGE

Constitutionality of Eight Hour Law involved, but case dismissed for want of jurisdiction. *Wathen* v. *Jackson Oil Co.*. 635

MOOT CASE:

This court does not pass on. *Louis. & Nash. R. R.* v. *Finn* 601
Hendrick v. *Maryland*. 610

See **Constitutional Law.**

MORTGAGE:

Lien of, on personal property in Illinois expires after three years and one extension of twelve months. *Fallows* v. *Continental Savings Bank* 300

MOTIVE. See **Interstate Rendition.**

MOTOR VEHICLES:

State has right to prescribe reasonable conditions and license fees for use of highways. Maryland Motor Vehicle Law. *Hendrick* v. *Maryland*. 610

See **Police Power.**

MULTIPLICITY OF SUITS. See **Jurisdiction.**

MUNICIPAL ORDINANCES. See **Constitutional Law; Franchises; Interstate Commerce; Ordinance; Police Power.**

MUNICIPALITIES. See **Police Power.**

NAMES, USE OF:

While transfer of person's name without any business may not be sufficient to entitle transferee to prevent others from using that name, it may be sufficient to put licensee on the footing of licensor against another party of same name. *L. E. Waterman Co.* v. *Modern Pen Co.* 88

See **Competition; Practice.**

NASHVILLE GRAIN RESHIPPING CASE:

United States v. *Louis. & Nash. R. R.*. 314

NAVIGATION:

A State may not require a license for navigation, except in exceptional cases as for compensation for improvements made by itself, but it may enforce as to its own corporations, having property within its borders, its usual system of taxation without infraction of the supreme law of the United

NAVIGATION—*Continued.* PAGE
States concerning navigation. *Cornell Steamboat Co.* v. *Sohmer*..... 549
See **United States.**

NEBRASKA:
Omaha, Nebraska, Ordinance requiring railroad to construct viaduct over crowded street not unconstitutional. *Missouri Pacific Ry.* v. *Omaha*..... 121

NEGLIGENCE:
Constituting defense of, abolished as to certain classes of employés in Ohio Workmen's Compensation Law. *Jeffrey Mfg. Co.* v. *Blagg*..... 571
Presumption of. See **Mississippi.**
Sufficiency of instructions as to. *Texas & Pac. Ry.* v. *Rosborough*..... 429
See **Employers' Liability Act.**

NEW JERSEY. See **Interstate Commerce.**

NEW MEXICO:
Cases involving De Baca land grants within territory ceded by Gadsden Treaty. *Lane* v. *Watts*..... 17

NEW ORLEANS:
Belt Railroad Ordinances. See **Constitutional Law.**

NEW TRIAL:
Court cannot order, on newly discovered evidence after end of term. *United States* v. *Mayer*..... 55
Where there has been a verdict on first trial for plaintiff which was set aside on the ground, that plaintiff had not capacity to sue and on the second trial verdict was directed for defendant on that ground, the Circuit Court of Appeals in reversing cannot direct judgment on original verdict; even if plaintiff waives a jury trial the case must be sent back for new trial. *McGovern* v. *Phila. & Reading R. R.*..... 389
See **Bill of Review; Jurisdiction.**

NEW YORK:
Ordinance of New York City of May 11, 1906, revoking license right of electric company to use streets under permission given in 1878 did not impair the obligation of the contract within the meaning of the Federal Constitution as the right was granted under the implied condition of user and had become subject to revocation by non-user. *N. Y. Electric Lines* v. *Empire City Subway*..... 179

NEW YORK—*Continued.* PAGE

New York Penal Laws, §§ 580. 583, making an agreement to commit any act for perversion of justice if overt act committed may include the withdrawal by connivance of a person from an insane asylum to which he has been duly committed by order of court as a lunatic. *Drew* v. *Thaw* 432

Section 184, Tax Law, imposing tax on transportation companies of the State for privilege of carrying on business in corporate capacity within State based on gross earnings of wholly intrastate business not violative of commerce clause of Federal Constitution, nor a license for privilege of navigating public waters of United States which is granted by Federal law, but merely a license on business in a corporate capacity. *Cornell Steamboat Co.* v. *Sohmer* 549

NEW YORK HARBOR:

Tows made up in harbor on New Jersey side for convenience and thence towed to the points in New York State not passing through any other State not interstate commerce so as to be removed from tax control of New York. *Cornell Steamboat Co.* v. *Sohmer*. 549

NEWSPAPERS:

Allowed under certain conditions for certain purposes in evidence. *Lawlor* v. *Loewe* 522

NOLO CONTENDERE, PLEA OF. See **Mandate.**

NON-USER:

Franchise may be lost by, and become subject to revocation. *N. Y. Electric Lines* v. *Empire City Subway* 179

NORTH CAROLINA:

Slick Rock and Tellico Basin section of boundary between North Carolina and Tennessee determined. *North Carolina* v. *Tennessee*. 1

Cession Act of 1789 construed and *held* further consent of Congress to agreement with Tennessee to settle boundary not essential under Art. I, § 10, cl. 3 of the Federal Constitution. *Id.*

Bill of review in regard to land within the State as determined by decree in above case refused. *Hopkins* v. *Hebard* 287

OCCUPATION TAX. See **Oklahoma.**

OFFICERS, OF ASSOCIATIONS:

When members may be jointly liable with, for acts. *Lawlor* v. *Loewe* 522

OFFICERS OF COURTS. See **Clerk's Fees.** PAGE

OFFICERS, OF STATES:

May so administer state statute fair on its face as to amount to denial of equal protection of the law by the State itself as against a class discriminated against. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

No such discrimination in this case. *Id.*

Duty of sheriff to levy execution in the absence of instructions to contrary. *Fallows* v. *Continental Savings Bank* 300

Members of State Banking Board not subject to judicial review in regard to administration of Depositors' Guaranty Funds. They are state officers. *Lankford* v. *Platte Iron Works* 461

Am. Water Co. v. *Lankford* 496

Farish v. *State Banking Board* 498

Effect of appearance for members of State Banking Board where statute does not provide for waiver of immunity of suit. *Farish* v. *State Banking Board* 498

OFFICERS, OF UNITED STATES:

Against public policy to contract to improperly influence and void. *Sage* v. *Hampe* 99

Quartermaster General can modify contract for building vessel so as to waive liquidated damages for delay under certain conditions. *Maryland Steel Co.* v. *United States* 451

OHIO WORKMEN'S COMPENSATION ACT:

Provisions in Workmen's Compensation Act establishing plan open on equal terms to all employers of over five employés and abolishing defenses of fellow servant and contributory negligence as to all such employers not entering plan, *held* not unconstitutional as denial of equal protection of the law. A classification based on number of employés is not unreasonable. *Jeffrey Mfg. Co.* v. *Blagg* 571

OKLAHOMA:

Snyder's Comp. Laws, § 480, prohibiting importation of intoxicating liquors not repugnant to commerce clause of Federal Constitution. *Overton* v. *Oklahoma.* 31

Under Enabling Act, Oklahoma admitted to Union on equal footing with original States and has same authority as other States to enact legislation not in conflict with Federal Constitution. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

Separate Coach Law not unconstitutional as repugnant to commerce clause as state courts construed it as relating only to intrastate commerce. *Id.*

OKLAHOMA—*Continued.* PAGE

Separate Coach Law unconstitutional as denying equal protection of the law in that it does not require equal accommodations for both African and white races in regard to all classes of cars although there may be only a limited demand for sleeping, dining and chair cars by persons of African race. *Id.*

Gross Revenue Tax on coal mining illegal as to lessees of United States under leases made pursuant to Choctaw and Chickasaw Agreement of 1897; lessees are instrumentalities of Federal Government. *Choctaw &c. Ry.* v. *Harrison* 292

Gross Revenue Tax on coal mining being evidently for purpose of securing a percentage on all sales in addition to *ad valorem* taxes is in effect a privilege or occupation tax, regardless of what state court and legislature call it. *Id.*

Bank Guaranty Fund Cases. See **Eleventh Amendment.**

OMAHA:

Viaduct Case. *Missouri Pacific Ry.* v. *Omaha* 121

OPPORTUNITY TO BE HEARD. See **Constitutional Law; Due Process; Fourteenth Amendment.**

ORDINANCES:

Ordinances construed:

Of Chicago, Illinois (street assessment). *Willoughby* v. *Chicago* 45

Of Omaha, Nebraska (railway viaduct). *Missouri Pacific Ry.* v. *Omaha* 121

Of New Orleans, Louisiana (Belt R. R.). *Louisiana Ry. & Nav. Co.* v. *New Orleans* 164

Of New York City (electric lines). *N. Y. Electric Lines* v. *Empire City Subway* 179

Of Covington, Kentucky (street railway regulations). *South Covington Ry.* v. *Covington* 537

Validity of: Ordinance otherwise valid not necessarily unconstitutional as denying due process of law because work required might be done differently or less expensively. *Missouri Pacific Ry.* v. *Omaha* 121

—— Or because it requires work to be done in too short a period. Such a provision may be separable and if completion is physically impossible, a court of equity can relieve. *Id.*

—— Police ordinance containing several provisions independent of each other may be constitutional as to those which are

ORDINANCES—*Continued.* PAGE
within, and unconstitutional as to those which are beyond, constitutional limitations. *South Covington Ry.* v. *Covington* 537
See **Constitutional Law; Franchises; Interstate Commerce; New York; Police Power.**

PARLOR CARS. See **Florida; Taxes.**

PARTIES:
Question of superior title of contesting claimants to lands acquired from a foreign country by treaty cannot be determined in an action between one claimant and the Government to which the other claimant is not a party. *Lane* v. *Watts* 17
Where state officers are parties. See **Eleventh Amendment.**
To action in Federal court. See **Citizenship; Domicil.**
Who may raise jurisdictional question. See **Jurisdiction.**
Who may raise constitutional question. See **Constitutional Law; Maryland Motor Vehicle Law.**

PARTNERSHIP:
A partner cannot participate in commissions of the firm on sales of investments to estate of which he is trustee. *Magruder* v. *Drury* 106

PATENTS:
For invention: Right conferred under laws of United States is confined to United States and its Territories, and infringement cannot be predicated of acts done wholly in a foreign country. *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.* 641
—— Exclusive right conferred by patent is property; its infringement is a tortious taking of a part thereof. *Id.*
—— Normal measure of damages for infringement is value of what was taken. *Id.*
—— Upon accounting in suit for infringement of patented part of machine the commingled profits should be apportioned between what was and what was not covered by the patented portion. All that which was not patented belongs to the seller. If plaintiff's patent only covered part of the patented machine and created only part of the profits he must take initiative in presenting evidence looking to the apportionment of profits. *Id.*
——Adequate basis is not laid for assessment of damages for loss of sale by showing number of infringing machines sold by defendant unless plaintiff shows that he lost that number of sales and could have delivered the machines. *Id.*

PATENTS—*Continued.* PAGE

—— Value of what was taken may be shown by proof of established royalty, or if none by what would be a reasonable royalty. *Id.*

—— Testimony of experts and of persons experienced in the particular business may be produced to show a proper apportionment of damages for infringement of a part of a patented machine. *Id.*

See **Costs.**

For designs. See **Copyright.**

For land. See **Public Lands.**

PENALTIES:

Courts of equity can relieve from unwarranted penalties for failure to comply with ordinance if complete compliance is impossible within prescribed period. *Missouri Pacific Ry.* v. *Omaha*. 121

See **Common Carrier; Constitutional Law; Georgia.**

PEONAGE:

Congress, in passing peonage laws under Thirteenth Amendment undertook to strike down all laws in States and Territories which permitted, or attempted to maintain, voluntary or involuntary service or labor of persons or peons in liquidation of debts or obligations. *United States* v. *Reynolds* 133

Statutory provisions of Alabama by which persons charged with and confessing crime can be released on bond with surety who pays fine under liability if separate punishment for failure to carry out contract with surety for liquidating debt by service fall within the prohibitions of the Thirteenth Amendment and amount to peonage. *Id.*

Peonage is a condition of compulsory service based on the indebtedness of the servant to the master. Constant fear of punishment renders the work compulsory. *Id.*

The basal fact in peonage is the indebtedness of the peon. *Id.*

PENAL CODE. See **Criminal Code; Criminal Law; Mail; Words.**

PERSONAL INJURIES. See **Employers' Liability Act; Ohio.**

PHYSICIANS:

Evidence of, in action for personal injuries brought under Employers' Liability Act excluded under § 2535, subd. 6, Rev. Stat., Arizona. *Arizona & New Mex. Ry.* v. *Clark*. . . 669

PLEADING: PAGE

Same precision not required in bills of equity as in pleadings at law, but convenient degree of certainty should be adopted so as to maintain plaintiff's case. *Garrett* v. *Louis. & Nash. R. R.* 308

Declaration should contain averment of every fact necessary to be proved in order to sustain plaintiff's right to recover and in order to let in proof, that parties may not be surprised, or the jury misled. *Id.*

When plaintiff after permission refused to amend, so as to allege pecuniary damage due to death of son, evidence was properly excluded as to such damage and the complaint properly dismissed. *Id.*

Where plaintiff has refused to amend and proof therefore properly excluded, judgment of dismissal should be affirmed and case not remanded for new trial on declaration being amended. *Id.*

Questions concerning effect of allegations and admissions which conflict with denials in same pleading are matters of local pleading and practice and the rule of the state court is not open to review here. *Washington* v. *Miller* 422

See **Evidence; Jurisdiction of District Court; Michigan.**

POLICE POWER:

In determining whether municipal ordinance unconstitutional under Fourteenth Amendment, this court will not disturb findings of two courts below regarding object and necessity of exercising police power. *Missouri Pacific Ry.* v. *Omaha.* 121

Municipality may exercise police power when authorized by State with same force as State itself. *Id.*

Police power properly exercised in compelling construction of viaduct over railway at company's expense. Ordinance not unconstitutional as deprivation of property without due process of law. *Id.*

While State may adopt reasonable police measure even though incidentally affecting interstate commerce it has no power to exclude from its limits foreign corporations or others engaged in such commerce or to impose such unreasonable conditions and requirements as will better their right to carry it on. *Sioux Remedy Co.* v. *Cope* 197

May be exercised by State or municipality authorized although incidentally affecting interstate commerce, Congress not having acted in regard thereto, if it does not attempt to

POLICE POWER—*Continued.* PAGE
regulate or burden such commerce. *South Covington Ry.* v. *Covington* 537
So as to regulations as to passengers riding on platform of motor cars and requiring cars to be kept clean, although used in interstate commerce. *Id.*
Not so as to number of passengers to each car or number of cars to be run, or temperature which must be maintained in cars, such regulations are burdens on interstate commerce. *Id.*
Movements of motor vehicles on highways is attended with constant danger and is proper subject for reasonable regulation in the exercise of its police power by the State and in the absence of legislation by Congress. So as to Maryland Motor Vehicle Law in respect to the points passed on. *Hendrick* v. *Maryland*. 610
See **Constitutional Law; Fourteenth Amendment; Ordinances.**

PORTO RICO:
Government of Porto Rico is of such nature as to come within general rule of exemption from suit. The right of exemption must be fairly raised and a sovereign government may by appearance or pleading consent to litigate a case on its merits. *Porto Rico* v. *Emmanuel* 251
Sections 1803 and 1869, Civil Code, as to which period of prescription applies to a case against Porto Rico and what starts the statute. *Id.*
See **Appeal and Error; Conditional Sale; Jurisdiction; Power of this Court.**
Cases coming from Porto Rico. *Monagas* v. *Albertucci* . . . 81
Porto Rico v. *Emmanuel* . . 251
Mercelis v. *Wilson* 579

POST OFFICE. See **Mails.**

PRACTICE:
This court follows decision of state court in regard to, and adopts its construction of, state statute: Extent of rule. *United States* v. *Reynolds* 133
St. Louis S. W. Ry. v. *Arkansas* 350
—— In determining whether assessment can be levied for past improvement. *Willoughby* v. *Chicago* 45
—— In determining whether proper practice in case of non-user of franchise is by *quo warranto* or to repeal it by subse-

PRACTICE—*Continued.* PAGE
quent ordinance and test the validity in a legal proceeding. *N. Y. Electric Lines* v. *Empire City Subway*. 179
This court does not necessarily follow decision of state court but determines for itself: Whether there was an existing contract which might be impaired by subsequent legislation. *Louisiana Ry. & Nav. Co.* v. *New Orleans*. 164
N. Y. Electric Lines v. *Empire City Subway*. 179
Determination of nature and effect of a scheme of taxation in state tax statute. *St. Louis S. W. Ry.* v. *Arkansas*. 350
Decision of two courts below not disturbed by this court: Upholding arrangement as to use of name in connection with manufacturing pens. *L. E. Waterman Co.* v. *Modern Pen Co*. 88
As to allowance of trustees' commissions. *Magruder* v. *Drury* 106
—— Findings in regard to necessity of exercising police power by municipality. *Missouri Pacific Ry.* v. *Omaha*. . . 121
—— As to propriety of subrogation of trustee in bankruptcy. *Fallows* v. *Continental Savings Bank*. 300
—— Certificate of state court cannot bring an additional Federal question into a record which does not otherwise show it to exist. *Cleveland & Pittsburgh R. R.* v. *Cleveland* 50
General rules: Whether Federal court can grant new trial after end of term is question of power and not of procedure; state statutes do not apply. *United States* v. *Mayer*. 55
—— Findings of fact sufficient to support conclusions of law. *Monagas* v. *Albertucci*. 81
—— State may prescribe reasonable rules of practice and procedure in regard to special appearances and make them under reasonable conditions amount to general appearance. *Western Indemnity Co.* v. *Rupp*. 261
—— Where petition for mandamus directly to court below to correct record is denied, and petition for certiorari to same court submitted at same time, is granted, the court may, where parties have so stipulated, treat the papers filed as the record and regard the case as submitted on the merits. *Lovell-McConnell Co.* v. *Auto Supply Co*. 383
—— Mandate of the appellate court must be followed by the court to which the case is remanded. *Shapiro* v. *United States*. 412
—— Whole case must come here; this court will not take a case in fragments. *Id.*
—— While trial court may submit to the jury the question of party's residence to determine whether diverse citizenship

PRACTICE—*Continued.* PAGE
exists, it is not bound so to do; in its discretion, it may dispose of the case on the testimony. *Gilbert* v. *David* 561
—— Where practice has not been established as to production of evidence in suit for infringement of patented part of machine where profits should be apportioned, case may be reversed and remanded with instructions as to how to proceed without costs to either party. *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.* 641
See **Aliens; Appeal and Error; Bill of Exceptions; Constitutional Law; Construction; Costs; Hawaii; Judgments and Decrees; Jurisdiction; Jury; New Trial; Pleading; Stare Decisis.**

PREFERENCES AND DISCRIMINATION. See **Interstate Commerce Commission.**

PRESCRIPTION AND LIMITATIONS. See **Porto Rico.**

PRESUMPTIONS:
This court will not assume a depositor's guaranty fund will not be faithfully managed and applied by the state officers in charge thereof under the statute. *Lankford* v. *Platte Iron Works* 461
All acts of Congress presumptively valid. *Henry* v. *Henkel* 219
As to state legislation. *St. Louis S. W. Ry.* v. *Arkansas* 350
Hendrick v. *Maryland*. 610
Also as to validity of rates established by commission. *Louis. & Nash. R. R.* v. *Finn* 601
Of negligence fixed by Mississippi statute in case of certain classes of accidents. *Easterling Lumber Co.* v. *Pierce* 380

PRIVATE LAND CLAIMS:
Statutory reservation of lands within territory acquired under treaty which are covered by claims of private parties may be subject to repeal. *Lane* v. *Watts* 17

PRIVILEGE TAXES. See **Oklahoma; Taxes and Taxation.**

PROCEDURE, LOCAL. See **Hawaii; Judgments and Decrees; Practice; Res Judicata.**

PROCESS, COMPULSORY PROCESS FOR. See **Evidence.**

PROFITS, FOR INFRINGING PATENT. See **Patent.**

PROHIBITION, WRIT OF. See **Appeal and Error.**

PROOF, BURDEN OF. See **Burden of Proof; Evidence.** PAGE

PROPERTY, IN PATENTS. See **Patent.**

Deprivation of. See **Constitutional Law; Fourteenth Amendment.**

PUBLIC HEALTH AND SAFETY:

Validity of state regulation affecting interstate commerce. *South Covington Ry.* v. *Covington* 537

PUBLIC LANDS:

Lands not reserved but necessarily included in either one or the other of two grants are not public lands or subject to disposal by Land Department. *Lane* v. *Watts* 17

Grants under § 9 of Land Grant Act of July 25, 1866, whether *in præsenti* or a covenant to convey depended on fulfillment of express condition that Indian title be extinguished and land become part of public domain. *Missouri, Kansas & Texas Ry.* v. *United States* 37

Indian lands included within grant of. *Id.*

While the right of way statute applies only to public lands and not to those segregated from public domain, settlers may, under Rev. Stat., § 2288, grant rights of way over lands before proof; Reclamation Act of 1902 does not affect these provisions. *Minidoka &c. R. R.* v. *United States* 211

Privileges to grant rights of way over homesteaders' lands were renewed and extended by act of March 3, 1903, c. 1424, 33 Stat. 991.

See **Public Policy.**

PUBLIC POLICY:

The policy of United States to protect Indians in their allotments cannot be regarded or disregarded at will by the States. *Sage* v. *Hampe* 99

To make its policy against alienation of allotments by Indians effective, the United States may make the prohibitions binding on others than Indians. *Id.*

A contract tending to bring improper influence on an officer of the United States and to induce attempts to mislead him is contrary to public policy and void. *Id.*

Policy of United States has been to encourage building of railroads in western States and in so doing has granted lands to aid in their construction and has also provided means by which companies not having grants of land can under reasonable conditions acquire rights of way over public lands. *Minidoka &c. R. R.* v. *United States* 211

PUBLIC POLICY—*Continued.* PAGE

The application of the principle of public policy embodied in § 4 of the Interstate Commerce Act as amended June 8, 1910, is to be determined by the substance of things not names, otherwise the statute would be inefficacious. *United States* v. *Louis. & Nash. R. R.*. 314

PURE FOOD LAWS. See **Meat Inspection Act.**

QUARANTINE ACTS:

Act of 1905 applied only to corporations and its penal terms did not include receivers of corporations, but under the act of 1913 those terms refer to all common carriers and include receivers of railroad corporations acting as common carriers. *United States* v. *Nixon* 231

QUARTERMASTER GENERAL. See **Contract.**

RACE DISCRIMINATION. See **Common Carrier.**

RAILROADS:

Municipal ordinance requiring railroad company to erect viaduct over crowded street in Omaha at its own expense held not unconstitutional. *Missouri Pacific Ry.* v. *Omaha* . . 121

Railroads may be required to furnish separate, but equal, accommodations for persons of white and African races, e. g., Oklahoma Separate Coach Law. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.* 151

Demurrage for railroad cars billed for reconsignment may attach at the customary point where such cars are held although not actually the point named as destination. *Berwind-White Co.* v. *Chicago & Erie R. R.* 371

See **Common Carrier; Constitutional Law; Discrimination; Evidence; Georgia; Jury; Michigan; Penalties; Police Power; Public Lands; Public Policy; Rates; State.**

RATES:

The establishment of rates is a legislative and not a judicial function. *Detroit & Mackinac R. R.* v. *Michigan R. R. Commission* 402

The function of courts in reviewing orders establishing rates is judicial and not legislative. *Id.*

Where special rates were voluntarily established and maintained for many years after the avowed reason for introducing them had ceased to exist and the carrier's reason for advancing them was not inadequacy but because they gave

RATES—*Continued.* PAGE

rise to discrimination, reasonable inference exists that advanced rates are too high, sufficient to support an order of the railroad commission having jurisdiction reëstablishing the original rates. *Louis. & Nash. R. R.* v. *Finn* 601

Reparation order held proper in proceeding to reëstablish original rates on ground advanced rates excessive. *Louis. & Nash. R. R.* v. *Finn* 601

Right to determine relative rate for long and short haul. *United States* v. *Louis. & Nash. R. R.* 314

See **Constitutional Law; Interstate Commerce Commission; Kentucky.**

REAL ESTATE:

Contract held to be one of conditional sale and not mortgage. *Monagas* v. *Albertucci* 81

Proceedings in suit to quiet title. *Mercelis* v. *Wilson* 579

Contract to convey Indian lands. *Sage* v. *Hampe* 99

RECEIVERS:

Of corporation is not a corporation or included within penal terms of the Quarantine Act of March 3, 1905; but receiver of a railroad corporation is a common carrier and under the act as amended in 1913 is within those terms. *United States* v. *Nixon* 231

RECLAMATION ACT:

Of June, 1902, does not affect § 2288, Rev. Stat., permitting settlers to give rights of way over their claims to railroad companies. *Minidoka &c. R. R.* v. *United States* 211

RECORD:

Additional Federal questions cannot be imported into it by certificate of state court if record does not otherwise show them to exist.

See **Clerk; Practice.**

REMEDIES. See **Competition.**

REMOVAL OF CAUSES:

Where the cause was removed from the state to the District Court, and comes here solely because plaintiff in error is incorporated under a Federal statute, this court goes no further than to inquire if there was plain error. *Texas & Pacific Ry.* v. *Rosborough* 429

Of suit pending under Employers' Liability Act in inferior court of Territory of Arizona to District Court under § 33 of Enabling Act. *Arizona & New Mex. Ry.* v. *Clark* 669

REPEAL: PAGE

Statutory reservation of lands within territory acquired by treaty which are covered by claims of private parties may be subject to repeal. *Lane* v. *Watts* 17

Repeals by implication not favored and occur only where conflict between earlier and later statute are so irreconcilable that effect cannot be given to both. *Washington* v. *Miller* .. 422

See **Statute.**

RES JUDICATA:

Even if a case holding that a prior decision should not be disturbed did not again make matter *res judicata*, the later case may be referred to as authority in regard to local procedure. *John Ii Estate* v. *Brown* 342

In any ordinary, even though judicial, proceeding a party is bound to present his whole case to the court. He is bound by the judgment. *Detroit & Mackinac R. R.* v. *Michigan R. R. Commission*..... 402

See **Judgments and Decrees; Michigan; Sovereignty; Stare Decisis.**

RESTRAINT OF TRADE. See **Anti-trust Act.**

RESTRICTIONS ON ALIENATION. See **Indians.**

REVIEW, BILL OF. See **Bill of Review.**

REVISED STATUTES:

For sections of, cited in opinions, see Table of Statutes cited, at front of volume.

RULES. See **Equity.**

SETTLERS. See **Public Lands.**

SEVENTH AMENDMENT. See **New Trial.**

SHERIFF:

Duty to levy under execution. *Fallows* v. *Continental Savings Bank*..... 300

SHERMAN ACT. See **Anti-trust Act.**

SLEEPING CARS:

Taxes on companies. See **Taxes.**

If separate accommodations required for white and African races, they must be equal. *McCabe* v. *Atchison, Topeka & Santa Fe Ry*..... 151

SOUTH DAKOTA: PAGE

Sections 883–885, Rev. Codes 1903, excluding foreign corporations from courts to enforce payment for goods sold in interstate commerce except under burdensome conditions held unconstitutional under commerce clause of Federal Constitution. *Sioux Remedy Co.* v. *Cope* 197

SOVEREIGNTY:

The judgments and decrees of courts of former sovereignty should be respected and not lightly disturbed by courts of present sovereignty on grounds of form and procedure. *John Ii Estate* v. *Brown* 342

Waiver by State of immunity from suit. See **Appearance.**

See **Eleventh Amendment; Oklahoma; Porto Rico.**

SPECIAL ASSESSMENTS. See **Taxes and Taxation.**

STARE DECISIS:

Decisions of state courts regard similar state statutes to one under review followed notwithstanding possible distinctions. *Pullman Co.* v. *Knott* 23

Overruling its own earlier decisions does not amount to deprivation of property without due process of law where vested rights are not interfered with. *Willoughby* v. *Chicago* 45

Mere change in judicial decision does not amount to impairment of obligation of contract within § 10 of Art. 10 of the Federal Constitution. *Cleveland & Pittsburgh R. R.* v. *Cleveland.* 50

The highest court of the State may depart from its former decisions in construing a state statute if it deems them untenable; and in that event this court accepts the latest construction and confines its attention to determining the constitutionality of the statute as so construed. *Sioux Remedy Co.* v. *Cope.* 197

Where this court in a case coming here on writ of error from the state court simply accepted the ruling of that court that under the applicable state statute a non-resident alien could not maintain action for death of relative, the decision is confined to that case. *McGovern* v. *Phila. & Reading R. R.* 389

The decisions of state tribunals regarding the interest which the State has in a fund administered by a state board is an important element to be considered by this court in determining that question. *Lankford* v. *Platte Iron Works* 461

See **Bill of Review; Judgments and Decrees; Res Judicata.**

STATES: PAGE

May not disregard policy of United States in regard to protection of Indians by restricting alienation of allotments. *Sage* v. *Hampe* 99

Has power to require carrier to furnish separate, but equal accommodations for white and African races. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.*. 151

Slick Rock and Tellico Basin sections of boundary between North Carolina and Tennessee determined according to judgment of the Commission of 1821. *North Carolina* v. *Tennessee* 1

Consent of Congress not necessary to agreement between States for settlement of boundary when in pursuance of former cession agreement which had been accepted by Congress. *Id.*

This court does not necessarily follow decisions of state courts in regard to constitutionality of state statutes under the Federal Constitution. *United States* v. *Reynolds* 133

The validity of a system of state laws will be adjudged by its operation and effect upon rights secured by the Federal Constitution and offenses punished by Federal statutes. *Id.*

State may require foreign corporation and others using its courts to comply with reasonable conditions relating to costs and procedure, but may not subject them to unreasonable conditions in connection with suits brought to enforce payment of goods sold in interstate commerce. *Sioux Remedy Co.* v. *Cope* 197

A State cannot subject a Federal instrumentality to a privilege or occupation tax, so *held* as to coal mines in Oklahoma worked under leases made by United States under Choctaw and Chickasaw agreement of 1897. *Choctaw, Okla. & Gulf R. R.* v. *Harrison* 292

The validity and priority of mortgage liens depends on the law of the State, and so held in bankruptcy proceedings. *Fallows* v. *Continental Savings Bank.* 300

State courts presumed to declare provisions of a state tax statute either inoperative as to interstate commerce or else unconstitutional as interfering therewith. *St. Louis S. W. Ry.* v. *Arkansas* 350

A State may enact that a conspiracy to accomplish what an individual is free to do shall be a crime. *Drew* v. *Thaw* 432

Decisions of tribunals of the State in regard to the interest of the State in a fund administered by state officers are an

STATES—*Continued.* PAGE

important element to be considered by this court in determining what such interest is. *Lankford* v. *Platte Iron Works* 461

This court will not assume that a state fund administered by a state board will not be faithfully managed and applied. *Lankford* v. *Platte Iron Works* 461

Under statute of State widow and minor children entitled to allowance for year's support for unadministered portion of estate of bankrupt pursuant to § 8 of the Bankruptcy Act. *Hull* v. *Dicks* 584

A State may not require license for navigating public waters of United States except in exceptional cases for compensation for improvements made by itself; but it may tax its own transportation corporations for privilege of carrying on corporate business within the State where the tax is based on that which is wholly intrastate. *Cornell Steamboat Co.* v. *Sohmer* 549

A State has power to prescribe reasonable regulations for motor vehicles moving in interstate commerce. *Hendrick* v. *Maryland* 610

Rights of citizens of United States to pass through a State of the Union are not interfered with by a reasonable license fee imposed by that State on motor vehicles. *Id.*

The reasonableness of the State's action in so far as it affects interstate commerce is always subject to inquiry and is always subordinate in that respect to the will of Congress. *Id.*

Eleventh Amendment: The state courts of Oklahoma having held that the statute creating the State Banking Board intended to give the State a definite title to the Depositors' Guaranty Fund, the fact that the fund is to be used to satisfy claims of beneficiaries does not take its administration from control of state officers or subject them to judicial control. *Lankford* v. *Platte Iron Works* 461
Am. Water Co. v. *Lankford* 496
Farish v. *State Banking Board* 498

Suit against the State Banking Board of Oklahoma to compel payments from and assessments for the Depositors' Guaranty Fund is a suit against the State. *Id.*

What amounts to waiver of immunity from suit. *Id.*

Under Thirteenth Amendment and Federal Statutes (Rev. Stat., §§ 1990, 5526; § 269, Crim. Code), Congress has undertaken to strike down all laws of States and Territories per-

STATES—*Continued.* PAGE

mitting or maintaining peonage or compulsory service in liquidation of debt. *United States* v. *Reynolds* 133

See **Peonage.**

Under Fourteenth Amendment the constitution of the State is not taken up into the Fourteenth Amendment. *Pullman Co.* v. *Knott*. 23

A state tax good on existing facts will not be upset under equal protection provision of Fourteenth Amendment upon hypothetical or unreal possibilities. *Id.*

State has power to impose annual franchise tax on right to exist as corporation or to exercise corporate powers within the State based exclusively on property used in intrastate business. *St. Louis S. W. Ry.* v. *Arkansas* 350

May require registration of motor vehicles and prescribe reasonable license fees therefor, and the latter may be graduated according to horse power without violating the due process or equal protection provisions of the Fourteenth Amendment. *Hendrick* v. *Maryland*..... 610

Has power to impose penalties sufficiently heavy to secure obedience to statute or regulations legally made thereunder. *Wadley Southern Ry.* v. *Georgia* 651

As to limitations of Fourteenth Amendment on the State's power of taxation and exercise of police power, see **Constitutional Law; Construction; Fourteenth Amendment; Interstate Commerce; Police Power; Practice.**

STATUTES:

Construction of: Construing statute of another State as not having extraterritorial effect does not amount to denying it full faith and credit. *Western Indemnity Co.* v. *Rupp* 261

Construction of statute based on treaty. *United States* v. *Portale* 27

Effect of putting statutes of a State into effect in a Territory of the United States as a complete system. *Adkins* v. *Arnold* 417

Quære, whether act of June 21, 1860, repealed *pro tanto* provisions of § 8 of Act of July 22, 1854. *Lane* v. *Watts* 17

Conflict of: Statutes although conflicting must be reconciled if possible and intent of legislature ascertained and given effect. *A. Bryant Co.* v. *N. Y. Steam Fitting Co.* 327

Where there is no incompatibility, a special statute is not repealed by a later general statute but the former remains in force as an exception to the later. *Washington* v. *Miller* 422

Repeals by implication are not favored. *Id.*

STATUTES—*Continued.* PAGE

One seeking to strike down a statute as unconstitutional must be directly and personally affected by it. *McCabe* v. *Atchison, Topeka & Santa Fe Ry.*. 151
Jeffrey Mfg. Co. v. *Blagg* 571
Louis. & Nash. R. R. v. *Finn* 601
Hendrick v. *Maryland*. 610

For all statutes, Federal and state, construed, applied or cited, see Table of Statutes Cited in front of this volume. See also **Congress, Acts of, Construed.**

Of Limitations. See **Limitations.**

Construction of. See **Construction.**

Carrying out Public Policy. See **Public Policy.**

See **Criminal Appeals Act; Criminal Law.**

State statutes construed. See **Construction; Fourteenth Amendment.**

Statutes affecting Descent and Distribution of Indian Allotments under Cherokee Agreements construed in separable clauses. See **Constitutional Law.**

STOCKHOLDER:

Jurisdiction of Federal court of suit of stockholder against corporation to enforce a remedy of the corporation controlled by Equity Rule No. 27 (formerly No. 94). *Wathen* v. *Jackson Oil Co.*. 635

STREETS:

Franchises for use of. See **Franchises; New York.**

Use of by motor vechicles; see **Maryland.**

STRIKES. See **Anti-trust Act.**

SUBROGATION:

Subrogation to rights of depositors in an insolvent bank in Oklahoma does not give right to sue state officers administering the Depositors' Guaranty Fund. *Farish* v. *State Banking Board*. 498

Right of trustees in bankruptcy. See **Bankruptcy.**

SUIT, RIGHT OF. See **Action; Subrogation.**

SURGEON. See **Physician.**

TARIFF:

Rates of demurrage in cars and method of filing tariff therefor. *Berwind-White Co.* v. *Chicago & Erie R. R.*. 371

Suppression clause in declaration required to be made by

TARIFF—*Continued.* PAGE

agent-consignee of imported goods by sub-section 10 of § 28 of Tariff Act of 1909 relates to omission of matter proper to be included in the invoice and account attached and not to independent facts. *United States* v. *Salen* 237

Notwithstanding this, Congress has given collectors power to ascertain such independent facts by other provisions of law. *Id.*

Rule of construction of tariff acts. *Id.*

TAXES AND TAXATION:

Cases involving validity, application and construction of tax statutes:

Florida Sleeping Car Company Tax. *Pullman Co.* v. *Knott.* 23

Street Assessment in Chicago. *Willoughby* v. *Chicago* 45

Oklahoma Coal Mining Tax. *Choctaw, Okla. & Gulf R. R.* v. *Harrison* 292

Arkansas Annual Franchise Tax. *St. Louis S. W. Ry.* v. *Arkansas* 350

New York tax on transportation companies. *Cornell Steamboat Co.* v. *Sohmer.* 549

Maryland Motor Vehicle Law. *Hendrick* v. *Maryland* 610

A state tax good upon existing facts will not be upset under equal protection provision of Fourteenth Amendment upon hypothetical or unreal possibilities. *Pullman Co.* v. *Knott* 23

Provision in Florida statute proper state officers fix amount of gross receipts on which tax is based in default of return not unconstitutional under due process clause of Fourteenth Amendment. *Id.*

This court on writ of error based on lack of power to make assessment cannot inquire into facts found by state court as to value, extent of benefits, etc. *Willoughby* v. *Chicago* . . 45

Whether assessment can be levied for past improvement depends on law of the State and this court follows construction of the statute by the state court. *Id.*

Where such could be levied against original owners, purchasers take subject to same liability and assessment is not deprivation of property without due process of law. *Id.*

A State cannot subject a Federal instrumentality to privilege or occupation tax. *Choctaw, Okla. & Gulf R. R.* v. *Harrison* 292

Neither courts or legislature by giving a tax a particular name can take from this court its duty to consider its real nature and effect. *Id.*

TAXES AND TAXATION—*Continued.* PAGE

Where manifest purpose of tax is to reach all sales and secure a percentage thereon and is in addition to *ad valorem* taxes it is in effect a privilege or occupation tax. *Id.*

The Oklahoma tax on coal mining held to be a privilege or occupation tax and that State cannot impose it on company operating mine under lease from United States made in pursuance of Choctaw and Chickasaw agreement. Lessees are instrumentalities of the Federal Government. *Id.*

In determining nature of a state tax and constitutionality of statute imposing it, this court must regard substance rather than form. The controlling test is found in the operation and effect of the statute as applied and enforced. *St. Louis S. W. Ry.* v. *Arkansas* 350

While concluded by the decision of the highest court of the State as to the mere construction of a state tax statute, this court is not concluded by that court's characterization of the scheme of taxation in determining whether the statute infringes constitutional rights. *Id.*

The Fourteenth Amendment does not impose iron clad rule upon States with respect to internal taxation or prevent double or unequal taxation if not based on arbitrary distinctions. *Id.*

State may impose annual franchise tax based exclusively on property within State and used exclusively in intrastate business. *Id.*

But payment must not be made a condition for carrying business including interstate business. Enforcement should be left to ordinary means of collection. *Id.*

A provision providing such a forfeiture might if inseparable render the statute imposing the tax unconstitutional. *Id.*

If the question is not involved this court will not declare provision to enforce payment of a tax by forfeiture of franchise instead of by ordinary means to collect debt as inseparable in advance of a decision so construing the statute by the state court. *Id.*

Arkansas Annual Franchise Tax not unconstitutional as denying due process or equal protection of the law or under commerce clause as to the points involved in this action. *Id.*

A State does not violate commerce clause by taxing its own transportation corporations for privilege of carrying on business in corporate capacity within the State based on gross earnings on transportation originating and terminating

TAXES AND TAXATION—*Continued.* PAGE
within State and expressly excluding interstate business. *Cornell Steamboat Co.* v. *Sohmer* 549
Transportation between points in same State not interstate commerce so as to be beyond taxing power of State because part of the journey is outside of State. *Id.*
So held as to § 184, Tax Law of New York as applied to earnings of corporation engaged in towing between New York Harbor and other points in New York State on tows made up on New Jersey side of the Hudson River for convenience. *Id.*
State may impose reasonable license fee on motor vehicles including those owned by non-residents and moving in interstate commerce. *Hendrick* v. *Maryland* 610

TENNESSEE:
Slick Rock and Tellico Basin sections of boundary between Tennessee and North Carolina determined according to judgment of Commission of 1821. *North Carolina* v. *Tennessee* 1
Under Cession Act of 1789 further consent of Congress to agreement between North Carolina and Tennessee to settle boundary was not essential under Art. I, § 10, Cl. 3. *Id.*
Bill of review in regard to land claimed under grants of Tennessee but actually located in North Carolina refused. *Hopkins* v. *Hebard* 287

TERMS OF COURT. See **Judgments and Decrees; Jurisdiction.**

TERRITORY:
Quære, whether act of August 4, 1854, incorporating territory acquired under Gadsden Treaty and making it subject to laws of New Mexico made provisions of § 8 of the Act of July 22, applicable thereto. *Lane* v. *Watts* 17
See **Alaska; Arizona; Hawaii; Porto Rico; Practice.**

THIRTEENTH AMENDMENT. See **Alabama; Peonage; States.**

TITLE TO LAND:
Question of superior title of contesting claimants cannot be settled in action to which one of them is not a party. *Lane* v. *Watts* 17
See **Jurisdiction.**

TRADE NAME. See **Corporations.** PAGE

TRANSPORTATION:

Taxes on transportation companies imposed by statute of New York and based on intrastate business held not unconstitutional. *Cornell Steamboat Co.* v. *Sohmer* 549

See **Interstate Commerce; Railroads.**

TREATIES:

A statute based on an international agreement should be literally construed so as to effectuate its object. *United States* v. *Portale* 27

So held as to provisions in the White Slave Traffic Act and the agreement of between the United States and Great Britain in regard to white slave traffic. *Id.*

Statute granting lands to a railroad company will not be construed as including Indian lands afterwards allotted in severalty under a treaty made immediately prior to the enactment of the statute as to do so would impute bad faith to the Government. *Missouri, Kansas & Texas Ry.* v. *United States* 37

Treaty of 1913 with Italy giving non-resident citizens of Italy right to maintain action for damages caused by death of relative and favored nation clause in treaty with Great Britain involved in action under Employers' Liability Act but case decided on different point. *McGovern* v. *Phila. & Reading R. R.* 389

See **Indians; Jurisdiction of this Court.**

TRIAL:

Habeas corpus not intended as substitute for functions of trial court. *Henry* v. *Henkel* 219

See **Jury; New Trial.**

TRUSTEES:

A trustee can make no profit out of trust and even though estate not a loser may not participate in commissions on sale of investments to estate by firm of which he is member. *Magruder* v. *Drury* 106

Entitled to commissions in District of Columbia on estate administered. *Id.*

See **Judgments and Decrees.**

Bankruptcy trustees; liens to which subrogated. See **Bankruptcy.**

UNFAIR LISTS. See **Anti-trust Act.** PAGE

UNFAIR TRADE. See **Competition.**

UNION LABELS. See **Anti-trust Act.**

UNITED STATES:

Bad faith in dealing with Indians will not be imputed to Government of United States. *Missouri, Kansas & Texas Ry.* v. *United States*. 37

Consent of United States attorney cannot confer jurisdiction on District Court to vacate judgment in criminal cause after end of term or debar United States from subsequently raising question of jurisdiction. *United States* v. *Mayer* 55

A contract tending to bring improper influence on officer of United States in regard to Indian allotments and to induce attempts to mislead him is contrary to public policy and void. *Sage* v. *Hampe* 99

United States can make its prohibitions on alienation on Indian allotments binding on others than Indians so as to make its policy effective. *Id.*

Policy of United States in protecting Indians in their allotments cannot be regarded and disregarded at will by the State. *Id.*

Public policy of United States has been to encourage building of railroads in western States. *Minidoka &c. R. R.* v. *United States*. 211

State cannot tax instrumentality of United States. Lessees of coal mines under leases from United States made pursuant to Choctaw and Chickasaw Agreement of 1897 not subject to privilege or occupation tax by Oklahoma. *Choctaw, Okla. & Gulf R. R.* v. *Harrison* 292

Laws of United States as to navigation of navigable waters are superior to those of the States, but a State may tax a transportation corporation on wholly intrastate business although carried on in navigable waters. *Cornell Steamboat Co.* v. *Sohmer*. 549

Right conferred by a patent of the United States is confined to the United States and its Territories. *Dowagiac Mfg. Co.* v. *Minnesota Plow Co*. 641

Consent to agreement between States. See **Tennessee.**

See **Congress; Contract; Officer.**

VEHICLES. See **Motor Vehicles.**

VERDICT. See **Jury.**

VIADUCT: PAGE

Construction of viaduct to carry railroad over crowded street at expense of company required by municipal ordinance and held not unconstitutional. *Missouri Pacific Ry.* v. *Omaha* 121

VIRGINIA:

Distinctions between provisions in constitutions of Virginia and of Michigan in regard to review by courts of orders made by State Railroad Commission. *Detroit & Mackinac R. R.* v. *Michigan R. R. Commission.* 402

WAIVER:

When the statute does not authorize waiver of exemption from suit, appearance of members of state board does not amount to such a waiver. *Farish* v. *State Banking Board* 498

Where state and Federal courts have concurrent jurisdiction voluntary appearance without objections may amount to waiver of defects in the removal proceedings. *Arizona & New Mex. Ry.* v. *Clark*. 669

WATERMAN PEN CASE:

Involving questions of right to use name of Waterman in connection with fountain pens by rival manufacturers under license of person of same name. *L. E. Waterman Co.* v. *Modern Pen Co.* 88

WATERS OF UNITED STATES. See **Navigation; States; Taxes; United States.**

WHITE SLAVE ACT:

Section 6 construed as including all persons connected with the act charged. *United States* v. *Portale* 27

See **Treaties.**

WIDOW:

Widow and minor children of bankrupt resident of Georgia dying after adjudicated bankrupt and before distribution of all of estate entitled to year's allowance from undistributed assets. *Hull* v. *Dicks* 584

WILL:

Devise by will included in restrictions on alienation of allotments under Choctaw and Chickasaw agreement ratified by act of July 1, 1902. *Taylor* v. *Parker* 42

Judgment of court of former sovereignty of Hawaii con-

WILL—*Continued.* PAGE
struing a will should not be disturbed by courts of present sovereignty on grounds mainly of form and procedure. *John Ii Estate* v. *Brown*. 342

WITNESSES. See **Congress; Habeas Corpus; Jurisdiction.**

WORDS AND PHRASES:
Defined: Current business as used in § 184, Penal Code. *United States* v. *Erie R. R.*. 513
"Proof" as used in its popular sense as evidence. See **Evidence.**
As used in Penal Statutes. See **Criminal Law.**

WORKMEN'S COMPENSATION LAW:
Of Ohio. See **Ohio.**

WRIT AND PROCESS. See **Jurisdiction.**

WRIT OF ERROR. See **Appeal and Error.**

WRITS OF PROHIBITION:
Circuit Court of Appeals may issue writs in support of its appellate jurisdiction. *United States* v. *Mayer* 55
Under certain conditions may issue writ of prohibition to District Court to restrain it from granting after end of term at which judgment was entered, new trial in criminal case under review by writ of error from the Circuit Court of Appeals. *Id.*