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VOLUME 237

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1914

CHARLES HENRY BUTLER

REPORTER

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NOTICE

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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]

THOMAS WATT GREGORY, Attorney General.
JOHN WILLIAM DAVIS, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

[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. For proceedings on the death of Mr. Justice Lurton, see *post*, p. v.

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.

PROCEEDINGS ON THE DEATH OF MR. JUSTICE LURTON.

HORACE HARMON LURTON, Associate Justice of the Supreme Court of the United States, died at the hotel Marlborough-Blenheim, Atlantic City, New Jersey, on Sunday, July 12, 1914, during vacation. He attended the closing session of the court for the October Term, 1913 on Monday June 14, 1914.

The funeral of MR. JUSTICE LURTON took place at Clarksville, Tennessee, on July 15, 1914. The interment was at Greenwood Cemetery in that city.

On Monday, October 12, 1914, at the opening of the court, 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."

SATURDAY, MARCH 27, 1915.

The Bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol, at twelve o'clock.

On motion of MR. SOLICITOR GENERAL DAVIS, MR. WILLIAM HOWARD TAFT was elected chairman, and MR. JAMES D. MAHER was elected secretary.

On motion of MR. JACOB M. DICKINSON, the Chair appointed a Committee on Resolutions: MR. JACOB M. DICKINSON, Tennessee, Chairman; MR. JUDSON HARMON, Ohio; MR. EDMUND F. TRABUE, Kentucky; MR. JOHN J. VERTREES, Tennessee; MR. EDGAR H. FARRAR, Louisiana; MR. S. S. GREGORY, Illinois; MR. FRANCIS LYNDE STETSON, New York; MR. HENRY W. ANDERSON, Virginia; MR. LAWRENCE MAXWELL, Ohio; MR. WILLIAM MARSHALL BULLITT, Kentucky; MR. CHARLES T. CATES, Jr., Tennessee; MR. JOHN W. YERKES, District of Columbia; MR. OTTO KIRCHNER, Michigan; MR. FRANK B. KELLOGG, Minnesota; MR. FREDERICK W. LEHMANN, Missouri.

Addresses were delivered by: MR. WILLIAM HOWARD TAFT, Ex-President of the United States; MR. JACOB M. DICKINSON, Ex-Secretary of War; MR. FRANK B. KELLOGG; MR. EDMUND F. TRABUE; MR. HENRY W. ANDERSON; MR. WILLIAM C. FITTS; MR. WILLIAM MARSHALL BULLITT, Former Solicitor General, and MR. OTTO KIRCHNER.

MR. JACOB M. DICKINSON for the Committee on Resolutions, presented the following:

RESOLUTIONS

We, members of the bar of the Supreme Court of the United States, moved by our high regard for the character and public services of MR. JUSTICE HORACE H. LURTON, who departed this life on the 12th day of July, 1914, have met at Washington, this 27th day of March, 1915, for the purpose of discharging what we regard as a high public duty in honoring the memory and recording our estimate of one who as a man, a citizen, a jurist, and a judge has greatly honored our country, and adopt the following:

HORACE HARMON LURTON was born on February 26, 1844, in Newport, Ky. His early life was passed partly at Clarksville, Tenn., and partly in the city of Chicago.

When the Civil War began he was a student at the old University of Chicago. He at once returned to Tennessee, and at the age of sixteen joined the army of the Confederate States, enlisting in the Thirty-fifth Tennessee, of which he became sergeant major.

He was captured at Fort Donelson and was imprisoned at Camp Chase, from which, after a brief confinement, he escaped. He reënlisted in the Third Kentucky Cavalry, and while serving under Gen. John H. Morgan, during his raid in Ohio, was again captured in 1863 and imprisoned, where he was confined until early in 1865. At that time, on account of his health, and in response to a personal appeal made by his mother to President Lincoln, he was released on parole.

His collegiate education thus interrupted was never completed, but it was richly supplemented by constant study and copious reading.

He graduated in law at Cumberland University, Lebanon, Tenn., in 1867. There he met Miss Frances Owen, who, in the same year, became his wife, and survives him. Their married life was an uninterrupted period of mutual love and comfort.

He entered upon the practice of his profession at Clarksville, Tenn., and continued until 1875, when he became a chancellor of Tennessee.

In 1878 he resigned and returned to the bar. He was associated in partnership at various times with Gustavus A. Henry, William A. Quarles, James E. Bailey, and Charles G. Smith, who were among Tennessee's most distinguished lawyers. He was a recognized leader and enjoyed a large practice.

In 1886 he was elected as judge of the Supreme Court of Tennessee, and served continuously until April, 1893, being chief justice the last four months of his service.

In that year he was appointed United States circuit

judge by President Cleveland, and became a judge of the Court of Appeals for the Sixth Circuit.

He became professor of constitutional law at Vanderbilt University in 1898 and dean of the law school in 1905, which positions he held until 1910.

In 1899 he received the degree of doctor of civil laws from Sewanee University, and in 1912 the degree of doctor of laws from the University of Pennsylvania.

In December, 1909, he was appointed by President Taft to the Supreme Bench of the United States, and took his seat January 3, 1910, in which position he served until his death.

Upon his appointment to the Supreme Court of the United States he was sixty-five years of age, being the oldest man ever appointed to that court. There were sound reasons for such distinction. He had been upon the bench thirty years and had achieved as chancellor a high reputation as an able, learned, conscientious, industrious, and impartial jurist, which was maintained, with increased prestige, throughout his long service on the Supreme Bench of Tennessee and as United States circuit judge.

He came to the Supreme Court equipped with an experience and learning that few appointees to that court have had. His long service upon the Federal bench especially qualified him to enter at once with full efficiency upon his duties.

President Taft had collaborated with him seven years in the Circuit Court of Appeals and well knew his fitness for the high office for which he nominated him.

During a continuous service on the bench, state and National, for a period of over thirty years, he decided almost every kind of case which human affairs could give rise to. His opinions, which are to be found in Pickle's Tennessee Reports, the Federal Reporter, and the Reports of the Supreme Court of the United States, are characterized by learning, conciseness, and lucidity, are convincing witnesses of his justice, wisdom, industry,

and comprehensive grasp of legal principles, and constitute a great and enduring monument to his fame.

He was thoroughly grounded in the fundamental principles of the law, and always maintained a profound reverence for constitutional safeguards.

In an address made at a joint meeting of the Maryland and Virginia Bar Associations in 1910 he said:

"The contention that the obligation of a constitution is to be disregarded if it stands in the way of that which is deemed of public advantage, or that a valid law, under the Constitution, is to be interpreted or modified so as to accomplish that which the executive administering it or a court called upon to enforce it shall deem to the public advantage, is destructive of the whole theory upon which our American Commonwealths have been founded, to say nothing of the constitutional relation of the Union and the States to each other. It is a substitution of men for a government of law. It is against this that I raise a warning voice."

He fully recognized the rights of persons and property, but did not hesitate to give full effect to constitutional legislation changing such rights.

He rendered no startling or sensational decisions. While this is true, he recognized fully the expanding and complex affairs of modern life and government and the necessity for the application of old principles to changed conditions. However, he never under this guise gave sanction to judicial legislation. His attitude on this vital principle is well shown by his own utterance in the case of John D. Park & Son against Hartmann, in which he said:

"It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Dis-

tinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy, principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law."

He was frank in expressing his views and always courageous in the performance of duty. He was quick to see and comprehend the points of argument, and clear, direct, and forceful in stating his conclusions.

He had an amiable disposition and a charming personality, which endeared him to a large circle of warm friends.

His associates loved and honored him, and the members of the bar who came before him entertained profound respect for his ability and efficiency as a judge, and hold his conduct toward them, which was always characterized by unfailing graciousness, attention, and patience, in most pleasing remembrance.

Both on and off the bench he was affable and courteous, without any appearance of seeking popularity. He was firm and impersonal in his rulings, without any touch of harshness. His manner was impressive and dignified, without show of authority.

He bore a conspicuous part in drafting the new Federal Equity Rules, and went to England for the purpose of informing himself as to the changes there in equity practice and their effect.

He left to his family the rich legacy of a stainless and unquestioned life.

He early became a member of the Episcopal Church, was constant in church duty, and for a long time preceding and at the time of his death held the position of vestryman in that church. His religion was not merely a profession, but its principles were constantly illustrated in his daily life.

In politics he was a Democrat.

Although he was a strict party man and believed that government should be administered through parties, and took a deep interest in politics and frequently was prominent and influential in political affairs, state and National, he never sought political office.

He and his colleague, MR. JUSTICE HARLAN, twice during the Civil War were opposed in battle. Notwithstanding they had fought on opposite sides in support of conflicting views as to the Constitution, they were in substantial accord in their judicial utterances on the fundamental principles of our Government.

The fact that one who had borne arms against a government and had been imprisoned by that Government, subsequently through its expressed will, sat in a tribunal which had final jurisdiction over the property, liberty, and lives of its people, and the interpretation of its Constitution, is a tribute to the qualities that found such distinguished recognition. It bears, however, for our whole Nation, for all time, and especially now, when the passions of a great war are manifesting themselves with fearful violence, a deeper lesson—that of a great people subduing in so short a time their prejudices, and following the injunction of Mr. Lincoln "with malice toward none, with charity for all," turning their backs with magnanimity upon the strife of the past, and doing those things which reunited our country in a common destiny, based upon a reconciliation, genuine and complete, and without example in history.

Respect for those in office, because they represent the sovereign power, is essential for stability of government. It is fortunate for a people to be served by those to whom honor is rendered, not only during incumbency of office but after they have passed out of office and out of life. The record of the lives of such men is the richest heritage and the highest inspiration that a people can possess.

This meeting is not to render grateful praise to one who can show appreciation to those who are present.

It is not a perfunctory tribute to place, for we are met to solemnly record our estimate of the services of one who has passed beyond the sense of praise or censure.

Tried by the standards which constitute the just test of title to the esteem of his countrymen, we confidently say that MR. JUSTICE LURTON is worthy of lasting commemoration in the annals of the Nation: Therefore be it

Resolved, By the Bar of the Supreme Court of the United States, that in the death of MR. JUSTICE HORACE H. LURTON, the bar and the people of the United States have sustained a great loss; that we deeply sympathize with his family and friends in their bereavement; that a copy of these proceedings be sent to Mrs. Lurton, and that, through the Attorney General, it be asked that they be spread upon the minutes of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 14, 1915.

Present: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY, MR. JUSTICE HUGHES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE LAMAR, MR. JUSTICE PITNEY, and MR. JUSTICE MCREYNOLDS.

THE ATTORNEY GENERAL addressed the court as follows:

May it please your Honors: In presenting the resolutions adopted by the memorable meeting of the bar, held in this room on March 27, to do honor to the memory of MR. JUSTICE HORACE HARMON LURTON, I might well be contented with the observation that the resolutions show such intimate acquaintance with his eventful career and such discriminating appreciation of his character and attainments as man and judge as to demand nothing more.

With respect to JUSTICE LURTON, my lines were so cast that a measure of the personal appropriately attaches, without which the part I am performing might in a sense be regarded somewhat in the light of one of the graceful functions belonging to the official station I hold. My personal acquaintance with JUSTICE LURTON began when as a youth I attended college at Clarksville, Tennessee, where he, subsequent to his service as chancellor, was the ascendant light at an unusually strong bar. After leaving college and moving West I next saw him some ten years later in Nashville presiding as chief justice of the Supreme Court of Tennessee. My presence on this occasion was almost accidental, but I recall with interest the fact that the attorney addressing the court was the distinguished gentleman who succeeded JUSTICE LURTON upon this bench and whose former official position I now hold.[1]

JUSTICE LURTON possessed a singular charm of candid affability. He took a lively interest in the aspirations and endeavors of younger men, particularly young lawyers. Whenever the opportunity offered, he encouraged them and gave them incentive to noble endeavors. I am one of the many who profited by his friendship.

That the men who strive are the men who succeed was eminently illustrated in the achievements of this life. He was denied the advantages of a completed college education. The hardships of the soldier, the privations of the prisoner, and the experience of the practitioner, quickened by a keen interest in public affairs and a studious disposition, were all utilized. The winds blew and the waters rolled to him knowledge and power, and the influences of the eventful times of his youth and early manhood so broadened him that he understood the varying phases of life and character, though he studied them to the end.

In the enchanted circle of home, around friendship's shrine, in the conflicts of the forum, in the temple of jus-

[1] MR. JUSTICE MCREYNOLDS.

tice, in the sanctuaries of the living God, JUSTICE LURTON was the same open, wholesome model of uplifting human character—a Christian gentleman. As a man, he bound himself to us by the strongest and tenderest ties.

It was as a judge, who ripened and gathered strength from the period of his early chancellorship, through service in the Supreme Court of Tennessee and the seventeen years of larger vision on the Circuit Court of Appeals, culminating in, and completed by, his brief but valuable work on the Supreme Court of the United States, that the deceased won his most enduring laurels.

When he went to the Court of Appeals of the Sixth Circuit he found it established in the confidence of the profession, and he contributed to the maintenance of its high standing. Coming to this court from a section so prolific in great judges, he fulfilled the measure of the expectation thus engendered.

JUSTICE LURTON was appointed at a riper age than any other man ever elevated to this bench. The deviation from what is generally a sound and acceptable rule was justified by the scope and length of his varied judicial experience and the richness of the results which had flowed therefrom.

While death claimed him sooner than could have been reasonably contemplated, his service here was singularly useful and beneficent. Aside from the invaluable work performed in connection with the preparation and adoption of the equity rules, JUSTICE LURTON, in the four and one-half years he adorned this bench, wrote the opinion of the court in ninety-eight cases, many of them involving issues of the gravest importance. Some of these opinions are destined to stand as leading authorities. He found himself constrained to dissent from the majority of the court in eighteen cases, and with respect to two of them filed dissenting opinions ably sustaining his views.

His style was admirable because of the clear and logical way in which he illuminated the subject in hand, each step in his reasoning following steadily after that which

had gone before, with the rhythm and certainty of a soldier's tread, so that when the end was reached there was no element of uncertainty as to what he had decided or meant to decide. He systematized facts and decomposed them into their elements, applying to them the principles of law and equity with unfailing precision.

To his other great qualities JUSTICE LURTON added powers of painstaking investigation, depth of research, and an accuracy in the use of our language that must ever make his opinions models of judicial composition. The loss of such an one may indeed be rightly regarded as a public calamity.

Actuated by these sentiments, sharing the spirit of these appropriate and appreciative resolutions, I present them to the court, as I am bidden by the bar to do, and request that a befitting order be entered, directing their perpetuation on the minutes of the court.

I now read the resolutions:

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copy of these proceedings be sent to Mrs. Lurton, and that, through the Attorney General, it be asked that they be spread upon the minutes of the Supreme Court of the United States.

THE CHIEF JUSTICE responded:

Mr. Attorney General, the motion which you make gives us solace, since it affords us an opportunity, by putting of record the resolutions which you so appreciatively present, to become participants in the action of the bar and thus again to manifest our sense of sorrow at the death of MR. JUSTICE LURTON.

The attachment between MR. JUSTICE LURTON and a member of this court resulting from prior association in judicial work in another forum [1] and between others resulting from a personal friendship of long standing, came when he took his seat upon this bench to unite him with all its members because of the resulting knowledge of his attainments and endearing character.

I asked one of my brethren not long since what was the mental quality of MR. JUSTICE LURTON which most impressed him. He said, "He was a lawyer, fully equipped by training and by experience to do the work which came to him to do." How terse and yet how comprehensive the analysis, since it embraced the developed powers of discrimination controlled by a trained and ripened intellect which enabled him intelligently to consider and clearly to understand the complex conditions and problems concerning which he was called upon as a judge to act. Accurate as was the portrayal, the inadequacy of the likeness which results is manifest unless there be added to the picture the lineaments of the man, his simplicity, his fidelity, his warmth of friendship, his tenderness to those he loved, all uniting with his intellectual qualities to make him what he was—a lovable and true man, an able and conscientious lawyer, and an intelligent, courageous, and devoted judge.

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[1] MR. JUSTICE DAY.

If there were time to review his public services, it would be unnecessary, since the mere mention of the landmarks of his career will bring out in bold relief his title to the admiration and respect of his countrymen. A practicing lawyer, a chancellor, a member of the Supreme Court of Tennessee, either as an associate member or its chief justice, from 1886 to 1893, a United States circuit judge from 1893 until he became a justice of this court in 1910. Mark the progressive evolution of his career and the irresistible inference of duty faithfully done which it affords. And to add to this demonstration take into view the judgment of the bar who practiced before him and the reports of the several courts during his service. The responsibility which he thus so worthily met is indicated by considering the grave duties which have rested upon state courts of last resort and upon the circuit courts of the United States from the beginning and the services which both have rendered to the security of life, liberty, and property, to the progress of our country, and to the perpetuation of our constitutional institutions. But that view does not give a full appreciation of the value of the work of Mr. Justice Lurton as a United States circuit judge. Bear in mind that when he became a circuit judge the circuit courts of appeals had been relatively newly created and the necessity for their existence as well as their future usefulness was in some minds far from certain. The benefit, therefore, to the country of the work of the court of appeals of the sixth circuit during his membership can not be judged alone by the volume and character of the business which came before it and by the enlightened manner in which that business was disposed of, but by considering how its discharge of duty coöperating in its full proportion with the work of the courts of appeals of other circuits demonstrated the wisdom of having created those courts and besides made certain how much the progress and development of our judicial institutions would be benefited by their continued existence.

I do not review the work of Mr. Justice Lurton on

this bench. It speaks for itself, since it demonstrates the benefit to the court and country which arose and would have continued to result had it been given to him, as we had all hoped it would be, to devote his matured powers to the service of the country for a long period of time. But this was not to be vouchsafed. Illness came, and when its serious character was apparent, in company with that comrade, high courage, which had been with him all the days of his life, comforted by the care and tenderness of those he so much loved and sustained by Christian faith and hope, he passed beyond our mortal vision. The unbidden thought which comes as to the fleeting result of all human effort, its perishability and the resulting despondency, is natural from such a loss, and the miasma of pessimism which they produce enveloped me as with those of my brethren who could do so we journeyed to Clarksville, Tenn., where he began his active career after the Civil War, there to lay him to rest. But as I stood by the open grave, surrounded by the kindly faces of so many of the warm-hearted people of Clarksville, who had gathered to pay their tribute of respect and affection, and heard the plaintive melodies of the old hymns telling of Christian faith and hope, pessimism vanished, and I came to feel death is not forever, and good works do not perish, but remain. Yes; it was given to me to think, as the waving wheat field in sunshine and in rain conserves its energy in the grain which long after the stem has been cut down and perished, pressed under the millstone, gives forth the nutriment of our material existence, why may we not believe that in the vast reservoir of Divine Providence the energy of our good deeds is conserved, so that they may continue when we have gone to aid and bless our country and our countrymen? What can better illustrate this truth than the work of the lawyer and the judge, since the rule of justice which solves the controversy of to-day becomes the rule of conduct preventing the arising of contention in the years to come? Can we doubt if we listen to the voices of Ulpian and Trebonian calling us

through the turmoil and dust of ages to the regions where reason dominates and hence justice prevails? But so distant an example need not be sought. Who of us has not known controversies as to powers of government whose complexities and difficulties were so great that their solution threatened the destruction of our constitutional system either by the disregard of national power or the overthrow of local authority? Insoluble, indeed, they have seemed when from out the past the voice of Marshall spoke and order prevailed, and State and Nation continued to move in harmony and majesty in their allotted orbits to the safety and blessing of our country and mankind.

Indeed, the truth of which I am speaking is illustrated in an episode in the life of Mr. Justice Lurton. We all recall that when he was in his youth a private in the southern army he was a prisoner of war, confined, I believe, on Johnsons Island, enduring the hardships of prison life and suffering from the intense rigor of the northern winter climate, to which he was not habituated. The youth's health failed and the fear came that his end was not far off. His mother, learning of the situation, pleaded from person to person until she came into the presence of President Lincoln to state her sorrow and out of the depths of her anguish to make her prayer for relief. Let us transport ourselves in imagination to the scene and listen to the mother's supplication and hear the answer from the lips of President Lincoln, springing from that well of compassion which was one of the supremest attributes of his nature: "Yes; let the mother have her boy." Ah! If it had been given to us to stand in reality where we have stood in fancy to-day, who of us would have thought when the storm of war which was then raging had ceased it would come to pass through the enduring power of the influence of the patriotism of our forefathers and of the wise institutions they had established that on the very dawn of peace one would seek in vain to find the erstwhile embattled armies, for they had vanished, leaving only a great host of devoted citizens seeking to serve their united

country in peace with the devotion with which, as they had understood it, they had sought to serve it in war? And who of us would have thought that it would soon be seen that the giving of the youth to the mother was the giving to the country of an enlightened and faithful public servant who, when the storm of war had passed, having been freed from imprisonment himself, would yet seek by a devoted discharge of his public duties to imprison his country men by binding them with enduring ties of respect and affection for the institutions of our forefathers, and who would be found dedicating his life to such work when the voice of the Father called him from the highest judgment seat in the land to what we would fain believe was his reward eternal.

These thoughts, while they afford consolation for our loss, should stimulate our endeavors. In this latter aspect let us, both judge and lawyer, before we leave these hallowed precincts to-day—hallowed because here justice is administered and here we each and all have avowed our fealty to the Constitution and our purpose to maintain it—resolve to seek more devotedly to discharge the duties which are upon us, to the end that, following in the footsteps of our brother whose life we to-day recall and of all those noble souls who have gone before, we may live by our good works; yes, continue to live when we are gone.

The resolutions of the bar and your remarks, Mr. Attorney General, will be spread upon the minutes, and any other tributes that may be received will be placed upon the files.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1914.

UNITED STATES *v.* HVOSLEF.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 331. Argued January 13, 1915.—Decided March 22, 1915.

Under Par. 20, of § 24, of the Judicial Code, the Court of Claims has jurisdiction of a suit against the United States for refund of money paid for documentary stamps affixed to charter parties under § 25 of the War Revenue Act of 1898 and the District Court of the proper District has concurrent jurisdiction of claims of that nature not exceeding ten thousand dollars.

Under the various refunding statutes, culminating in the act of July 27, 1912, c. 256, 37 Stat. 240, such claims are founded upon a law of Congress within the meaning of the Tucker Act as now incorporated in the Judicial Code.

Although the pendency of one class of claims may have induced the passage of an act of Congress providing for their adjustment, the act may embrace other claims if its terms are sufficiently wide so to do.

While under § 297, of the Judicial Code, § 5 of the Tucker Act was saved from repeal and the District Court having jurisdiction of a claim against the United States is the one of the District in which the plaintiff resides, that requirement may be waived; and if no specific objection is taken before pleading to the merits, it will be deemed to have been waived, and if the District Court otherwise has jurisdiction, the case may proceed.

Under the Refunding Act of July 27, 1912, protest at the time of affix-

ing documentary stamps was not essential to recovery. Right to repayment exists if the record shows that the sums sought to be recovered were not legally payable and the claim was duly presented within the time prescribed.

The constitutional freedom from taxation on imports assured by § 9, Art. I, of the Federal Constitution, means more than mere exemption from taxes specifically laid upon the goods themselves. It means that the process of exportation shall not be obstructed by any burden of taxation.

Where a charter party is practically a bill of lading for the entire cargo of the vessel, and is essential to the business of exportation in shipload lots, a tax on the charter party is, in substance, a tax on exportation and, as such, a tax on the exports, and, if on charter parties of vessels exclusively for foreign ports, is invalid under § 9, Art. I, of the Federal Constitution.

There is a distinction between tonnage taxes, as laid by the Federal Government, and export taxes, and the fact that Congress has power to lay a tonnage tax on entry does not authorize it to lay taxes on exportation which practically amount to taxes on the exports themselves.

THE facts are stated in the opinion.

The Solicitor General, with whom *Mr. Theodor Megaarden* was on the brief, for the United States:

The District Court was without jurisdiction of the action.

The claim of the petitioners was presented to the Commissioner of Internal Revenue and by him rejected. The remedy of petitioners was therefore an action against the Collector of Internal Revenue and not against the United States. *Edison Electric Co.* v. *United States*, 38 Ct. Cl. 208; *Nichols* v. *United States*, 7 Wall. 122, 129; *Sybrandt* v. *United States*, 19 Ct. Cl. 461; *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Savings Bank*, 104 U. S. 728, 734.

This established rule is not altered by the act of July 27, 1912, 37 Stat. 240, upon which petitioners rely. The sole object of this act was simply the extension of time to January 1, 1914, for the filing of belated claims.

It does not affirmatively appear that the suit was brought in the district in which the petitioners reside.

The Tucker Act (under which this suit was brought) declares that it must be brought in the district where the plaintiff resides; and this provision as to venue is mandatory. *Reid Wrecking Co.* v. *United States*, 202 Fed. Rep. 314, 316.

The petition fails to state a cause of action.

There can be no recovery in the absence of any showing that the taxes were paid under protest. *Chesebrough* v. *United States*, 192 U. S. 253; *United States* v. *N. Y. & Cuba Mail S. S. Co.*, 200 U. S. 488.

And to "require" the payment of stamps upon charter parties on the part of the Treasury Department does not constitute duress, or make payment under protest unnecessary to a recovery. *United States* v. *Edmondston*, 181 U. S. 500.

The act of July 27, 1912, does not dispense with protest or duress as a condition precedent to a recovery. *Chesebrough* and *N. Y. & Cuba Mail S. S. Co. Cases, supra.*

The petition does not show that the claim for refunding was presented to the Commissioner of Internal Revenue within the statutory time.

The tax which was imposed upon charter parties was not unconstitutional.

The tax was not unconstitutional merely because it may have been measured by the cargo space of vessels employed in some instances in the export trade.

The tax in question was measured by the tonnage of the vessels chartered, and tonnage taxes may lawfully be imposed by Congress. *State Tonnage Tax Cases*, 12 Wall. 204, 216.

And a duty on tonnage may be imposed with a view to revenue, as well as with a view to the regulation of commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1, 202; *State Tonnage Tax Cases, supra.*

The tax only incidentally and remotely affected articles exported.

The tax was not a tax on articles exported and the act imposing it does not come within the constitutional prohibition of a tax or duty on such articles. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 79; *C., B. & Q. Ry.* v. *United States*, 209 U. S. 90.

The most that can be claimed is that the taxes were paid on goods intended for exportation; and goods intended for exportation are not exports. *Coe* v. *Errol*, 116 U. S. 517; *Cornell* v. *Coyne*, 192 U. S. 418; *Pace* v. *Burgess*, 92 U. S. 372; *Turpin* v. *Burgess*, 117 U. S. 504.

The cases of *Fairbank* v. *United States* and *United States* v. *N. Y. & Cuba Mail S. S. Co.* are easily distinguishable.

For the legislative history of the acts involved and the rules of construction applicable see *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 465; *American Net Co.* v. *Worthington*, 141 U. S. 468, 473; *Binns* v. *United States*, 194 U. S. 486, 495, 496; *Blake* v. *National Bank*, 23 Wall. 307, 319.

Mr. Everett P. Wheeler, with whom *Mr. Simon Lyon* and *Mr. R. B. H. Lyon* were on the brief, for defendants in error:

Jurisdiction of this cause was conferred upon the District Court of the United States by Judicial Code, March 3, 1911, § 24, subd. 20, by which the United States submitted itself to the jurisdiction of the District Court.

The twentieth clause was a reënactment with some extension as to amount of the act of March 3, 1887, 24 Stat. 505.

This jurisdiction is similar to that conferred upon the Court of Claims by § 145, Jud. Code.

The act of July 27, 1912, pleaded in the petition is broad, and the history of its enactment on this subject shows plainly that the act in question is not to be limited

by construction but should be construed according to its plain terms.

The statute being "remedial in its character and relating to the law of procedure is to be liberally construed with reference to the purpose of its enactment." *Bechtel* v. *United States*, 101 U. S. 597, 599; *United States* v. *Musgrave*, 160 Fed. Rep. 700; *United States* v. *Ninety-nine Diamonds*, 139 Fed. Rep. 961, 965.

Remedial statutes should be construed liberally. *Silver* v. *Ladd*, 7 Wall. 219; *Merchants Nat. Bank* v. *United States*, 42 Ct. Cl. 6; 1 Kent Comm. 465; *Thacher* v. *United States*, 149 Fed. Rep. 902.

The action did not have to be brought against the collector. *Kaufman's Case*, 11 Ct. Cl. 668; *Anson* v. *Murphy*, 109 U. S. 238; *Nichols* v. *United States*, 7 Wall. 122; *United States* v. *Finch*, 201 Fed. Rep. 95; *Dooley* v. *United States*, 182 U. S. 222, 228; *Christie Street Co.* v. *United States*, 136 Fed. Rep. 326; *Medbury* v. *United States*, 173 U. S. 492; *Foster* v. *United States*, 32 Ct. Cl. 170; *The Daly Case*, 26 Op. Atty. Gen. 194.

This judicial power is a real, substantial, effective jurisdiction, to hear and to decide.

When it is exercised in constitutional cases, this court, appointed and acting by virtue of the authority conferred by the people, determines whether or not their representatives in the Congress have exceeded their powers. *Fairbank* v. *United States*, 181 U. S. 283, 285.

One of the limitations upon the taxing power of Congress is that no tax or duty shall be laid on any articles exported from any State.

The presumption is in favor of the constitutionality of a statute but this presumption is less strong in favor of a statute imposing taxes in a multitude of ways, and upon a multitude of objects.

A legislature cannot do indirectly what the Constitution forbids it to do directly. *Passenger Tax Cases*, 7 How.

283, 414; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238; *Fairbank* v. *United States*, 181 U. S. 283; *United States* v. *N. Y. & Cuba Mail S. S. Co.*, 200 U. S. 488; *Steamboat Co.* v. *Livingston*, 3 Cowen, 713, 733; *Brown* v. *Maryland*, 12 Wheat. 419; *Nor. & West. Ry.* v. *Sims*, 191 U. S. 441; *Bailey* v. *Alabama*, 219 U. S. 219, 244; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 27; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 162.

This principle is as old as the Roman law. Digest Lib. I, Tit. 3, De legibus &c., § 29; Hulot & Berthier (1805), p. 60.

The power to tax involves the power to destroy. *McCulloch* v. *Maryland*, 4 Wheat. 316, 431; *Fairbank* v. *United States*, 181 U. S. 283, 290.

Where the legislative power to tax existed, the court cannot limit its exercise, even though this would destroy the subject of taxation. *Veazie Bank* v. *Fenno*, 8 Wall. 533.

A tax on charter parties is unconstitutional, and differs in no respect from the stamp tax on export bills of lading or on manifests, both of which have been held unconstitutional. A tax upon it is as clearly a tax upon exports as was the tax in the other cases referred to. To tax either is clearly to tax the goods which they enable to be exported. See *Fairbank Case, supra.*

It is essential to the export business as it is universally used in cases of full cargo lots, and the courts treat it as one of the documents essential to such transactions. *Ireland* v. *Livingston*, L. R. 5 H. L. 395, 406; *Tamvaco* v. *Lucas*, 1 Best & Smith, 185, 197. Under the *Fairbank Case* an export document, to be protected against taxation, need not be a document absolutely necessary to the carrying on of the business. The charter party is a commercially necessary document, in view of the way in which business is actually done, and that being so, it is directly covered by the decision in the *Fairbank Case.*

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the District Court awarding a recovery against the United States for the amount paid as stamp taxes upon certain charter parties under § 25 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 460. These charter parties were exclusively for the carriage of cargo from ports in the States of the United States to foreign ports and the imposition of the taxes was held to be in violation of § 9, Article I, of the Constitution of the United States, which provides: "No Tax or Duty shall be laid on Articles exported from any State."

The suit was brought under paragraph 20 of § 24 of the Judicial Code which confers jurisdiction, concurrent with the Court of Claims, upon the District Court 'of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress' (see act of March 3, 1887, c. 359, § 1, 24 Stat. 505); and the claim of the plaintiffs (defendants in error) was based upon the act of July 27, 1912, c. 256, 37 Stat. 240, which is as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety eight, known as the War-Revenue Tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their

claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

The Government demurred to the petition upon the grounds that the court had no jurisdiction of the defendant, or of the subject of the action, and that the petition did not state facts sufficient to the action, and that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled (217 Fed. Rep. 680) and, after answer, the case was heard on the merits. The court found in substance that the firm, of which the defendants in error were the surviving members, had paid without protest certain stamp taxes on charter parties of the character described; that, on filing their claim under the act of 1912 it had been certified by the collector to be correct in its statement of facts, but that the Commissioner of Internal Revenue had rejected it for the reason that the act was not applicable. Holding the taxes to be unconstitutional, and the claim to have been duly presented, the court rendered judgment for the claimants.

The Government contends that the court erred in deciding (1) that the court had jurisdiction of the case, (2) that it need not be averred or proved that the tax was paid under protest, and (3) that the tax was invalid.

The first contention—with respect to jurisdiction—is that, the claim having been rejected, the remedy of the claimants was an action against the Collector of Internal Revenue and not against the United States. The course of the pertinent legislation since the passage of the War Revenue Act of 1898 may be briefly reviewed: In 1900, Congress provided for the redemption of, or allowance for, internal revenue stamps, including cases where 'the rates or duties represented thereby' had been 'excessive in amount, paid in error, or in any manner wrongfully collected.' Act of May 12, 1900, c. 393, 31 Stat. 177. In

1902, various provisions of the War Revenue Act, and amendments thereof, including §§ 6, 12, 25, schedules A and B, with regard to stamp taxes, and § 29 as to taxes on legacies and distributive shares, were repealed. Act of April 12, 1902, c. 500, 32 Stat. 96, 97. The repealing act was to take effect on July 1, 1902, and shortly before that date Congress made specific provision that certain taxes collected under the repealed statute should be refunded. Act of June 27, 1902, c. 1160, 32 Stat. 406. These taxes were (1) those that had been paid upon bequests for uses of a religious, literary, charitable, or educational character, etc.; (2) the 'sums paid for documentary stamps used on export bills of lading, such stamps representing taxes which were illegally assessed and collected'; and (3) taxes theretofore or thereafter paid upon legacies or distributive shares to the extent that they were collected 'on contingent beneficial interests' which had not become vested prior to July 1, 1902. It was also provided that no tax should thereafter be assessed under the act in respect of any such interest which had not become 'absolutely vested in possession or enjoyment' prior to the date mentioned.

The act of 1902 was followed by other refunding statutes. In *United States* v. *New York & Cuba Mail S. S. Co.*, 200 U. S. 488, suit had been brought in the District Court to recover taxes which had been paid under the War Revenue Act upon manifests of cargoes bound to foreign ports, and it was held (following *Chesebrough* v. *United States*, 192 U. S. 253) that no recovery could be had because the payment had been voluntarily made; the jurisdiction of the court was not impugned. Thereupon Congress provided for the refunding of sums paid for stamps "on export ships' manifests" representing taxes 'which were illegally assessed and collected,'—'said refund to be made whether said stamp taxes were paid under protest or not, and without being subject to any statute of limitations.' Act of March 4, 1907, c. 2919, 34 Stat. 1371,

1373. Again, in 1909, the Secretary of the Treasury was directed to pay to those who had duly presented their claims prior to July 1, 1904, the sums paid for stamps used 'on foreign bills of exchange' (drawn between July 1, 1898, and June 30, 1901) 'against the value of products or merchandise actually exported to foreign countries, such stamps representing taxes which were illegally assessed and collected, said refund to be made whether said stamp taxes were paid under protest or duress or not.' Act of February 1, 1909, c. 53, 35 Stat. 590; see also acts of August 5, 1909, c. 7, 36 Stat. 118, 120; June 25, 1910, c. 385, 36 Stat. 774, 779; August 26, 1912, c. 408, 37 Stat. 595, 626.

It thus appears that the act of 1912—upon which the present claim is based—was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims, and it follows that these claims must be deemed to be founded upon a 'law of Congress' within the meaning of the provisions of the Tucker Act, now incorporated in the Judicial Code. See *Medbury* v. *United States*, 173 U. S. 492, 497; *McLean* v. *United States*, 226 U. S. 374, 378. With respect to the refunding of taxes paid on the 'contingent interests' described in the act of June 27, 1902, *supra*, it has been held that upon the rejection of the claim an action lies against the United States in the Court of Claims, or in the District Court (where the amount is within the prescribed limit). *Fidelity Trust Co.* v. *United States*, 45 Ct. Cl. 362; *S. C.*, 222 U. S. 158; *United States* v. *Jones*, 236 U. S. 106; *Thacher* v. *United States*, 149 Fed. Rep. 902; *United States* v. *Shipley*, 197 Fed. Rep. 265. And this is true not only where such taxes were paid before the refunding act was passed but also where subsequently they were wrongfully collected in violation of its provisions. *United States* v. *Jones*, *supra*. The same rule must obtain

as to all claims described in the act of 1912, and in this view we are not concerned in the present case with questions arising under the general provisions of the internal revenue laws.

It is urged by the Government that Congress intended to limit the act of 1912 to the refunding of death duties erroneously or illegally assessed under § 29 of the War Revenue Act. Reference is made to the legislative history of the statute, but the contention lacks adequate support. (See House Reports, 62d Cong. 2d Sess., Report No. 848, June 6, 1912.) While the pendency of claims for the refunding of such taxes may have induced the passage of the act its terms were not confined to these. On the contrary, after providing for the claims arising under § 29, Congress added the further clause making express provision for the presentation of claims for the refunding 'of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act'; and the Secretary of the Treasury is directed to pay to those who duly present their claims and establish the erroneous or illegal collection 'any sums paid by them . . . to the United States under the provisions of the Act aforesaid.' We are not at liberty to read these explicit clauses out of the statute.

Another objection to the jurisdiction of the District Court is that under § 5 of the Tucker Act (a provision which was saved from repeal by § 297 of the Judicial Code) the suit was to be brought 'in the district where the plaintiff resides.' 24 Stat. 506. The petition alleged that petitioners were the surviving members of a copartnership engaged in business in the City of New York 'within the district aforesaid' and that their 'business and partnership residence was and is in the Borough of Manhattan, City of New York, in said district.' It is said that the allegation was insufficient to show the residence required by the statute, but it does not appear that any such objection was

made in the court below. The general language of the demurrer with respect to jurisdiction had appropriate reference to the general authority of the court to entertain such a suit against the United States and to the jurisdiction of the subject-matter of the action. But assuming that the subject-matter was within the jurisdiction of the court the requirement as to the particular district within which the suit should be brought was but a modal and formal one which could be waived, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits. *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127, 131; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129, 133; *Martin* v. *Balt. & Ohio R. R.*, 151 U. S. 673, 688; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 220; *Western Loan Co.* v. *Butte & Boston Mining Co.*, 210 U. S. 368; *Arizona & New Mexico Ry.* v. *Clark*, 235 U. S. 669, 674.

It is also apparent, in the light of the manifest purpose and scope of the legislation to which we have referred, that the contention based upon the absence of protest cannot be sustained. Where taxes have been illegally assessed upon the 'contingent interests' described in the refunding act of 1902 it has been held that recovery may be had although the taxes were paid without protest. *United States* v. *Jones*, *supra*. In the acts of 1907 and 1909, *supra*, with respect to stamp taxes on "export ships' manifests" and on foreign bills of exchange against exports, Congress expressly provided for refunding whether the taxes had been paid under protest or not. The fact that these express words were not repeated in the act of 1912 cannot, in view of the nature of the subject, be regarded as evidencing a different intent; rather must this act receive in this respect the same construction as that which has been given to the act of 1902. If it appeared that the sums sought to be recovered were not legally payable, and the claim was duly presented within the time fixed, the right to

repayment was established by the express terms of the statute.

The question, then, is whether the tax, so far as it was laid upon charter parties which were exclusively for the carriage of cargo from state ports to foreign ports, was a valid one. The constitutional provision that 'no tax or duty shall be laid on articles exported from any State' has been the subject of elaborate and authoritative exposition and we need but to apply the principles of construction which have been settled by previous decisions.

The prohibition relates only to exportation to foreign countries (*Woodruff* v. *Parham*, 8 Wall. 123; *Dooley* v. *United States*, 183 U. S. 151, 154, 162), and is designed to give immunity from taxation to property that is in the actual course of such exportation (*Pace* v. *Burgess*, 92 U. S. 372; *Turpin* v. *Burgess*, 117 U. S. 504; *Cornell* v. *Coyne*, 192 U. S. 418). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it. It was the clear intent of the framers of the Constitution that 'the process of exporting the products of a State, the goods, chattels, and property of the people of the several States, should not be obstructed or hindered by any burden of taxation.' Miller on the Constitution, p. 592. It was with this view that Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheat. 419,—holding that a state tax on the occupation of the importer was a tax on imports and that the mode of imposing it merely varied the form without varying the substance—drew the comparison between the two prohibitions: "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported

from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would the Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?" *Id.*, pp. 444, 445. And in *Almy* v. *California*, 24 How. 169, applying the same principle, the court said by Chief Justice Taney that 'a tax or duty on a bill of lading, although differing in form from a duty on the article shipped' was 'in substance the same thing,' for 'a bill of lading, or some written instrument of the same import,' was 'necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another.' There, as was pointed out in *Woodruff* v. *Parham*, *supra*, shipments to foreign ports were not in fact involved, but this did not detract from the force of the statement so far as it concerns the effect of the tax described.

In *Fairbank* v. *United States*, 181 U. S. 283, the question of Federal taxation of export bills of lading was directly involved, and after great consideration was definitely determined. In that case, there had been a conviction under the War Revenue Act of 1898. It was the contention of the Government that no tax was placed upon the article exported; that so far as the question was as to what might be exported, and how it should be exported, the statute imposed no restriction; that the full scope of the legislation was to impose a stamp duty on a document not necessarily, though ordinarily, used in connection with the exportation of goods; that it was a mere 'stamp imposition

on an instrument' and similar to many such taxes which are imposed by Congress by virtue of its general power of taxation, not upon these alone, but upon a great variety of instruments used in the ordinary transactions of business. These arguments were not convincing. The court held that 'the requirement of the Constitution is that exports should be free from any governmental burden.' The language is 'no tax or duty.' 'We know historically,' said the court, 'that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as in accordance with the rules heretofore noticed the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed.' In answer to the contention that the sole purpose of the prohibition was to prevent discrimination between the States, and that there should be enforcement only so far as necessary to prevent such discrimination, the court said: 'If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden.' The court found an analogy in the construction which had been given to the commerce clause in protecting interstate commerce from state legislation imposing direct burdens (*Robbins* v. *Shelby County*, 120 U. S. 489, 494); and legislative precedents for the tax were held

to be unavailing in view of the clear meaning and scope of the constitutional provision.

Following this decision, it was held by the District Court that the stamp tax on manifests of cargoes for foreign ports was invalid. These manifests were essential to the exportation. *New York & Cuba Mail S. S. Co.* v. *United States*, 125 Fed. Rep. 320. And while the case was determined in this court upon another ground, the correctness of this ruling as to the invalidity of the tax was conceded by the United States. 200 U. S. 488, 491.

Under this established doctrine, we are of the opinion that the tax upon these charter parties cannot be sustained. A charter party may be a contract for the lease of the vessel or for a special service to be rendered by the owner of the vessel. Where, as is very frequently the case, the ship owner undertakes to carry a cargo, to be provided by the charterer, on a designated voyage, the arrangement is in contemplation of law a mere contract of affreightment. By such a charter, the ship owner is the carrier of the goods transported by the ship, 'for the reason that the charter-party is a mere covenant for the conveyance of the merchandise or the performance of the stipulated service.' *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch, 39, 49, 50; *Reed* v. *United States*, 11 Wall. 591, 600, 601; *Leary* v. *United States*, 14 Wall. 607, 610; *Richardson* v. *Winsor*, 3 Cliff. 395, 399; *The T. A. Goddard*, 12 Fed. Rep. 174, 178; 1 Parsons on Shipping, p. 278. The findings in the present case do not permit us to question the character of the charter parties here involved. It appears that the defendants in error, being ship brokers, engaged at various times the vessels respectively, which are named in the schedule attached to the findings, solely for the carriage of cargo from ports in the United States to the foreign ports specified; that is, we understand the findings to mean that these charters were for

described voyages on which 'cargoes of goods were to be, and were in fact, carried' to the places mentioned.

Instead of a contract for the carriage of a particular lot of goods occupying less than the entire cargo space, as in the case of an ordinary bill of lading, the charter party was a contract for the carriage of a full cargo lot. In legal principle, there is no distinction which can condemn the tax in the one case and save it in the other. Whether the contract of carriage covers a small lot, or a partial cargo, or an entire cargo—whether the goods occupy a part of the cargo space or the whole cargo space—can make no constitutional difference. The charters were for the exportation; they related to it exclusively; they serve no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports.

The Government urges the analogy of tonnage taxes or duties. The same argument was pressed unsuccessfully in the *Fairbank Case*, *supra*, p. 305. It should be observed that a tonnage tax, as it has been laid by the Federal Government from the beginning, is a tax on entry. 1 Stat. 135 (July 20, 1790, c. 30); Rev. Stat., § 4219; Acts Feb. 27, 1877, c. 69, 19 Stat. 240, 250; June 26, 1884, c. 121, § 14, 23 Stat. 53, 57; July 19, 1886, c. 421, § 11, 24 Stat. 79, 81. See *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 696. A duty of tonnage under Article I, § 10, of the Constitution, has been described as a charge 'for entering or leaving a port' (*Huse* v. *Glover*, 119 U. S. 543, 549), but Congress has not attempted to impose a tonnage tax for the privilege of leaving a state port for a foreign port and we have no occasion to consider the question of the validity of such a tax. Again, it is contended that the tax bore only incidentally upon exportation. It was to be paid on all charter parties of vessels having a 'registered tonnage.' But, aside from any question as to the scope of this provision, the tax as

applied to the charter parties here in question was nothing else than a tax on exportation and to this extent was in any event invalid. The same principle governs that has constantly been held to obtain in cases where it has been sought to give effect to taxes upon interstate commerce under general legislation of the States. In *Robbins* v. *Shelby County*, *supra*, it was strongly urged, 'as if it were a material point in the case,' that no discrimination was made 'between domestic and foreign drummers'—that is, between those of the State whose legislation was in question and those of other States; that all were taxed alike. But the court held that this did not meet the difficulty, inasmuch as interstate commerce could not 'be taxed at all, even though the same amount of tax should be laid on domestic commerce.' This had been decided, as the court pointed out, in the case of *The State Freight Tax*, 15 Wall. 232; and it has become one of the commonplaces of constitutional law. See *Brennan* v. *Titusville*, 153 U. S. 289, 304; *Caldwell* v. *North Carolina*, 187 U. S. 622, 629; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 510; *Crenshaw* v. *Arkansas*, 227 U. S. 389. We know of no ground upon which a different effect can be given to the explicit constitutional provision which denies to Congress the right to tax exportation from the States.

There is a further objection that the goods were not on the vessel at the time the charter party was made, but as the charters related only to the exportation this objection is plainly without merit.

The judgment of the District Court is affirmed.

Judgment affirmed.

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

THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 616. Argued January 13, 1915.—Decided April 5, 1915.

United States v. *Hvoslef*, *ante*, p. 1, followed to effect that the requirement of § 5 of the Tucker Act, requiring the suit to be brought in the District in which claimant resides, is one of procedure which can be waived and is waived by a general appearance.

Although the Government may assert in its demurrer to an action brought in the District Court for refund of taxes under the Tucker Act that it appears specially, a demurrer which raises not only the question of jurisdiction of the subject-matter of the action but also that of the merits—seeking to obtain a decision on the constitutionality of the tax—is in substance a general appearance and amounts to a waiver of objection with respect to the district in which the suit is brought.

Exportation is a trade movement and the exigencies of trade determine what is essential to the process of exporting.

Insurance against loss is an integral part of exportation and is so vitally connected therewith that a tax on the policies is essentially a tax upon the exportation as such.

Taxes on policies of marine insurance on exports are within the prohibitions of § 9, Art. I, of the Federal Constitution, prohibiting any tax or duty on articles exported from any State; and *held* that amounts paid for stamps on such policies under the War Revenue Act of 1898 were illegally exacted and recoverable under the Refunding Act of July 27, 1902.

217 Fed. Rep. 685, reversed.

THE facts, which involve the construction of § 9, Article I, of the Federal Constitution, prohibiting any tax or duty on exports and the validity of stamp taxes under the War Revenue Act of 1898 on policies of marine insurance on exports, are stated in the opinion.

Mr. Everett P. Wheeler for plaintiff in error:

Insurance policies on exports are articles exported. Art. I, § 9, Cl. 5, Fed. Const.

Constitutional prohibition applies when the document taxed is intended to, and does become a part of the business of exporting. *Fairbank* v. *United States*, 181 U. S. 283; *Almy* v. *California*, 24 How. 169; *N. Y. & Cuba S. S. Co.* v. *United States*, 125 Fed. Rep. 320, and see act of Feb. 1, 1909, 35 Stat. 590.

The policy of insurance is a part of the usual commercial documents on the export of goods. *Tamvaco* v. *Lucas*, 30 L. T. Q. B. 234; *Hickox* v. *Adams*, 34 L. T. N. S. 404; Benjamin on Sales, 5th ed., § 590, p. 705; *Mee* v. *McNider*, 109 N. Y. 500; and see act of Sept. 2, 1914 (Public 193), establishing Government War Insurance Bureau.

When these policies were issued to cover exports, they became at once an instrumentality of export and as such were not taxable. *Paul* v. *Virginia*, 8 Wall. 168, distinguished.

The argument that the tax is upon goods within the domestic jurisdiction is rebutted. *Cornell* v. *Coyne*, 192 U. S. 415, distinguished.

In support of these contentions see cases *supra* and *The Antelope*, 2 Ben. 405; *Cunningham* v. *Hall*, 1 Cliff. 43; *Hickox* v. *Adams*, 34 L. T. N. S. 404; *Ireland* v. *Livingston*, L. R. 5 H. L. 395; *Nathan* v. *Louisiana*, 8 How. 73; *People's Ferry Co.* v. *Beers*, 20 How. 393; *Stroms Bruks &c.* v. *Hutchinson*, 1905, App. Cas. 515; *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, distinguished.

Mr. Solicitor General Davis, with whom *Mr. Theodor Megaarden* was on the brief, for the United States:

The District Court was without jurisdiction of the action.

The claim of the petitioner was presented to the Commissioner of Internal Revenue and by him rejected. The

remedy of petitioner was therefore an action against the Collector of Internal Revenue and not against the United States.

It does not affirmatively appear that the action was brought in the district in which the petitioner resides.

An allegation that a corporation is doing business in a certain State does not necessarily import that it was created by the laws of that State. *Brock* v. *Northwestern Fuel Co.*, 130 U. S. 341; *Insurance Co.* v. *Francis*, 11 Wall. 210; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444.

The petition fails to state a cause of action in that it does not show that the tax was paid involuntarily and after protest.

The tax which was imposed upon policies of marine insurance was not unconstitutional.

In *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; and *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, it has been held that insurance is a mere incident, and not a part of commerce and that the State's power over the subject is absolute and not limited by the interstate commerce clause of the Constitution.

As insurance is not commerce under the interstate commerce clause, it cannot be foreign commerce within the meaning of the clauses exempting exports from a tax by Congress.

The taxes involved in this case affect articles exported in only the most remote and incidental manner, and a provision therefor is no more unconstitutional than an act of Congress in regulation of commerce which has a mere incidental effect upon exportations. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 79–80; *C., B. & Q. Ry.* v. *United States*, 209 U. S. 90; *McLean* v. *Denver & R. G. R. R.*, 203 U. S. 38, 50.

The effect of a contrary holding must not be overlooked. It means the giving of immunity from all taxes of every kind and description, to all property and persons in any

way incidentally connected with foreign trade. See *Turpin* v. *Burgess*, 117 U. S. 504.

A contract of insurance does not in any way assist to carry the goods or to start them on their voyage, nor even to evidence the title thereto, and has no physical relation whatever to foreign commerce.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error is a corporation engaged in the business of underwriting policies of marine insurance. It brought this action to recover the amount paid as stamp taxes upon policies insuring certain exports against marine risks. The taxes were paid under the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 461; and the recovery was sought under the provisions of the act of July 27, 1912, c. 256, 37 Stat. 240, upon the ground that the tax was invalid, being in substance a tax upon exportation and hence contrary to § 9, Article I, of the Federal Constitution, prohibiting any tax or duty on articles exported from any State.

It was alleged that the policies were issued in the following manner: Open policies were executed by the Insurance Company containing an agreement that the Company would insure all cargoes which the insured should ship in the foreign trade during the life of the policies, and that the shipper would procure such insurance and from time to time would pay the premiums according to the regular rates for the particular voyages. When the shipper had a cargo of goods ready for export, 'designated and set apart from all other goods for shipment on a particular ship,' he filled up certain blank forms of declaration (furnished to him by the Company) in accordance with the facts of each case and delivered the declaration to the Company at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration

was not delivered until the vessel had sailed. Upon receiving each of the declarations, the Company entered the amount and rate of the premium and delivered to the shipper a certificate of insurance by which the goods described were insured for the voyage and upon the vessel specified. It was further averred that bills of exchange were drawn by the exporters on the consignees of the merchandise for the purchase price, and that the bills of lading and the certificates of insurance were by custom required as the necessary documents to enable the exports to be made and the bills to be discounted; and that these documents were actually forwarded to the foreign country to which the goods were shipped. At the end of each month, the Company rendered to the insured a bill for the premiums which had accrued in accordance with the declarations; and, monthly, the Company presented to the Collector a book containing a summary of the premiums earned in respect of such insurance and purchased the stamps required by the War Revenue Act. By direction of the Collector—in accordance with the method prescribed for mutual convenience by the Commissioner of Internal Revenue—these stamps were affixed to the book and then canceled. In each case, the goods were in fact exported and were insured during their transit by sea to the foreign ports. The claim for the refunding of the taxes was duly presented to the Collector, it was alleged, under the act of 1912, and was transmitted to the Commissioner of Internal Revenue who refused payment.

The Government demurred upon the grounds that the court had no jurisdiction of the defendant, or of the subject of the action, and that the petition did not state facts sufficient to constitute a cause of action. The District Court sustained the demurrer, holding the tax to be a valid one (217 Fed. Rep. 685). Judgment was entered dismissing the petition, and this writ of error has been sued out.

The Government seeks to support the judgment by

denying the jurisdiction of the District Court upon the ground that it was not shown that the petitioner resided within the district (act of March 3, 1887, c. 359, § 5, 24 Stat. 505, 506), as it was not set forth that the petitioner was incorporated in the State of New York (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444). It was alleged that the petitioner was a corporation and that 'its principal office for conducting said business in the United States and its residence was and is in the Borough of Manhattan, City of New York, in said District.' On behalf of the Company, it is asserted in argument that it is a foreign corporation, that is, foreign to the United States, and hence it is insisted that the provision of § 5 of the Tucker Act is inapplicable (citing *In re Hohorst*, 150 U. S. 653, 660). This question is not here, as the record does not show the place of incorporation. But the contention of the Government is inadmissible for the reason that it does not appear that the objection as to the district was raised below, and the decision of the District Court, which has jurisdiction 'concurrent with the Court of Claims' of the subject-matter of such an action within the prescribed limit as to amount (Jud. Code, § 24, par. 20), was invited upon the merits. The requirement of § 5 of the Tucker Act (which was saved from repeal, Jud. Code, § 297), is one of procedure which could be waived (*United States* v. *Hvoslef*, *ante*, p. 1), and the question of jurisdiction submitted under the demurrer was deemed by the District Court to be the same as that which had been considered and decided in the *Hvoslef Case* (217 Fed. Rep. 680, 682, 683); that is, as to the authority to entertain a suit against the United States under the act of July 27, 1912, *supra*. While the Government asserted in its demurrer that it appeared specially, it raised by that pleading not simply the question of the jurisdiction of such a suit against the United States but also that of the merits, seeking, and thus obtaining, a decision as to the constitutionality of

the tax and hence of the insufficiency of the facts alleged to support a recovery. Such a demurrer is in substance 'a general appearance to the merits' and is a waiver of objection with respect to the district in which the suit was brought. *Western Loan Co.* v. *Butte Mining Co.*, 210 U. S. 368, 372; *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127, 130.

The other preliminary questions being identical with those determined in *United States* v. *Hvoslef, supra*, we come at once to the application of the constitutional provision; and upon this point it is unnecessary again to review the decisions establishing the governing principle. There, the question was as to the validity of the tax upon charter parties which were exclusively for the carriage of cargo from state ports to foreign ports, and, here, the question is as to the tax upon policies insuring such exports during the voyage. Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition? It is manifest that we are not called upon to deal with transactions which merely anticipate exportation, or with goods that are not in the course of being actually exported (*Coe* v. *Errol*, 116 U. S. 517; *Turpin* v. *Burgess*, 117 U. S. 504; *Kidd* v. *Pearson*, 128 U. S. 1; *Cornell* v. *Coyne*, 192 U. S. 418). Nor have we to do, in the present case, with the taxation of the insurance business, as such, or with the power of the State to fix the conditions upon which foreign corporations may transact that business within its borders (*Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *Noble* v. *Mitchell*, 164 U. S. 367; *Nutting* v. *Massachusetts*, 183 U. S. 553; *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495). Let it be assumed, as this court has said, that the insurance business, generically considered, is not commerce; that the contract of insurance is a personal contract,—an indemnity against the happening of a contingent event. The inquiry still re-

mains whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon the exportation itself.

The answer must be found in the actual course of trade; for exportation is a trade movement and the exigencies of trade determine what is essential to the process of exporting. The avails of exports are usually obtained by drawing bills against the goods; these drafts must be accompanied by the bills of lading and policies or certificates of insurance. It is true that the bills of lading represent the goods, but the business of exporting requires not only the contract of carriage but appropriate provision for indemnity against marine risks during the voyage. The policy of insurance is universally recognized as one of the ordinary 'shipping documents.' Thus, when payment is to be made in exchange for such documents, they are held to include not only a proper bill of lading but also 'a policy of insurance for the proper amount.' *Tamvaco* v. *Lucas*, 1 B. & S. 185, 197, 206. It is not sufficient to tender the bill of lading without the policy. Benjamin on Sales, § 590, note; *Hickox* v. *Adams*, 34 L. T. N. S. 404. The requirements of exportation are reflected in the familiar 'C. I. F.' contract (that is, at a price to cover cost, insurance, and freight), which has 'its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in *Ireland* v. *Livingston*' (L. R. 5 H. L. 395, 406). *Ströms Bruks Aktie Bolag* v. *Hutchison* (1905) A. C., 515, 528. See also *Mee* v. *McNider*, 109 N. Y. 500. It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis. In illustration of this, the appellant appropriately directs

our attention to the recent action of Congress in establishing the War Risk Insurance Bureau, by which the Government itself undertakes to supply insurance against war risks in order to protect exports from the burden of excessive rates. Act of September 2, 1914, c. 293, 38 Stat. 711. In the report of the Committee of the House on Interstate and Foreign Commerce recommending the passage of the bill as an emergency measure, reference is made to the fact that other nations were insuring the vessels and cargoes under their respective flags against war risks. (House Reports, 63d Cong. 2d Sess., Report No. 1112.) The bill itself recites that the foreign commerce of the United States 'is now greatly impeded and endangered' through the lack of such provision, and that it is deemed 'necessary and expedient that the United States shall temporarily provide for the export shipping trade adequate facilities for the insurance of its commerce against the risks of war.' This is a very clear recognition of the fact that proper insurance during the voyage is one of the necessities of exportation. The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process.

For these reasons, we must conclude that, under the established rule of construction, the tax as laid in the present case was within the constitutional prohibition. *Fairbank* v. *United States*, 181 U. S. 283; *United States* v. *Hvoslef*, *ante*, p. 1.

Judgment reversed.

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

UNITED STATES *v.* EMERY, BIRD, THAYER REALTY COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 117. Argued January 12, 13, 1915.—Decided April 5, 1915.

The District Court, sitting as a Court of Claims, under § 24 (20 subd.) has jurisdiction over claims against the United States for refunding taxes paid under the Corporation Tax law under duress and protest to the Collector and by him turned over to the United States.

The great act of justice embodied in the Court of Claims is not to be construed strictly and with an adverse eye.

A realty corporation simply collecting and distributing rent from a specified parcel of land is not doing business within the meaning of the Corporation Tax Law of 1909. *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 170, followed; *Cedar St. Realty Co.* v. *Park Realty Co.*, 220 U. S. 107, distinguished.

THE facts, which involve the jurisdiction of the District Court sitting as a Court of Claims and also of the validity of a tax imposed under the Corporation Tax Law of 1909, are stated in the opinion.

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

The District Court was without jurisdiction of the suit.

The remedy, if any, is an action against the collector, expressly provided by statute. *Nichols* v. *United States*, 7 Wall. 122.

Where a revenue act expressly provides a particular remedy for the recovery of taxes illegally assessed and paid, such remedy is exclusive. *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Cheatham* v. *United States*, 92 U. S. 85, 88; *Nichols* v. *United States*, *supra*.

Hence a suit against the United States does not lie.

The realty company was engaged in business within the meaning of the Corporation Tax Act of 1909. *Corporation Tax Cases*, 220 U. S. 107, 171.

In support of these contentions see cases *supra* and *Chesebrough* v. *United States*, 192 U. S. 253; *Christie-Street Co.* v. *United States*, 136 Fed. Rep. 326; *Philadelphia* v. *Collector*, 5 Wall. 720; *Collector* v. *Hubbard*, 12 Wall. 1; *Ferry* v. *United States*, 85 Fed. Rep. 550; *Dooley* v. *United States*, 182 U. S. 222; *Edison Electric Co.* v. *United States*, 38 Ct. Cl. 208; *Erskine* v. *Van Arsdale*, 15 Wall. 75; *McCoach* v. *Minehill R. R. Co.*, 228 U. S. 295; *Medbury* v. *United States*, 173 U. S. 492; *Reid* v. *United States*, 211 U. S. 529; *Spreckels Sugar Co.* v. *McClain*, 192 U. S. 397; *Sybrandt* v. *United States*, 19 Ct. Cl. 461; *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Savings Bank*, 104 U. S. 728; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187.

Mr. Albert R. Strother, with whom *Mr. James G. Smart* was on the brief, for defendant in error:

The District Court had jurisdiction. *Nichols* v. *United States*, 7 Wall. 122, distinguished.

The statute gives no special exclusive remedy.

The cases subsequent to the *Nichols Case* establish the proposition that the court had jurisdiction in this case.

The realty company was not liable to the tax. *The Corporation Tax Cases*, 220 U. S. 107; *The Zonne Case*, 220 U. S. 187; *The Minehill Case*, 228 U. S. 295.

In support of these contentions see cases cited *supra* and also *Campbell* v. *United States*, 107 U. S. 407; *Cary* v. *Curtis*, 3 How. 236; *Chesebrough* v. *United States*, 192 U. S. 253; *Christie-Street Co.* v. *United States*, 136 Fed. Rep. 326; *Corporation Tax Cases*, 220 U. S. 107; *Water Co.* v. *Defiance*, 191 U. S. 184; *Dooley* v. *United States*, 182 U. S. 222; *S. C.*, 183 U. S. 151; *Eliot* v. *Freeman*, 220 U. S.

178; *McCoach* v. *Minehill R. R. Co.*, 228 U. S. 295; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Nichols* v. *United States*, 7 Wall. 122; *Philadelphia* v. *Collector*, 5 Wall. 720; *Swift* v. *United States*, 105 U. S. 691; *S. C.*, 111 U. S. 22; *United States* v. *Am. Tobacco Co.*, 166 U. S. 468; *United States* v. *Finch*, 206 Fed. Rep. 95; *United States* v. *Hyams*, 146 Fed. Rep. 15; *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *N. Y. & Cuba S. S. Co.*, 200 U. S. 488; *United States* v. *Nipissing Mines Co.*, 206 Fed. Rep. 431; *United States* v. *Savings Bank*, 104 U. S. 728; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187.

Mr. Everett P. Wheeler filed a brief as *amicus curiæ*.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit under the Judicial Code of March 3, 1911, c. 231, § 24, par. 20, 36 Stat. 1087, 1093, formerly the Tucker Act of March 3, 1887, c. 359, §§ 1, 2, 24 Stat. 505, to recover the amount of taxes paid under protest. It presents two questions: Whether the District Court sitting as a Court of Claims had jurisdiction of this case; and whether the claimant, the defendant in error, was 'engaged in business' or 'doing business' within the meaning of the Corporation Tax Law of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112. The District Court asserted its jurisdiction and gave judgment for the claimant. 198 Fed. Rep. 242.

The facts do not need lengthy statement. The Emery, Bird, Thayer Dry Goods Company, a business corporation of Kansas City, Missouri, occupied certain lands, partly hired and partly owned by it, for the purposes of its business. Eighteen months before the passage of the Corporation Tax Law its members decided that the claimant should be organized, and it was, for the purpose of acquiring the Dry Goods Company's lands and of letting the same to the Dry Goods Company, the latter having

the management of the property and assuming the responsibilities in respect of it. The only business done by the claimant was to keep up its corporate organization and to collect and distribute the rent received from its single lessee; and the Court found as a fact that it was not doing business within the statute, subject, of course, to the question whether the activities stated constituted such doing business as matter of law. The chartered powers of the claimant included performing and enforcing the performance of the respective covenants in the leases taken over and the sale of the property or any part of it upon the vote of not less than two-thirds of the stockholders, who were very nearly the same as those of the Dry Goods Company. It also covenanted to rebuild in case the buildings were destroyed. But there has been no occasion to perform any of these undertakings.—The taxes in question were paid under duress and protest, and were turned over by the Collector to the United States, which still retains them. A claim to have the taxes refunded was submitted in due form to the Collector of Internal Revenue, but repayment was denied.

The objection to the jurisdiction pressed by the Government is that the only remedy is a suit against the Collector. As the United States has received and keeps the money and would indemnify the Collector if he had to pay, Rev. Stat. 3220, the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable' &c., are extended to this tax, c. 61, § 38, 36 Stat. 11, 117, but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the Collector for an unjustified collection was given by the common law.—The jurisdiction over suits against the United

States under § 24, Twentieth, of the Judicial Code, extends to 'all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress.' However gradually the result may have been approached in the earlier cases it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, § 24, First) and those 'founded upon' (*id.*, § 24, Twentieth), a law of the United States, rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye. *Dooley* v. *United States*, 182 U. S. 222, 228. *United States* v. *Hvoslef*, March 22, 1915, *ante*, p. 1. Jurisdiction was taken for granted in *United States* v. *N. Y. & Cuba S. S. Co.*, 200 U. S. 488, and was upheld in *Christie-Street Commission Co.* v. *United States*, 136 Fed. Rep. 326. *United States* v. *Hyams*, 146 Fed. Rep. 15, 18. *United States* v. *Finch*, 201 Fed. Rep. 95, 97.

Being of opinion that the District Court had jurisdiction we pass to the merits. They also may be disposed of without much discussion. The line lies between *Cedar Street Co.* v. *Park Realty Co.*, 220 U. S. 107, 170, and *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; the latter case being carried perhaps a little farther by *McCoach* v. *Minehill Railway*, 228 U. S. 295. We are of opinion that this case is governed by the last two and that the decision was right. The question is rather what the corporation is doing than what it could do, 228 U. S. 305, 306, but looking even to its powers they are limited very nearly to the necessary incidents of holding a specific tract of land. The possible sale of the whole would be merely the winding up of the corporation. That of a part would signify that the Dry Goods Company did not need it. The claimants' characteristic charter function and the only one that it was carrying on was the bare receipt and distribution to its stockholders

of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged.

Judgment affirmed.

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

NEW ORLEANS TAX PAYERS' PROTECTIVE ASSOCIATION *v.* SEWERAGE AND WATER BOARD OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 192. Argued March 11, 1915.—Decided April 5, 1915.

The fact that water used for drinking and bathing goes into the sewer after it has been used does not make it water for sewerage purposes.

Act No. 270, Louisiana, of 1908, and ordinance of the City of New Orleans thereunder establishing rates for water for drinking and domestic purposes other than sewerage is not unconstitutional as impairing the obligation of the statute of August, 1897, providing for free water for sewerage purposes.

Where the later Act complained of goes no farther than the prior act, the obligation of whose contract is claimed to have been impaired, there is no ground for invoking the jurisdiction of this court under § 237, Jud. Code, and the writ will be dismissed.

THE facts, which involve the constitutionality under the obligation of contract clause of the Federal Constitution of certain statutes of Louisiana and ordinances of New Orleans relative to drainage and water supply, are stated in the opinion.

Mr. Charles Louque for plaintiff in error:

The taxpayers' petition for building a free sewerage system with free water therefor was understood to mean free water to all tax payers, connected to sewers. All fixtures used for cleansing purposes connected to sewers are entitled to free water. The Legislature had no power to alter this intent and impair the obligations of this contract by substituting the word domestic water. As to the status of the water companies see *New Orleans Water Co.* v. *Rivers*, 115 U. S. 680; *N. O. Gas Co.* v. *La. Light Co.*, 115 U. S. 650; *St. Tammany Water Works* v. *N. O. Waterworks*, 120 U. S. 64; *S. C.*, 164 U. S. 474.

Act No. 6 of 1899 created a contract under the Constitution of the United States.

The charter of the New Orleans Waterworks Co. was declared forfeited by the Supreme Court of Louisiana, because the company violated the conditions imposed by its charter: it did not furnish clear water, as directed, and it overcharged its customers, some to a greater extent and others to a less amount. A writ of error was taken to this court and dismissed for want of jurisdiction. *State* v. *New Orleans Water Co.*, 107 Louisiana, 3; *New Orleans Waterworks* v. *State*, 185 U. S. 336.

The property erected, and constructed by the tax payers, and their board, under the authority of this act was in no sense public property which the legislature could take away from them, and dispose of as they might wish.

It belongs to that species which is termed private property, which the legislature cannot take away from its owners. See cases cited in *N. O., Mobile &c. R. R.* v. *New Orleans*, 27 Louisiana, 521.

By § 35 of the act chartering the Sewerage and Water Board the act reserves to the General Assembly the right and power to amend the act in any respect not impairing the vested rights or the contract rights of the holders of the bonds issued under its provisions.

The court should enforce one of the conditions of the petition of the property tax payers, which cannot be amended by the legislature.

Mr. Walter L. Gleason, with whom *Mr. Isaiah D. Moore* was on the brief, for defendant in error:

The contract clause of the Federal Constitution is not directed against all impairments of contract obligations, but only against such as result from a subsequent exertion of the legislative power of the State. *Cross Lake Club* v. *Louisiana*, 224 U. S. 632.

When the state court gives no effect to the subsequent law, but decides on grounds independent of that law, that the right claimed was not conferred by the contract claimed to have been impaired, the case stands as though the subsequent law had not been passed and the court has no jurisdiction. *Missouri-Kansas Ry.* v. *Olathe*, 222 U. S. 187; *Fisher* v. *New Orleans*, 218 U. S. 439; *Hubert* v. *New Orleans*, 215 U. S. 175; *New Orleans Water Works* v. *Louisiana*, 185 U. S. 336; *Weber* v. *Rogan*, 188 U. S. 14; *Central Land Co.* v. *Laidly*, 159 U. S. 103; *Missouri &c. Ry.* v. *Kansas*, 222 U. S. 187; *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 38; *Mobile R. R.* v. *Mississippi*, 210 U. S. 187; *Bacon* v. *Texas*, 163 U. S. 207.

Where the constitution of the State provides, as it does in this instance, for a special tax after an election and in pursuance thereof an election was held and the property tax payers of the municipality voted upon themselves a special tax for a specified period for the purpose of constructing, maintaining and operating a sewerage, water and drainage system, the voting of the tax and the levying of same does not constitute a contract between the citizen tax payers and the State. No consideration moves to the State, other than the general public welfare; and the imposition of the tax is an exercise of a fundamental sovereign power. *Saunders* v. *Kohnke*, 109 Louisiana, 838; *Hunter*

v. *Pittsburg*, 207 U. S. 161; *Tucker* v. *Ferguson*, 22 How. 575; *West Wisconsin Railway* v. *Supervisor*, 100 U. S. 597.

The grant by the General Assembly of a charter to a municipal corporation, for the purpose of constructing, controlling, maintaining and operating the public water system, the public sewerage system and the drainage system of the City, title whereof shall be in the City, does not constitute a contract with the State, and the charter is subject to legislative control, except where restricted by the state constitution. *Saunders* v. *Kohnke*, 108 Louisiana, 838; *Hunter* v. *Pittsburg*, 207 U. S. 161.

Memorandum opinion by direction of the court. By Mr. Justice Holmes.

This is a petition to have an act of the Louisiana legislature (1908, No. 270), and ordinances of the respondent Board declared unconstitutional as impairing the obligation of a contract between the property tax payers and the City of New Orleans. The statute makes it the duty of the Board to require all inhabited premises in the City to be connected with the mains of the public water system 'and to take therefrom at least such water supply as shall be used on said premises for drinking and domestic purposes, exclusive of sewerage, at rates to be fixed.' The contract supposed is that the water for drinking and domestic purposes should be free. The constitution of the State, Art. 232, forbids taxation above a limit, which has been reached, except for permanent public improvements by vote of the property tax payers in the place concerned. In this case the tax payers petitioned the City to levy a special tax of two mills per annum for forty-three years for the acquisition of a system of water works and purification of the water and for the construction 'of a free sewerage system, with free water therefor.' The proposition was adopted by special election, ordinance, statute and con-

stitutional amendment, and this adoption is relied upon as making a contract to the above effect. Under the rules of the Board 1,000 gallons per quarter are allowed free, for flushing closets, but rates are fixed and charged for water otherwise used. These charges were held to be consistent with the actual contract, if any, by the Supreme Court of the State.

The argument for the plaintiffs in error is that as all water that goes into the sewers is sewerage after it gets there, the arrangement required that all such water should be free. But the character of the water that is to be free is determined before it reaches the sewer. It is water 'therefor'—that is for a free sewerage system; or, in other words, water that is discharged into the sewers for the purpose of ensuring the working of a free sewerage system. According to the finding of the Supreme Court the allowance for that purpose is liberal. The original statute of August 18, 1899, that was ratified by the Constitutional Amendment itself, provided that the Board should "have power to fix the rates to be charged private consumers of water, and to collect the same from all persons who use water (except for sewerage purposes only), from the public water supply of the City of New Orleans" &c. § 21. Obviously drinking or bathing water is not used for sewerage purposes, although it goes into the sewer after it has served its end, whereas water used for flushing closets does go into the sewer for sewerage purposes, simply to make them work. The Act of 1908 goes no farther than that of 1899, and there is no ground for invoking the jurisdiction of this court.

Writ dismissed.

SMOOT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 208. Argued March 18, 19, 1915.—Decided April 5, 1915.

A letter from the Government engineer in charge to a contractor, who had, under written contract with the United States, agreed to furnish a specified amount of material at a specified price, that a larger amount of material would probably be required, *held* in this case not to be a contract for the additional amount or a modification of the original contract.

As a general rule, specific or individual marks and figures control generic ones; and there is an analogy between the control of specific figures over estimates and that of monuments over distances. *Brawley* v. *United States*, 96 U. S. 168.

Smoot v. *United States*, 48 Ct. Cl. 427, affirmed.

THE facts, which involve a claim for profits on a contract for sand with the United States for the Washington City Filtration Plant which the United States refused to receive, are stated in the opinion.

Mr. William G. Johnson for appellant:

The order of February 17, 1905, is an absolute and unconditional order to supply 151,000 cubic yards of sand between that date and October.

That order is not only an absolute and unconditional order by its terms, but was so intended at the time.

The engineer officer in charge had lawful authority to make the order of February 17, 1905.

The United States is liable to claimant for the anticipated profits on the sand he was not permitted to deliver.

Claimant is entitled to recover for the cost of the new washing and screening plant.

The record contains no finding of fact supporting the conclusion of law disallowing the cost of the new plant.

In support of these contentions, see *Brawley* v. *United States*, 96 U. S. 500; *Bulkley* v. *United States*, 19 Wall. 37; *Parish* v. *United States*, 100 U. S. 500; *United States* v. *Behan*, 18 Ct. Cl. 687; *United States* v. *Behan*, 110 U. S. 338.

Mr. Assistant Attorney General Thompson for the United States:

The Government is not liable for the alleged anticipated profits on the additional cubic yards of sand. *Brawley* v. *United States*, 96 U. S. 168; *Watts* v. *Camors*, 115 U. S. 353, 360; *Plumley* v. *United States*, 226 U. S. 545.

The Government is not liable for the cost of the additional washing and screening plant.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for the profits that would have been realized on sand that the claimant alleges to have been contracted for by the United States but that the United States refused to receive, and for the cost of additional plant alleged to have been provided for the purpose of furnishing the sand. The Court of Claims rejected the claim. 48 Ct. Cl. 427. The facts are as follows:

By a contract approved on April 20, 1903, the claimant undertook to furnish for the Washington filtration plant 140,200 cubic yards, more or less, of filter sand, to be deposited in twenty-nine filter beds, at $2.65 per yard. The contract and specifications showed explicitly that the quantities mentioned were approximate only, and in October, 1904, there was a discussion in the claimant's presence as to the probabilities of an increase over the 140,200 yards to meet shrinkage, which had not been taken into account. The delivery began in August, 1904, but the claimant's progress was not satisfactory to the Government engineers. By January 3, 1905, 15 of the

29 beds were completed and the engineer in charge wrote to the claimant directing him to complete the deliveries in the 15 beds by placing there before May 15, 70,000 yards in addition to 20,936 yards then in place. The claimant replied holding out prospects of performance and saying that he had another plant under way. But on February 17, the total sand in place was 28,231 cubic yards.

On that date the engineer in charge wrote to the claimant saying that he had 'laid down a general program of work to be done during each of the months from now on,' with the following particulars among others:

"February and March....Filter sand, complete beds 17, 18, 21, 22.....19,000 cubic yds.
April....Filter sand, complete 15, 16, 20 about.....18,000 cubic yds.
May....Filter sand, complete 3, 4, 5, begin 1.....21,000 cubic yds.
June....Filter sand, complete 1, 2, 9, 14.....21,000 cubic yds.
July....Filter sand, complete 7, 8, 13, begin 12.....21,000 cubic yds.
August....Filter sand, complete 10, 11, 12, 6.....21,000 cubic yds.
September....Filter sand, complete 25, 26, 27.....18,000 cubic yds.
October....Filter sand, complete 28, 29.....12,000 cubic yds.

In the program outlined above the quantity of sand going into each bed has been assumed as 6,000 cubic yards. The depth of sand varies for the different beds but 6,000 yards is about the average. Three and one-half beds has been indicated as a month's work. In some cases 3½ beds will require more than 21,000 cubic yards of sand while in others they will require less. In any case the yardage is the item to which especial attention must be paid, and this should in all cases be equal to that indicated in the program. . . . You are required to take notice that the quantities of work, and, unless otherwise ordered, the locations of the same above scheduled for the several months, will be rigorously exacted as a minimum, and any failure on your part to perform in any month the quantity of work stipulated for that month

will be considered by me as sufficient cause for the exercise" of several stringent rights, to go elsewhere, to annul the contract, &c.

This letter is relied upon by the claimant as a contract making definite the amount that was stated only approximately by the original one. It called for 151,000 yards in addition to the 28,231 yards in place, or in all 179,231, as against the 140,200, more or less, originally mentioned. The actual amount needed after allowing for shrinkage ultimately was fixed by the engineers at about 157,000 cubic yards, but the claimant was not notified until May 29, when he immediately entered a protest. He actually supplied 157,725 yards. The claim is for the net profit upon the 21,506 yards that would have been furnished had the figures of the letter been exact. As to the duplicate plant it is found that it was erected to provide for such increased deliveries per month as were necessary under the claimant's contract. There is no justification in the finding for the attempt to attribute the second plant to the letter of February 17, and therefore so much of the claim may be dismissed. It is not necessary to consider whether the claimant would fall under the general rule that in contracts for sale and delivery the purchaser is not concerned with the steps that his vendor may take in order to enable himself to perform; *United States* v. *O'Brien*, 220 U. S. 321, 327; *Bacon* v. *Parker*, 137 Massachusetts, 309, 311; or rather under *Parish* v. *United States*, 100 U. S. 500. We also pass the question whether complete indemnity is not embraced in the claim for profits. *Noble* v. *Ames Mfg. Co.*, 112 Massachusetts, 492.

The appellant admits that neither claim can be maintained unless the letter quoted bound the United States as an unqualified contract. We agree with the Court of Claims that it neither purported to modify the formal agreement originally made nor had that or any effect upon it. The letter was a spur to a tardy contractor and

a sketch of what was expected, but it said nothing to indicate that the engineer in charge was attempting to affect the agreement made by his superior, if he could have done so, or if, notwithstanding the reasons given by the Court of Claims, the claimant could recover for anything but the work actually done in any event. The obviously dominant measure of the sand to be furnished was what was needed for the filters, and the figures in the letter on their face were the engineer's estimate of what would be needed, not an order for those amounts whether needed or not. *Brawley* v. *United States*, 96 U. S. 168. In that case Mr. Justice Bradley refers to the control of monuments over distances and estimates of quantity, as an analogy. In general, specific or individual marks prevail over generic ones. *Praesentia corporis tollit errorem nominis. Watts* v. *Camors*, 115 U. S. 353. *United States* v. *Harvey Steel Co.*, 196 U. S. 310, 318. In *Parish* v. *United States*, 100 U. S. 500, the contract to furnish the ice required at certain points named, for armies that were in the field, manifestly referred to no certain objective standard, but could be made definite only by orders. Here no one could have supposed that the United States undertook to purchase more than was needed for its plant and what was needed only was roughly estimated in round numbers by the engineer, to let the dilatory claimant know what he must be ready to do.

Judgment affirmed.

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

HENKEL *v.* UNITED STATES.

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

No. 142. Argued January 20, 21, 1915.—Decided April 5, 1915.

There is no question of the authority of the United States to devote the Indian lands involved in this action to irrigation purposes.

Under the provisions of the Reclamation Act of June 17, 1902, the Secretary of the Interior had power to acquire all rights and property necessary therefor, including those of allottee Indians, by paying for their improvements and giving them the right of selecting other lands.

The restrictions on alienation of lands allotted to Indians within the area of the Milk River Irrigation Project did not extend to prohibiting an allottee Indian from selling his improvements to the United States and selecting other lands so that the United States could use the lands selected for purposes of an irrigation project as provided by act of Congress.

In this case *held* that the mother of Indian minors whose father was not an Indian was the natural guardian and her relinquishment of the original allotment on their behalf was proper and binding.

196 Fed. Rep. 345, affirmed.

THE facts, which involve the rights of allottee Indians and the power of the Government to purchase improvements and make new allotments where the land allotted is needed for reclamation purposes, are stated in the opinion.

Mr. Thomas J. Walsh for plaintiff in error.

Mr. Assistant Attorney General Wallace, Jr., for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was an action in ejectment brought by the United States in the United States Circuit Court for the

District of Montana, to recover certain lands in the Blackfeet Indian Reservation. The defendants (now plaintiffs in error) other than Henry Henkel are members of the Piegan Tribe of Indians. Henry Henkel is the husband of Caroline Henkel and the other defendants to the action are their children. They lived together as a family and occupied the lands in question, upon which they had constructed certain buildings and improvements. On November 5, 1906, Caroline Henkel, for herself and two daughters, together with her two sons George Henkel and William Henkel, executed a document addressed to the Commissioner of Indian Affairs, by which, describing themselves as members of the Piegan Tribe of Indians, they undertook to relinquish all claims to lands and buildings then occupied by them on the Blackfeet Indian Reservation, Montana, comprising about 800 acres of land, the lands being situated at the foot of Lower St. Mary Lake, and south of Swift Current Creek. The conditions of the surrender of the lands for use in connection with the proposed St. Mary Reservoir of the United States Reclamation Service were that they should be paid the sum of $7,500 for the improvements on such selections, and be subsequently allowed to select allotments of equal area, or as provided by law, from the unoccupied lands of the Blackfeet Reservation in Montana. Henry Henkel, as husband and father, concurred in the agreement and endorsed his approval thereon.

On February 15, 1907, the price named in the instrument just referred to, seven thousand five hundred dollars, was paid to Caroline Henkel, who for herself and two daughters, and George and William Henkel, for themselves, relinquished to the United States all their right, title and claim in and to the lands and buildings then occupied by them on the Blackfeet Indian Reservation, Montana, and located at the foot of Lower St. Mary Lake and south of Swift Current Creek, and released the United

States from all claims for damages to all improvements of whatsoever nature on the land. This receipt and release was also agreed to by the husband, Henry Henkel.

These facts are set up in the complaint, and it is averred that pursuant to the Act of Congress of June 17, 1902, c. 1093, 32 Stat. 388, the Government had made investigations of and surveys for an irrigation project which was known as the Milk River Irrigation Project, under and by virtue of which certain lands in the northern part of the State of Montana were to be irrigated; that among other works forming part of the system to be established, a dam was to be built at the foot of the Lower St. Mary Lake, by which the lands above mentioned, and now in controversy, were to be flooded, and that the same were necessary for flooding in connection with the reclamation project above referred to.

The defendants answered, admitting the execution and delivery of the instrument above referred to, and the payment of the money, as recited in the release and receipt. They averred that they were all members of the Piegan Tribe of Indians, except Henry Henkel, and had the right as such Indians to be upon the Blackfeet Indian Reservation; that they had settled upon the lands in question more than ten years before the beginning of this suit, which, since a recent survey, were designated by congressional subdivisions, and embraced the land in controversy, and ever since their settlement upon said lands they had occupied the same in common as their home, and since the passage of the act of March 1, 1907, c. 1015, 2285, 34 Stat. 1035, opening the reservation to settlement, they had selected such lands as their allotments under that act, the lands being grazing in character. The answer sets out the selection of each of the defendants entitled to allotments and it is alleged that each acquiesced in the selection made by the other. The answer then avers that the allotting officers had refused to allot the lands in

question to them, but that under protest William Henkel, George Henkel and Lizzie Henkel had been allotted lands elsewhere, which lands they offered to surrender if the lands selected by them should be allotted to them; the refusal to allot such lands, as the answer avers, being based upon the instruments referred to in the complaint. The answer averred that the lands were at all times since the execution of these instruments worth more than the price offered by the Government, which sum the defendants offered to return.

To this answer a demurrer was sustained by the court, and the plaintiffs in error electing to stand upon the answer, judgment was rendered accordingly, awarding to the United States the possession of the premises. The case was taken to the Circuit Court of Appeals for the Ninth Circuit, where the judgment of the lower court was affirmed. 196 Fed. Rep. 345. The case is now here upon writ of error.

The contention of the plaintiffs in error, defendants below, is that no statute of the United States has conferred authority upon the Government or its officers to acquire the lands described by the relinquishment from the Henkels, as above set forth. Such action, it is contended, would amount to an act of bad faith upon the part of the Government toward these Indians, in view of their established rights in these lands; and to permit the reclamation statute of 1902 to have such effect, it is insisted, would be virtually to permit it to repeal previous acts of Congress disposing of these lands for the benefit of the Indians.

A consideration of these matters requires some examination of the previous status of the Indians and what Congress has undertaken to do by legislation in their behalf.

By the act of February 8, 1887, c. 119, 24 Stat. 388, as amended February 28, 1891, c. 383, 26 Stat. 794, authority was given to the President, as to any reserva-

tion which he should consider advantageous for agricultural or grazing purposes, to allot, after survey thereof, "to each Indian located thereon one-eighth of a section of land"; and if the lands allotted were valuable for grazing purposes only, to allot to each a quarter-section of land. Allotments, which were to be set apart under the provisions of the act were to be selected by the Indians, heads of families selecting for their minor children, in such manner as to embrace the improvements of the Indians making the selection. Upon the approval of the allotments by the Secretary of the Interior, patents were to issue therefor, in the name of the allottees, which patents should declare that the United States would hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indians to whom allotted, and that conveyances of land set apart and allotted as provided in the statute, or any contract concerning the same, before the expiration of the time above mentioned, should be null and void. In that act it was provided that nothing therein contained should affect the power of Congress to grant the right of way through any lands granted to an Indian for railroads, or other highways or telegraph lines, for the public use, or to condemn such lands to public uses upon making just compensation.

On September 28, 1895, an agreement was made with the Indians (29 Stat. 353) which was approved by the act of June 10, 1896, c. 398, 29 Stat. 321, 355. Article V of that agreement provides as follows:

"Since the situation of the Blackfeet Reservation renders it wholly unfit for agriculture, and since these Indians have shown within the past four years that they can successfully raise horned cattle, and there is every probability that they will become self-supporting by attention to this industry, it is agreed that, during the existence of this agreement no allotments of land in

severalty shall be made to them, but that this whole reservation shall continue to be held by these Indians as a communal grazing tract upon which their herds may feed undisturbed; and that after the expiration of this agreement the lands shall continue to be held until such time as a majority of the adult males of the tribe shall request in writing that allotment in severalty shall be made of their lands:" provided, however,

"That any member of the tribe may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of such description shall give the said members of the tribe the right to take such land when allotments of the land in severalty shall be made."

While the Henkel family had occupied this 800-acre tract, it does not appear that they had filed a description of the land and improvements with the agent, so as to give them the right to take such land when allotment of the same should be made. Nevertheless, they would have a strong equity for recognition, in view of their settlement upon the land and construction of improvements thereon, and but for the relinquishment relied upon in this case, they might perfect their right to the allotment. It is to be noted, however, that this agreement, in article VII, contains an important recognition of a reserved right of the Government to use the lands upon compensation being made therefor, for certain public improvements. As it is therein provided, 29 Stat. 356 "whenever, in the opinion of the President, the public interests require the construction of railroads, or other highways, telegraph or telephone lines, canals and irrigating ditches, through any portion of this reservation, right of way shall be and is hereby granted for such purposes, under such rules, regulations, limitations, and restrictions

as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians."

While the plaintiffs in error were thus occupying the lands under this agreement and statute, the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388, was passed. That act outlines a comprehensive reclamation scheme, and provides for the examination and survey of lands and for construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semi-arid lands. Section VII of that act provides (p. 389)—

"That where, in carrying out the provisions of this act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation."

Section X of the same act provides—

"The Secretary of the Interior is hereby authorized to perform any and all acts . . . necessary and proper for the purpose of carrying the provisions of this act . . . into effect."

In 1902, preliminary surveys for the Milk River Reclamation Project were begun by the Reclamation Service, and the boundaries of the St. Mary Dam and its right of way for flooding area were outlined. On February 28, 1903, the Secretary of the Interior, on recommendation of the director of the service, withdrew, under the terms of the Reclamation Act, a strip of land one-half mile wide around lower St. Mary Lake and on each side of the river, after which construction was authorized and a large amount of work has since been done.

The authority of the Congress of the United States to devote these lands to irrigation purposes is unquestioned. As a matter of fact, it might, if it saw fit, remove the Indians therefrom and devote the land to such uses.

Recognizing the injustice of arbitrary appropriations to other uses, no effort has been made to take these lands without compensation to the Indians for the improvements which they have made, and they have been given the right to select other lands in place of those released. The reclamation projects undertaken by the Government are very extensive, and cover many States; and they must involve in their construction, the flooding of lands in connection with dams designed to hold water for such purposes; and must necessarily include much territory which is included in Indian reservations. This situation was of course well known to Congress when it passed the Reclamation Act, and we cannot doubt, in view of the broad authority conferred by §§ VII and X above quoted, that it was the purpose of Congress to give the Secretary of the Interior the right to acquire such rights as are here involved, when necessary for reclamation purposes. In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for that purpose, and to acquire the same, either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe it was the intention of Congress, because of the Indians' right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the reclamation projects which it was evidently the purpose of Congress to authorize and promote. The Secretary of the Interior, in interpreting this act, dealt fairly with the Indians in so far as this record shows, paid them for the improvements they had put upon the lands, and gave them the right to select other lands which might be open to allotment, of equal area, as provided by law, from the unoccupied lands

of the Blackfeet Indian Reservation. In so doing, we think he acted within his authority, and was executing the purposes intended by the act of Congress to which we have referred.

The Circuit Court of Appeals in its decision laid emphasis upon the case of *Williams* v. *First National Bank*, 216 U. S. 582, in which this court recognized the right of one Indian to surrender and relinquish to another Indian a preference right to an allotment of a tract of land. In that case it was held that one Indian might sell his improvements and holdings to another Indian for allotment, and lay his own on other land which he might find vacant, or which he might, in turn, purchase from another Indian, and the Circuit Court of Appeals held that, this being so, as a matter of course, and for stronger reasons, an Indian might relinquish his rights to the United States, and that restrictions had been placed upon the power of the Indians to alienate their lands or convey their rights of possession only for their protection, and not for the purpose of restricting their right to deal with the United States or to relinquish their rights to the Government, citing *Lykins* v. *McGrath*, 184 U. S. 169, and *Jones* v. *Meehan*, 175 U. S. 1. Without questioning the correctness of this reasoning, we think the purpose of the United States to acquire any property necessary for the reclamation project embraced such transactions as the Secretary had in this case with the Indians, and the action which he took under the authority conferred by that act wholly justified all that was done in the premises.

As to the contention that the daughters for whom the mother signed are not bound by the release: The mother undertook to act for them as minors, and there is nothing to indicate that they were not such, as there is no allegation in the answer to which the demurrer was sustained that they were adults and therefore capable of acting for themselves. The references to the regulations of the

Interior Department, which are called to our attention by the Government, show that that Department has uniformly required the interest of minors to be represented by the natural guardian, which in this case was the mother. There is no court to which they could have applied for the judicial appointment of a guardian, and we see no reason to question the legality of the practice of the Department in this respect. A communication from the Acting Commissioner of Indian Affairs, attached to the Government's brief, declares that that office and the Interior Department have uniformly held that the natural guardian could execute valid relinquishments in behalf of minor children, and we see no reason why this authority should be questioned.

We reach the conclusion that the Court of Appeals did not err in affirming the judgment of the Circuit Court, and its judgment is accordingly

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in this decision.

SLIGH *v.* KIRKWOOD, SHERIFF OF ORANGE COUNTY, FLORIDA.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 185. Argued March 9, 10, 1915.—Decided April 5, 1915.

It is within the police power of the State to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits then and there immature and unfit for consumption.

While Congress has exclusive power to regulate interstate commerce, and the State may not, when Congress has exerted that power, in-

terfere therewith, even in the otherwise just exercise of its police power, the State may in such a case act until Congress does exert its authority, even though interstate commerce may be incidentally affected.

Limitations on the police power are hard to define; in its broadest sense that power includes all legislation and almost every function of civil government; it embraces regulations designed to protect and promote public convenience, property, welfare, safety and health.

This court takes judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida.

A State may protect its reputation in foreign markets by prohibiting the exportation of its products in such an improper form as would have a detrimental effect on its reputation.

This court will not consider the effect of a construction of a statute prohibiting the exportation of fruit when immature and unfit for consumption as food as prohibiting its export while immature for other commercial purposes than that of food until the state court has so construed it.

The provisions in the Federal Food and Drugs Act relating to shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition do not apply to fruit unfit for consumption because green or immature. Congress has not covered the latter field.

Chap. 6236, § 1, Laws of Florida, of 1911, prohibiting the delivery for shipment of citrus fruits immature or otherwise unfit for consumption is not unconstitutional as an attempt to regulate interstate commerce.

65 Florida, 123, affirmed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a statute of Florida prohibiting the sale or shipment of citrus fruits which are immature or otherwise unfit for consumption, are stated in the opinion.

Mr. Charles B. Robinson, with whom *Mr. E. J. L'Engle* was on the brief, for plaintiff in error:

Section 1 of Chapter 6236, in so far as the same applies to interstate shipments, is in conflict with and contravenes § 8, Art. I, of the Federal Constitution, which provides that Congress shall have the power to regulate

commerce with foreign nations and among the several States and with the Indian tribes.

The plaintiff in error was not and could not legally be held in custody for the alleged violation of that act, upon and for an alleged shipment of citrus fruits out of and beyond the limits of the State, the validity of said section being denied and drawn in question on the ground that it is repugnant to and in contravention of the commerce clause of the Federal Constitution.

In support of these contentions, see *Stone* v. *Mississippi*, 101 U. S. Sup. Ct. 814; *Adams Expr. Co.* v. *New York*, 232 U. S. 14; *Kansas City &c. Ry.* v. *Kaw Valley District*, 233 U. S. 75; *Leisy* v. *Harden*, 135 U. S. 100; *S. C.*, 34 Law Ed. 128; *Minnesota Rate Cases*, 230 U. S. 352; *Bowman* v. *Chi. & N. W. R. R.*, 125 U. S. 479; *Vermont* v. *Peet*, 80 Vermont, 449; *S. C.*, 68 Atl. Rep. 661; *S. C.*, 14 L. R. A. N. S. 677.

Mr. Charles B. Parkhill for defendant in error:

Section 1, Chapter 6236 of the Laws of Florida, 1911, is constitutional and a valid exercise of the police power of the State. It is designed to promote the public health, and the police power of the State embraces regulations for that purpose. *Wilkerson* v. *Roher*, 140 U. S. 545.

The regulation of food stuff has in view the protection of health. Freund Police Power, Chapter 28, 232.

The term "provisions" means "food." Oranges are highly nutritious and are food. *State* v. *Angello*, 71 N. H. 224; 6 Words & Phrases, 5754.

Any substance which, taken into the body, is capable of sustaining or nourishing the living is food. 13 Am. & Eng. Encl. (2d ed.) 729; 3 Words & Phrases, 2856; *Arbuckle* v. *Blackburn*, 113 Fed. Rep. 616, 622.

The term "fruit" includes oranges. *Humphreys* v. *Union Ins. Co.*, 12 Fed. Cas. 876, 880; 4 Words & Phrases, 2994.

One of the informations filed against the plaintiff in error, covers citrus fruits, which are not only immature, but otherwise unfit for consumption. Clearly this statute is designed to protect the public health. *People* v. *Chiperly*, 101 N. Y. 634.

The statute is not in contravention of the commerce clause of the Federal Constitution. It does not seek to limit, regulate and control interstate commerce.

To constitute interstate commerce there must be an article or commodity, the subject of commerce, and destined to pass from one State to another. Only such commodities as may lawfully become the subjects of purchase, sale or exchange, are articles of interstate commerce, within the protection of the commerce clause of the Constitution. *Turner* v. *Maryland*, 107 U. S. 17.

The State of Florida has a right to say what shall be lawful, merchantable citrus fruits.

Articles which, on account of their existing condition, would bring and spread disease or pestilence, and meats or other provisions unfit for human use, are not legitimate subjects of trade and commerce, and are not within the protection of the commerce clause of the Constitution, but fall within the police power of the State. 17 Am. & Eng. Encl. (2d ed.) 67, 68.

When the legislature of Florida prohibits the sale or shipment of immature citrus fruits, or fruits unfit for consumption, it thereby prevents said citrus fruits from becoming an article of interstate commerce. *People* v. *Hesterberg*, 211 U. S. 31; *Dent* v. *West Virginia*, 129 U. S. 114; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *State* v. *Harrub*, 95 Alabama, 176.

The power of Congress to regulate interstate commerce does not interfere with the right of the State to prohibit its own property from becoming an article or commodity of interstate commerce, and a statute may take private

property out of the commerce clause of the Constitution, may outlaw such private property, if it be inherently bad or liable to affect the health, prosperity or welfare of the people of the State.

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity or the public welfare, as well as those designed to promote the public safety or the public health. *Chicago, B. & Q. R. R.* v. *Drainage Com'rs*, 200 U. S. 561; *Lake Shore Ry.* v. *Ohio*, 173 U. S. 285; *Atlantic Coast Line* v. *Coachman*, 59 Florida, 130; *Commonwealth* v. *Savage*, 29 N. E. Rep. 468.

Where a law is for the protection of life, liberty and prosperity or the general welfare, there is no limitation upon the power of the legislature except as is found in the Constitution. *Hawthorn* v. *People*, 109 Illinois, 302.

The police power extends to regulations to preserve the reputation of the States in foreign markets. Freund, Police Power, § 276; *Critsman* v. *Northup*, 8 Cow. (N. Y.) 46.

The legislature may have known that immature citrus fruits, or citrus fruits unfit for consumption, shipped beyond the limits of the State of Florida would destroy the reputation of this important product of the State in the markets of the world. The legislature may have also known that the taking of immature citrus fruits from the trees would injure the trees and thus hurt the prosperity of the people of the State. The legislature may have known that the sale of immature oranges might cause the sale of immature and poor seed for the planting of orange groves, and thus hurt the prosperity of the State. *Plumley* v. *Massachusetts*, 155 U. S. 461; *Sherlock* v. *Alling*, 93 U. S. 99; *Dent* v. *West Virginia*, 129 U. S. 114.

The provisions of the act of 1911 bear a reasonable relation to the evil sought to be cured, and this court will uphold same. *Eubank* v. *Richmond*, 226 U. S. 137. *State* v. *Peet*, 80 Vermont, 449, distinguished.

MR. JUSTICE DAY delivered the opinion of the court.

A statute of the State of Florida undertakes to make it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.[1]

Plaintiff in error, S. J. Sligh, was charged by information containing three counts in the Criminal Court of Record in Orange County, Florida, with violation of this statute. One of the counts charged that Sligh delivered to an agent of the Seaboard Air Line Railway Company, a common carrier, for shipment to Winecoff & Adams, Birmingham, Alabama, one car of oranges, which were citrus fruits, then and there immature and unfit for consumption. Upon petition for writ of *habeas corpus* in the Circuit Court of Florida for Orange County, the court refused to order the release of Sligh, and remanded him to the custody of the Sheriff. Upon writ of error to the Supreme Court of Florida, that judgment was affirmed (65 Florida, 123), and the case is brought here.

The single question is: Was it within the authority of the State of Florida to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits,—oranges in this case,—then and there immature and unfit for consumption?

It will be observed that the oranges must not only be immature, but they must be in such condition as renders

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[1] "Section 1. That it shall be unlawful for any one to sell, offer for sale, ship or deliver for shipment any citrus fruits which are immature or otherwise unfit for consumption, and for any one to receive any such fruits under a contract of sale, or for the purpose of sale, or of offering for sale, or for shipment or delivery for shipment. This section shall not apply to sales or contracts for sale of citrus fruits on the trees under this section; nor shall it apply to common carriers or their agents who are not interested in such fruits and who are merely receiving the same for transportation." Chap. 6236, Laws of Florida of 1911.

them unfit for consumption; that is, giving the words their ordinary signification, unfit to be used for food. Of course, fruits of this character, in that condition, may be deleterious to the public health, and, in the public interest, it may be highly desirable to prevent their shipment and sale. Not disputing this, the contention of the plaintiff in error is that the statute contravenes the Federal Constitution in that the legislature has undertaken to pass a law beyond the power of the State, because of the exclusive control of Congress over commerce among the States, under the Federal Constitution.

That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the *Minnesota Rate Cases*, 230 U. S. 352.

While this proposition seems to be conceded, and the competency of the State to provide local measures in the interest of the safety and welfare of the people is not doubted, although such regulations incidentally and indirectly involve interstate commerce, the contention is that this statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other States who may receive the fruits from Florida in a condition unfit for consumption; and however commendable it may be to protect the health of such foreign peoples, such purpose is not within the police power of the State.

The limitations upon the police power are hard to define,

and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. *New York* v. *Miln*, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. *Barbier* v. *Connolly*, 113 U. S. 27. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield* v. *United States*, 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago &c. Railway* v. *Drainage Commissioners*, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: "Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. . . . And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.'" *Eubank* v. *Richmond*, 226 U. S. 137, 142.

The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles,

it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. "Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution." *Bowman* v. *Railway Company*, 125 U. S. 465, 489.

Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the State. In *Geer* v. *Connecticut*, 161 U. S. 519, a conviction was sustained of one who was charged with having in his possession game birds, killed within the State, with the intention of procuring transportation of the same beyond state limits. This law was attacked upon the ground that it was a direct attempt to regulate commerce among the States. After discussing the peculiar nature of such property, and the power of the State over it, this court said (p. 534): "Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson*, 128 U. S. 1; *Hall* v. *De Cuir*, 95 U. S. 485; *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Gibbons* v. *Ogden*, 9 Wheat. 1." In *New York, ex rel. Dilz*

v. *Hesterberg*, 211 U. S. 31, it was held that the State might punish the sale of imported game during the closed season in New York, notwithstanding such game was imported from abroad, and was thus beyond the control of the State, the law being sustained upon the ground that, while foreign commerce was incidentally affected, the State might prohibit the sale of such game in order to protect local game during the closed season; and to make such regulations effective required the prohibition of the sale of all game of that kind.

So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the State from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation.

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market. The shipment of fruits, so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the State. The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be

said that this legislation has no reasonable relation to the accomplishment of that purpose.

As to the suggestion that the shipment of such fruit may be legitimately made for commercial purposes, for the purpose of making wine, citric acid, and possibly other articles, it is sufficient to say that this case does not present any such state of facts, and of course the constitutional objection must be considered in view of the case made before the court, which was a delivery for shipment of oranges so immature as to be unfit for consumption. Whether such a case, as supposed, of shipment for commercial purposes, would be within the statute, would be primarily for the state court to determine, and it is not for us to say, as no such case is here presented.

It is pointed out in the opinion of the Supreme Court of Florida, and we repeat here, that no act of Congress has been called to our attention undertaking to regulate shipments of this character, which would be contravened by the act in question. As the Florida court says, the sixth subdivision of the Food and Drugs Act, if citrus fruits should be held to be within the prohibitions against vegetable substances, includes only such as are in whole or in part filthy, decomposed or putrid. Green or immature fruit, equally deleterious to health, does not seem to be within the Federal act. Therefore until Congress does legislate upon the subject, the State is free to enter the field. *Savage* v. *Jones*, 225 U. S. 501.

In the *Vermont Case*, referred to by counsel for plaintiff in error, *State of Vermont* v. *Peet*, 80 Vermont, 449, the act made it unlawful to ship without the State veal less than four weeks old when killed, and it was held to run counter to the Federal act and regulation upon the same subject.

We find no error in the judgment of the Supreme Court of Florida, and it is

Affirmed.

STATE OF SOUTH CAROLINA, EX REL. PHOENIX MUTUAL LIFE INSURANCE COMPANY *v.* McMASTER, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

STATE OF SOUTH CAROLINA, EX REL. SHERFESEE *v.* SAME.

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

Nos. 195, 196. Argued March 12, 1915.—Decided April 5, 1915.

It is within the power of the State to determine for itself the conditions upon which a foreign corporation may do business within its limits, so long as it does not impose upon it any conditions depriving it of rights secured under the Federal Constitution, and the State may even altogether exclude from doing business within its borders a corporation not doing an interstate business so long as no rights conferred by the Constitution and laws of the United States are destroyed or abridged.

Where the state statute authorizes an officer of the State to license some foreign corporations to do intrastate business under specified conditions and to reject others, the exercise of that authority in good faith by such officer does not amount to denial of equal protection of the law as to a corporation excluded where the action was based upon a classification which was not so arbitrary and unreasonable as to fall within the prohibitions of the Fourteenth Amendment.

A classification of foreign insurance corporations for the purpose of establishing conditions under which they will be licensed to do business within the State based on the amount of their investments in state securities is not so arbitrary as to amount to a denial of equal protection of the laws.

The action of the Insurance Commissioner of South Carolina, in requiring foreign insurance corporations having less than a certain proportionate amount of investments in state securities to make deposits while those having that amount might give surety bonds is not an arbitrary classification amounting to denial of equal protection of the law.

Where the state court has sustained the action of a state officer as being within his statutory authority, this court is not concerned with that question; the only question before it is whether the conduct of state authority transgresses the provisions of the Federal Constitution.

94 S. Car. 379, and 382, affirmed.

THE facts are stated in the opinion.

Mr. T. Moultrie Mordecai for plaintiffs in error:

The Insurance Commissioner has gone beyond the scope of the act from which he derived his power, and has arbitrarily discriminated between the insurance companies in the same class. His action is not sanctioned by the laws of the State, but constitutes a deprivation of the property of this plaintiff in error without due process of law, and a denial to it of the equal protection of the law within the meaning of the Fourteenth Amendment.

For definition of approved bonds, see Century Dictionary, Anderson's Law Dictionary, *sub* bonds and securities.

Classification, in its very definition, implies equality of the individuals of each class. Discrimination between individuals of the same class is a denial of the equal protection of the laws, and a deprivation of property without due process of law. The same means and methods should be applied impartially to all the constituents of each class, and no greater burdens shall be laid upon one than are laid upon another in the same calling. *Leeper* v. *Texas*, 139 U. S. 462; *Kentucky R. R. Tax Cases*, 115 U. S. 337; *Barbier* v. *Connolly*, 113 U. S. 27; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 228; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Moore* v. *Missouri*, 159 U. S. 678; *Florida &c. Ry.* v. *Reynolds*, 183 U. S. 471; *Mobile & O. Ry.* v. *Tennessee*, 153 U. S. 486; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *Mich. Cent. R. R.* v. *Powers*, 201 U. S. 245; *S. W. Oil Co.* v. *Texas*, 217 U. S. 114; *Citizens' Tel. Co.* v. *Fuller*, 229 U. S. 332; *Magown* v. *Bank*, 170

U. S. 283; *Giozza* v. *Tiernan*, 148 U. S. 657; *Cotting* v. *Kansas City*, 183 U. S. 79; *Insurance Co.* v. *Mettler*, 185 U. S. 308; *Field* v. *Asphalt Co.*, 194 U. S. 618; *American Sugar Co.* v. *Louisiana*, 179 U. S. 89; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 334; *Penn. Ins. Co.* v. *New York*, 134 U. S. 594; *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

The very idea of classification is that of inequality. *A., T. & S. F. Ry.* v. *Matthews*, 174 U. S. 96.

A classification between individuals otherwise having resemblances must be based upon reason and sound justice, and the power if so given cannot be arbitrarily exercised. *International Harvester Co.* v. *Missouri*, 234 U. S. 199; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20.

The action of the commission in refusing the bonds of plaintiff in error, was discrimination of the most arbitrary nature, and a clear invasion of the right of the plaintiff to the equal protection of the laws as secured by the Fourteenth Amendment. He has not only undertaken to disregard the plain language of the statute, in regard to classification of the various kinds of insurance companies, and to impose most arbitrary and unequal terms upon individuals of the same class, but he has taken upon himself to go further, and to say that the very terms which he himself has imposed may or may not be insisted upon, as he may see fit.

The principle involved in *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, is the same as in this case; the result is not the imposition of an unjust burden upon the existence of plaintiff in error in the State of South Carolina, but the very destruction of that existence.

Mr. F. H. Dominick for defendant in error:

The insurance business cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. *Bank of Augusta* v. *Earle*, 38 U. S. 519; *Paul* v. *Virginia*,

75 U. S. 168; *Liverpool Ins. Co.* v. *Massachusetts*, 77 U. S. 566; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Philadelphia Fire Assn.* v. *New York*, 119 U. S. 110; *LaFayette Ins. Co.* v. *French*, 59 U. S. 404; *Society for Savings* v. *Coite*, 73 U. S. 594; *Providence Institute* v. *Massachusetts*, 73 U. S. 611; *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 632; *DuCat* v. *Chicago*, 77 U. S. 410.

Pursuant to the powers vested in the respective States, the State of South Carolina has prescribed certain conditions for the admission of foreign insurance corporations into the State of South Carolina and certain conditions to be complied with by such companies before receiving an annual license to do business within the State of South Carolina. Some of these conditions are prescribed by statute; others are placed within the discretion of the duly appointed agents and officers of the State.

The act of 1912 referred to, gives any party full power of appeal to the Supreme Court of South Carolina if he feels aggrieved by the decision of the Insurance Commissioner.

In this case plaintiff in error has had full and free access to the courts of the State of South Carolina and has had full advantage of the process of such courts provided by law in such cases. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Kentucky Railroad Rate Tax Cases*, 115 U. S. 337.

All life insurance companies were placed in the same class by the Insurance Commissioner. Those who had certain investments, to wit: Investments in South Carolina securities, were permitted, in the discretion of the Commissioner, to deposit a surety bond if they saw fit. Those who did not have certain investments in South Carolina securities were, within the discretion of the Insurance Commissioner, required to deposit securities instead of bonds in surety companies.

Petitioner did not offer to deposit with the Insurance

Commissioner any securities whatever, nor to comply with the said ruling in any manner; but, in effect attempted to exercise its own discretion by insisting that the Insurance Commissioner accept the bond which was tendered. Under these circumstances the petitioner is not in a position to raise this question, as it has failed to show that said ruling was prejudicial to its rights.

MR. JUSTICE DAY delivered the opinion of the court.

These cases involve the same questions, and, being practically one proceeding, may be disposed of together. They arise out of an application to the Supreme Court of the State of South Carolina for a writ of mandamus, requiring the respondent, Fitz. H. McMaster, as Insurance Commissioner of the State of South Carolina, to issue to the Phoenix Mutual Life Insurance Company, a corporation of the State of Connecticut (hereinafter called the Phoenix Company), a license to do business in South Carolina as a life insurance company for the year beginning April 1st, 1912. The Supreme Court of the State refused to issue the writ (94 S. Car. 379, 382), and the case is brought here, because of alleged deprivation of rights under the Fourteenth Amendment to the Federal Constitution.

By the act of March 8, 1910, § 13, 26 Statutes at Large (South Carolina), 774, it was provided:

"Before licensing any insurance company to do business in this State, the Insurance Commissioner shall require each such company to deposit with him an approved bond or approved securities, in the discretion of the Commissioner, as follows: Each legal reserve life insurance company, twenty thousand dollars; each fire, accident, or casualty or surety insurance company, or any company not herein specified, ten thousand dollars: Provided, That domestic industrial insurance companies shall in no case

be required to deposit more than the legal reserve on their policies, but not less than one thousand dollars, which said deposit may be made at the rate of five hundred dollars a year, on April 1st of each year, until the whole be deposited; each domestic mutual life insurance company doing business on a recognized table of mortality with interest assumption not higher than four per centum per annum, not less than three thousand dollars. But each such domestic company shall keep on deposit with the Insurance Commissioner at all times, not less than the legal reserve on all of its outstanding policies: Provided, Further, That the terms of this Section shall not apply to domestic mutual assessment companies not doing business in more than two adjoining counties. If a bond be given, it shall be conditioned to pay any judgment entered up against any such company in any court of competent jurisdiction in this State, and such judgment shall be a lien upon the bond or securities. In case a bond is given, the judgment creditor shall have the right to bring suit on said bond for the satisfaction of the judgment in the county in which the judgment is received."

Under authority of this act, the Insurance Commissioner notified insurance companies that, exercising a discretion reposed in him to require such companies to make deposits with the Insurance Commissioner or accept a surety bond, beginning April 1, 1912, companies which had not invested at least one-fourth of their reserve in South Carolina in securities named in the act of 1910, would be required to deposit South Carolina securities with the Department. From such companies no surety bond would be accepted. From companies which had invested at least one-fourth of their reserve on South Carolina policies in securities of that State, a surety bond would be accepted. The letter also stated that the Department would receive on deposit South Carolina state, county, or municipal bonds; first mortgage bonds of real estate in the State;

first mortgage bonds of solvent domestic corporations, whose property was situate entirely within the State; or time certificates of deposit in banks of the State.

The Phoenix Company applied for a license for the year beginning April 1, 1912, and inclosed its check for the license fee and a surety bond in the sum of $20,000. The Insurance Commissioner refused the license, and declined to issue the same unless the Phoenix Company would make a deposit with him of securities acceptable to him, in the sum of $20,000, in bonds of the State of South Carolina, of any county, state or town of the State of South Carolina, or first mortgage bonds on real estate in the State of South Carolina, or first mortgage bonds of solvent domestic corporations, whose property was situated entirely within that State, or any property situated in that State and taxable therein, or time certificates of deposit in banks of that State.

Afterwards the Commissioner notified the surety company that he would not accept a bond from the Phoenix Company unless the latter would furnish him with an affidavit showing that at least one-fourth of its reserve on South Carolina policies had been invested in the securities named in the act of 1910. The Insurance Company declined to make such affidavit, or to make such investments, on the ground that the same was not required by any law of the State of South Carolina. It is the contention of the Insurance Company that the action of the Commissioner in undertaking to exact from it as a condition of receiving a license the investment of at least one-fourth of its reserves in the securities as required by the Commissioner, and in accepting from other insurance companies, which had complied with the requirement of the Commissioner, the bond of a surety company, and issuing to them a license, was discriminatory. And the Phoenix Company particularly insisted that the action of the Commissioner in licensing the Mutual Benefit

Life Insurance Company of New Jersey on giving a surety company bond, without that company having invested 25 per cent. of its reserve in securities demanded by the Commissioner, discriminated against the plaintiff in error, which action, it was contended, deprived the company of its property without due process of law, and violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the State of South Carolina put its decision denying the writ on the ground that the petitioner had failed to deposit with the Insurance Commissioner any securities, or to comply with the law and the ruling of the Commissioner, and that it stood in no position to raise the question involved; and dealing with the equal protection of the law, the court held that the Commissioner, under the act of 1910, was given broad authority to examine into the safety and solvency of applicants for the privilege of doing business within the State, with reference to their dealings and the conduct of their business; that the statute gave him authority to determine whether the applicant had the necessary qualifications for doing business within the State; and that the Commissioner had the right to determine whether the particular applicant should deposit bond or securities. In this way only could the discretionary power conferred upon the Commissionerer be exercised, and the court therefore concluded that there was no denial of the equal protection of the laws.

The case is presented here only in its aspect of deprivation of alleged rights secured by the Federal Constitution. We fail to see any substantial merit in the contention that the applicant has been deprived of due process of law in the exercise of the discretion given to the Commissioner to accept or reject applicants for the insurance privilege under the laws of the State, and in requiring some to give bonds and others to deposit securities, after having

investigated their condition and methods of doing business.

The main contention, pressed in argument, and upon which the reversal of the judgment of the Supreme Court of South Carolina is contended for, is based upon the equal protection clause of the Fourteenth Amendment, because of the alleged discriminatory action of the Commissioner in dealing with different insurance companies, and particularly with the case of the Mutual Benefit Life Insurance Company of New Jersey. An inspection of the record, however, shows a different condition of facts with reference to that company from that shown as to the Phoenix Company. While it is true that both are life insurance companies, and doubtless solvent and sound in their business methods, and while it appears that the Mutual Benefit Life Insurance Company did not have, actually invested in South Carolina securities, one-fourth of its reserve on South Carolina policies, it did have, on April 1, 1912, real estate mortgage loans in the State, duly approved, and awaiting investment, considerably in excess of one-fourth of its reserve on South Carolina policies; while the Phoenix Company, out of its reserve on South Carolina policies of $375,000, had only $10,350 of investments in the form of South Carolina securities, and did not indicate any purpose or intention of acquiring more.

Furthermore, the Phoenix Company is a foreign corporation, whose license to do business in the State of South Carolina would expire upon the first day of April, 1912, and, therefore, it was within the power of the State, so long as it did not impose upon the company as a condition of doing business within the State any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this court, and the Insurance Company, being within that

class of companies not doing an interstate business, the State might, in the exercise of its lawful authority, exclude it from doing business within the State, so long as no rights conferred by the Constitution and laws of the United States were destroyed or abridged. See *Harrison* v. *St. Louis & San Francisco R. R.*, 232 U. S. 318, 332, 333, and cases in this court therein cited.

Assuming, without deciding, that the Phoenix Company occupied such attitude in the State of South Carolina as to entitle it to claim the benefit of the equal protection clause of the Fourteenth Amendment, we are of opinion that upon this record no such facts are shown as would lead to the conclusion that the action of the Insurance Commissioner in this case amounted to a deprivation of the equal protection of the law. The state court put its decision, as we have seen, upon the ground that under the authority given in the statute to the Insurance Commissioner to license one company and reject another, the exercise of such statutory authority in good faith would not make his action in any given case obnoxious to the protection of the rule of equality prescribed by the Constitution.

The equal protection of the laws, as this court has frequently decided, means subjection to equal laws applying alike to all in the same situation, or as expressed by Mr. Justice Field, speaking for this court in *Barbier* v. *Connolly*, 113 U. S. 27, 31,—a case much relied upon by the plaintiffs in error,—equal protection of laws means "that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights. . . . That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition." In this general definition, the court recognizes, as it always has, that what

the equal protection of the law requires is equality of burdens upon those in like situation or condition. It has always been held consistent with this general requirement to permit the States to classify the subjects of legislation, and make differences of regulation where substantial differences of condition exist.

In this case, where the Insurance Commissioner was under examination concerning the differences between the treatment of the Mutual Benefit Life Insurance Company and the Phoenix Company, after speaking of the action of the Mutual Benefit Company in making large loans in the State of South Carolina, when inquired of as to whether approved loans of the Mutual Benefit Company would bring property into the State of South Carolina, against which local policy holders could enforce their claims, the Commissioner answered that it was not a question of added safety, but to have within the State of South Carolina actual things that could be levied upon in case of suit. These large loans of the Mutual Benefit Company within the State of South Carolina would not only bring property into that State, which might be reached through the local courts, but would evidence a purpose in the Company to remain in the State in a permanent way,—a fact which was entitled to significance in determining the matter of licensing the Company to do business.

The Supreme Court of South Carolina has sustained the Act as giving authority, so far as the State is concerned, to the Insurance Commissioner to take the action which he did concerning the withholding of a license to the Phoenix Company and the granting of licenses to other companies, notably the Mutual Benefit Life Insurance Company of New Jersey. We are only concerned with the question whether this conduct of the state authority was so arbitrary and discriminatory in its character as to amount to a deprivation of the equal protection of the

laws, within the meaning of the Federal Constitution. We think the action here challenged was based upon real and substantial differences, and was not that merely arbitrary classification which this court has condemned because of the Fourteenth Amendment.

We find no error in the judgment of the Supreme Court of the State of South Carolina, and the same is

Affirmed.

UNITED STATES OF AMERICA *v.* NOBLE.

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

No. 127. Argued March 1, 2, 1915.—Decided April 5, 1915.

The Quapaw Indians are still under National tutelage; the guardianship of the United States continues notwithstanding the citizenship conferred upon allottees.

Where Congress has imposed restrictions upon alienation of an allotment, the United States has capacity to sue for the purpose of setting aside conveyances or contracts transferring such restrictions.

Restrictions under the act of March 2, 1895, being for a specified period, were absolute and bound the land for that period whether in the hands of the allottee or his heirs except as to leasing it for the specified terms permitted by the act of June 10, 1896, or by the supplemental act of June 7, 1897; neither of those acts gave the allottee or his heirs any power to dispose of his or their interest in the lands subject to the lease or any part of it.

Assignments of interest in rents and royalties which pertained to the reversion of the land of 1896 and 1897 are invalid.

Rents and royalties already accrued from lands are personal property, but those to accrue are a part of the estate, remaining in the lessor.

"Overlapping leases" of Indian allotments are abnormal and the practice of making them facilitates abuses in dealing with ignorant and inexperienced Indians.

The rule that a general power to lease for not exceeding a specified period, without saying either in possession or on reversion, only authorizes a lease in possession and not *in futuro*, applies to the power given allottee Indians by the acts of 1896 and 1897 and leases made for the full period subject to an existing and partly expired lease for the same number of years are unauthorized and void.

197 Fed. Rep. 292, reversed.

THE facts are stated in the opinion.

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

Mr. A. S. Thompson, Jr., and *Mr. V. E. Thompson*, with whom *Mr. S. C. Fullerton* and *Mr. Preston Davis* were on the brief, for appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Government brings this appeal to review a decree of the Circuit Court of Appeals, which affirmed a decree dismissing, upon demurrer, its suit as against the appellees. 197 Fed. Rep. 292.

The suit was instituted against the appellees, and others, to set aside certain mining leases of an Indian allotment, and assignments of rents and royalties, upon the ground that they were procured in fraud of the allottee, and were in violation of the restriction against alienation imposed by Congress. The land in question had been allotted to Charley Quapaw Blackhawk, a member of the Quapaw tribe of Indians, under the act of March 2, 1895, c. 188, 28 Stat. 876, 907. Patent was issued on September 26, 1896. The act of 1895 contained the following restriction:

"*Provided* That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

By the act of June 10, 1896, c. 398, 29 Stat. 321, 331, Congress authorized the allottees of lands, within the limits of the Quapaw Agency, 'to lease the same for a term not exceeding three years for farming purposes, or five years for mining or business purposes.' A further authorization—the one here involved—was made by the act of June 7, 1897, c. 3, 30 Stat. 62, 72, which was as follows:

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes. And said allottees and their lessees and tenants shall have the right to employ such assistants, laborers, and help from time to time as they may deem necessary: *Provided*, That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or disability, any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased, in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him. All acts and parts of acts inconsistent with this are hereby repealed."

The bill alleges that the allottee made the following mining leases of the allotted lands, and assignments of rents and royalties, to wit:

(1) Lease, dated January 11, 1902, to A. W. Abrams, for ten years from date, in consideration of the sum of $10, and a royalty of five per cent. of the market value of all minerals mined or removed (except gas, for which there was to be paid $40 per annum for each paying well), with the proviso that there should be a minimum rental of $20 a year in case the royalties did not exceed that amount. On August 13, 1903, the lease was assigned by Abrams to the Iowa & Oklahoma Mining Company.

(2) Lease, dated August 24, 1903, to A. W. Abrams,

for ten years from date, in consideration of $18, and of royalties which were the same as in first lease save that the minimum rental was $21 a year. This lease was assigned on November 2, 1904, to the Iowa & Oklahoma Mining Company.

(3) Lease, dated March 25, 1905, to L. C. Jones, and the appellee A. J. Thompson, for ten years from date, for $10 and five per cent. royalty. It was stated that the lease was subject to the first lease above mentioned. The interest of Jones was assigned to the appellee, A. J. Thompson, on July 31, 1905.

(4) Lease, dated April 4, 1905, to the Iowa & Oklahoma Mining Company, for ten years from date, for $25, with the same royalties as in the first lease above mentioned and with minimum rental of $21 a year.

(5) Lease, dated May 12, 1906, to the same company, for ten years from date and with the same consideration as that of the lease described in paragraph (4). It was provided that 'this lease and all former leases above referred to shall run concurrently,'—the lessee being entitled to elect under which of the leases it would operate.

(6) Lease, dated July 28, 1906, to the same company, for the term of twenty years from date for $21, with the same royalties and minimum rental as those reserved in the preceding lease described in paragraph (5):

(7) Grant or assignment, dated August 16, 1902, to the appellee, Charles F. Noble, of all the allottee's 'right, title and interest in and to the royalty, rent and proceeds' of the mining lease dated January 11, 1902, made to Abrams, described in paragraph (1). It was further agreed, by said instrument, that if the Abrams' lease 'should be surrendered and become void the within lease should hold good for the period of ten years.' On the same date, Noble assigned 'a one-half interest in the above-described instrument' to John M. Cooper.

(8) Assignment, dated February 21, 1906, to the ap-

pellees, A. S. Thompson and V. E. Thompson. It recited a judgment, in a suit against Noble and Cooper, decreeing that the allottee was the owner 'of two and one-half percentage of the entire product mined from said land and sold on or subsequent to the 31st day of January, 1906, and up to and including the 11th day of January, 1912,' and assigned to the above-mentioned appellees 'an undivided one-half interest in and to the said judgment for royalties,' that is, 'one and one-quarter per cent. of the whole product on said lands' during the period covered by the first lease to Abrams, described in paragraph (1).

The bill further averred that the allottee, Charles Quapaw Blackhawk, was a full blood Indian, born in 1835, unable 'to read, or write, or understand intelligently the English language,' an 'ignorant and uneducated child of nature,' old and infirm, and wholly incapacitated for the transaction of business; that the lands were worth approximately $100,000; that on January 11, 1902, when the first lease was made, the lands had not been prospected and the value for mining purposes was uncertain, and that the consideration mentioned in that lease was 'equitable and sufficient'; that immediately thereafter, the lessee (the defendant, Abrams) caused the lands to be drilled and prospected and found 'large, valuable and paying bodies of lead and zinc ore'; that for the five years preceding the filing of the bill (July, 1909), there had been 'a number of concentrating plants or so-called ore mills located upon the said land, and in operation,' and that 'the actual value of the output thereof, when in operation,' was in excess of $50,000 a year; that in 1905, and before, the defendant Abrams, through his assignee, the Iowa & Oklahoma Mining Company, had sublet to other mining companies portions of the lands in consideration of a royalty of fifteen per cent. of the market value of the ores mined, which was a reasonable royalty; and that the transactions narrated in the

bill (apart from the first lease to Abrams) were 'inequitable and unconscionable' and a fraud upon the allottee.

The validity of the first lease was conceded by the Government, but it was alleged that all the other leases and the assignments were in violation of the express restriction subject to which the allotment was made.

Demurrers were filed by all the defendants. The Circuit Court held that the Government was not entitled to impeach the transactions upon the ground of fraud, but could challenge the validity of the several instruments as being in violation of the statutory restriction. It is not important here to consider the disposition made of the leases described in paragraphs (2), (4), (5), and (6), as these are not involved in this appeal. It is sufficient to say that the demurrers of Abrams and the Iowa & Oklahoma Mining Company were overruled, and that those of the appellees were sustained. *United States* v. *Abrams*, 181 Fed. Rep. 847. As to the latter, the bill was dismissed, and the decree to that effect was affirmed by the Circuit Court of Appeals, as already stated.

We have, then, the question of the validity of the lease and assignments described in paragraphs (3), (7), and (8).

The Quapaws are still under national tutelage. The Government maintains an agency and, pursuant to the treaty of May 13, 1833, 7 Stat. 424, an annual appropriation is made for education and other assistance (37 Stat. 530). In 1893, the Quapaw National Council made provision for allotments in severalty which were to be subject to the action of Congress and in the act of ratification of 1895 Congress imposed the restriction upon alienation which has been quoted. The guardianship of the United States continues, notwithstanding the citizenship conferred upon the allottees (*United States* v. *Celestine*, 215 U. S. 278, 291; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315, 316; *Hallowell* v. *United States*, 221 U. S. 317, 324; *United States* v. *Sandoval*, 231 U. S.

28, 48); and, where Congress has imposed restrictions upon the alienation of an allotment, the United States has capacity to sue for the purpose of setting aside conveyances or contracts by which these restrictions have been transgressed. *Heckman* v. *United States*, 224 U. S. 413; *Mullen* v. *United States*, 224 U. S. 448, 451; *Bowling* v. *United States*, 233 U. S. 528, 534.

1. We may first consider the assignments of rents and royalties. Under his patent, the allottee took an estate in fee, subject to the limitation that the land should be 'inalienable for the period of twenty-five years' from date. This restriction bound the land for the time stated, whether in the hands of the allottee or his heirs. *Bowling* v. *United States*, *supra*. It put it beyond the power of him, or of them, to alienate the land, or any interest therein, in any manner except as permitted by the acts of 1896 and 1897. See *Taylor* v. *Parker*, 235 U. S. 42. The comprehensiveness of the restriction was modified only by the power to lease; and while the allottee could make leases, as provided in these acts, they gave him no power to dispose of his interest in the land subject to the lease, or of any part of it. The rents and royalties were profit issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor. As such, they would pass to his heirs, and not to his personal representatives. 1 Washburn on Real Property, *337; *Wright* v. *Williams*, 5 Cow. 499. It is true that the owner of the reversion, when unrestricted in his right to convey, may sever the rent and grant it separately, but this is by virtue of his freedom to deal with the estate in the land. 2 Bl. Com. *176.

It necessarily follows that the allottee in the present case having no power to convey his estate in the land could not pass title to that part of it which consisted of the rents and royalties. It is said that the leases contemplated the payment of sums of money, equal to the agreed per-

centage of the market value of the minerals and thus that the assignment was of these moneys; but the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land. The further argument is made that the power to lease should be construed as implying the power to dispose of the rents to accrue. This is wholly untenable. The one is in no way involved in the other; the complete exercise of the authority which the statute confers would still leave the rents and royalties, to accrue, as part of the estate remaining in the lessor. It was the intent of Congress that the allottees during the period of restriction should be secure in their actual enjoyment of their interest in the land. *Heckman* v. *United States*, *supra*. The restriction was removed only to the extent specified; otherwise, the prohibition against alienation remained absolute.

The first assignment of royalties, as above described [paragraph (7)], was made on August 16, 1902, of rents to accrue under the first lease, of January 11, 1902, which was to run for ten years. The second assignment made in January, 1906 [paragraph (8)] was, in substance of 'one and one-quarter per cent. of the whole product on said lands' until January 11, 1912. Both were assignments of interests which pertained to the reversion, and both must be held to be invalid under the statute.

2. The lease, here in controversy, was made on March 25, 1905, for ten years from date [paragraph (3)]. The property was already subject to a lease, concededly valid, for ten years from January 11, 1902. The lease under which the appellee claims is what is known as an 'overlapping lease.' It is not necessary to describe transactions of this character, for they are abundantly illustrated in the record which shows that this allottee made six leases of the same rights in less than five years, each for ten years from date with the exception of the last which was for twenty years, and all reserving substantially the same rents and

royalties which were reserved in the first lease at a time when the property had not been prospected. The practice, to say the least, is an abnormal one, and it requires no extended discussion to show that it would facilitate abuses in dealing with ignorant and inexperienced Indians. It is urged, however, that the manner of dealing with the Indians, in gradually releasing them from guardianship and preparing them for complete independence, is for Congress to determine; that Congress has in this case authorized a lease for ten years; that this was a lease for ten years, and no longer, and hence was within the authority; and that, however wise it might have been to prohibit 'overlapping leases,' Congress did not so provide.

We are of the opinion that this is too short a view. The question is as to the scope of the authority given by Congress; that is, whether it did not extend simply to leases in possession, and should be taken not to include 'leases in reversion.' The allottee, as we have seen, is under an absolute restriction with respect to his reversion for a period of twenty-five years from the date of his patent. In the light of this restriction, and of the governmental policy which induced it, there is sound reason for construing the power as not authorizing anything more than a lease in possession, as well understood in the law. At common law, as the Government points out, it was the established doctrine, that a tenant for life with a general power to make leases could make only leases in possession, and not leases in reversion or *in futuro*. He was not authorized by such a power to make a lease to commence 'after the determination of a lease in being.' Such a lease was deemed to be 'reversionary.' *Countess of Sussex* v. *Wroth*, Cro. Eliz. 5; *Shecomb* v. *Hawkins*, Cro. Jac. 318; Yelv. 222; *Winter* v. *Loveday*, Comyn, 37; Sugden on Powers, p. 749; 4 Greenleaf's Cruise's Digest, 165, 166; *Taussig* v. *Reel*, 134 Missouri, 530, 544–547; Woodfall on Landlord and Tenant (19th ed.), 239, 244, 245. "A general

power to lease for a certain number of years without saying either in possession or reversion, only authorizes a lease in possession and not *in futuro*. Such a power receives the same construction as a power to make leases in possession. What is expressed in the one is understood in the other." *Shaw* v. *Summers*, 3 Moore, C. P. 196. This is not to say that an agreement for a new lease, at a fair rental, made shortly before the expiration of an existing lease, would not be sustained in equity. See *Dowell* v. *Dew*, 1 You. & Coll. 345.

We are unable to see that the allottee under the power in question has any better position. The protection accorded by Congress, through the restriction upon the alienation of the allottee's estate—modified only by the power to lease as specified—was not less complete because the limitation was not in the interest of a remainderman, but was for the benefit of the allottee himself as a ward of the Nation. The act of 1897 gives him authority 'to lease' for a term not exceeding the stated limit. Taking the words in their natural sense, they authorize leases in possession and nothing more. The language does not compel the recognition of leases which are to take effect in possession many years after their execution, if, indeed, it could be assumed that they were not intended to be concurrent. Such leases certainly violate the spirit of the statute, and according to the analogies of the law they violate its letter.

If, on the other hand, the lease be deemed to be a concurrent lease, that is, to be effective from its date, then it could only have that effect, being subject to the existing lease, as a grant or assignment of the reversion while the existing lease continued. Accordingly, it would entitle the lessee, as assignee of part of the reversion, to the rent reserved in the previous lease. Bac. Abr., *tit.*, *Leases*, (N); *Harmer* v. *Bean*, 3 C. & K. 307. Woodfall on Landlord and Tenant (19th ed.), 245, 246. But every convey-

ance of the reversion, or of any interest therein, was clearly prohibited by the restriction.

From every point of view, we must conclude that a lease for ten years, made in 1905, subject to an existing lease for ten years, of the same property, which by its terms was to run until 1912, was unauthorized and void.

As the United States was entitled to maintain the suit to cancel these instruments as transgressing the statutory restriction, it is unnecessary to consider the question whether, in the absence of such a violation, the Government would have capacity to sue to redress alleged frauds committed against allottees.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

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

ROBINSON *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 167. Argued March 3, 4, 1915.—Decided April 5, 1915.

In a suit for personal injuries under the Employers' Liability Act, a contract between the plaintiff and a third party may be admissible in evidence on the trial to show that plaintiff was not defendant's employé even though a demurrer had been sustained to a special plea that the contract contained a release of liability.

A contract between the Pullman Company, as employer, and its employé releasing the employer, and also all railroad corporations over

whose lines the employer's cars were operated, from all claims for liability in personal injury sustained by the employé, *held* in this case valid unless the employé of the Pullman Company was also the employé of the railroad company, in which case that provision of the contract would be invalid under § 5 of the Employers' Liability Act.

Congress in legislating on the subject of carriers by rail was familiar with the situation and used the term employé in its natural sense and did not intend to include as employés of the carrier persons on interstate trains engaged in various services for other masters.

40 App. D. C. 169, affirmed.

THE facts, which involve the construction of the Federal Employers' Liability Act and its application to employés of others than the carrier, are stated in the opinion.

Mr. Levi H. David, with whom *Mr. Alexander Wold* was on the brief, for plaintiff in error:

Plaintiff was an employé of the railroad company either as a matter of law or of fact, and whether he was in the employ, jointly and severally, of the railroad company and the Pullman Company, he was entitled to have his case submitted to the jury under the Employers' Liability Act of 1908. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451; *Williams* v. *Car Co.*, 40 La. Ann. 417; *Thorpe* v. *Railroad Co.*, 76 N. Y. 402; *Dwinelle* v. *Railroad*, 120 N. Y. 117; *Louisville R. R.* v. *Katzenberger*, 16 Lea, 380; *Railroad Co.* v. *Lillie*, 112 Tennessee, 341; *Railroad Co.* v. *Ray*, 101 Tennessee, 10; *Balt. &. Ohio So. W. Ry.* v. *Voigt*, 176 U. S. 498, 520; *O'Brien* v. *Chicago & N. W. Ry.*, 116 Fed. Rep. 502; *S. C.*, affirmed on new trial, 132 Fed. Rep. 593; *S. C.*, 153 Fed. Rep. 511.

The joint business relations between the Pullman Company and the Baltimore & Ohio Railroad Company, as disclosed by the written contract offered in evidence in this case, are closer than the relations existing between the express company and the railroad company shown to exist in the *Voigt Case*.

Plaintiff in error was an employé of both corporations.

The contract between the two companies creates a partnership. *Balt. & Ohio So. W. Ry.* v. *Voigt, supra; Oliver* v. *Nor. Pac. Ry.*, 196 Fed. Rep. 432; *Ward* v. *Thompson*, 22 How. 330.

Where there is any partnership arrangement between two masters (*e. g.*, two railroad companies), wherein a servant is employed for the common business of both, the servants of either master will become fellow-servants. McKinney on Fellow Serv., p. 46; *Railroad* v. *Schneider*, 45 Ohio St. 678; *Swainson* v. *Railroad*, L. R., 3 Exch. Div. 341.

Employment and payment of a person are not indispensable elements to create the relation of master and servant. *D. & R. G. R. R. Co.* v. *Gustafson*, 21 Colorado, 393; *Gaines* v. *Bard*, 57 Arkansas, 615.

Plaintiff in error became *pro hac vice* employé of the railroad company.

The general servant of one person may, for a time or on a particular occasion, become the servant of another by submitting himself, either expressly or impliedly, to the control and direction of the other. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Brooks* v. *Central Sainte Jeanne*, 228 U. S. 688; *Morgan* v. *Smith*, 159 Massachusetts, 571; *Hasty* v. *Sears*, 157 Massachusetts, 123; *Johnson* v. *Lindsay*, L. R. App. Cas. (1891), 371; *Rourke* v. *Colliery Co.*, L. R., 2 C. P. Div. 205; *McDowell* v. *Company*, 28 N. Y. Supp. 821; *Wyllie* v. *Palmer*, 137 N. Y. 248; *Kimball* v. *Cushman*, 103 Massachusetts, 194; *Brown* v. *Smith*, 86 Georgia, 274; *Clapp* v. *Kemp*, 102 Massachusetts, 481; *Murray* v. *Currie*, L. R., 6 C. P. Div. 24; *Railroad Co.* v. *Jones*, 12 S. W. Rep. (Tex.) 972; *Railroad* v. *Schneider*, 45 Ohio St. 678; *Westover* v. *Hoover* (Neb.), 129 N. W. Rep. 285; Thomp. on Neg. (2d ed.), § 3742; *M., K. & T. Ry.* v. *Reasor*, 28 Tex. Civ. App. 302; *Vary* v. *B. C. R. & M. R.*, 42 Iowa, 246; *Hannegan* v. *Union Warehouse Co.*, 38 N. Y. Supp. 272; *Mound*

City Co. v. *Conlon*, 92 Missouri, 229; *Atkyn* v. *Wabash Ry.*, 41 Fed. Rep. 193.

If the uncontradicted evidence of plaintiff did not show him to have been an employé of defendant, or the employé of both defendant and the Pullman Company, as a matter of law, the evidence was sufficient to be submitted to the jury. *Northwestern Packet Co.* v. *McCue*, 17 Wall. 508; *Mo., Kans. & Tex. Ry.* v. *West*, 232 U. S. 682; *Tenn. &c. R. R.* v. *Hayes*, 97 Alabama, 201; *Dwinelle* v. *N. Y. C. & H. R. R.*, 120 N. Y. 118; *Sacker* v. *Waddell*, 98 Maryland, 50.

Plaintiff in error was not a volunteer in the collection of railroad transportation from its passengers. *Brooks* v. *Central Sainte Jeanne*, 228 U. S. 688; *Pullman Car Co.* v. *Lee*, 49 Ill. App. 77.

The alleged release was no bar. *Standard Oil Co.* v. *Anderson*, 212 U. S. 221; *Voigt Case, supra; O'Brien* v. *Chicago &c. Ry.*, 116 Fed. Rep. 502.

Negligence of the defendant was shown. *Nor. Pac. Ry.* v. *Mix*, 121 Fed. Rep. 476; *Hayes* v. *Michigan Central R. R.*, 111 U. S. 241; *Great Northern Ry.* v. *Sloan*, 196 Fed. Rep. 275; *Pennsylvania R. R.* v. *Goughnour*, 208 Fed. Rep. 961.

The evidence of the defendant's negligence should have been submitted to the jury. *Tex. & Pac. Ry.* v. *Gentry*, 163 U. S. 353; *Chic. & N. W. Ry.* v. *O'Brien*, 82 C. C. A. 461; *Hough* v. *Texas & Pac. Ry.*, 100 U. S. 213; *Nor. & West. Ry.* v. *Earnest*, 229 U. S. 114; *Grand Trunk Ry.* v. *Lindsay*, 233 U. S. 42.

The Pullman car is not a vehicle of a common carrier independent of the railroad company. *Robinson* v. *Southern Ry.*, 40 App. D. C. 549; *Pickard* v. *Pullman Car Co.*, 117 U. S. 34.

The status of sleeping-car companies operated in connection with railway trains is not that of a carrier of goods or passengers, *Lemon* v. *Pullman Car Co.*, 52 Fed. Rep. 262;

Meyer v. *St. Louis &c. Ry.*, 54 Fed. Rep. 116; nor is it that of an innkeeper. *Blum* v. *Pullman Car Co.*, 1 Flipp. (U. S.) 500; *Pullman Car Co.* v. *Lawrence*, 74 Mississippi, 782; *Nevin* v. *Pullman Car Co.*, 106 Illinois, 222; Hutchinson on Carriers (ed. 1906), §§ 1130, 1136; *Pullman Car Co.* v. *Taylor*, 65 Indiana, 153; *Pullman Car Co.* v. *Pollock*, 69 Texas, 123; *Louis. & Nash. R. R.* v. *Katzenberger*, 16 Lea (Tenn.), 380; *Dwinelle* v. *N. Y. C. & H. R. R.*, 120 N. Y. 117; *P., C. & S. L. Ry.* v. *Krouse*, 30 Oh. St. 224.

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

The plaintiff was not an employé of the defendant railroad, and therefore not a beneficiary of any of the provisions of the Employers' Liability Act.

The cases cited in brief for plaintiff, to the effect that plaintiff was an employé of the defendant railroad, do not sustain that contention.

Plaintiff was not an employé of both companies.

The trial court did not err in admitting in evidence contract between plaintiff and Pullman Company.

Defendant's negligence in connection with the accident was not shown.

In support of these contentions see *Balt. & Ohio R. R.* v. *Voigt*, 176 U. S. 498; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 36; *Brown* v. *Railroad Co.*, 6 App. D. C. 242; *Chicago &c. R. R.* v. *Hamler*, 215 Illinois, 525; *Davis* v. *Ches. & Ohio Ry.*, 5 L. R. A. (N. S.) 458; *Denver &c. R. R.* v. *Whan*, 11 L. R. A. (N. S.) 432; *Hughson* v. *Richmond & Danville R. R.*, 2 App. D. C. 98; *Jones* v. *St. Louis &c. Ry.*, 125 Missouri, 666; *McCloskey* v. *Cromwell*, 11 N. Y. 593; *McDermon* v. *Southern Pacific Co.*, 122 Fed. Rep. 669; *Missouri &c. R. R.* v. *Blalack*, 105 Texas, 297; *Missouri &c. R. R.* v. *West*, 134 Pac. Rep. 655; *North Car. R. R.* v. *Zachary*, 232 U. S. 256; *O'Brien* v. *Chicago &c. Ry.*, 116

Fed. Rep. 502; *S. C.*, 132 Fed. Rep. 593; *S. C.*, 153 Fed. Rep. 511; *Oliver* v. *Nor. Pac. R. R.*, 196 Fed. Rep. 432; *Patton* v. *Fox*, 179 Missouri, 533; *Penna. Co.* v. *Roy*, 102 U. S. 451; *M., K. & T. R. R. Co.* v. *West*, 232 U. S. 682; *Santa Fe &c. Ry.* v. *Grant*, 228 U. S. 177; *Schafer* v. *Stonebraker*, 4 Gill & Johnson (Md.), 355; *Shaw* v. *Railroad Co.*, 101 U. S. 565; *Standard Oil Co.* v. *Anderson*, 212 U. S. 221; *Philadelphia Co.* v. *Stimpson*, 14 Pet. 448; *Tietz* v. *Tietz*, 90 Wisconsin, 66.

See also Employers' Liability Act of 1908, 35 Stats. 65, 149; Iowa Employers' Act, Iowa Code, §§ 2071, 2074; Missouri Fellow-Servants' Law, § 2876, Rev. Stat. of Missouri, 1899.

MR. JUSTICE HUGHES delivered the opinion of the court.

George R. Robinson, the plaintiff in error, brought this action to recover damages for personal injuries sustained by him while performing his duty as a porter in charge of a Pullman car which was being hauled by the defendant as a part of an interstate train. The injuries were received in a collision which was due, it was alleged, to the defendant's negligence. The defendant introduced in evidence the plaintiff's contract of employment [1] with the Pullman

[1] The material portions of the contract are as follows:

"Be it known, That I, the undersigned, hereby accept employment by, and enter into, or continue from this date, in the service of, The Pullman Company upon the following express terms, conditions and agreements, which in consideration of such employment and the wages thereof I do hereby make with said The Pullman Company, to wit:

"First. So long as I shall remain in said employment and service, I will fully comply with all regulations, rules and orders of said Company or its agents, issued for the government of its employés, go wherever I may be required in said service, and well, faithfully and honestly perform all duties assigned to me.

"Second. My wages shall at all times be calculated and paid at the monthly rate per day for the number of days I shall have been actually

Company, by which he released all railroad corporations over whose lines the cars of that company might be operated while he was traveling in its service 'from all claims for liability of any nature or character whatsoever on account of any personal injury or death.' The trial court directed a verdict in favor of the defendant and the judg-

employed, and I may quit or resign, or may be suspended or discharged from such employment and service, at any time, or at any place, without previous notice. . . .

"Fourth. I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge The Pullman Company, and its officers and employés, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"Fifth. I am aware that said The Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts, wherein said The Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employés of said The Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said The Pullman Company and do agree to protect, indemnify and hold harmless said The Pullman Company with respect to any and all sums of money it may be compelled to pay, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employés by the corporations or persons over whose lines of railroad the cars of said The Pullman Company may be operated while I am traveling over said lines in the employment or service of said The Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service."

ment, entered accordingly, was affirmed by the Court of Appeals. 40 App. D. C. 169.

The plaintiff in error complains of the admission of the contract in evidence, in view of the fact that a demurrer to a special plea setting up the release had been sustained; but, if the contract was a defense, it cannot be said that the court erred in giving effect to it, despite the earlier ruling. The evidence was admissible under the plea of not guilty. *Brown* v. *Balt. & Ohio R. R.*, 6 App. D. C. 237, 242; *Shafer* v. *Stonebraker*, 4 Gill & J. (Md.) 345, 355, 356; *Johnson* v. *Philadelphia &c. R. R.*, 163 Pa. St. 127, 133. It is also clear that, unless condemned by statute, the contract was a valid one and a bar to recovery. *Balt. & Ohio &c. Rwy.* v. *Voigt*, 176 U. S. 498; *Sante Fe &c. Rwy.* v. *Grant Co.*, 228 U. S. 177.

The substantial question is whether the contract of release was invalid under § 5 of the Employers' Liability Act, of April 22, 1908, c. 149, 35 Stat. 65, which provides that 'any contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void.' The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employés' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the Railroad Company within the meaning of the Act. It will be observed that the question is not whether the Railroad Company, by virtue of its duty to passengers of which it cannot divest itself by any arrangement with a sleeping car company, would not be liable for the negligence of a sleeping car porter in matters involving the passenger's safety (*Pennsylvania Co.* v. *Roy*, 102 U. S. 451). Nor are we here concerned with the measure of the obligation of the Railroad Company, in the absence of special contract, to one in the plaintiff's situation by

reason of the fact that he was lawfully on the train, although not a passenger. The inquiry rather is whether the plaintiff comes within the statutory description, that is, whether upon the facts disclosed in the record it can be said that within the sense of the Act the plaintiff was an employé of the Railroad Company, or whether he is not to be regarded as outside that description being, in truth, on the train simply in the character of a servant of another master by whom he was hired, directed and paid, and at whose will he was to be continued in service or discharged.

The contract between the Pullman Company and the Railroad Company was introduced in evidence. Without attempting to state its details, it is sufficient to say that the case was not one of co-proprietorship (see *Oliver* v. *Northern Pacific R. R.*, 196 Fed. Rep. 432, 435). It appeared that there was supplied by the Pullman Company on its own cars a distinct and separate service which was performed by its own employés under its own management. For this service the Pullman Company charged its customary rates. It was provided that the Railroad Company should not receive compensation from the Pullman Company for the movement of cars furnished under the contract nor should the Pullman Company be paid for their use. But whenever the gross revenue from sales of seats and berths in the Pullman cars exceeded an average of $7,750 per car per annum the Pullman Company was to pay to the Railroad Company one-half of the excess; and if the average gross revenue from the Pullman cars (from causes beyond the control of the Pullman Company) was less than $6,000 per car per annum for two consecutive years that company was entitled to terminate the agreement upon twelve months' notice, with the option, however, on the part of the Railroad Company, to pay to the Pullman Company such sum as would bring the gross revenue up to the specified amount or to purchase the cars at a price to be determined. We think it to be

clear that in employing its servants the Pullman Company did not act as the agent of the Railroad Company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employés of the Pullman Company were bound by the rules and regulations of the Railroad Company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation.

With this limitation, the Pullman Company supplied its own facilities and for this purpose organized and controlled its own service, including the service of porters; it selected its servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure. See *Hughson* v. *Richmond & Danville R. R.*, 2 App. D. C. 98; *McDermon* v. *Southern Pacific Co.*, 122 Fed. Rep. 669; *Jones* v. *St. Louis &c. Rwy.*, 125 Missouri, 666; *Chicago &c. R. R.* v. *Hamler*, 215 Illinois, 525. It is said that the plaintiff had been promoted to be a 'porter in charge' of the Pullman car between Washington and Wheeling, with increased compensation, but he still was the porter of the Pullman Company, employed in its work. It is insisted that he should be regarded as the employé of the Railroad Company because of the fact that in the case of passengers coming on the train after three o'clock in the morning, he received the railroad ticket or fare which he placed in an envelope and gave to the train conductor 'when he came back'; the railroad ticket was punched or canceled by the conductor. This, however, was an obvious accommodation to the passenger in the Pullman car, and in any event it was merely an incidental matter which cannot be deemed to qualify the character of plaintiff's employment as it is to be viewed from the standpoint of the statute.

We are of the opinion that Congress used the words 'employé' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employé. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act.

We conclude that the plaintiff in error was not an employé of the defendant company within the meaning of the Employers' Liability Act, and that the judgment must be affirmed.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* MAXWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 181. Submitted March 8, 1915.—Decided April 5, 1915.

Under the Act to Regulate Commerce the duly filed tariff of the carrier must be charged by it and paid by the shipper or passenger without deviation therefrom.

Shippers and travelers are charged by the duly filed tariff and must abide thereby, unless it is found to be unreasonable by the Interstate Commerce Commission.

Neither misquotation of rates nor ignorance is an excuse for charging or paying less or more than the filed rate.

Although a passenger might have gone and returned by direct route to and from the point of destination, if he expressed the desire to go and come by a different route via specified points, he must pay the filed tariff rates for the route taken, notwithstanding a misquotation

made by the carrier's agent and accepted by him in good faith. Such a mistake is not a mere misrouting by error of the carrier which would relieve the passenger.

In a case here under § 237, Jud. Code, if the filed tariffs are not included in the record, this court takes the findings of the state court.

If the tariffs are not included in the record of a case to recover excess over an undercharge, and this court reverses a judgment against the carrier on the findings of the state court, and it appears on further proceedings that there was no undercharge, the carrier cannot recover in the court below.

THE facts, which involve the construction of the Act to Regulate Commerce and the right of the carrier to recover from a passenger the amount of an undercharge on sale of railroad tickets, are stated in the opinion.

Mr. John B. Keeble and *Mr. Ed. T. Seay* for plaintiff in error, submitted.

Mr. John A. Pitts and *Mr. K. T. McConnico* for defendant in error, submitted.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought, before a Justice of the Peace in Tennessee, by the Louisville & Nashville Railroad Company to recover $58.30 as the amount of an alleged undercharge on the sale of railroad tickets. Judgment for the defendant was affirmed by the Court of Civil Appeals and by the Supreme Court of the State. The case comes here on error.

The facts, which were said to be undisputed, were found by the state court to be as follows:

Defendant in error, G. A. Maxwell, after repeated interviews, and correspondence, with the representatives of the Louisville & Nashville Railroad Company in regard to rates on round trip tickets to Salt Lake City, pur-

chased on or about the first day of June, 1910, "two passenger tickets from Nashville, Tennessee, to Salt Lake City, by way of Chicago, Ill., Denver, Colo., and routed to return by Denver, Colo., Amarillo and Fort Worth, Texas, and Memphis, Tennessee, and paid for each ticket the sum of $49.50.

"There were at the time, published rates under the provisions of the Interstate Commerce Act by which fares over the route actually traveled, going and coming, aggregated $78.65 each, or $29.15 each more than was charged and collected therefor, making a difference of $58.30 between the amount paid by Mr. Maxwell for the tickets in question, and the amount that should have been charged and collected.

"Mr. Maxwell was informed when he first made inquiry about the tickets in January, that there were no special rate tickets at that time, but likely would be by May or June first. He then, and on several occasions thereafter, made known his desire to go to Salt Lake City by one route, and return by another, and was told that he could not be furnished reduced rates except by going and coming over the same route, but after repeated inquiries, and the correspondence referred to, he was informed that he could make the trip on reduced rates one way, and return another; and when he went finally to purchase the two tickets, he stated to the agent that he wanted to go by way of Chicago and Denver and return by way of Stamford, Texas, and was given the tickets routed as hereinbefore noted, at the rates mentioned. At that time, he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes, going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo and Memphis.

"Mr. Maxwell was in no way at fault in the matter.

He did no more than tell the agent the points to which he wished to go and make it known that he did not wish to go and return by the same route. The agent fixed the routing in the tickets and named the fare, and Maxwell paid without further question."

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The Act (§ 6) provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906) have been set forth in numerous decisions. *Gulf, Col. & Santa Fe Rwy.* v. *Hefley*, 158 U. S. 98; *Tex. & Pac. Rwy.* v. *Mugg*, 202 U. S. 242; *Tex. & Pac. Rwy.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 445; *Armour Packing Co.* v. *United States*, 209 U. S.

56, 81; *N. Y. C. & H. R. R.* v. *United States*, 212 U. S. 500, 504; *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155, 166; *Illinois Central R. R.* v. *Henderson Co.*, 226 U. S. 441; *Kansas Southern Rwy.* v. *Carl*, 227 U. S. 639, 653; *Pennsylvania R. R.* v. *International Coal Co.*, 230 U. S. 184, 197; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 110–113; *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 284. In the *Mugg Case, supra*, it appeared that a rate, less than the lawful scheduled rate, had been quoted to the shipper by the agent of the railroad. The shipper had relied upon the quoted rate in making his shipments and sales. But it was held that he was bound to pay the established rate and was not entitled to the delivery of the goods without such payment. This was upon the ground that it was beyond the power of the carrier to depart from the filed rates and that the erroneous quotation of the rate by its agent did not justify it in making a different charge from that which was lawfully applicable to the shipment. As was said in *Kansas Southern Rwy. Co.* v. *Carl, supra:* "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid."—It was "the purpose of the Act to have but one rate, open to all alike and from which there could be no departure." *Boston & Maine R. R.* v. *Hooker, supra*, p. 112. The rule is applicable to the transportation of passengers and their baggage. *Id.*

The Supreme Court of the State fully recognized the established principle, but stated that the majority of the court were of the opinion that it was not controlling here,

for the reason that Mr. Maxwell could have gone to the point of destination, Salt Lake City, on one route, and have returned on another route, at the price actually paid for the tickets, and that, therefore, 'the mere misrouting of the ticket by the Railroad Company' was not a discrimination. In thus holding, the assumption was that there was an error on the part of the Railroad Company in the routing, by which he was misled, and that, as it is said, Mr. Maxwell 'could have gone to Salt Lake City at the price paid over other routes going and returning through Chicago and Denver or going through St. Louis and Denver and returning through Denver, Amarillo and Memphis, either one of which would have met his requirements.'

We are unable to reach the conclusion that this ground of decision was available under the findings of fact. A misstatement, or misquotation, of the rate over a given route is one thing; misrouting is a different matter. We do not think that it can be said that there is a 'misrouting,' in any proper sense, when the route given by the company is that requested by the shipper or passenger. See *Spreckels* v. *Monongahela R. R.*, 18 I. C. C. Rep. 190, 191. According to the findings of fact, it appears that, after his interviews and correspondence, Mr. Maxwell finally 'stated to the agent that he wanted to go by way of Chicago and Denver, and return by way of Stamford, Texas.' His request covered four points,—Chicago, Denver, Salt Lake City, and Stamford. It appears by the findings that he could have gone, at the rate actually paid, through St. Louis and Denver, returning through Denver, Amarillo and Memphis, or that he could have made the trip, at that rate, 'going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver.' But according to the findings, he was not entitled at the rate which he paid to make the trip through Chicago and Denver, returning

as he desired through Stamford, Texas. We are not concerned with the reasons for the differences in rates on the various routes, but merely with the fact that they existed under the applicable tariffs as filed. Under these tariffs, the findings of fact show that the amount paid was less than the amount due over the route selected.

The counsel for the defendant in error insist that as the tariffs are not included in the record, the judgment cannot be reversed. But, as we have said, we take the findings of the state court.

It is further insisted that, on reference to the tariffs, it will appear that the Railroad Company is mistaken in its assertion that there was an undercharge, and that the rate actually paid was, in truth, the lawful rate. The tariffs have not been submitted to us and it is sufficient to say that if in the further proceedings in this case it shall appear that the defendant in error is right in this contention, it will necessarily follow that the Railroad Company will be unable to recover. But we cannot so hold upon the case as it is now presented.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MCREYNOLDS dissents.

GUFFEY *v.* JAMES A. SMITH.

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

No. 86. Argued December 2, 3, 1914.—Decided April 5, 1915.

Under the settled rule of decision in Illinois an oil and gas lease like that involved in this suit passes to the lessee, his heirs and assigns, a present vested freehold interest in the premises, and an option on the part of the lessee to surrender does not create a tenancy at will, give the lessor an option to compel surrender or make the lease void as wanting in mutuality.

Decisions of the highest courts of the State in which the property is situated are accepted and applied by the Federal courts as rules of property in passing upon the estate and rights passing by such a lease.

Where, as is the case in Illinois, the holder of such a lease cannot maintain ejectment in the state courts, he cannot, under §§ 721 and 1914, maintain such an action in the Federal courts in that State.

Where ejectment cannot be maintained by one holding a gas and oil lease against another claiming under a later lease, and no other action affords an adequate remedy, the earlier lessee may maintain a suit in equity to restrain the later lessee and for accounting and discovery in the Federal courts where the requisite amount is involved and diverse citizenship exists, even though such a suit, by reason of the lessee having an option to surrender, could not be maintained in the courts of the States.

Remedies afforded and modes of procedure pursued in the Federal courts sitting as courts of equity are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting.

According to the general principles and rules of equity enforced in the Federal courts, a clause in a lease permitting the lessee to surrender it is not an obstacle to enforcing the lease in equity against those who, under a later lease, are committing waste.

Whether a lease is so unfair and inequitable that it cannot be enforced by the lessee in equity must be determined in view of the circumstances under which it was given; and in this case *held* that an oil and gas lease of undeveloped land requiring all expenses to be paid by the lessee and providing for reasonable royalties and fixed rental

during a designated period of delay is not so unfair and inequitable as to require that equitable relief be withheld, even where it contains a provision permitting the lessee to surrender it at any time.

Under the statutes of Illinois a lessee who omits to pay rent when due may cure his default by payment at any time prior to demand and notice or within the time named in the notice, and if so paid the lessee's rights are the same as though the default had not occurred.

On an accounting for oil and gas taken under color of a lease later than that of plaintiff but without actual knowledge thereof, although the same was recorded, *held*, that the later lessees were entitled to be credited with the cost of improvements and operation, incurred prior to, but not after, the date on which they were actually notified of the rights of the earlier lessee. The continued taking thereafter was a wilful taking and appropriation of the property of another.

202 Fed. Rep. 106, reversed.

THE facts are stated in the opinion.

Mr. Jos. W. Bailey and *Mr. J. H. Beal*, with whom *Mr. Robert J. Dodds* was on the brief, for petitioners.

Mr. J. A. Hindman for respondents:

To warrant the granting of any of the relief sought, the complainants must not only come into court with "clean hands," but it must clearly appear that the contract upon which they base their demand for relief is one which a court of equity will enforce. They must recover, if at all, upon the strength of their own title and upon the merits of their own cause; *Michigan Pipe Co.* v. *Fremont Pipe Co.*, 111 Fed. Rep. 284; *Jackson* v. *Ashton*, 11 Peters, 229; *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224; *Federal Oil Co.* v. *Western Oil Co.*, 112 Fed. Rep. 373; *S. C.*, 121 Fed. Rep. 675; *Rust* v. *Conrad*, 47 Michigan, 449; High on Injunctions (3d ed), §§ 22, 698; 22 Cyc., p. 749; 10 Am. and Eng. Enc. (1st ed.), p. 784.

Because of the peculiar character of oil and gas as "property," and the violent fluctuations in the value of lands and leaseholds incident to the discovery of these

substances, the courts have placed contracts of this kind in a class by themselves, and in the light of the known character of the business of "oil mining," construe them most strictly against the lessee and favorable to the lessor. *Huggins* v. *Daley*, 99 Fed. Rep. 606; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Parish Fork Oil Co.* v. *Bridgewater Gas Co.*, 51 W. Va. 583; *Steelsmith* v. *Gartlan*, 45 W. Va. 27; *Betman* v. *Harness*, 42 W. Va. 433; *Venture Oil Co.* v. *Fretts*, 152 Pa. St. 451; *Watford Oil Co.* v. *Shipman*, 233 Illinois, 9; *Kolachny* v. *Galbreath*, 26 Oklahoma, 722; Bryan on Petroleum and Natural Gas, p. 146; Donohue on Petroleum and Gas, p. 149; Thornton on Law Relating to Oil and Gas, p. 98.

The contracts upon which the complainants base these actions should not be enforced in a court of equity because they are deceptive, unjust, unequal, unfair and inequitable; while they purport to be for the sole and only purpose of mining and operating for oil and gas, they contain no provision requiring this purpose to be accomplished, but permit the complainants to hold the premises dormant for the purpose of speculation, and thus defeat the very purpose for which they were given. Cases *supra*, and *Nash* v. *Towne*, 5 Wall. 689; *Miss. & Mo. R. R.* v. *Cromwell*, 91 U. S. 643; *King* v. *Hamilton*, 4 Pet. 311.

The leases owned by the complainants, and upon which they base these actions, are not enforceable in a court of equity (a) for want of consideration, (b) for want of mutuality of engagement and (c) for want of mutuality of remedy.

The consideration for the execution of the leases in question was not the recited $1.00, nor the 25 cents a year mentioned, but the real consideration was the development of the premises for, and if found, the production of oil and gas, and the rents and royalties resulting therefrom and dependent thereon. If the lease fails to

bind the lessee to diligent search for oil and gas, it is without consideration, binding upon neither party, and voidable at the pleasure of either. Cases *supra*, and *Foster* v. *Elk Fork Oil Co.*, 90 Fed. Rep. 178; *Elk Fork Oil Co.* v. *Jennings*, 80 Fed. Rep. 839; *Natural Gas Co.* v. *Teel*, 67 S. W. Rep. 545; *S. C.*, 68 S. W. Rep. 976; *Eclipse Oil Co.* v. *South Penn. Oil Co.*, 47 W. Va. 84; *Trees* v. *Eclipse Oil Co.*, 47 W. Va. 107; *Crawford* v. *Ritchey*, 43 W. Va. 252; *Cassel* v. *Crothiers*, 193 Pa. St. 193; *Gadbury* v. *Ohio &c. Co.*, 162 Indiana, 9.

Contracts, unperformed, optional as to one of the parties, are optional as to both. Cases *supra*, and *So. Express Co.* v. *Western N. C. R. R.*, 99 U. S. 191; *United States* v. *Noe*, 23 How. 312; *Dorsey* v. *Packwood*, 12 How. 126; *Reece* v. *Zinn*, 103 Fed. Rep. 97; *Cold Blast Co.* v. *Kansas City &c. Co.*, 114 Fed. Rep. 77; *Am. Cotton Co.* v. *Kirk*, 68 Fed. Rep. 791; *Crane* v. *Crane*, 105 Fed. Rep. 869; *Weaver* v. *Weaver*, 109 Illinois, 225; *Chicago Gas Light Co.* v. *Lake*, 130 Illinois, 42; *Lancaster* v. *Roberts*, 144 Illinois, 213; *Vogle* v. *Peakoc*, 157 Illinois, 339; *Welty* v. *Jacobs*, 171 Illinois, 624; *East St. Louis &c. Co.* v. *East St. Louis*, 182 Illinois, 433; *Cleveland* v. *Martin*, 218 Illinois, 73; *Bauer* v. *Lumaghi Coal Co.*, 209 Illinois, 316; *Watford Oil Co.* v. *Shipman*, 233 Illinois, 9; *Cortelyou* v. *Barnsdall*, 236 Illinois, 138; *Ulry* v. *Keith*, 237 Illinois, 284; *Iron Age Pub. Co.* v. *West. Un. Tel. Co.*, 83 Alabama, 493; *Snodgrass* v. *South Penn. Oil Co.*, 47 W. Va. 509; *Campbell* v. *Lambert*, 36 La. Ann. 35; *Hoffman* v. *Maffioli*, 104 Wisconsin, 630; *Luke* v. *Livingston*, 70 S. E. Rep. 21; *Mallet* v. *Watkins*, 132 Georgia, 700; *Fowler Utility Co.* v. *Gray*, 168 Indiana, 1; *Gadbury* v. *Ohio Oil Co.*, 162 Indiana, 9; Donahue on Petroleum and Gas, p. 155; 22 Cyc. 950.

A court of equity never interferes where the power of revocation exists. Cases *supra*, and *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339, 359; *Kerrick* v. *Hannaman*, 168 U. S. 328, 336; *Pantages* v. *Grauman*, 191 Fed. Rep.

318; *Shubert* v. *Woodward*, 167 Fed Rep. 47; *Norris* v. *Fox*, 45 Fed. Rep. 406; *Alworth* v. *Seymore*, 44 N. W. Rep. 1030; *Fowler Utility Co.* v. *Gray*, 168 Indiana, 1; *Welty* v. *Jacobs*, 171 Illinois, 624; *Watford Oil Co.* v. *Shipman*, 233 Illinois, 9.

The complainants should not recover as they have neither done equity by performing nor by tendering performance of the optional provisions of the lease, nor in their bill do they offer to do equity by offering to perform whatever the court shall decree ought to be done on their part. Cases *supra*, and *Kelsey* v. *Crowther*, 162 U. S. 404; *Morgan* v. *Morgan*, 2 Wheat. 290; *Colson* v. *Thompson*, 2 Wheat. 336; *Brashier* v. *Gratz*, 6 Wheat. 528; *Bank of Columbia* v. *Hanger*, 1 Pet. 455; *Purcell* v. *Coleman*, 4 Wall. 513; *Watts* v. *Waddle*, 6 Pet. 389; *Boon* v. *Missouri Co.*, 17 How. 340; *Thayer* v. *Wilmington*, 105 Illinois, 540; *Chi. Mun. G. L. Co.* v. *Town of L.*, 130 Illinois, 42; Story's Eq. Jur., § 736; Pomeroy's Spec. Performance, § 330.

The completion of a well upon the demised premises within the time stipulated (nine months) was a condition precedent to the vesting of any estate. And at the expiration of the time given in which to make the preliminary test, none having been made, the lessor had a right to avoid the lease by leasing to another. *Crawford* v. *Richey*, 43 W. Va. 252; *Gadbury* v. *Ohio Co.*, 162 Indiana, 9; *Oil Co.* v. *Fretts*, 152 Pa. St. 451.

The lease of the complainants should not be enforced in a court of equity because of the laches of the complainants in that they failed to carry out the purpose of the lease, but stood by awaiting the result of development by others, the fruit of whose enterprise, labor and money, they now seek to appropriate. *Hollingsworth* v. *Fry*, 4 Dall. 345; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 593; *Johnson* v. *Standard Mining Co.*, 148 U. S. 360; *Munroe* v. *Armstrong*, 96 Pa. St. 307; *Iron Co.* v. *Trout*,

83 W. Va. 409; 16 Cyc. 161; 22 Am. & Eng. Ency. (1st ed.), p. 1043.

Oil and gas *in situ* are not capable of private ownership, but they become "property" only when reduced to possession. Title to these substances is inchoate and contingent upon their discovery and production. Leases of this character, therefore, vest in the lessee no present title to the oil and gas, but are a mere license to explore for, and, if found, to reduce the same to possession. Cases *supra*, and *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *State* v. *Ohio Oil Co.*, 150 Indiana, 21; *Heal* v. *Niagara Oil Co.*, 150 Indiana, 483; *People's Gas Co.* v. *Tyner*, 131 Indiana, 277; *Townsend* v. *State*, 147 Indiana, 624; *Hancock* v. *Diamond Glass Co.*, 162 Indiana, 146; *New Am. Oil Co.* v. *Troyer*, 166 Indiana, 402; *Ray* v. *Gas Co.*, 138 Pa. St. 576; *Dark* v. *Johnson*, 55 Pa. St. 164; *Klepner* v. *Lemon*, 176 Pa. St. 502; *Brown* v. *Vandergriff*, 80 Pa. St. 142; *Funk* v. *Halderman*, 53 Pa. St. 229; *Keir* v. *Patterson*, 41 Pa. St. 357; *Jones* v. *Forest Oil Co.*, 194 Pa. St. 379; *Wood Co. Pet. Co.* v. *W. Va. Trans. Co.*, 28 W. Va. 210; *Hall* v. *Vernon*, 47 W. Va. 295; *Crawford* v. *Richey*, 43 W. Va. 252; *Guffey* v. *Hukill*, 34 W. Va. 49; *Shepperd* v. *McCalmont Oil Co.*, 38 Hun, 37; *Watford Oil Co.* v. *Shipman*, 233 Illinois, 9; *Poe* v. *Ulry*, 233 Illinois, 56; *Bruner* v. *Hicks*, 230 Illinois, 536; Barringer on Mines and Mining, pp. 30, 31.

If the oil and gas in place, like solid minerals, were capable of ownership, and if it were conceded that the leases in question conveyed to the complainants title to the oil and gas *in situ*, the measure of damages, in an action at law for their conversion, would be the value of these substances in place, and not the amount for which they were sold, unless the trespass was wilful or malicious. *Bolles Wooden-Ware Co.* v. *United States*, 106 U. S. 433; *Colorado &c. Co.* v. *Truck*, 70 Fed. Rep. 294; *Durant Min. Co.* v. *Percy &c. Co.*, 93 Fed. Rep. 166; *Golden*

Reward Min. Co. v. *Buxton*, 97 Fed. Rep. 413; *Resurrection Co.* v. *Fortune &c., Co.*, 129 Fed. Rep. 668; *Mon. Min. Co.* v. *St. L. Min. Co.*, 147 Fed. Rep. 897; *United States* v. *Homestake Min. Co.*, 117 Fed. Rep. 481; *Montrozona Min. Co.* v. *Thacher*, 75 Pac. Rep. 595; *United Coal Co.* v. *Canon City Coal Co.*, 24 Colorado, 116; *Dyke* v. *National Transit Co.*, 22 N. Y. App. Div. 360; *Stockbridge Iron Co.* v. *Cone Iron Works Co.*, 102 Massachusetts, 80.

Where one having a superior title goes into a court of equity to assert his right to property, even as against a wilful wrongdoer, he is required to do equity by paying for improvements placed upon the property. And if he seek an accounting for rents and profits, he must bear the cost of production. *Williams* v. *Gibbes*, 20 How. 535; *Ruffners* v. *Lewis*, 7 Leigh, 720; *Lagger* v. *Mut. Labor Assn.*, 146 Illinois, 296; *Williams* v. *Vanderbilt*, 145 Illinois, 239; *Butler* v. *Butler*, 164 Illinois, 171; *Eury* v. *Merill*, 61 Illinois, 193; *Gloss* v. *Clark*, 47 Ill. App. 609; *Cable* v. *Ellis*, 120 Illinois, 136; *Britt* v. *Yeaton*, 101 Illinois, 242; *Bradley* v. *Snyder*, 14 Illinois, 363; *Williamson* v. *Jones*, 34 W. Va. 563; *Chaney* v. *Colman*, 77 Texas, 100; *Phillips* v. *Coast*, 130 Pa. St. 572; 3 Pomeroy's Eq. Jur., § 1241.

It was error to charge interest on the respective amounts the defendants were decreed to pay the complainants, from the tenth day of August, 1910. Rev. Stat. Illinois, § 2, Ch. 74; *Imperial Hotel* v. *Claffin Co.*, 175 Illinois, 124; *Florshein* v. *Ill. Tr. Sav. Bank*, 192 Illinois, 382; *Foote* v. *Ill. Tr. Sav. Bank*, 193 Illinois, 600; *Espert* v. *Alschlanger*, 117 Ill. App. 484; *Hablet* v. *Bloomington*, 71 Ill. App. 204; *Gloss* v. *Clark*, 97 Ill. App. 620.

When the nature of property in natural gas and oil contained in the earth, and the legal effect of instruments of the character of those here involved have been settled authoritatively by the rulings of the highest court of the State in which they have their *situs*, such decisions

establish rules of property peculiar to mining in that State, which the Federal courts will recognize and follow. *Burgess* v. *Seligman*, 107 U. S. 20; *Elmdorf* v. *Taylor*, 10 Wheat. 152; *Bucher* v. *Chesire R. Co.*, 125 U. S. 555; *Brown* v. *VanBraam*, 3 Dall. 344; *Riddle* v. *Mandeville*, 1 Cr. 290; *S. C.*, 5 Cr. 322; *Telfair* v. *Stead*, 2 Cr. 407; *Batton* v. *Easton*, 1 Wheat. 476; *Powell* v. *Harmon*, 2 Pet. 214; *Green* v. *Neal*, 6 Pet. 292; *Jackson* v. *Chew*, 12 Wheat. 153; *Henderson* v. *Griffin*, 5 Pet. 151; *Bank of Hamilton* v. *Dudley*, 2 Pet. 492; *Smith* v. *Kernichan*, 7 How. 198; *Neesmith* v. *Sheldon*, 7 How. 812; *Golden* v. *Prince*, 3 Washington, 318; *Suydam* v. *Williamson*, 24 How. 427, *contra; Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349; *Swift* v. *Tyson*, 16 Pet. 1; *Lane* v. *Vick*, 3 How. 464; *Foxcraft* v. *Mallet*, 4 How. 353; *Rowen* v. *Runnels*, 5 How. 134; *Williamson* v. *Berry*, 8 How. 495.

The questions involved in these cases have been firmly settled by a long and uniform line of decisions by the highest court of Illinois, and by the highest Federal court in that jurisdiction, and likewise by the United States Supreme Court; these decisions should forever foreclose further agitation of these questions in that State. Cases *supra*, and *Frisby* v. *Ballance*, 5 Illinois, 287; *Bowman* v. *Cunningham*, 78 Illinois, 48; *Weaver* v. *Weaver*, 109 Illinois, 869; *Lancaster* v. *Roberts*, 144 Illinois, 213; *Vogle* v. *Pekoc*, 157 Illinois, 339; *Welty* v. *Jacobs*, 171 Illinois, 624; *Baur* v. *Lumaghi Coal Co.*, 209 Illinois, 316; *Cleveland* v. *Martin*, 218 Illinois, 73; *Bruner* v. *Hicks*, 230 Illinois, 536; *Watford Oil and Gas Co.* v. *Shipman*, 233 Illinois, 9; *Smith* v. *Guffey*, 202 Fed. Rep. 106; *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339, 359.

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

This was a suit in equity brought in the Circuit Court of the United States for the Eastern District of Illinois

by the holders of an oil and gas lease covering a small tract of land in Crawford County, Illinois, to enjoin operations under a later and similar lease and to obtain a discovery and an accounting in respect of the oil and gas produced and sold in the course of operations already had. In due course the case was referred to a master who took the evidence, reported the same with his conclusions upon questions of fact and law and recommended a decree awarding the relief prayed, but taking no account of the gas theretofore used or sold. Exceptions to the report were filed by the defendants and at the final hearing the Circuit Court overruled the exceptions, confirmed the report and entered a decree as recommended. The decree was reversed by the Circuit Court of Appeals with a direction that the bill be dismissed, the ground of decision being that the complainants were not entitled to relief in equity and should be remitted to such remedy as they might have at law, because by the terms of their lease they had an option to surrender it at any time. 202 Fed. Rep. 106. Other questions in the suit were not considered by that court. The case is now here upon a writ of certiorari.

Both leases were for the same tract and were given by James A. Smith, who owned it in fee simple. The earlier lease was given to one Walton May 22, 1905, and by two successive assignments made in November and December following was transferred to Joseph F. Guffey and others, the complainants. It and the assignments were properly recorded June 15, 1906. The later lease was given to one Allison August 9, 1906, was assigned shortly thereafter to one Willett and was transferred March 25, 1907, to Solley, Johnson and Hennig, three of the defendants. There was also an intermediate lease to one Wilcox, given March 23, 1906, but as it was voluntarily surrendered and nothing is claimed thereunder, it suffices to say (a) that it contained a provision whereby the lessee

therein agreed to protect the lessor against any expense or damage that might arise by reason of the earlier lease, (b) that before surrendering it Wilcox drilled a well upon the premises in an effort to find oil and gas, but without success, and (c) that the complainants, upon learning of this lease, promptly served upon Wilcox and the lessor a notice asserting the rights conferred by the prior lease.

Allison and his immediate assignee, Willett, took the subsequent lease with actual notice of the earlier one and with constructive, if not actual, notice of its transfer to the complainants, but made no inquiry of the latter respecting its status or their claim under it. Nothing was done under the subsequent lease by Allison, but after its assignment to Willett the latter entered upon the premises, with the lessor's sanction, and drilled a well which yielded a flow of gas but no oil. Upon learning of these drilling operations the complainants, in a written notice to Willett and the lessor, again asserted their claim under the prior lease and demanded that the operations cease.

Solley and his associates took the assignment from Willett without actual knowledge of the prior lease, but under the local law were constructively charged with notice of it and of its transfer to the complainants, for both were duly recorded. They acted upon the advice of an abstractor who failed to make a proper examination of the records. After receiving the assignment, Solley and his associates, with the lessor's approval, proceeded to drill other wells upon the premises and developed the presence therein of oil in paying quantities. On August 1, 1907, they were actually and fully informed of the prior lease and of the complainants' purpose to insist upon the rights conferred by it and to obtain redress for the invasion of those rights, but they persisted in their drilling operations and produced and sold from the premises large quantities of oil. These operations were being continued when the suit was

brought (March 24, 1908) and when the accounting was had before the master. Most of the oil taken from the premises was extracted and sold after August 1, 1907, the date when Solley and his associates were actually and fully informed of the complainants' claim.

In its terms the prior lease of May 22, 1905, under which the complainants claim, substantially conforms to one in common use in unexplored territory, as is shown by the evidence in this case and by reported decisions in other cases. It recites that it was given in consideration of one dollar paid to the lessor and the covenants and agreements of the lessee therein set forth. It contains the usual words of grant and demise; runs to the lessee, Walton, his heirs and assigns; describes the purpose for which it was given as that of mining and operating for oil and gas and laying pipe lines and building tanks and other structures to take care of those substances when produced, and defines the terms for which it was to endure as five years from its date "and as long thereafter as oil or gas or either of them is produced" from the premises. The lessee covenants and agrees therein, first, to deliver to the lessor, free of cost, in the pipe line to which the wells may be connected the equal one-eighth part of all oil produced and saved from the premises; second, to pay one hundred dollars per year for the gas from each gas well the product of which is marketed and used off the premises; third, to locate all wells so as to interfere as little as possible with the cultivated portions of the land; and fourth, to complete a well on the premises within nine months after the date of the lease, or to pay at the rate of twenty-five cents per acre per year, quarterly in advance, for the additional time the completion of a well is delayed beyond the nine months, such payments to be made directly to the lessor or deposited to his credit in the Exchange Bank, at Martinsville, Illinois. There is also a surrender clause to the effect that "upon the

payment of one dollar, at any time," the lessee, his heirs or assigns, "shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue" thereunder "shall cease and determine."

Among the master's findings and conclusions which were approved by the Circuit Court were the following:

"The Master further finds that the complainants have been at all times financially responsible and able to perform the covenants of their lease; that they have not drilled a well on said premises, but that they have paid all the rentals required by the terms of said lease to be paid, at the rate of twenty-five cents per acre, and deposited the same in the bank designated in the lease to receive the same, for the owner of the land."

"That prior to purchasing the Allison lease, Willett made inquiry by telephone of the Exchange Bank, at Martinsville, whether or not rentals had been paid on the Walton lease by the complainants, and was informed by the bank that no such payments had been made or deposited to the credit of James A. Smith, although, as a matter of fact, the Master further finds that, at the time the said Bank gave this information, the rental money had in fact been deposited to the credit of the said James A. Smith."

"That the Walton lease, under which complainants claim title, has never been forfeited for failure to comply with the terms thereof, and up to the time of the filing of this suit, no grounds existed whereby such a forfeiture could be declared."

In addition to Solley and his associates, the defendants to the suit included the lessor and the Ohio Oil Company, the latter having purchased the oil with knowledge of the premises from which it was produced and of the complainants' claim under the prior lease.

It is settled by the decisions of the Supreme Court of

Illinois that an oil and gas lease like that of the complainants passes to the lessee, his heirs and assigns, a present vested right—"a freehold interest"—in the premises, that this interest is taxable as real property, and that the clause giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality. *Bruner* v. *Hicks*, 230 Illinois, 536, 540, 542; *Watford Oil and Gas Co.* v. *Shipman*, 233 Illinois, 9, 13, 14; *Poe* v. *Ulrey*, *Id.* 56, 62, 64; *Ulrey* v. *Keith*, 237 Illinois, 284, 298; *People* v. *Bell*, *Id.*, 332, 339; *Daughetee* v. *Ohio Oil Co.*, 263 Illinois, 518, 524. These decisions constitute rules of property and must be accepted and applied in passing upon the complainants' rights. *McGoon* v. *Scales*, 9 Wall. 23, 27; *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 583; *Barber* v. *Pittsburgh &c. Ry.*, 166 U. S. 83, 99.

It also is settled that in the courts of Illinois the holder of such a lease cannot maintain an action of ejectment thereon (*Watford Oil and Gas Co.* v. *Shipman*, *supra*, p. 12; *Gillespie* v. *Fulton Oil and Gas Co.*, 236 Illinois, 188, 206), and by reason of the legislation of Congress requiring that in actions at law in the Federal courts of first instance effect shall be given to the local laws and modes of proceeding (Rev. Stat., §§ 721, 914) it results that the complainants could not have maintained an action of ejectment in the Circuit Court. An action for damages, of course, would not have afforded a plain, adequate and complete remedy in the circumstances and, if such a remedy was to be had, it was necessary to resort to a suit in equity for an injunction, discovery and accounting, as was done. *Joy* v. *St. Louis*, 138 U. S. 1, 46; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 567; *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459, 474. Thus the principal question for decision is whether such a suit could be successfully maintained in the Circuit Court,

diverse citizenship and the requisite jurisdictional amount being conceded.

The Supreme Court of Illinois, while fully sustaining the right to maintain such a suit in the courts of the State when the lease contains no clause giving the lessee an option to surrender it (*Gillespie* v. *Fulton Oil and Gas Co.*, *supra*), holds that the presence of such a clause in the lease operates to prevent the lessee from directly or indirectly enforcing it in equity (*Watford Oil and Gas Co.* v. *Shipman* and *Ulrey* v. *Keith*, *supra*), the ground of distinction being that the surrender clause, although lawful in itself and not affecting the validity of the lease, renders it so lacking in mutuality that equity will remit the lessee to his remedy at law. These decisions, it is insisted, should have been accepted and applied by the Circuit Court. To this we cannot assent. By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat., §§ 913, 917; *Neves* v. *Scott*, 13 How. 268, 272; *Payne* v. *Hook*, 7 Wall. 425, 430; *Dodge* v. *Tulleys*, 144 U. S. 451, 457; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 204. As was said in the first of these cases, "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable."

It next is insisted that according to the general principles and rules of equity administered in the Federal courts the surrender clause constitutes an insuperable obstacle

to granting the relief sought, the argument being that, as the complainants have a reserved option to surrender the lease at any time, it cannot be specifically enforced against them and therefore cannot be similarly enforced in their favor. The rule intended to be invoked has to do with the specific performance of executory contracts, is restrained by many exceptions, and has been the subject of divergent opinions on the part of jurists and text-writers. Without considering it in other aspects, we think it is without present application. Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing an irreparable injury calculated to accomplish its practical destruction. The complaint is not that performance of some promised act is being withheld or refused, but that complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief. In this respect the case is not materially different from what it would be if the complainants were claiming under an absolute conveyance rather than a lease. In a practical sense the suit is one to prevent waste, and it comes with ill grace for the defendants to say that they ought not to be restrained because perchance the complainants may sometime exercise their option to surrender the lease. We think this option, which has not been exercised and may never be, is not an obstacle to the relief sought.

Another contention of the defendants is that the lease is so unfair and inequitable in its terms that relief in equity should be withheld and the complainants left to seek a remedy at law, which is tantamount to saying that they must submit to the practical destruction of their leasehold and accept such reparation as may be obtained through recurring actions for damages. Whether

the lease is unfair and inequitable must be determined in view of the circumstances in which it was given. *Willard* v. *Tayloe*, 8 Wall. 557, 570, 571; *Marble Company* v. *Ripley*, 10 Wall. 339, 357; *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459, 473. They were these: Whether the leased tract contained oil or gas was not known. It was in an undeveloped district in which there was no oil or gas well and no pipe line leading to a market. Drilling wells was attended with large expense, the cost of each well being upwards of one thousand dollars, according to the testimony of one of the defendants. No fraud, deception or overreaching was practiced in procuring the lease. The parties were competent to contract with each other and entered into the lease because in the circumstances its provisions were satisfactory to them. Under its terms the cost of the drilling was to be borne by the lessee. If the undertaking was unsuccessful he alone was to stand the loss, and if it was successful the lessor was to share in the results by receiving substantial royalties, the reasonableness of which is not questioned. The consideration for the lease, viz., one dollar paid to the lessor and the covenants and agreements of the lessee, cannot be pronounced unreasonable. Similar leases resting upon a like consideration often have been sustained in cases not distinguishable from this.[1] The lease was to remain in force five years and as much longer as oil or gas was being produced from the premises; in other words it was to expire in five years unless oil or gas was produced within that time. The lessee expressly covenanted to drill a well within nine months or to pay a

[1] See *Allegheny Oil Co.* v. *Snyder*, 106 Fed. Rep. 764; *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. Rep. 801; *Brown* v. *Fowler*, 65 Ohio St. 507; *Gas Co.* v. *Eckert*, 70 Ohio St. 127; *Venedocia Oil Co.* v. *Robinson*, 71 Ohio St. 302; *Lowther Oil Co.* v. *Guffey*, 52 W. Va. 88; *Pyle* v. *Henderson*, 65 W. Va. 39; *Brick Co.* v. *Bailey*, 76 Kansas, 42; *Gillespie* v. *Fulton Oil Co.*, 236 Illinois, 188.

rental of twenty-five cents per acre per year quarterly, in advance, for such time as the completion of the well was delayed beyond that period, the delay, of course, not to extend beyond the primary term of five years. The terms of the covenant doubtless were suggested by the undeveloped condition of the district and by the expense and risk incident to exploring for oil and gas. They evidently were satisfactory to the lessor at the time and the record discloses no reason for holding that in the circumstances they were unreasonably liberal to the lessee. Some criticism is directed against the reserved option to surrender, but it is difficult to perceive how it could be declared inequitable. If it was not exercised the lessee would be bound by his covenants, and if exercised the lessor would be free to deal with the premises as he chose. A surrender was not to affect any existing liability, but only to avoid those "thereafter to accrue." A like clause is in the subsequent lease and, according to the evidence and several reported decisions, is of frequent occurrence in such instruments. We conclude that there is nothing in the terms of the lease which requires that equitable relief be withheld.

While the complainants, as found by the Master, paid all the rental required by the terms of the lease and while they paid most of it in advance of the time stipulated, the first two payments were not seasonably made, and this is urged as a ground for refusing equitable relief. The objection is not well taken. The rental was not in arrears when the subsequent lease of August 9, 1906, was given, and there was no attempt at any time to forfeit or put an end to the lease because of the omissions to pay strictly in advance. While there was no provision in the lease for a forfeiture, the subject was covered by an Illinois statute. Hurd's Rev. Stat. of 1905, c. 80, § 8. Under it the lessor could have demanded the rent in arrears and have notified the complainants in writing that unless

payment was made within a time named in the notice, not less than five days thereafter, the lease would be terminated; and upon a failure to pay within that time he could have treated the lease as ended. But there was no such demand or notice, and consequently no failure to comply with either. As interpreted by the Supreme Court of the State, the statute confers upon a lessee who omits to pay rent at the time it is due a right to cure his default by paying at any time prior to demand and notice or within the time named in the notice. *Chadwick* v. *Parker*, 44 Illinois, 326; *Chapman* v. *Kirby*, 49 Illinois, 211; *Woods* v. *Soucy*, 166 Illinois, 407. Here the default was cured in advance of any demand or notice and thereafter the complainants' rights were the same as if the default had not occurred.

In the accounting Solley and his associates were charged with the value, in the pipe line where the same was sold, of all the oil taken by them from the premises, save the one-eighth part going to the lessor as a royalty, and error is assigned upon this because no deduction was made for the cost of the improvements and operations whereby the oil was taken from the earth and delivered at the pipe line. As respects the cost incurred prior to August 1, 1907, we think the objection is well taken, for up to that time Solley and his associates were in actual ignorance of the earlier lease and were proceeding in the honest belief that the later lease, assigned to them by Willett, was the only one upon the premises. They paid a substantial sum for it, were let into possession by the lessor, and were not conscious that they were invading the rights of others. True, the prior lease had been properly recorded, but as they consulted an abstractor before consummating the transaction with Willett and were advised that the title was clear, the constructive notice resulting from the recording of the prior lease was not inconsistent with an honest, though mistaken, belief on their part

that they had acquired a perfect right to take and dispose of the oil. But the expenses incurred after August 1, 1907, are upon a different footing. On that date Solley and his associates were actually and fully informed of the prior lease and of the complainants' purpose to insist upon the rights conferred by it and to obtain redress for the invasion of those rights, so what was done thereafter cannot be regarded as anything less than a wilful taking and appropriation of the oil which was subject to the complainants' superior right. These views are amply sustained by our decisions. *Woodenware Co.* v. *United States*, 106 U. S. 432; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 434; *Pine River Logging Co.* v. *United States*, 186 U. S. 279; *United States* v. *St. Anthony Railroad*, 192 U. S. 524, 542. See also *Central Coal Co.* v. *Penny*, 173 Fed. Rep. 340; *Bender* v. *Brooks*, 103 Texas, 329; *Gladys City Oil Co.* v. *Right of Way Oil Co.*, 137 S. W. Rep. 171, 182.

We conclude that the decree in the Circuit Court was right save that the accounting should have proceeded along the lines just indicated, and those improvements the cost of which should have been deducted in the accounting, that is, those made before August 1, 1907, should have been awarded to the complainants.

The decrees below are reversed and the cause is remanded to the District Court, as successor to the Circuit Court, with directions that the accounting and the decree be conformed to the views herein expressed.

Decree reversed.

GUFFEY *v.* SUSANNAH SMITH.

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

No. 87. Argued December 2, 3, 1914.—Decided April 5, 1915.

Decided on authority of *Guffey* v. *Smith*, *ante*, p. 101.

THE facts are stated in the opinion.

Mr. Joseph Bailey and *Mr. J. H. Beal*, with whom *Mr. Robert J. Dodds* was on the brief for petitioner.

Mr. J. A. Hindman for respondent.

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

This case is in all material respects like that of *Guffey* v. *James A. Smith*, just decided. The two cases were argued together and the views expressed in that are decisive of this.

The decrees below are reversed and the case is remanded to the District Court with like directions as in that case.

Decree reversed.

PENNSYLVANIA RAILROAD COMPANY *v.* PURITAN COAL MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 76. Argued November 11, 1914.—Decided April 5, 1915.

Section 8 of the Act to Regulate Commerce gives the shipper a right of action against the carrier for damages occasioned by his doing an act prohibited by the statute, and § 9 gives the shipper the option to proceed either before the Interstate Commerce Commission or in the Federal courts.

Construing §§ 8 and 22, however, in connection with the statute as a whole, the Act to Regulate Commerce is both declaratory and creative, and while shippers are given new rights, existing causes of action are preserved and the jurisdiction of state courts is not superseded, in cases in which the decision does not involve the determination of matters calling for the exercise of administrative power and discretion of the Commission or relate to subjects over which exclusive jurisdiction is given to the Federal courts.

While the Federal courts may have exclusive jurisdiction of a suit brought to declare that a rule of practice promulgated by the carrier is unfair, a suit for damages occasioned by the violation or discriminatory enforcement of the carrier's rule, fair on its face and not attacked as unfair, does not involve administrative questions but only those of fact; and even though for damages arising in interstate commerce, such a suit is not within the exclusive jurisdiction of the Federal courts, but may be prosecuted either in those courts or in the state courts.

The state courts have jurisdiction of an action of the shipper against the carrier to furnish a reasonable number of cars, whether the action be treated as one for breach of the common law duty to furnish the cars or for unjust discrimination in allotting cars to another shipper in violation of the carrier's own rule to furnish all the shippers on an equal *pro rata* basis. The jurisdiction of the state court is not defeated because the breach of common law duty is also an unjust discrimination.

Motive for breach of common law duty of the carrier to furnish a reasonable number of cars is immaterial, and what was a proper supply under the circumstances is a matter of fact.

While, ordinarily, a shipper on reasonable demand is entitled to all the cars it can promptly load, that right is not absolute, and a carrier is not liable for failure to supply cars as the result of sudden and great demands which it had no reason to apprehend, but in a case of car shortage it is bound to treat shippers fairly if not identically.

Where there is a shortage and the shipper complains that the carrier's rule of distribution is unfair, the question is for the Commission, *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 312, but where the shipper does not attack the rule itself but complains that the carrier refused to furnish the number of cars it was entitled to under the rule, while other shippers were furnished more cars than they were entitled to under the same rule, a preliminary finding of the Commission is unnecessary; and even if the shipments were interstate the state and Federal courts have jurisdiction.

An exception is properly disallowed by the state appellate court, and will be disregarded by this court, if no relevant testimony was offered to support it and no point thereon raised in the trial court.

237 Pa. St. 420, affirmed.

In March 1908, the Puritan Coal Mining Company brought suit in the Court of Common Pleas of Clearfield County, Pennsylvania, against the Pennsylvania Railroad Company for damages caused by the latter's failure to furnish cars needed for the transportation of coal. On November 21, 1908, the plaintiff filed a "Statement of Claim" in which it was alleged that the defendant was a common carrier of freight between points within the State of Pennsylvania and as such bound to furnish shippers with adequate facilities for the transportation of coal, but that the carrier did not, as required by law, furnish the plaintiff with sufficient cars to enable it to transport coal mined by it. By reason of such failure to perform its duty and legal obligation, the defendant caused the plaintiff damage to the extent of $260,777.

Other paragraphs in the Statement alleged that the carrier established and published the capacity of all coal mines in the region reached by its railway; that, as a common carrier, it was bound to furnish cars upon the

basis of equality in proportion to the rated capacity of plaintiff's mines. But, disregarding its duty, under the statute of the State, the defendant did, unreasonably as well as unlawfully, refuse to furnish the plaintiff with its pro rata share of coal cars held for daily distribution and did subject the plaintiff to unreasonable disadvantage in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Company by giving to the latter 500 cars before distributing any to the plaintiff. By reason of the undue and unjust discrimination against the plaintiff and the undue preference in favor of the Berwind-White Company the plaintiff was not furnished with the cars to which it was entitled and thereby lost the profit of $260,777 which it could and would have made on coal, which it could and would have shipped had it received its due proportion of cars.

On November 23, 1908 and again in April 1911, other Statements were filed which repeated and amplified the charge of unjust discrimination in the distribution of cars whereby the plaintiff received less and the Berwind-White Company more than was proper under the rule of allotment, established by the carrier.

The defendant moved to dismiss the case because the state court was without jurisdiction. The court held that the motion was bad as a demurrer; bad as a plea in abatement, and dismissed it as having been prematurely made. The defendant filed no other defense except a plea of the Statute of Limitations as to certain items of damage claimed in an amendment to the original Statement.

By consent the case was heard by the judge without a jury. He made a report of the facts from which it appears that: Ordinarily the carrier was able to furnish shippers with cars on demand; but in 1902 there was a strike in the Anthracite Region which cut off the usual supply of anthracite coal to eastern cities and compelled them to use bituminous coal mined along the lines of the Pennsyl-

vania Railway. The new demand for soft coal was so great that the Railroad Company was not able to supply the full number of cars called for by the mining companies on its line. Its established rule in such cases was that cars should be allotted to the several coal Districts in proportion to their output, the cars thus allotted to the Districts being then distributed to the mining companies therein in proportion to their capacity. During the Anthracite Coal Strike, however, the carrier violated this rule and made excessive allotments to the "Scalp Level Region," in which the Berwind mines were located, and made too small an allotment to the "Mountain Region" in which the Puritan mines were situated.

There was evidence that the Puritan Company had orders for coal at a price which would have netted it a large profit. The coal so ordered was to be delivered "Free On Board" the cars at the Puritan mines—the purchaser and consignee paying the freight to points of destination within and without the State. There was evidence that the Puritan Company was ready, willing and able to make such sales and deliveries and constantly demanded cars in order to enable it to fill these orders. Sometimes the carrier for days would fail to furnish cars, with the result that the company's mining operations were seriously interrupted. Sometimes the Puritan got cars but not the full number to which it was entitled on the basis of distribution according to mine capacity, although the Berwind-White Company during the same period received more than its proportion.

The Railroad Company's elaborate and detailed Distribution Sheets were introduced in evidence. They showed the number of cars to be allotted to mines on the basis of capacity for each day of the period during which the car shortage existed. From these Sheets and the other evidence in the case it appeared that the Berwind Company received many more cars than its share and that the

Puritan received several thousand less than its proportion. There was proof as to the number of tons these cars could have hauled; that the Puritan had orders for coal which it would have sold if these cars had been furnished; there was also evidence as to the royalty and cost of production, with data on which to make calculation of the damage resulting from the failure to receive cars.

The trial judge held that the state court had jurisdiction and entered a judgment for the plaintiff, which with interest amounted to $74,323.88. Exceptions to the report were overruled and the case was taken to the Supreme Court of Pennsylvania on assignments in which complaint was made that the trial judge erred—

"(1) in holding that the state court had jurisdiction;

(2) in failing to hold that, under the Commerce Act, the Federal court alone had jurisdiction;

(3) in holding that the business between the Puritan Company and the Railroad was intrastate business where coal was sold F. O. B. the cars at the mines;

(4) in holding that the plaintiff could recover damages for failure to receive cars intended for use in shipping coal outside the State;

(5) in adopting the method for distributing cars on which the damages were collected;

(6) in failing "to take into account the private or individual cars, so-called, which were delivered to the plaintiff during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the court has found should have been allotted to the region or district in which the plaintiff's mines were located."

Mr. Francis I. Gowen, with whom *Mr. Frederic D. McKenney* and *Mr. John G. Johnson* were on the brief, for plaintiff in error:

The Interstate Commerce Act alone is applicable.

Actions for breach of the Interstate Commerce Act are not maintainable in state courts.

Cars while being loaded preparatory to interstate movement are employed in interstate commerce.

If the action is maintainable as to intrastate cars, unjust discrimination in distribution of such must be shown to justify recovery.

In determining the number of cars the shipper is entitled to, his individual or private cars must be counted. *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Adams Exp. Co.* v. *New York*, 232 U. S. 14; *Chicago &c. Railway Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Clark Brothers* v. *Penna. R. R.*, 241 Pa. St. 515; *Hillsdale Coal Co.* v. *Penna. R. R.*, 19 I. C. C. 356; *Int. Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Loomis* v. *Lehigh Valley R. R.*, 208 N. Y. 312; *Minnesota Rate Cases*, 230 U. S. 352; *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 304; *North Carolina R. R.* v. *Zachary*, 231 U. S. 305; *Nor. Pac. Ry.* v. *Pacific Coast Ass'n*, 165 Fed. Rep. 1; *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *Ohio* v. *Worthington*, 225 U. S. 101; *Pennsylvania R. R.* v. *Int. Comm. Comm.*, 193 Fed. Rep. 81; *Savage* v. *Jones*, 225 U. S. 501; *Sheldon* v. *Wabash Ry.*, 105 Fed. Rep. 785; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Stineman Mining Co.* v. *Pennsylvania R. R.*, 241 Pa. St. 509; *Tex. & Pac. Ry.* v. *Sabine Tram Co.*, 227 U. S. 111; *Thompson* v. *Pennsylvania R. R.*, 10 I. C. C. 640; *Van Patten* v. *Chi., Mil. & St. P. Ry.*, 74 Fed. Rep. 981; *Yazoo & Miss. Valley R. R.* v. *Greenwood Grocery Co.*, 227 U. S. 1.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

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

The Pennsylvania Railroad Company, an interstate carrier, was sued in a state court for damages caused by its

failure to furnish the Puritan Company with cars in which to load coal for shipment to points within and without the State. The pleadings alleged not only that the carrier had failed to perform its duty to furnish cars, but that in violation of a state statute it had unjustly discriminated against the Puritan Company by failing to distribute cars in accordance with the carrier's own rule that, in time of shortage, they should be allotted to the coal companies on the basis of mine capacity.

The trial court held that the plaintiff was entitled to recover damages caused by the unjust discrimination in distribution of cars. The Supreme Court of Pennsylvania did likewise and affirmed the judgment in favor of the plaintiff. 237 Pa. St. 420.

The Railway Company then brought the case here insisting in effect that (1) the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the power of the Interstate Commerce Commission; (2) that no court had jurisdiction of a suit against it for discriminatory allotment until after the Commission had determined that its rule for distribution was improper; and (3) that no suit for damages against an interstate carrier could be brought for damages occasioned by a failure to deliver cars or for an unjust discrimination in distribution, except in a United States court.

1. These contentions involve a consideration of the jurisdiction of the Commission, of the state courts, and of the Federal courts. But fortunately it will not be necessary to enter into an elaborate discussion of each of the questions.

Section 3 [1] of the Commerce Act makes it unlawful for

[1] "SEC. 3. It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, cor-

the carrier to unduly prefer one shipper over another. Section 8 [1] gives a right of action against the carrier for damages occasioned by his doing an act prohibited by the statute, and § 9 provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." . . .

It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a state court; and that the Federal tribunals have exclusive jurisdiction of a certain class of cases referred to in § 9 has been recog-

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poration, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[1] "SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

nized in the few decisions dealing with the question. See *Copp* v. *Railroad Co.*, 43 La. Ann. 511; *Carlisle* v. *Missouri Pacific*, 168 Missouri, 656; *Western &c. R. R.* v. *White*, 82 S. E. Rep. 644; *Gulf, C. & S. F. Ry.* v. *Moore*, 98 Texas, 302; *Puritan* v. *Pennsylvania Co.*, 237 Pa. St. 448. In *Mitchell Company* v. *Pennsylvania Railroad*, 230 U. S. 250, the same view of the statute was taken in discussing another, but related, question. This construction is also supported by the legislative history of the statute. For while the Hepburn Act, as a convenience to shippers, permitted suits on Reparation Orders to be brought in the Federal court of the District where the plaintiff resided or the Company had its principal office; and while the act of 1910 (36 Stat. 554) in further aid of shippers, permitted suits on Reparation Orders to be brought in state or Federal courts, it made no change in §§ 8 and 9 which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States court.

2. But §§ 8 and 9 standing alone might have been construed to give the Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently, for the purpose of preventing such a result, the Proviso to § 22 declared that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

That proviso was added at the end of the statute,—not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections,—but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to

property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common law duties and the like. But for this proviso to § 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts and this clause was added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction. *Galveston &c. R. R.* v. *Wallace*, 223 U. S. 481.

Construing, therefore, §§ 8, 9 and 22 in connection with the statute as a whole, it appears that the Act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. Compare *Abilene Case*, 204 U. S. 439, 446; *Robinson* v. *Balt. & Ohio*, 222 U. S. 506; 36 Stat. 551 (15); 38 Stat. 220.

In the light of these conclusions, and bearing in mind that the damages sued for here are found to have been inflicted during the anthracite strike of 1902 (before the passage of the Hepburn Act of 1906) it becomes necessary to determine whether the plaintiff's suit was based on a right of action as against an interstate carrier of which the state court had jurisdiction.

3. The difficulty in answering the question grows out of the double character of the pleadings and the construction given the facts by the state court.

The "Statement" contains four counts—one on the common law liability for failure to furnish cars, and the

other three for damages occasioned by unjust discrimination. The plaintiff seems to have ignored his common law cause of action and the trial court entered a judgment for plaintiff for damages as for unjust discrimination. The Supreme Court of Pennsylvania affirmed the judgment, but said that 'if the case was with the plaintiff on its facts, and it is so found there was an offense threefold in character: (1) the offense against the common law, (2) an offense against the Pennsylvania statute of June 3, 1883, making undue and unreasonable discrimination unlawful, (3) an offense against § 3 of the Federal statute regulating interstate commerce.'

There are several decisions, already cited, which hold that suits against Railroads for unjust discrimination in interstate commerce can only be brought in the Federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in § 9.

But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is

no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts.

4. It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated as a suit for a breach of the carrier's common law duty to furnish cars, or an action for damages for the carrier's unjust discrimination in allotting cars to the Berwind-White Company, while at the same time refusing to follow its own rule and furnish them to the Puritan Company on the basis of mine capacity. In either case the liability is the same. For where the carrier performs its duty to A and at the same time fails to perform its duty to B, there has been, in a sense, a discrimination against B. In those instances neither the cause of action, nor the jurisdiction of the court, is defeated because the breach of duty is also called an unjust discrimination.

In the present case the pleadings contained no reference to the Commerce Act. The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. The plaintiff's right and measure of recovery would have been exactly the same if the cars had been furnished to a Manufacturing Plant, instead of to the Berwind-White Coal Company. The plaintiff's cause of action and damages would have been the same if the failure to receive the cars had been due to the fact that the carriers negligently allowed empty cars to stand on side tracks; or, if by reason of a negligent mistake they had been sent to the wrong point. The motive causing the short supply of cars was therefore wholly immaterial, except as corroboration of other evidence showing an actual shortage of cars, so that, if we ignore the plaintiff's characterization of the defend-

ant's conduct, and consider the nature of the case, alleged in the first count and established by the evidence, it will appear that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common law liability to furnish it with a proper number of cars. What was a proper supply was a matter of fact.

5. Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that "if his coach be full" he was not liable for failing to transport more than he could carry. Hutchinson on Carriers, 146; *Lovett* v. *Hobbs*, 2 Shower, 127; *Riley* v. *Horne*, 2 Bing. 217; *Peet* v. *Ry.*, 20 Wisconsin, 594. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers—but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not, identically. In determining how the inadequate supply shall be distributed, it might be necessary to consider the character of the freight tendered—whether perishable or staple and whether a necessity of life needed in crowded cities and the like. In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true

in *Morrisdale Coal Co.* v. *Pennsylvania Railroad*, 230 U. S. 304, 312–314. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory since it took no account of private and foreign cars controlled by the mining company. The reasonableness of the rule was a matter for the Commission.

6. The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity, was unfair, unreasonable, discriminatory, or preferential. But, as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's Distribution Sheets, showed the number of cars to which the Plaintiff, the Berwind-White Company and other Coal Companies in the district, were each entitled. The evidence further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial there was no administrative question as to the reasonableness of the rule but only a claim for damages occasioned by its violation in failing to furnish cars. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 197. The state and Federal courts had concurrent jurisdiction of such claim against an interstate carrier without a preliminary finding by the Commission.

7. It is, however, argued that such a question, calling for the exercise of the administrative function of the Commission, did in fact arise out of the defendant's claim and contention that the court should have taken private cars into account in determining whether the plaintiff received the number to which it was entitled. But, probably because of the carrier's own rule of distribution, there was

no pleading raising such an issue, and there was no sufficient evidence as to the number of private cars received by the Puritan, the Berwind-White, or other companies. The information on that subject was peculiarly within the knowledge of the carrier and proof adequate to furnish a basis for the contention should have been offered—if, indeed, the carrier could have been heard to insist that private cars should have been counted when its own rule, as well as the general practice in the United States, was to exclude them in calculating the number of coal cars to which each mine was entitled. Neither need we inquire whether the fact that the Commission subsequently announced a rule, under which private cars had to be taken into account in making the distribution, could be given a retrospective effect. For, be that as it may be, the exception was properly disallowed, because, as held by the Supreme Court of Pennsylvania, no relevant evidence was offered to support the contention, and no point was raised during the trial, that private cars should be counted in the distribution.

Judgment affirmed.

CHAPMAN *v.* ZOBELEIN.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 200. Submitted March 11, 1915.—Decided April 5, 1915.

An issue as to the invalidity of a tax levy merely because excessive does not raise a Federal question.

A statute providing for the sale of property for taxes giving an opportunity to be heard as to the fairness of the original assessment and providing notice be given of the place and time of sale with a right of redemption for five years, does not deprive the owner of his prop-

erty without due process of law within the meaning of the Fourteenth Amendment and so *held* as to § 3897 of the Civil Political Code of California.

19 Cal. App. 132, affirmed.

THE facts, which involve the constitutionality under the due process of law provision of the Fourteenth Amendment of certain provisions under the tax law of the State of California, in regard to amount of property and its sale for taxes, are stated in the opinion.

Mr. Ernest E. Wood, with whom *Mr. Charles Lantz* was on the brief, for plaintiff in error.

Mr. Edward F. Wehrle for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The laws of California provide a means by which the owner of property can be heard before the Board of Equalizers as to the fairness of the tax assessment. If no objection is made and the taxes are not paid a delinquent list is published. If default still continues the property, instead of being offered to the highest bidder, is sold to the State which holds the 'absolute title as of the date of the expiration of five years from the time of the sale.' During that period the owner has the right to redeem by paying the original and accrued taxes, penalties and interest. It is, however, not the policy of the State to retain separate parcels of land; and if the owner does not redeem within the five years and if the State has not otherwise disposed of the same the statute provides that the land or so much thereof as the Controller may think necessary shall after public advertisement and notice to the owner be sold to the highest bidder.[1]

[1] 3897. "Whenever the State shall become the owner of any property sold for taxes and the deed to the State has been filed . . . the Controller may thereupon by a written authorization direct the

Under these laws an assessment of $1.80 was made against a lot in Los Angeles standing in the name of Givens. It was regularly and duly sold on July 1, 1899. A certificate was made and recorded, which recited that the lot had been sold to the State for $2.51 and that its title would become absolute on July 2, 1904, unless in the meantime redeemed as provided by law. There was no offer to redeem, and in January, 1905, the Controller having determined that past due and accrued taxes, penalties and costs amounted to $16.19, directed the County Tax Collector to sell the lot to the highest bidder for cash. After the required publication and notice by mail, the property was on February 11, 1905, sold to Zobelein, for the sum of $166. A deed was made to him and the proceeds of the sale deposited with the Treasurer for the use of the State and County as provided by law.

On March 19, 1908, William Chapman claiming to be the owner of the lot made a tender of the original and accrued taxes, penalties and interest to date. The tender having been refused he filed a bill asking that his title be quieted and that Zobelein's tax deed be canceled. On the trial Chapman offered evidence to show that there were

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tax-collector . . . to sell the property or any part thereof as in his judgment he shall deem advisable in the manner following: he must give notice of such sale by first publishing a notice for at least three successive weeks . . . such notices must state specifically the place . . . day and hour of sale . . . a description of the property . . . a statement of all the delinquent taxes, penalties, costs, interest and expenses up to the date of such sale . . . the name of the person to whom the property was assessed. . . . Said notice shall also embody a copy of the authorization received from the controller. It shall be the duty of the tax-collector to mail a copy of said notice, postage thereon prepaid, to the party to whom the land was last assessed next before the sale, at his last known post-office address. At the time set for such sale, the tax-collector must sell the property described in the controller's authorization and said notices, at public auction to the highest bidder for cash in lawful money of the United States. . . ."

those present at the sale who would have been willing to pay $16.19, the full amount of the tax, for a strip ten feet off of the easterly or northern end of the lot—leaving the remainder to the owner; that the Collector had not offered to sell so much of the land as would bring the amount of the tax but, instead, had sold the entire lot, 40 by 140 feet in size, and of the full value of $500 for $166, and that the excess, $149.81, had been covered into the treasury. By reason of these facts he claims that the sale was void and that the statute in authorizing such a sale operated to take his property without due process of law. The bill to quiet title was dismissed, and that judgment having been affirmed, the case is here on writ of error.

The plaintiff relies upon *Slater* v. *Maxwell*, 6 Wall. 268, and other like cases, in which sales under an excessive levy were held to be void. But those decisions are not applicable here, not only because an issue as to the invalidity of a levy merely because excessive, does not raise a Federal question, but because the statute here by giving a five-year period of redemption was intended in part to afford the tax payer an opportunity to protect himself against the sale of valuable property for an insignificant sum. The statute in providing that the State should buy in the property and holding it subject to redemption for five years, intended to furnish relief to those who, for want of ability to pay, or for want of notice of the levy, might otherwise be deprived of their property by an ordinary tax sale. Whatever the character of the title which the State acquired at the first sale,—whether legal or equitable,—it was in any event defeasible by redemption within five years.

The plaintiff in error insists, however, that at the second sale property worth $500 was sold for $166 all of which went to the State. He says that this was forfeiture pure and simple, and that there can be no valid forfeiture without a judicial determination as to the existence of the facts

warranting so heavy a penalty. 2 Cooley on Taxation (3d ed.), 858.

The plaintiff's contention must be limited to a consideration of the attack on the proceedings in which his lot was sold in 1905. And, without undertaking to consider the essentials of a valid forfeiture of property for non-payment of taxes, it is sufficient to say that, in the present case, the statute gave an opportunity to be heard as to the fairness of the original assessment. It gave notice of the time and place at which the property would be sold to the State subject to the owner's right to redeem during a period of five years. Under the California decisions the first sale, at the end of five years, vested the State with the title. *King* v. *Mullen*, 171 U. S. 417, 436. See also 2d Cooley on Taxation, 3d ed., 862. The present case is even stronger, for this is a bill attacking the title of the purchaser who bought at the second sale, after notice had been given to the owner, by publication and mail of the time and place when it would occur—his right to redeem continuing up to the time the State actually entered or sold. *Santa Barbara* v. *Savings Society*, 137 California, 463. Certainly such a sale, after the finding by the Controller of the amount of taxes due and after public and special notice to the owner would "work the investment of the title through the public act of the Government. . . . The sale was the public act which is equivalent to office found." *King* v. *Mullin*, 171 U. S. 417, 436. That case shows that the defendant was not deprived of his property without due process of law in violation of the Fourteenth Amendment. All other questions raised by the record are concluded by the decision of the state court. The judgment of the Supreme Court of California is

Affirmed.

EASTERN RAILWAY COMPANY OF NEW MEXICO *v.* LITTLEFIELD.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 320. Submitted March 1, 1915.—Decided April 5, 1915.

Penna. R. R. v. *Puritan Mining Co., ante,* p. 121, followed to effect that under the proviso of § 22 of the Act to Regulate Commerce the state courts by virtue of their general jurisdiction can determine the right of a shipper to recover damages from the carrier for its failure to supply a reasonable number of cars after it had accepted the order, although a car shortage existed of which it had knowledge but did not notify the shipper.

While a carrier may be relieved from performing a service by reason of conditions arising without fault on its part, it must promptly notify shippers of its inability, or the reception of goods without notice will estop the carrier from setting up what might be a sufficient excuse.

Where the record does not contain the evidence and there are no findings of fact, the verdict of the jury in favor of the plaintiff must be construed to mean that the evidence sustained the material allegations of the complaint.

The liability of a carrier for failing to furnish a reasonable number of cars for an accepted shipment becomes fixed when the goods are tendered and the carrier fails to furnish the facilities needed, and that liability cannot be avoided by proving a car shortage for which the carrier was not responsible but of which it gave no notice to the shipper.

Whether a carrier is liable at common law as forwarders of freight to be delivered to connecting carriers outside the State and whether associated carriers are so associated as to be jointly and severally liable are not Federal questions and are concluded by the decision of the state court.

Writ of error to review 154 S. W. Rep. 543, dismissed.

THE facts are stated in the opinion.

Mr. A. H. Culwell, Mr. Gardiner Lathrop, and *Mr. Robert Dunlap* for plaintiff in error, submitted.

Mr. W. A. Dunn, *Mr. J. A. Templeton*, and *Mr. D. T. Bomar* for defendant in error, submitted:

Federal questions which the highest state court is by its settled practice justified in disregarding, either because not assigned or not noticed or relied upon in the brief or argument of counsel will not serve as a basis of a writ of error from the Federal Supreme Court. *Hulbert* v. *Chicago*, 202 U. S. 275; *Cox* v. *Texas*, 202 U. S. 446; *Western Electrical Co.* v. *Abbeville Electrical Co.*, 197 U. S. 299; *Cin. & Ohio Ry.* v. *Slade*, 216 U. S. 78; *West. Un. Tel. Co.* v. *Wilson*, 213 U. S. 52; *Leathe* v. *Thomas*, 207 U. S. 93; *Yazoo Ry.* v. *Adams*, 180 U. S. 1.

This court, in an action at law, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided. *Dower* v. *Richards*, 151 U. S. 658.

It is not enough that such right, privilege or immunity was thus set up and claimed, but it must be made manifest either that the right was denied or that the judgment could not have been rendered without denying it. *West. Un. Tel. Co.* v. *Wilson*, 213 U. S. 52.

This court will not take jurisdiction of a cause where the judgment of the state court rests on two grounds, one of which does not involve a Federal question or where it does not appear on which of two grounds the judgment was based, and the non-Federal ground in itself is sufficient to sustain the judgment. *Allen* v. *Arguimbau*, 198 U. S. 149; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *West. Un. Tel. Co.* v. *Wilson*, 213 U. S. 52; *Arkansas Southern Ry.* v. *German Nat'l Bank*, 207 U. S. 270; *Leathe* v. *Thomas*, 207 U. S. 93; *Vandalia Ry.* v. *Indiana*, 207 U. S. 359.

The plaintiffs' cause of action as declared on in their petition was based on, and grew out of the breach by defendants of their common law duty, to furnish at the point

of origin of the shipment, after due and reasonable notice so to do, a sufficient number of suitable cars wherein to ship the cattle, then and there tendered for shipment.

Such a breach of duty was not such a violation of the interstate commerce act as was cognizable alone by the United States court to the exclusion of the state courts. *Re Winn*, 213 U. S. 458; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 208; *G. H. & S. A. Ry.* v. *Wallace*, 223 U. S. 481.

Notwithstanding the breach of duty on the part of the defendants, of which plaintiffs complain and for which they seek to recover damages, may have been inhibited by, and may constitute a violation of the interstate commerce law, the state courts are not deprived of jurisdiction over such a cause of action, but such jurisdiction is expressly recognized by § 22 of the act of February 4, 1887, and by par. 7 of the act of June 29, 1906, amending § 20 of the act of 1887. *G. H. & S. A. Ry.* v. *Wallace*, 223 U. S. 481; *Adams Express Co.* v. *Crominger*, 226 U. S. 491; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 208.

Mr. Justice Lamar delivered the opinion of the court.

The plaintiffs in error jointly operate the Santa Fe system of railway lines extending through Arizona, Texas, Kansas and Oklahoma into Missouri. The Littlefield Cattle Company owns ranches near these roads and brought suit for damages caused by their failure to furnish cars needed for the transportation of cattle from points in Texas to points in Missouri.

The Cattle Company's declaration averred that finding in the spring of 1907 that it would need 200 cars in which to ship cattle to market it requested the carriers' station agent in May, 1907, to furnish these cars in lots of 50, at designated places on designated dates in September and October, 1907. The defendants accepted the order and

plaintiff relying on the duty and promise brought 3900 head of cattle to the station at the time stated and tendered the same for shipment. The defendants refused to furnish the cars needed. Plaintiff was consequently forced to hold the cattle under herd for several weeks awaiting the arrival of cars wherein to ship the same. On October 18, 1907 plaintiff learned for the first time definitely that defendants would not furnish cars until several weeks thereafter, whereupon plaintiff was forced to abandon the shipment and return the herd to the ranch in Texas which was distant from the station about 100 miles. By reason of the expense and loss of the market plaintiffs were damaged $35,000.

Each Railway Company demurred specially on the ground that it could not be required to furnish cars to go beyond its line in interstate shipment; and insisted that if plaintiff had any right of action it arose under the Commerce Act and the United States courts had exclusive jurisdiction of the suit. The demurrer was overruled. There was a verdict for the plaintiff and, the judgment thereon having been affirmed by the Supreme Court of Texas, the case is here on a writ of error in which the assignments are said to present two questions involving the construction of the act to regulate commerce.

1. The decision in *Penna. R. R.* v. *Puritan Coal Mining Company*, just decided, *ante*, p. 121, makes it unnecessary to do more than repeat that, under the proviso to § 22 of the Commerce Act, the state courts by virtue of their general jurisdiction can determine the right of a shipper to damages for failure to supply cars in cases like that presented by the plaintiff's pleading in the present suit. There was, therefore, no error in overruling the defendant's demurrer.

2. It is claimed that a Federal question, and one calling for the exercise of the administrative function of the Commission, was raised by the contention in defendants'

answer that plaintiffs' demand for cars was unreasonable and as the defendants were unable to comply with the demand they are not liable for failure to furnish the cars within the time, as alleged.

This contention is based on the averment in the answer that the defendant's lines were adequate for the needs of the sparsely settled country through which they ran 'until the — day of ———, 1907 when an unprecedented rush of settlers to the southwest created an unprecedented demand for transportation facilities of all kinds, including cars for live stock.' It was also averred that during the year 1907 there was a car shortage throughout the country and "It was impossible for the defendants to have furnished the cars demanded by the plaintiffs without neglecting other demands and discriminating against other persons and firms contrary to the provisions of the Federal law regulating interstate commerce." There is complaint made of the rulings of the trial judge relating to this defense.

But whatever may be the rights and remedies of the parties and the jurisdiction of the Commission, in such cases, it is certain that the defendants' answer does not meet the issue nor set out facts which would constitute a defense against the cause of action alleged in the plaintiffs' pleading. For the answer indicates that the car shortage was known to the carriers when the plaintiffs demanded cars to be furnished in September and October. There is no allegation that in May the carrier objected that the demand was unreasonable in the time that it was made or in the number of cars that were demanded. Nor was there any claim that the want of equipment was brought to the attention of the Cattle Company, or that it was notified that conditions were such as to make it impossible for the carriers to agree to furnish cars at the time and place designated. If such information had then been given to the shipper, or promptly upon subsequent dis-

covery that the defendants would be unable to supply the cars, a different question would have arisen. But, where, without fault on its part, a carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability, otherwise the reception of goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods or for delay in shipment after they had been received. The evidence is not set out in the record and there are no findings of fact, but the verdict of the jury must be construed to mean that the evidence sustained the material allegations of the complaint and showed that the defendants had negligently failed to furnish cars promised.

Thus construed it appears that the plaintiff in May gave the carriers notice that it would need 200 cars in the following September and October to be used in the shipment of cattle from Texas to Missouri. The offer was accepted and a statement was made that the cars would be on hand at the time and place named. Relying thereon the Cattle Company drove its herd a long distance across the country and at great expense kept them at the station until definitely notified that they could not be shipped for several weeks. In the meantime great expense had accrued, the market was lost and the cattle had to be driven 100 miles back to the ranch.

The liability of the carriers under these facts, and in the absence of a showing of new facts establishing an excuse, became fixed when the cattle were tendered for shipment and the carrier failed to furnish the facilities needed. That liability cannot now be avoided by proof that the failure to furnish cars was occasioned by a shortage for which the carriers may not have been responsible but as to which they failed to give timely notice to the shipper.

The question as to whether at common law these railroads were liable as forwarders of freight to be delivered

to connecting carriers outside the State; and whether the railways were so associated as to make them jointly and severally liable are matters concluded by the decision of the Supreme Court of Texas. There is no merit in the Federal question relied on and the writ of error is

Dismissed.

UNITED STATES *v.* SHERMAN & SONS COMPANY.

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

No. 541. Argued December 17, 18, 1914.—Decided April 5, 1915.

The Government will not allow foreign goods to be brought into this country and then litigate with the importer as to the amount of duty. The duty, as assessed by the Collector, must be paid in any event, not only as a condition of entering the goods, but also as a condition of the right to file a protest. After payment and protest the importer may exercise a right of review under the statutory method and procedure provided therefor.

The assessment and collection of duties is an administrative matter, no notice or hearing being necessary where the assessment is *in rem* and against the foreign goods sought to be entered.

In case of fraud, inability on the part of the Government to proceed *in rem* against goods fraudulently entered would not prevent it from enforcing the personal liability of the importer in a suit *in personam*. *United States* v. *National Fiber Co.*, 133 Fed. Rep. 596, approved.

An importer is not concluded by a reliquidation order made more than one year after the entry where the complaint contains no allegation of the presence of a protest or of fraud, but may file his plea and be heard in his defense as in other cases even though he did not file a protest and make the payment required in the case of the original liquidation.

In a suit brought against an importer to recover the amount of duty

assessed under a reliquidation made more than a year after the original liquidation the Government must conform to the general rule of pleading where recovery is sought on the ground of fraud.

THESE two test cases raise the question of the power of the Collector of Customs to make a reliquidation more than a year after the duty on foreign merchandise has been paid and the imported goods have been removed for consumption. The cases are here on a certificate which shows that in 1909 Sherman & Sons Company imported certain laces from Syria and Egypt. The merchandise was entered at the Port of New York and the duty thereon was assessed by the Collector. The amount of duty thus liquidated was paid by the importer and the goods were removed in 1909.

More than four years thereafter the Collector made a new assessment, or reliquidation, by which he increased the amount of duties to be paid on the laces. Notice of the reliquidation was given by the Collector to Sherman & Sons Company. They filed no protest within the 15 day period mentioned in the Tariff Act of 1909, 36 Stat. 100, § 14, and thereafter two suits were brought by the Government, in the United States District Court for the Southern District of New York, for the recovery of the difference between the duty assessed and paid in 1909 and that fixed by the reliquidation in 1913.

The only substantial difference between the two cases is that in No. 1 the suit was on a Liquidation Order which contained no charge that the importer had been guilty of fraud; while in No. 2 the action is based on a Reliquidation Order which contained a statement that the "entries were reliquidated by the said collector, as aforesaid, pursuant to his findings and decisions that they, as well as the consular invoices presented with them, upon the basis of which the said entries were originally liquidated, as aforesaid, were false and fraudulent, and that the original

liquidations and the delivery of the said goods, wares, and merchandise, aforesaid, had been effected by and through the fraud of the defendant."

In both suits the District Court sustained the demurrer and the United States electing not to plead over, both actions were dismissed. The cases were then taken to the Circuit Court of Appeals, which certified the following questions:

"(1) Can an importer of dutiable merchandise, when sued by the United States for a balance of duties found to be due upon a reliquidation of the entry, attack the validity of the reliquidation, where it appears upon the face of the complaint that the reliquidation was made more than a year after the entry, and where the complaint contains no allegation of the presence of a protest or of fraud, or is the remedy provided by the Customs Administrative Act (act of June 10, 1890, and act of August 5, 1909, 26 Stat. 136 and 36 Stat. 100), viz., of protest, payment of the full amount of duties ascertained to be due upon the reliquidation and appeal to the board of general appraisers, and thence to the courts, the only way in which he may attack the validity of the reliquidation?

"(2) Does the complaint in action No. 1 herein, all of the allegations in which, with the exception of the formal allegations of sovereignty and incorporation, are hereinabove set forth, state a good cause of action?

"(3) If the foregoing question is answered in the negative, then is it sufficient for the United States in order to state a good cause of action to allege the finding or decision of the collector that there was fraud, as in action No. 2 herein, without alleging in what connection the collector had made his finding or decision of fraud, i. e., whether he had found fraud in the dutiable value, or in the classification, or in the quantity of the merchandise, and without alleging the presence of fraud as a fact or the facts constituting the fraud?"

Mr. Assistant Attorney General Warren for the United States:

The special method and special tribunals provided by Congress for the correction of errors of tax officials are exclusive, and if, under the tariff act of 1909, the importer fails to protest and appeal to the Board of General Appraisers and the United States Court of Customs Appeals he cannot contest the validity of the liquidation or reliquidation of duties when sued by the Government in the District Court.

The action or decision of the collector of customs upon the facts when acting in a discretionary or judicial capacity is conclusive and cannot be reviewed by the courts except when and in the manner permitted by statute.

The act of June 22, 1874, § 21, is a statute of limitation. It can be taken advantage of by importer only by means of a plea or answer as a matter of defense.

The objection that the rule contended for by the Government casts upon the importer the burden of proving a negative, i. e., the absence of fraud in the original entry or liquidation, is not a sound one. Such a burden is often cast upon one of the parties to a legal controversy.

Mr. Thomas M. Lane and *Mr. James M. Beck* for Sherman & Sons Company.

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

The questions certified by the Circuit Court of Appeals involve an inquiry as to whether the Collector of Customs, after the expiration of one year, can make a finding of fraud and thereupon make a reliquidation of duties which is final unless, within 15 days, the importer pays the amount thus

declared to be due so as to secure the right to a hearing (1) on the finding of fraud and (2) on the correctness of the new assessment on goods which had been removed for consumption.

On the part of the Government it is claimed that this power is conferred by § 21 of the act of 1874; [1] but it is a significant fact that although the act has been in force for more than 40 years there are only two instances reported, in which the Collector, after the expiration of one year, has attempted to reliquidate because of the existence of fraud. Those two cases (*United States* v. *Vitelli*, Customs Ct. of Appeals (1914) and *United States* v. *Federal Sugar Co.*, 211 Fed. Rep. 1016) are of recent date and in direct conflict with each other.

The novelty of the practice, the conflict in the two decisions and the statement that numerous suits on similar reliquidation orders are now pending, justify a somewhat detailed examination of the authority conferred upon the Collector by the Tariff Act of 1909,[2] 36 Stat., p. 100, § 14;

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[1] "That whenever any goods, . . . shall have been entered and passed free of duty, and whenever duties upon any imported goods, . . . shall have been liquidated and paid, and such goods, . . . shall have been delivered to the owner, . . . such entry and passage free of duty, and *such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.*" Act of June 24, 1874, 18 Stat. 190, § 21.

[2] Subsec. 14. "*The decision of the Collector as to the rate and amount of duties chargeable upon imported merchandise . . . shall be final and conclusive* against all persons interested therein unless the owner . . . shall, within 15 days after . . . ascertainment and liquidation of duties, . . . if dissatisfied with such decision, give notice in writing to the Collector . . . the reasons for his objections thereto, and *if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon.* Upon such notice and payment the Collector shall transmit

p. 98, § 12; the act of 1874,[1] 18 Stat. 190, and the Customs Regulations prescribing the method of liquidating duties and defining the effect of liquidation orders.

An analysis of the various provisions bearing on the subject shows, that when foreign merchandise is to be entered at a domestic port, the owner files his statutory Declaration, together with the invoice, account and list of the goods sought to be imported. *United States* v. *Salen*, 235 U. S. 237. The Surveyor gives a certificate as to weight or quantity, and the Appraiser issues a certificate of value. (Customs Regulations, 861, 1431, 1481, 1484.) With these documents before him—and with the privilege of examining witnesses "touching any matter deemed material in ascertaining the dutiable value and classification of the merchandise,"—the Collector determines the rate of duty to be imposed under the Tariff Act and thereupon calculates, assesses and liquidates the amount to be paid. His decision, as to the amount of duty is final—unless within 15 days the importer files a protest and pays the full amount of duty thus liquidated. In that event the Collector is required to transmit the invoice and all the papers connected therewith to the Board of Nine General Appraisers for their determination of the questions raised by the protest. From them the case can be taken to the Court of Customs Appeals. If the decision

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the invoice and all the papers and exhibits connected therewith to the Board of Nine General Appraisers, for due assignment and determination. . . . Such determination shall be final . . . except in cases where an application shall be filed in the . . . Court of Customs Appeals within the time and in the method provided for in this act." § 28, Subsec. 14, Tariff Act of 1909, 36 Stat. 100.

"All notices in writing to Collectors of dissatisfaction of any decision thereof as to the rate or amount of duties chargeable upon imported merchandise, . . . with the invoice and all papers and exhibits, shall be forwarded to the Board of Nine General Appraisers . . . 36 Stat. 98, subsec. 12.

[1] See note 1, page 150.

is in favor of the importer provision is made for a refund of any overcharge assessed against him.

If, however, there is no such protest, payment and appeal, the Collector's decision is *final as to the amount of duty* (36 Stat. 100, subsection 14) except that for one year—certainly when the goods have not passed beyond his reach (*Iasigi* v. *Collector*, 1 Wall. 384),—the Collector, like a court during the term at which a judgment is entered, has full control of the assessment, and may on his own motion set aside his first order and make a reliquidation. *Robertson* v. *Downing*, 127 U. S. 613. Where there is no such renewal or continuance of the original proceeding, but, where the duty is paid, as assessed, the statute (18 Stat. 190, § 21) provides that the "*settlement shall, after the expiration of one year, in the absence of fraud, be final and conclusive upon all parties.*"

1. This brief review of the many and detailed provisions of the statutes will suffice to show that the Government will not allow foreign goods to be brought into this country and then litigate with the importer as to the amount of duty. Neither bond, nor security, nor retention of the goods during litigation, will dispense with the necessity of payment. The duty, as assessed by the Collector, must be paid in any event,—not only as a condition of the goods being entered, but also as a condition of the right to file a protest. When that has been done, Congress, in order to prevent injustice, has given the importer, who thus pays and protests, the right to bring the goods into the United States, has granted him the opportunity to review the finding of the Collector and has also given him the promise of a refund in case the Collector is found to have made an overcharge. (36 Stat. 103, subsection 23.) But this right of review is not an appeal in ordinary course of law and can be exercised only in the statutory method, on statutory conditions before special statutory tribunals of limited jurisdiction.

2. This summary method of collection, and the requirement that duties be paid as assessed before the right to litigate arises, is an incident of the fact that the assessment and collection of duties is an administrative matter—no notice or hearing being necessary since the assessment is *in rem* and against the foreign goods which are sought to be entered. The amount is determined by inspection of experts, and payment is enforced against the merchandise actually in custody of the customs officers, who cannot permit its removal until the assessed charges have been paid.

If, after the duty had been paid and the goods had been removed, it should be made to appear that they had been fraudulently entered and were still in the possession of the importer, they could be retaken and condemned in forfeiture proceedings. Or, if after the expiration of one year it should be discovered that, as alleged in the present case, there had been false invoices, false weights, or fraud of any kind, by which the United States had been deprived of its just dues, and if the goods themselves could not be found, so as to be forfeited, the inability to proceed *in rem* would not prevent the Government from bringing a suit *in personam* to enforce the importer's personal liability for the debt which accrued and which rightfully should have been paid when the foreign merchandise was entered at the domestic port.

This is illustrated by the decision in *United States* v. *National Fiber Company*, 133 Fed. Rep. 596, cited by the Government on another branch of the argument. It there appeared that certain bales of *flax* had been fraudulently entered as *waste-paper stock*. In the suit brought in a Federal court to recover the duties that should have been paid, the importer insisted that the Government was limited to the summary and statutory method of liquidation above mentioned, claiming that "as soon as property is fraudulently withdrawn the power to collect the duty

ceases, and fines, penalties and forfeitures are imposed." In answering this contention the court cited *Meredith* v. *United States,* 13 Pet. 486, and quoted the following correct statement of the law in *United States* v. *Cobb,* 11 Fed. Rep. 78:

"The summary proceedings which the customs officers are required by law to take against the goods are in the nature of proceedings *in rem,* but are not the sole remedies of the Government for the collection of the duties. . . . The act makes the duties a personal debt or charge upon the importer which accrues to the Government upon the arrival of the goods at the proper port of entry. They are due although the goods have been smuggled, or for any reason have never come to the hands of the customs officers, or the statutory proceedings have never been instituted, or through accident, mistake, or fraud no duties or short duties have been paid. The importer is not discharged from his debt by a delivery to him of the goods without payment."

3. It is said, however, that even if the United States can bring a suit, against the importer, to recover a personal judgment for the duties on goods fraudulently undervalued, that does not deprive the Collector of the power to reliquidate impliedly given by the act of 1874. And it is further argued that, where such statutory method of liquidation is adopted by the Collector, only the statutory method of defense, by protest and payment, is available to the importer. As the importers here filed no protest and made no payment of the duty reliquidated in 1913, it is said that the Collector's finding is as conclusive as was his original liquidation in 1909.

But while the tariff act makes the decision of the Collector final as "*to the rates and amount of duties*"; and while the act of 1874 provides that when such duties have been paid "*such settlement,* after the expiration of one year, and in the absence of fraud, *shall be final and conclusive,*"—yet

in neither of these laws did Congress authorize the Collector to make findings of fraud. Those statutes relate to a power to be exercised when the foreign merchandise was in the custody of the customs officers. By virtue of that possession they were not obliged to hear testimony, but by inspection could determine weight, value and classification, and, as experts (*In re Muser*, 49 Fed. Rep. 831), perform the administrative function of liquidating the amount of duty that must be paid before such foreign goods could be brought into the country.

To that judgment *in rem*, against particular goods in custody, the statute gave a certain quality of finality. But a wholly different situation, and one not provided for by statute, would arise if, after the expiration of the year, the Collector—or his successor in office who had no knowledge of the original transaction—should undertake to reliquidate duties on goods that had been removed and consumed. In such case—the merchandise not being in possession of the customs officers—the essential facts as to weight, value and classification could not be determined by the inspection of experts, as contemplated by law, but would depend upon the testimony of witnesses. If in addition to this new, and non-statutory, method of fixing the amount of duty there is to be added a jurisdiction authorizing the Collector to declare that there had been fraud in the procurement of the original liquidation, it will be seen that the limited administrative power to make a *quasi*-judgment *in rem*, against goods in possession, has grown with the lapse of time, and that the authority claimed for the Collector on reliquidation is far more extensive than that exercised when the original order was entered. For, according to the argument now made, he can, after the expiration of one year, not only hear testimony as to the value of goods not in possession, but, without notice to the importer, can declare him to have been guilty of fraud and make that finding of fraud and value

conclusive unless, within 15 days, the importer protests and pays the amount of the reassessment as the condition of the right to defend. If, within the 15 days, the importer protests but is unable to make such payment, it is claimed that such reliquidation becomes conclusive, so that in a suit to collect the sum thus declared to be due, the Government is not only relieved from the burden of proving the Collector's charge of fraud, but the importer would not be permitted to defend, even to establish his innocence.

The statement of the proposition is well calculated to raise a doubt as to its correctness. *Sabariego* v. *Maverick*, 124 U. S. 261, 291–293. For if the Collector, after one year, can determine that there had been fraud, and thereupon can make a reliquidation having such characteristics of finality as is here claimed for his finding, he can, as in the present case, do so at the end of 4 years; or as in the *Vitelli Case*, after 7 years; or, as in other pending cases referred to in the argument, after 15 years. If—after such a lapse of time, in which parties may die, witnesses may remove or documents be lost—the Collector can make a finding of fraud which can be resisted only upon condition of paying the amount of the reliquidated duties, then there will be many instances in which the importer, and many more instances in which his heirs, will be unable to make the cash payment so as to secure the right to prove that there was no fraud either in fact or in law.

Whether such right to defend, granted on such onerous and sometimes impossible conditions, would afford due process of law to the citizen, otherwise liable to be bound *in personam* by such reliquidation, need not be discussed. For certainly such a power will not be implied and none such can be found in the Tariff Act of 1909 or in § 21 of the act of 1874. They provide that in the absence of protest a finding of *value* is conclusive and that the *settlement*,

in accordance with that finding, is, " . . . in the absence of fraud, final and conclusive."

But there is no provision as to the method in which, or the tribunal before which, the existence of the nullifying fraud can be determined. The silence of Congress on that subject, however, cannot be construed as the expression of an intent to enlarge the administrative function of the Collector into power and jurisdiction to declare that, years before, there had been fraud in the procurement of the order liquidating duties on goods removed.

On the contrary, the failure to make special provision, as to the method of setting aside such orders for fraud, was a recognition of the fact that the determination of the question as to whether there was fraud involved an exercise of the judicial rather than the executive function and that therefore such orders were subject to the general provisions of law by which any other fraudulent judgment can be set aside by the courts in proceedings seasonably begun. *Bailey* v. *Glover*, 21 Wall. 342. By such general law the party sought to be affected must be informed of the nature of the fraud which the complainant undertakes to establish and must be given notice and opportunity to be heard in his defense, before the old order can be set aside and a new order entered.

This conclusion is not in conflict with the principle which recognizes that the Government may proceed *in rem* against foreign goods sought to be entered; or without a judicial hearing, may determine the amount of taxes due by a citizen, and make that administrative finding a lien, which can be resisted only on condition that bond and security be given to pay what is *prima facie* a valid lien on the property of the taxpayer. *McMillen* v. *Anderson*, 95 U. S. 37. For it is not claimed that the reliquidation order here is a general or a special lien, but only that it forms the basis of a suit in which a judgment *in personam* can be obtained. In such a suit the fraud relied on must

be alleged and proved. To sustain the Government's contention that the Collector's finding was conclusive unless protest and payment had been made would be equivalent to saying that a charge of fraud in procuring goods, whether made by a Collector or by a Grand Jury, could be made conclusive, unless before the trial the defendant restored the goods or their value.

These conclusions indicate the general nature of the answer to be given to the questions certified by the Circuit Court of Appeals—though their form is such as to make it impossible to give a categorical answer of Yes or No.

1. As to the question marked 1, we hold that the importer is not concluded by the reliquidation order, and when suit is brought for the amount claimed to be due he may file his plea and be heard in his defense as in other cases, even though he did not file a protest and make the payment required in the case of the original liquidation.

2. The question marked 2 we answer No.

3. To the question marked 3, we answer No—the Government in such a suit being obliged to conform to the general rule of pleading where recovery is sought on the ground of fraud.

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

AMERICAN SURETY COMPANY OF NEW YORK *v.* SHULZ.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 643. Argued February 23, 1915.—Decided April 5, 1915.

Under § 24, Judicial Code, the District Court has jurisdiction of a suit to enforce a supersedeas bond given under §§ 1000 and 1007, Rev. Stat. Such a suit is one of a civil nature arising under the Constitution or laws of the United States even though the suit in which the bond was given was not one so arising.

A supersedeas bond is not a substitute for the judgment in a civil suit for which it is given—the judgment and bond are distinct; the former rises out of the common law and the latter out of a law of the United States.

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

Mr. Charles F. Carusi, with whom *Mr. Henry C. Wilcox*, *Mr. Walter B. Grant* and *Mr. Joseph M. Gazzam* were on the brief, for plaintiff in error.

Mr. Abram J. Rose, with whom *Mr. Alfred C. Petté* and *Mr. Philip M. Brett* were on the brief, for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

Shultz brought suit in a New York court against Whitcomb for breach of contract. The case was removed to the United States District Court for the Southern District of New York, where the plaintiff recovered a judgment for $25,000. The defendant, Whitcomb, in order to take the case to the Circuit Court of Appeals, gave a supersedeas

bond for $30,000, with the American Surety Co. as security. The judgment was affirmed, and not having been paid, Shultz brought suit on the bond against the Surety in the United States District Court for the Southern District of New York.

The defendant demurred on the ground that the Federal court had no jurisdiction. The demurrer was overruled and the case was brought here by the Surety Company, where it contends that though the bond may have been given by virtue of the laws of the United States, "the suit thereon did not involve any controversy respecting the validity, construction or effect of such law" and hence the Federal court was without jurisdiction—the parties not being citizens of different States. *Shulthis* v. *McDougal*, 225 U. S. 561.

This conclusion would be correct if the suit is to be treated as an ordinary action on a sealed instrument voluntarily given. *Lovell* v. *Newman*, 227 U. S. 425. But while in a sense the supersedeas bond was the contract of the Surety Company it was not made in pursuance of any agreement with Shultz and could have been given over his objection, since the laws of the United States (Rev. Stat., §§ 1000, 1007) declared that a writ of error could be obtained by the defendant filing an approved bond with surety conditioned to make good his appeal. Such a bond operated to stay the judgment. Conversely, when that judgment was affirmed, the same laws of the United States gave Shultz a right of action on the bond, and in the suit to enforce that right the measure of his recovery depended upon the construction to be given the Federal statute. Such a suit to enforce such a right could be brought in the United States court by virtue of § 24 of the Judicial Code, which declares that the District Court has jurisdiction of any suit of a civil nature at common law which "arises under the Constitution or laws of the United States."

While there has been no ruling by this court as to

whether a suit on a supersedeas bond can be said to 'arise out of the laws of the United States,' yet there would seem to be no doubt on the subject when the source and nature of the plaintiff's cause of action is considered. If there was room for discussion, the matter is concluded by *Bock* v. *Perkins*, 139 U. S. 628, and *Sonnentheil* v. *Morlein Co.*, 172 U. S. 401, where it was held that a suit on a United States marshal's bond was one arising under the laws of the United States which, therefore, could be brought in the Federal court without regard to the citizenship of the parties. Compare *Tullock* v. *Mulvane*, 184 U. S. 497, 506.

The Surety Company insists, however, that those cases relate to suits on bonds intended to secure the performance of a Federal duty by Federal officers and are not applicable to a case like this, where the suit is on a bond given to supersede a judgment which did not arise out of the laws of the United States but was a mere evidence of a liability which arose at common law and became a security therefor. *Tennessee* v. *Union Bank*, 152 U. S. 454; *Metcalf* v. *Watertown*, 128 U. S. 587; *Provident Society* v. *Ford*, 114 U. S. 635, 641. In effect the argument is that Whitcomb's common law liability was superseded by the judgment; the judgment was superseded by the bond, and as the judgment did not arise under the laws of the United States, neither did the right of action on the bond, which was a mere substitute for the judgment.

But the bond is not a substitute for the judgment nor is it of the same nature. Indeed, it was given for the very purpose of preventing the plaintiff from enforcing it and to enable the defendant, Whitcomb, to prosecute an appeal in an effort to have it set aside. The judgment and the bond were wholly distinct, and arose out of different laws—one out of the common law, the other out of a law of the United States. When the amount of Whitcomb's liability for breach of contract had been adjudged by the Federal court the plaintiff was entitled, at once, to enforce

payment by levy and sale. The laws of the United States, however, intervened and gave to the defendant a means of preventing immediate collection and possibly of defeating the judgment. This delay,—which was helpful to the defendant,—was granted by a Federal statute on condition that he would file a bond with surety conditioned to pay the plaintiff in the event the defendant failed to make good his appeal. If that appeal was not made good the plaintiff's right of action likewise arose out of a Federal statute. A court of the United States had jurisdiction to determine whether there had been a breach of the condition and, if so, the extent of plaintiff's rights and of the defendant's liability under such law. The judgment of the District Court is

Affirmed.

KNAPP *v.* ALEXANDER-EDGAR LUMBER COMPANY.

ERROR TO THE CIRCUIT COURT OF BAYFIELD COUNTY, STATE OF WISCONSIN.

No. 139. Submitted January 18, 1915.—Decided April 5, 1915.

An entryman's interest prior to actual possession is more than mere color of title. From the time of the entry the homesteader has the right of possession as against trespassers and all others except the United States.

The title of a homesteader, while inchoate, is subject to be defeated only by his failure to comply with the requirements of the statute, and so long as he complies therewith he has an inceptive title sufficient as against third parties to support suits in equity or at law.

A homesteader has a preferential right to the land, and when he receives a patent vesting in him the complete legal title it relates back to the date of the initiatory act so as to cut off intervening claimants.

Under special circumstances such as are present in this case, a homesteader may maintain an action for trespass against one cutting timber on the land entered and recover from the wrongdoer and retain for his own use the value of that which has been taken notwithstanding the trespasser has settled with the Government and paid an amount in satisfaction for the timber taken.

Although, until patent issues, the land entered is under the control of the Land Department, the power of that Department is not unlimited or arbitrary and cannot be exercised without notice to the homesteader and opportunity to be heard; and it is open to the homesteader to seek redress in the courts for wrong done to his interests by an unwarranted compromise.

In this case the facts do not show knowledge on the homesteader's part of the facts sufficient to charge him with ratification, and *quære* whether ratification can be inferred from a mere demand on his part without benefits accruing to him as the result thereof.

Quære as to the right of the trespasser against whom judgment is rendered in such a case to require from the homesteader an assignment of his claim against the Government for the amount collected by it in settlement of the trespass.

Judgment based on 145 Wisconsin, 528, reversed.

THE facts, which involve the rights of a homestead after entry and before patent as against trespassers, are stated in the opinion.

Mr. H. H. Grace, Mr. Geo. B. Hudnall and *Mr. C. R. Fridley* for plaintiff in error.

Mr. C. B. Bird, Mr. M. B. Rosenberry, Mr. A. L. Kreutzer and *Mr. J. J. Okoneski* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought in the Circuit Court of Bayfield County, Wisconsin, by plaintiff in error, to recover damages for timber cut and removed from his land and converted into lumber by defendant. The Circuit Court rendered judgment for plaintiff, but the Supreme Court of the State reversed this (145 Wisconsin, 528), and re-

manded the cause with directions to enter judgment in favor of defendant, and this having been done, the case comes here upon questions concerning the nature of an entryman's title under the homestead laws of the United States. Rev. Stat., U. S., §§ 2289, *et seq.*

The facts as found by the trial court, whose findings were adopted by the Supreme Court, are as follows: Prior to February 20, 1902, the land in question, being a tract of 160 acres situate in Bayfield County, Wisconsin, was public land subject to homestead entry under the laws of the United States. On the date mentioned, pursuant to § 2289 *et seq.*, plaintiff duly made application for a homestead entry of this land at the local land office, filed the proper affidavit, paid the Register and Receiver's fees, and obtained a certificate of the entry and a Receiver's receipt. On February 26 he made and filed the non-saline affidavit required by law. On April 5 he went upon the land temporarily, found employés of defendant cutting timber thereon, and forbade their cutting any more. On July 1, and within six months after the making of the entry, he established his actual residence in a house upon the land, and resided upon and cultivated the land continuously thereafter, in accordance with the laws of the United States, for a term of five years. On August 5, 1907, he made his final proof, and a Receiver's final receipt was issued to him. On January 22, 1908, he received a patent, and ever since then has been the owner of the land in fee. On and between March 20 and April 7, 1902, defendant by its agents entered upon the land and cut and removed therefrom, willfully, unlawfully, and without authority, 49,190 feet of pine timber. Thereafter a special agent of the United States investigated the trespass, and reported the amount thereof to the Secretary of the Interior, together with a proposition of settlement made by defendant after the trespass had been estimated, and accompanied by a certified check for $320.14. Upon the

basis of this report, which stated that the trespass was unintentional, the Secretary of the Interior in July, 1903, treating the amount offered as the measure of damages due to the Government under the ruling in *Wooden-Ware Co.* v. *United States*, 106 U. S. 432, accepted the proposition of settlement, and the money was deposited in the treasury of the United States as received "on account of depredations upon the public timber." There is nothing in the pleadings or findings to show that plaintiff was a party to this settlement, or had any notice of it, although his entry was then, and had been at the time the timber was cut, in full force. After he received his patent, he demanded said sum of $320.14 from the Government, but the demand was refused. In fact, the cutting of the 49,190 feet of pine timber from the land in question by defendant was not done by mistake, and defendant did not at or before the time of the service of its answer in the action serve upon plaintiff an affidavit that the cutting was done by mistake, or offer to submit to judgment in any sum, as provided by § 4269, Wisconsin Stats. 1898. The stumpage value of the timber was $5 per thousand; its highest market value before the trial and while in possession of defendant was $12 per thousand; and upon the latter basis the trial judge gave judgment in favor of the plaintiff for $714.87, which included interest from the date of the patent; the court holding that defendant's settlement with the Government was of no effect as against plaintiff.

Section 4269, Wisconsin Stats. 1898, provides: "In all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff or to recover damages for such trespass the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured, the same shall have been, at any time before the trial, while in the possession of the trespasser or any purchaser from

him with notice, shall be found or awarded to the plaintiff, if he succeed, except as in this section provided." The other provisions here referred to cover cases where the cutting was done by mistake or under *bona fide* claim of title. In view of the findings, they have no bearing upon the present case.

The Supreme Court held that since at the time of the cutting the plaintiff was not in actual possession of the land, his right of action, as in trespass *quare clausum fregit*, must depend upon constructive possession, to be established by showing a good title; that notwithstanding plaintiff's homestead entry, there was, for timber cutting prior to the time of his actual entry into possession of the land, only a single right of action, and this was for the benefit of the United States as legal owner, to the exclusion of the entryman; and that, consequently, the settlement between defendant and the Government was a complete defense to plaintiff's action. The court seems to have regarded the entryman, prior to the taking of actual possession, as having no more than color of title, and, while recognizing that the equitable doctrine of relation is applicable also to proceedings at law, held that this had no effect as against the claim of the United States, and when this was satisfied all claim for damages by reason of the timber cutting became extinguished, and the issuance of a patent could not revive it.

Laying aside for the moment the effect of the settlement, it is, we think, erroneous to regard the entryman's interest prior to actual possession as being nothing more than a color of title. From the making of his entry the homesteader has the right of possession as against trespassers and all others except the United States; he has also an inchoate title, subject to be defeated only by failure on his part to comply with the requirements of the homestead law as to settlement and cultivation. So long as he complies with these laws in the course of earning a complete

right to the lands as against the Government he has a substantial inceptive title, sufficient as against third parties to support suits in equity or at law. *United States* v. *Buchanan*, 232 U. S. 72, 76, 77; *Gauthier* v. *Morrison*, 232 U. S. 452, 460–462; and cases cited.

The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws it must be and is held that when he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut off intervening claimants. *Shepley* v. *Cowan*, 91 U. S. 330, 337, 338; *Landes* v. *Brant*, 10 How. 348, 372; *Lessee of French* v. *Spencer*, 21 How. 228, 240; *Beard* v. *Federy*, 3 Wall. 478, 491; *Grisar* v. *McDowell*, 6 Wall. 363, 380; *Stark* v. *Starrs*, 6 Wall. 402, 418; *Lynch* v. *Bernal*, 9 Wall. 315, 325; *Gibson* v. *Chouteau*, 13 Wall. 92, 101; *United States* v. *Anderson*, 194 U. S. 394, 398; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334, 335. In *Gibson* v. *Chouteau*, 13 Wall. 92, 100, the court, by Mr. Justice Field, said: "By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had." The present question was very fully considered by the Circuit Court of Appeals for the Eighth Circuit in *Peyton* v. *Desmond*, 129 Fed. Rep. 1, 11, 13. In that case timber was severed from the land after the initiation and during the maintenance of plaintiff's homestead claim, and an action brought after patent issued was sustained, the court saying: "It does not comport with the spirit of the homestead law to say that, after the initiation

and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant."

Is the case altered by the fact that after the trespass, and before plaintiff received the patent, defendant settled with the representatives of the Government and paid an amount agreed upon as a satisfaction of the Government's claim? In considering this question it is essential to bear in mind that the trespass was in fact willful, and not attributable to mistake; that at the time of the trespass defendant had constructive if not actual notice of plaintiff's homestead entry; that when it made the settlement with the Government over a year later, plaintiff was in possession of the land as a homestead settler and defendant had actual notice of his rights; that the compromise was made without notice to him, and was voluntarily made upon the basis of a report of a special agent to the effect that the trespass was unintentional, when defendant knew the fact to be otherwise; and that whether the trespass was unintentional or willful had a most material bearing upon the amount of damages recoverable, as well upon general principles (*Wooden-Ware Co.* v. *United States*, 106 U. S. 432) as under § 4269, Wisconsin Stat. What would have been the effect of a compromise made with the consent of plaintiff or after notice to him and an opportunity for a hearing, we do not need to say, for no such question is presented. But we think it follows from principles well established that defendant cannot set up the settlement made under the circumstances here disclosed and without notice to plaintiff, holder of an inceptive title to the land. Although until patent issues the homestead is under the

control of the Land Department, which may for sufficient reasons even cancel the entry, yet this power is not unlimited or arbitrary, nor can it be exercised without notice to the homesteader with opportunity for a hearing. *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288, 326; *Michigan Land Co.* v. *Rust*, 168 U. S. 589, 592; *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 453, 454; *Hawley* v. *Diller*, 178 U. S. 476, 489; *Thayer* v. *Spratt*, 189 U. S. 346, 351; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 338. We think there is no difference in principle that will uphold as against the entryman a release or compromise by the Land Department, without notice to him, of a substantial right of action against a trespasser, to the benefits of which the entryman is entitled. Therefore, when the patent has issued and the jurisdiction of the officers of the Land Department is thus terminated, we think it is open to the homesteader to seek redress in the courts for wrongs done to his interest by such an unwarranted compromise, as for other legal errors committed in the course of administration. *Moore* v. *Robbins*, 96 U. S. 530, 533; *United States* v. *Schurz*, 102 U. S. 378, 396 *et seq.*; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640, 645; *Michigan Land Co.* v. *Rust*, 168 U. S. 589, 592; *Brown* v. *Hitchcock*, 173 U. S. 473, 478; *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 454. And where, as here, the departmental action complained of has substantially impaired the value of the homestead entry, and has been taken wholly without notice to the entryman, it constitutes no bar to judicial proceedings otherwise properly maintainable by him against the trespasser after receipt of his patent.

It is no answer to say that the legal right of action for a trespass to unoccupied lands resides in the owner of the legal title as being constructively in possession. Defendant did not pay the Government under compulsion of a suit or judgment in trespass, but, for reasons of its

own, voluntarily undertook to compromise the matter. In doing this, it could not properly rely upon restrictions peculiar to the action of trespass, but must take account of pertinent legal rights and obligations, however arising. Hence it was bound at its peril to recognize the beneficial nature of the homesteader's interest, at least to the extent of seeing that his rights were not cut off without notice. Defendant knew, when it made the compromise, or with proper inquiry would have known, that plaintiff was in possession under a homestead entry that antedated the trespass; that his patent, if and when issued, would relate back to the time of his entry; and that the officials of the Land Department could not lawfully take action substantially impairing the value of his entry, without notice to him and an opportunity to be heard. It results, in our opinion, that a voluntary compromise made with those officials without notice to the homesteader, and upon a basis that, as defendant knew, did not afford full legal compensation for the injury done, cannot be invoked by defendant to his detriment.

To the suggestion that plaintiff has ratified the compromise, because, after he received his patent, he unsuccessfully demanded from the Government the sum of $320.14, received by it in settlement from defendant, it is sufficient to say that it is not found that he did this with full knowledge of the facts. Whether ratification could be inferred from plaintiff's mere demand, without benefit accruing to him as the result of it, we do not stop to consider.

We therefore hold that the Supreme Court of Wisconsin erred in denying a recovery to plaintiff, whether because of the incomplete nature of his title and his want of possession at the time of the trespass, or because of the settlement afterwards made between the Government and defendant.

We are not called upon to consider whether plaintiff

could recover from the United States by a suit in the Court of Claims the amount received from defendant in the compromise (*United States* v. *Jones*, 131 U. S. 1; *United States* v. *Anderson*, 194 U. S. 394), because upon the facts as found plaintiff is entitled to recover a larger amount and upon a different basis of fact from that which controlled in the compromise; and defendant as the wrongdoer cannot put upon plaintiff the burden of prosecuting two actions to recover compensation for a single wrong. Our decision, however, is without prejudice to action by the Wisconsin courts requiring that plaintiff, upon obtaining judgment against defendant in accordance with the principles above declared, and as a condition to payment of that judgment by defendant, shall assign to defendant his claim against the Government, or, upon being properly indemnified, shall agree to permit defendant to use his name in proceedings to recover the money. We intend no intimation respecting the effect, if any, of § 3477, Rev. Stat., upon such an assignment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

REINMAN *v.* CITY OF LITTLE ROCK.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 153. Argued January 22, 1915.—Decided April 5, 1915.

The decision of the state court of last resort that a municipal ordinance is within the scope of the power conferred on the municipality by the legislature is conclusive upon this court.

Where the state court has held that an ordinance is within the power conferred on the municipality it must be regarded as a state law within the meaning of the Federal Constitution.

Any enactment, from whatever source originating, to which a State gives

the force of law is a statute of the State within the meaning of § 237, Jud. Code, conferring jurisdiction on this court.

Even though a livery stable is not a nuisance *per se* it is within the police power of the State to regulate the business, and to declare a livery stable to be a nuisance, in fact and in law, in particular circumstances and particular places; if such power is not exercised arbitrarily or with unjust discrimination it does not infringe upon rights guaranteed by the Fourteenth Amendment.

The opinion of the state court is to be interpreted in the light of the issue as framed by the pleadings.

Where averments of facts in the complaint are contradicted by the answer, and the expression used by the court "dismissed for want of equity," may, under the practice of the state court, as in Arkansas, indicate dismissal on the merits as distinguished from a dismissal based upon a formal defect or fault—this court assumes that the state court adopted the facts set up in the answer, that being the basis of facts which would most clearly sustain its decision.

The ordinance of the City of Little Rock, Arkansas, making it unlawful to conduct the business of a livery stable in certain defined portions of that city, is not unconstitutional as depriving an owner of a livery stable already established within that district of his property without due process of law or as denying him equal protection of law.

107 Arkansas, 174, affirmed.

Plaintiffs in error filed their bill of complaint in the Pulaski County Chancery Court, a state court of general chancery jurisdiction, praying an injunction against the City of Little Rock, its mayor and other officers, to restrain them from enforcing an ordinance passed by the city council to regulate livery stables. The ordinance recites that "The conducting of a livery stable business within certain parts of the City of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the City," and it is ordained that it shall be unlawful to conduct or carry on that business within the area bounded by Center, Markham, Main, and Fifth Streets, under penalties prescribed. Plaintiffs include a firm that conducts a livery and sale stable business, and a corporation that carries on a general livery stable business, within the de-

fined area. It is averred that the businesses are and have been for many years conducted in brick buildings, in a proper and careful manner, and without complaint as to sanitary conditions; that plaintiffs during the progress of their business have been compelled to enter into leases for the grounds and improvements and to construct brick buildings at great cost, useful for no other purpose, and that these and other large expenditures made for improvements will be lost if they are compelled to cease to do business there; that there is no other available site in the city where such business can be profitably carried on and where plaintiffs have assurance that they may remain without molestation; that these matters are matters of public notoriety, and the establishment of the business in that locality has been encouraged by the city, and upon the strength of such encouragement the buildings were constructed and expenditures made; that the passage of the ordinance was procured by named parties (not made defendants) who desired to purchase the property of plaintiffs; that plaintiffs have tried to obtain another location for their business outside of the prohibited district, but are unable to do so except with extravagant outlay which they are unable to make; and that the action of city council in prohibiting the carrying on of any livery stable business in the locality mentioned is unreasonable, discriminatory, not warranted by law or the charter of the City, and in contravention of those provisions of the Fourteenth Amendment respecting due process of law and the equal protection of the laws. A verifying affidavit and a copy of the ordinance were attached as exhibits.

Defendants demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer and granted a temporary restraining order. Defendants answered, denying the material averments of the bill, and asserting that the ordinance was passed in good faith

for the purpose of promoting the health and prosperity of the citizens, and in the belief that said livery stables in said district were conducive to sickness and inconvenience and ill health to the citizens, and were damaging to the property in that vicinity; also, "that said district composes the greatest shopping district in the entire State of Arkansas; that it contains the largest and best hotels in the State, and the district encompasses the most valuable real estate in the entire State; that said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive odor coming from said stables, to the great detriment of the tenants in the property adjoining and the shoppers who go within this district, and hotel guests; that said stables being in such densely populated part of the city produce disease, making that section extremely unwholesome," etc.

Plaintiffs excepted and also demurred to the answer as insufficient in law to raise an issue of fact upon the authority assumed by the City to pass the ordinance, and as stating no facts sufficient to constitute a defense. The cause was then heard, upon the complaint and exhibits, the answer, and the demurrer; the demurrer was sustained, and, defendants declining to plead further, it was decreed that the temporary restraining order be made perpetual.

Defendants appealed to the Supreme Court of Arkansas, which court, on February 24, 1913, made a decree reversing the decree of the lower court, with costs, and remanding the cause with directions to dismiss the complaint for want of equity. The decree of reversal recited: "This cause came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is error in the proceedings and

decree of said Chancery Court in this cause, in this: Said court erred in granting the relief prayed for in the complaint, whereas the same is without equity and should have been dismissed." It was therefore ordered and decreed that the decree of the Chancery Court be reversed, "and that this cause be remanded to said Chancery Court with directions to dismiss the complaint of the appellees for want of equity." Upon the same day an opinion was filed in the Supreme Court, expressing the grounds of the decision. 107 Arkansas, 174.

Thereafter, a petition for rehearing was filed, and by leave of the court was submitted at a later date with a supporting brief. Among the averments of the petition were the following: "That the effect of the ruling of this Honorable Court is to deprive the appellees of the opportunity of presenting evidence to sustain those of the allegations of the Complaint as are denied by the said answer, for the said ruling orders the dismissal of the said complaint and does not remand the cause so that appellees may present evidence to sustain the allegations of their bill of complaint bearing on the question whether said ordinance and permit system does or does not amount to a deprivation of property and a denial of the equal protection of the laws, within the provisions of the Fourteenth Amendment to the Constitution of the United States, as well as the provisions of the constitution of the State of Arkansas. That unless the appellees are given an opportunity to introduce evidence as aforesaid the said answer may be taken as conclusive against them; that upon the finding that said demurrer was improperly sustained the cause should have been remanded to take evidence as to the said constitutional questions, including the use and abuse of the said permit system by said City." The petition for rehearing was taken under advisement, and at a later date overruled, without opinion. The present writ of error was then sued out.

Mr. Morris M. Cohn for plaintiff in error.

Mr. J. Merrick Moore for defendant in error.

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

The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the law-making power of the State; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of Judicial Code, § 237, which confers jurisdiction upon this court. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 555, and cases cited.

Therefore the argument that a livery stable is not a nuisance *per se*, which is much insisted upon by plaintiffs in error, is beside the question. Granting that it is not a nuisance *per se*, it is clearly within the police power of the State to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment. For no question is made, and we think none could reasonably be made, but that the general subject of the regulation of livery stables, with respect to their location and the manner

in which they are to be conducted in a thickly populated city, is well within the range of the power of the state to legislate for the health and general welfare of the people.

While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment. *Slaughter House Cases*, 16 Wall. 36, 62; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *Barbier* v. *Connolly*, 113 U. S. 27, 30; *Soon Hing* v. *Crowley*, 113 U. S. 703, 708; *Lawton* v. *Steele*, 152 U. S. 133, 136; *Gundling* v. *Chicago*, 177 U. S. 183, 188; *Williams* v. *Arkansas*, 217 U. S. 79, 87; *Cronin* v. *People*, 82 N. Y. 318, 321; *In re Wilson*, 32 Minnesota, 145, 148; *City of St. Louis* v. *Russell*, 116 Missouri, 248, 253.

The only debatable question arises from the contention that under the particular circumstances alleged in the complaint, viz: that plaintiffs in error have conducted the livery stable business for a long time in the same location and at large expense for permanent structures, and the removal to another location would be very costly, and since (as the complaint alleges) their stables are in all respects properly conducted, this particular ordinance must be deemed an unreasonable and arbitrary exercise of the power of regulation. But these averments of fact are contradicted by the answer, and so we are confronted with the question: Upon what basis of fact is this matter to be determined? Plaintiffs in error insist that it is to be

decided upon the basis of the averments contained in their complaint, because the Supreme Court ordered the complaint to be dismissed for want of equity. But it seems that in the practice of the courts of Arkansas, as elsewhere, the expression "dismissed for want of equity" is employed to indicate a decision upon the merits as distinguished from one based upon a formal defect or default; and that it applies as well where on final hearing it is found that the averments of the complaint are not true in fact, as where those averments do not upon their face show a sufficient basis of fact for the granting of the relief sought. *Meux* v. *Anthony*, 11 Arkansas, 411, 422, 424; *Smith* v. *Carrigan*, 23 Arkansas, 555; *McRae* v. *Rogers*, 30 Arkansas, 272.

Upon the face of this record it appears that all the material averments of the bill were denied by the answer, and that the latter pleading also showed particular reasons why it was proper for the city council to prohibit the further maintenance of livery stables within the limited district described in the ordinance. It was averred that that district is in a densely populated and busy part of the City of Little Rock, and that the stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease. Plaintiffs did not contradict this, but demurred to the answer as insufficient in law, and the cause was heard in the trial court upon the complaint and exhibits, the answer, and the demurrer. The demurrer being sustained, and defendants declining to plead further, a perpetual restraining order followed in due course. Upon the removal of the cause to the Supreme Court on defendant's appeal it was heard there, as appears from the decree rendered by that court, "upon the transcript of the record of the Chancery Court of Pulaski County." That record includes not only the complaint, but the answer and demurrer. The Supreme Court in its opinion made no statement of the facts upon which it proceeded

to judgment, and did not intimate that it ignored the effect of the answer and confined itself to the averments of the bill alone. It is true that broad reasoning was employed; but, upon familiar principles, the opinion is to be interpreted in the light of the issue as framed by the pleadings. Besides, the petition for rehearing especially set up that the effect of the ruling of the Supreme Court was to deprive plaintiffs of the opportunity of presenting evidence to sustain those allegations of the complaint that were denied by the answer, that unless they were given an opportunity to introduce evidence the answer might be taken as conclusive against them, and that the cause ought to have been remanded to take evidence, etc. The fact that the Supreme Court denied the rehearing without giving reasons is at least consistent with the theory that plaintiffs had properly interpreted the meaning of the decree as entered, and that it correctly expressed the intent and the purpose of the court.

By § 25 of the Judiciary Act of 1789 (ch. 20, 1 Stat. 86) it was provided: "No other error shall be assigned or regarded as a ground of reversal . . . than such as appears on the face of the record." Under this Act, it was uniformly held that in reviewing the judgments of state courts (in States other than Louisiana, where the opinion formed a part of the record), this court could not look into the opinion to ascertain what was decided. In the amendatory act of February 5, 1867 (ch. 28, § 2, 14 Stat. 386), the words above quoted were omitted, and because of this it has since been held that this court is not so closely restricted as before to the face of the record to ascertain what was decided in the state court, and may examine the opinion, when properly authenticated, so far as may be useful in determining that question. This is recognized in paragraph 2 of our eighth rule. "But after all," said Mr. Justice Miller, speaking for the court in *Murdock* v. *City of Memphis*, 20 Wall. 590, 633, 634,

"the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the Federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment. Hence, in the present case, we ought to and do assume that the Arkansas Supreme Court acted upon the basis of the facts set up in the answer of the City, treating them as sufficiently substantiated by the effect of the demurrer in admitting them to be true so far as properly pleaded. This being so, there is, as we have already remarked, no reasonable question of the validity of the ordinance, and the judgment of the Supreme Court is

Affirmed.

MALLOY *v.* STATE OF SOUTH CAROLINA.

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

No. 172. Argued March 5, 1915.—Decided April 5, 1915.

The constitutional inhibition on *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action and not to obstruct mere alterations in conditions deemed necessary for the orderly infliction of humane punishment. *Rooney* v. *North Dakota*, 196 U. S. 319.

A law is not *ex post facto* within the constitutional prohibition that mollifies the rigor of the criminal law; but only those laws that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction fall within the prohibition. *Calder* v. *Bull*, 3 Dall. 386.

A statute not changing the penalty of death for murder but only the mode of producing death, does not increase the punishment.

Producing death by electrocution instead of by hanging does not increase the punishment and is not unconstitutional under the *ex post facto* prohibition of the Federal Constitution; and so *held* as to the statute of South Carolina providing for punishment of murder by death produced by electrocution instead of hanging.

95 S. Car. 441, affirmed.

THE facts, which involve the constitutionality under the *ex post facto* provision of the Federal Constitution of the law of South Carolina relating to punishment for murder and altering of place and method of execution of the death sentence, are stated in the opinion.

Mr. Charles L. Prince, with whom *Mr. W. F. Stevenson* was on the brief, for plaintiff in error.

Mr. F. H. Dominick, with whom *Mr. Thomas H. Peeples*, Attorney General for South Carolina, was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

At the summer term, 1912, Court of General Sessions, Marlboro County, South Carolina, Joe Malloy was found guilty without a recommendation to mercy under an indictment charging him with the murder of Moore, November 24, 1910, and sentenced to death by electrocution in conformity to the Act of the Legislature approved February 17, 1912 (S. Car. Statutes at Large, 1912, p. 702),

the pertinent portions of which are in the margin.[1] The judgment was affirmed by the Supreme Court of the State (95 S. Car. 441); the cause is here by writ of error; and a reversal is asked solely upon the ground that the enactment of 1912 materially changed the punishment for murder and therefore in respect of Malloy's offense is

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[1] An Act to Prescribe the Method of Capital Punishment in South Carolina.

Sec. 1. Be it enacted by the General Assembly of the State of South Carolina, That after the approval of this act by the Governor all persons convicted of capital crime and have imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the State Penitentiary, at Columbia, under the direction of the Superintendent of the Penitentiary instead of by hanging.

Sec. 2. The Board of Directors of the State Penitentiary are authorized and required to provide a death chamber and all necessary appliances for inflicting such penalty by electrocution and pay the costs thereof out of any funds in their hands. The expense of transporting any such criminal to the State Penitentiary shall be borne by the county in which the offence was committed.

Sec. 3. Upon the conviction of any person in this State of a crime, the punishment of which is death, it shall be the duty of the presiding Judge to sentence such convicted person to death according to the provisions of this Act, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be transmitted by the Clerk of the Court of General Sessions in which said sentence is pronounced to the Superintendent of the State Penitentiary, at Columbia. . . .

Sec. 4. At such execution there shall be present the executioner and at least two assistants, the Penitentiary surgeon and one other surgeon, if the condemned person so desires, an electrician, the condemned person's counsel and relatives, if they so desire, ministers of the gospel, not exceeding three, if they so desire, and not less than twelve nor more than twenty-four respectable citizens of this State, to be designated by the executioner.

Sec. 5. . . .

Sec. 6. . . .

Sec. 7. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.

Approved the 17th day of February, A. D. 1912.

ex post facto and in contravention of Art. I, § 10, of the Federal Constitution.

Under the South Carolina laws effective when the crime was committed the punishment for one found guilty of murder without recommendation to mercy was death by hanging within the county jail, or its enclosure, in the presence of specified witnesses. The subsequent act prescribed electrocution as the method of producing death instead of hanging, fixed the place therefor within the penitentiary, and permitted the presence of more invited witnesses than had theretofore been allowed.

In response to the meticulous objection based upon change of place for execution and increased number of witnesses it suffices to refer to what this court said through Mr. Justice Harlan in *Holden* v. *Minnesota*, 137 U. S. 483, 491, and *Rooney* v. *North Dakota*, 196 U. S. 319, 325, 326. The constitutional inhibition of *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment.

The contention in behalf of plaintiff in error most earnestly relied on is this: Any statute enacted subsequent to the commission of a crime which undertakes to change the punishment therefor is *ex post facto* and unconstitutional unless it distinctly modifies the severity of the former penalty. "The courts cannot and will not undertake to say whether or not a change from hanging to electrocution is an increase or mitigation of punishment;" and therefore the act of 1912 cannot apply in the circumstances presented here. *Hartung* v. *People*, 22 N. Y. 95.

The often-quoted opinion of Mr. Justice Chase in *Calder* v. *Bull*, 3 Dall. 386, 390, 391, summarizes *ex post facto* laws within the intendment of the Constitution thus: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done,

criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive." Further expounding the subject, he adds: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction." And to the general doctrine thus announced this court has continued to adhere.

In *Mallett* v. *North Carolina*, 181 U. S. 589, 597, Mr. Justice Shiras, speaking for the court, after reviewing former opinions, applied the established principles and concluded that the impeached legislation was not *ex post facto* since it "did not make that a criminal act which was innocent when done; did not aggravate an offence or change the punishment and make it greater than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offence; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offence charged."

Considering the above stated settled doctrine and well known facts of which judicial notice is taken, we think the validity of the impeached act is clear.

Impressed with the serious objection to executions by hanging and hopeful that means might be found for taking life "in a less barbarous manner," the Governor of New York brought the subject to the attention of the legis-

lature in 1885. A commission thereafter appointed to ascertain the most humane and practical method of inflicting the death sentence reported in favor of electrocution. This was adopted by the statute of 1888 and, with the approval of the courts, has been in continuous use since that time. *In re Kemmler,* 136 U. S. 436; *People ex rel. Kemmler* v. *Durston,* 119 N. Y. 569.

Influenced by the results in New York eleven other States [1] have adopted the same mode for inflicting death in capital cases; and, as is commonly known, this result is the consequent of a well-grounded belief that electrocution is less painful and more humane than hanging. *Storti* v. *Commonwealth,* 178 Massachusetts, 549, 553; *State* v. *Tomassi,* 75 N. J. L. 739, 747.

The statute under consideration did not change the penalty—death—for murder, but only the mode of producing this together with certain non-essential details in respect of surroundings. The punishment was not increased and some of the odious features incident to the old method were abated.

In *Hartung* v. *People, supra,* the court had under consideration and condemned an act of the legislature which made a distinct addition to the penalty prescribed when the crime was committed; and the conclusion therein is not properly applicable in the circumstances of the present cause where there has been no such change.

The judgment of the court below is

Affirmed.

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[1] Ohio, 1896; Massachusetts, 1898; New Jersey, 1907; Virginia, 1908; North Carolina, 1909; Kentucky, 1910; South Carolina, 1912; Arkansas, Indiana, Pennsylvania and Nebraska, 1913.

DETROIT TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF COATES, *v.* PONTIAC SAVINGS BANK.

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

No. 173. Argued March 5, 1915.—Decided April 5, 1915.

The law of Michigan, as it was in 1903, did not give to unsecured creditors of the mortgagor a lien upon the property covered by an unrecorded chattel mortgage, but merely a right to a lien requiring a proceeding of some kind for its fastening; and the right to such a lien was lost if the proceeding was not taken prior to the bankruptcy of the mortgagor.

196 Fed. Rep. 29, affirmed.

THE facts, which involve the rights of creditors of a bankrupt as against those of the holder of an unrecorded chattel mortgage under the laws of the State of Michigan, are stated in the opinion.

Mr. Bernard B. Selling for complainants and appellants.

Mr. Harrison Geer and *Mr. Elmer R. Webster* for defendants and appellees, submitted.

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

To secure his outstanding note for $2300, Coates, a resident of Michigan and the present bankrupt, gave the Pontiac Savings Bank a mortgage upon his stock of goods, fixtures, etc., in May, 1902, which was not filed for record until the following September. Between these dates he

incurred indebtedness exceeding $1400 to sundry dealers for goods sold and delivered; and it is admitted that under the laws of Michigan the mortgage was void as to them although good as between the parties thereto. In January, 1903, Coates sold the chattels for cash, paid his note out of the proceeds and procured a release of the lien upon the records by the mortgagee who acted with knowledge of the facts. Proceedings were instituted against him shortly thereafter and he was duly adjudged a bankrupt. Appellant here was appointed trustee and, replying upon supposed rights of creditors, commenced this proceeding in the District Court—September, 1903—to recover from the Pontiac Savings Bank the amount of allowed claims for debts contracted by the bankrupt while the mortgage was off the records, although none of them had been reduced to judgment and no steps had been taken to fix a lien upon the property or its proceeds. The bank set up the absence of any lien and the validity of the mortgage as between the parties thereto and maintained that the trustee stood in the shoes of the bankrupt and could not enforce the alleged rights of creditors. This defence was sustained by the Circuit Court of Appeals (196 Fed. Rep. 29).

The cause has been pending a very long time and must be decided under the provisions of the Bankrupt Act as it existed in February, 1903,—before the material changes created by amendments—and according to the laws of Michigan then in effect whose exact import is not entirely clear. Being of opinion that the action of the court below was correct, we will consider only the ground which it assigned therefor.

Payment to the bank by the bankrupt is attacked as invalid under § 9523, Michigan Compiled Laws of 1897, which provides that every chattel mortgage "which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of

the things mortgaged, shall be absolutely void as against the creditors of the mortgagor" unless filed for record as directed.

The Circuit Court of Appeals declared (p. 33): "It is settled by the decisions of the Supreme Court of Michigan that the words 'creditors of the mortgagor' mean subsequent creditors in good faith and without notice of the mortgage, and that the statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage. Recovery can be had here on but one of two theories: First, that the bankruptcy act creates a lien in favor of the creditors under which the rights given by the Michigan statute can be enforced; or, second, that the Michigan statute creates such a lien. The bankruptcy act does not operate as an attachment of the bankrupt's property, nor itself create a lien in favor of creditors of the class before us. *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Crucible Steel Co.* v. *Holt*, 174 Fed. Rep. 127; affirmed by the Supreme Court April 1, 1912, 224 U. S. 262. The controlling question, therefore, is whether the rights given by the Michigan statute to the class of creditors named amount to an actually established lien, or, on the other hand, to a mere right to create a lien. . . . Since the decision below, the case of *In re Huxoll*, 193 Fed. Rep. 851, has been decided by this court. We there carefully reviewed and considered the Michigan decisions, and reached the conclusion that the Michigan statute does not of itself create a lien upon the mortgaged property prior to the lien of the mortgage; but gives merely a right to a lien, requiring a proceeding of some kind for its fastening. We there held that the right to lien was lost if such proceeding was not taken before bankruptcy."

Replying to the contention that an assignee for the benefit of creditors in Michigan may avoid unrecorded chattel mortgages and that the rights of a trustee in bank-

ruptcy are not less, the Circuit Court of Appeals further said: "As we pointed out in the *Huxoll Case*, the Michigan decisions mean no more than that the assignee is by the assignment given a lien upon the property which did not before exist. The mere fact that a lien is created under statutory assignment for the benefit of creditors does not give a lien under the Bankruptcy Act. This conclusion directly follows from the decision in *York Mfg. Co.* v. *Cassell, supra.*"

We think the Circuit Court of Appeals properly interpreted and applied the doctrine announced in *York Mfg. Co.* v. *Cassell,* and are unable to see that it reached an incorrect conclusion concerning the pertinent laws of Michigan. *Holt* v. *Crucible Steel Co.*, 224 U. S. 262, 267.

The decree is

Affirmed.

RIVERSIDE AND DAN RIVER COTTON MILLS *v.* MENEFEE.

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

No. 169. Argued March 4, 1915.—Decided April 12, 1915.

To condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment.

Courts of one State cannot without violating the due process clause extend their authority beyond their jurisdiction so as to condemn the resident of another State when neither his person nor his property is within the jurisdiction of the former. *Pennoyer* v. *Neff*, 95 U. S. 714.

A corporation, no more than an individual, is subject to be condemned without a hearing in violation of the due process clause; and the mere fact that one who is a director, but who is not a resident agent, of a foreign corporation resides within a State does not give the courts

of that State jurisdiction over a corporation which is not doing business and has no resident agent therein. This applies to a judgment even though by implied reservation its effect is limited to the confines of the State.

Wherever a provision of the Constitution is applicable the duty to enforce it is all embracing and imperative. Due process cannot be denied in fixing, by judgment, against one beyond jurisdiction of the court, an amount due even though the enforcement of the judgment be postponed until execution issue.

The fact that a judgment rendered without due process of law may not, under the full faith and credit clause, be enforced in another State, affords no ground for the court entering a judgment without jurisdiction in violation of due process of law.

THE facts, which involve the validity under the due process clause of the Fourteenth Amendment of a judgment against a foreign corporation not doing business within the State, are stated in the opinion.

Mr. F. P. Hobgood, for plaintiff in error.

No appearance for defendant in error.

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

The plaintiff in error, a corporation called hereafter the Riverside Mills, was sued in North Carolina by the defendant in error, a resident of that State, to recover for personal injuries alleged to have been suffered by him while working in Virginia as an employé in a cotton mill operated by the Riverside Mills. The summons directed to the corporation was returned by the sheriff served as follows: "by reading and leaving a copy of the within summons with Thos. B. Fitzgerald, a director of the defendant corporation." The Riverside Mills filed a special appearance and motion to dismiss in which it prayed for the striking out of the return of service for the reason that

"the defendant is a foreign corporation, not doing business in North Carolina, and has not been domesticated and has no agent upon whom service can be made and that the service of the summons is invalid and does not amount to due process of law as against this defendant." This motion was supported by an affidavit of a person styling himself secretary and treasurer of the company stating the facts to be that the corporation was a Virginia one, had its place of business in Virginia, carried on its factory there, had never transacted business in North Carolina, had no property there and that the person upon whom service was made, although he was a director of the corporation and was a resident of North Carolina, had never transacted any business in that State for the corporation. The motion to strike out was refused although the court found the facts to be in accordance with the statement made in the motion and in the affidavit. The defendant answered. There was a trial to a jury and despite the insistence upon the invalidity of the summons, there was a verdict against the Riverside Mills to which it prosecuted error to the Supreme Court of North Carolina. For the purpose of that review an agreed case was made in which the facts were found to be as stated in the affidavit supporting the motion to strike out and in considering the case the court below stating the same facts reviewed the ruling of the trial court upon that premise.

Coming first to consider the statutes of North Carolina and various decisions of that State construing and applying them, the court held that as the plaintiff was a resident of the State and the director upon whom the summons was served also resided in the State, the summons was authorized, wholly irrespective of whether the foreign corporation had transacted any business in the State, had any property in the State, or whether the resident director was carrying on business for the corporation in North Carolina or had done so. The court came then to

consider decisions of this court which it deemed related to the question under consideration, for the purpose of testing how far the due process clause relied upon operated from a Federal point of view, that is, the Constitution of the United States, to dominate and modify, if at all, the state rule. In doing so reference was made to the ruling in *Goldey* v. *Morning News*, 156 U. S. 518, and *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, in the first of which it was held that there was no basis for asserting jurisdiction as the result of service of process on the president of a foreign corporation in a State where he was temporarily present and where the corporation did no business, had no property and where the president was transacting no business for the corporation in the State where he was served; and in the second of which under like conditions the same conclusion was reached where the service was made on a director of a foreign corporation residing in the State where the suit was brought. After briefly reviewing these cases, which were both decided in courts of the United States on removal from state courts, and directing attention to the fact that in the *Goldey Case* it was observed, "Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government," and that the same observation was reiterated in the opinion in the *Conley Case*, it was in effect decided that from the point of view of the Constitution of the United States the due process clause relied upon did not control the state law so as to prevent the taking of jurisdiction under the summons for the purpose of entering a judgment, whatever effect the due process clause might have upon the power to enforce the judgment when rendered. The court said: "Under our decisions above quoted and upon which the plaintiff relied in bringing his action the service is sufficient for a valid judgment at least within our jurisdiction." Concerning the judgment of affirmance

which it awarded, the court further said: "What opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration." Two members of the court dissented upon the ground that the decisions of this court which were referred to in the opinion of the court clearly established that there was no power to render the judgment, and that the same conclusion was required as the result of the following additional cases in this court: *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8; *Kendall* v. *American Automatic Loom Company*, 198 U. S. 477; *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602; *St. Clair* v. *Cox*, 106 U. S. 350; *Barrow Steamship Company* v. *Kane*, 170 U. S. 100; *Construction Co.* v. *Fitzgerald*, 137 U. S. 98. To the judgment thus rendered (161 N. Car. 164) this writ of error was prosecuted.

Was error committed in deciding that consistently with the due process clause of the Fourteenth Amendment there was jurisdiction to enter against the defendant a money judgment, even although by implied reservation its effect was limited to the confines of the State and the extent to which the judgment as so rendered was susceptible of being executed was left open for future consideration when the attempt to enforce the judgment would give rise to the necessity for its solution?

That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement. Equally well settled is it that the courts of one State cannot without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another State when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in *Pennoyer* v. *Neff*, 95 U. S. 714, and has been without deviation upheld by a long line of cases, a few of the leading

ones being cited in the margin.[1] And that a corporation no more than an individual is subject to be condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in *Pennoyer* v. *Neff*, is also established by the cases referred to and many others.

Whatever long ago may have been the difficulty in applying the principles of *Pennoyer* v. *Neff* to corporations, that is, in determining when, if at all, a corporation created by the laws of one State could be sued in the courts of another sovereignty, because of the conception that as an ideal being a corporation could not migrate and its officers in going into another sovereignty did not take with them their power to represent the corporation, such difficulty ceased to exist with the decision of this court rendered more than thirty years ago in *St. Clair* v. *Cox*, 106 U. S. 350, which, together with the leading cases which have followed it, have been already referred to. And the doctrine which they uphold with virtual unanimity has been upheld by the courts of last resort of most of the States in such a number of cases as to render their citation unnecessary. Without restating the *St. Clair Case* or the leading cases which have followed and applied it, we content ourselves with saying that it results from them that it is indubitably established that the courts of one State may not without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another State where such corporation has not come into such State for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no

[1] *St. Clair* v. *Cox*, 106 U. S. 350; *Freeman* v. *Alderson*, 119 U. S. 185; *Wilson* v. *Seligman*, 144 U. S. 41; *Scott* v. *McNeal*, 154 U. S. 34; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432; *Haddock* v. *Haddock*, 201 U. S. 562; *Clark* v. *Wells*, 203 U. S. 164; *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573.

qualified agent therein upon whom process may be served; and that the mere fact that an officer of a corporation may temporarily be in the State or even permanently reside therein, if not there for the purpose of transacting business for the corporation or vested with authority by the corporation to transact business in such State, affords no basis for acquiring jurisdiction or escaping the denial of due process under the Fourteenth Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances. And this makes clear why there is no ground for assuming that there was conflict between the ruling in *Goldey* v. *Morning News*, *supra*, where it was held that jurisdiction could not be acquired over a corporation of one State in another and different State by service on the president of the corporation temporarily in such State, and the ruling in *Conley* v. *Mathieson Alkali Works*, *supra*, that jurisdiction could not be acquired under the same circumstances by service on a director permanently residing in the other State, since both cases were rested upon the basis that not the character of the residence but the character and power of the one served as an agent of the corporation, was the test of the right to acquire jurisdiction.

It is self-evident that the application of these settled principles establishes the error of the decision of the court below unless it be that the distinction upon which the court acted be well founded, that is, that the enforcement of due process under the Fourteenth Amendment was without influence upon the power to render the judgment since that limitation was pertinent only to the determination of when and how the judgment after it was rendered could be enforced. But this doctrine while admitting the operation of the due process clause, simply declines to make it effective. That is to say, it recognizes the right to invoke the protection of the clause but denies its re-

medial efficiency by postponing its operation and thus permitting that to be done which if the constitutional guarantee were applied would be absolutely prohibited. But the obvious answer to the proposition is that wherever a provision of the Constitution is applicable the duty to enforce it is imperative and all-embracing and no act which it forbids may therefore be permitted. If the suggestion be that although under the jurisdiction which was exerted in form a money judgment was entered, as no harm could result until the execution, therefore no occasion for applying the due process clause arose, it suffices to say that the proposition but assumes the issue for decision since the very act of fixing by judicial action without a hearing a sum due, even although the method of execution be left open, would be in and of itself a manifestation of power repugnant to the due process clause.

It is however, unnecessary to pursue the subject from an original point of view, since in *Pennoyer* v. *Neff*, *supra*, among other things it was said that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." And see *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602, where these principles were treated as self-evident. It is true that in most of the decided cases questions concerning judgments rendered without a hearing under the circumstances here disclosed have arisen from attempts to enforce such judgments in jurisdictions other than the one wherein they were rendered, presumably because the defense of want of due process was not made until the judgments had been entered and an effort to enforce them was made. But the fact that because unobservedly or otherwise judgments have been rendered in violation of the due process clause and their enforcement has been refused under the full faith and credit clause affords no ground for

refusing to apply the due process clause and preventing that from being done which is by it forbidden and which if done would be void and not entitled to enforcement under the full faith and credit clause. The two clauses are harmonious and because the one may be applicable to prevent a void judgment being enforced affords no ground for denying efficacy to the other in order to permit a void judgment to be rendered.

Reversed.

UNITED STATES EX REL. CHOTT *v.* EWING, COMMISSIONER OF PATENTS.

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

No. 194. Argued March 10, 11, 1915.—Decided April 12, 1915.

The provisions of the Judicial Code in regard to the jurisdiction of this court were obviously intended not to increase its jurisdiction but to reduce it.

Although when considered isolatedly there may be conflict between the provisions of the fifth, and of the concluding paragraph of § 250 of the Judicial Code, that conflict can be eliminated by applying the elementary rules of construction of turning primarily to the context of the section and secondarily to provisions *in pari materia*.

Paragraph V of § 250 of the Judicial Code, concerning the validity of an authority of the United States, confers no jurisdiction on this court to review a judgment of the Court of Appeals of the District of Columbia where the question of authority arises under the patent laws of the United States; judgment in such cases is made final by the concluding paragraph of § 250, unless this court exercises its rights of certiorari or the Court of Appeals certifies questions to this court as provided by that paragraph.

Writ of error to review 40 App. D. C. 591, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the Court of Appeals of the Dis-

trict of Columbia under § 250 of the Judicial Code, are stated in the opinion.

Mr. Joshua R. H. Potts for plaintiff in error.

Mr. Assistant Attorney General Warren, with whom *Mr. R. F. Whitehead* and *Mr. W. S. Ruckman* were on the brief, for defendant in error.

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

A brief statement of the origin and nature of the controversy is essential to an understanding of the questions which we are called upon to decide. The relator applied for a patent. His claim was rejected by the primary examiner. He appealed to the Board of Examiners in Chief, and that body, disagreeing with the primary examiner, reversed his decision and sustained the claims of the patent. By authority of the Commissioner the primary examiner then made a further investigation and directed the attention of the Commissioner to additional patents which it was deemed demonstrated that the invention was not patentable. Thereupon the Commissioner, coinciding with such opinion, approved the action of the primary examiner and decided that the invention was not patentable. The Commissioner, however, did not then formally reject the claim to patent but wrote to the applicant calling attention to the authority of the Commissioner to review the case personally despite the favorable action of the Board of Examiners in Chief and assigning a day when a hearing would be afforded as to the patentability of the invention. The applicant challenged the right of the Commissioner to act in the premises and insisted that as a result of the conclusions of the Board of Examiners in Chief he was

entitled to a patent and that it was the plain ministerial duty of the Commissioner to direct it to issue. The Commissioner then filed an opinion insisting upon his authority and pointing out the reasons which caused him to conclude that the invention was not patentable. The opinion concluded with the statement, "I am clearly of the opinion that the application sets forth nothing upon which a patent can properly be based. The claims are therefore rejected and the patent refused. Appeal from this decision to the Court of Appeals should be taken, if at all, within the time prescribed by the rules of that court."

Instead of taking the appeal as thus suggested, the relator commenced this proceeding by mandamus in the Supreme Court of the District to compel the issue of the patent. From a judgment in his favor ordering the mandamus as prayed the Commissioner and the primary examiner prosecuted error to the Court of Appeals. That court, concluding that it was without authority to control the Commissioner in the performance of his administrative duties by the writ of mandamus, reversed the action of the trial court, directed the dismissal of the application for mandamus, reserving however the right of the relator to seek by appeal (Rev. Stat. § 4911) the redress of any wrong which it was deemed had been committed by the Commissioner in refusing to direct the issue of the patent, and this writ of error is prosecuted to that judgment. 40 App. D. C. 591.

At the threshold our jurisdiction to review is disputed on the ground that the concluding paragraph of § 250 of the Judicial Code upon which our jurisdiction depends provides that "Except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals [of the District of Columbia] shall be final in all cases arising under the patent laws," and that the exception embraced in the subsequent section includes

only the discretionary right to certiorari and the power of the Court of Appeals to certify a question under the circumstances provided. On the other hand, it is insisted jurisdiction obtains because of the right of this court to review the judgments and decrees of the Court of Appeals of the District conferred by the fifth paragraph of § 250, that is, "in cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question." Our jurisdiction is therefore to be determined by fixing the meaning of these two provisions. It cannot be doubted that isolatedly considering the text of the fifth paragraph the controversy comes within its terms, that is, it involves the validity of an authority exercised under the United States or draws in question the existence or scope of the power of an officer of the United States. So also it is not substantially disputable, although the contrary is argued, that isolatedly considered the case is excluded from our jurisdiction because it is within the last paragraph of § 250, that is, is one arising under the patent laws since it depends upon those laws and concerns the very right and authority to issue a patent as provided by those laws. Looked at isolatedly, therefore, there is absolute conflict between the two provisions. But even if the method of isolated consideration were not otherwise plainly a mistaken one, it follows that it cannot be adopted since it affords no possible solution of the controversy. Such solution must therefore be sought by following the elementary rules, that is, by turning primarily to the context of the section and secondarily to provisions *in pari materia* as affording an efficient means for discovering the legislative intent in enacting the statute thereby vivifying and enforcing the remedial purposes which it was adopted to accomplish.

From the point of view of the context, as it is manifest

that the provisions in the concluding clause were enacted as exceptions or limitations upon the grant of jurisdiction contained in the previous passage of § 250, it clearly results that it was not contemplated that the power conferred by the fifth paragraph would extend to and embrace the cases wherein by the last paragraph the judgments or decrees of the Court of Appeals of the District of Columbia were made final. This being true, it hence also is necessarily true that the fifth paragraph concerning the validity of an authority confers no jurisdiction on this court to review a case where the question of authority arises under the patent laws of the United States. Indeed it would be very unreasonable to assume that jurisdiction was conferred to review the action of the Court of Appeals in all cases in which its authority was exerted to direct the officials of the Patent Office under the patent laws to issue a patent, and yet no power was reserved to review the action of that court in determining after the issue of a patent whether it was or was not rightfully issued. And the cogency of this view becomes at once apparent when it is considered that prior to the enactment of the Judicial Code, under § 233 of the District Code (31 Stat. 1227) jurisdiction of this court to review the judgments or decrees of the Court of Appeals of the District embraced cases "without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent," a provision not preserved in § 250 of the Judicial Code. But the question is hardly an open one since it has been expressly held that the power does not exist in this court to review the Court of Appeals of the District of Columbia in a criminal case which would obtain under § 250 but for the provision of the last paragraph making final the action of that court in criminal cases. *Gompers* v. *United States*, 233 U. S. 604. And by analogy a like consideration when applied to the sections of the statute concern-

ing the jurisdiction of this court to review the judgments of Circuit Courts of Appeals has led to a like conclusion. *Macfadden* v. *United States*, 213 U. S. 288. Besides, when looked at comprehensively, in view of the fact that the provisions of the Judicial Code were obviously intended not to enlarge the jurisdiction of this court but to relieve it, and considering in this light the omissions and the limitations therein expressed and the power to certiorari stated in § 251, the conclusion is irresistible that the intent and purpose of the act was, while narrowing the imperative jurisdiction, to create an equipoise by extending the voluntary or discretionary exercise of jurisdiction by means of the writ of certiorari,—a purpose which would be wholly frustrated if the contention as to jurisdiction now insisted upon were sustained.

Dismissed for want of jurisdiction.

SOUTHERN PACIFIC COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 202. Submitted March 11, 1915.—Decided April 12, 1915.

Where a railroad company transports property and troops of the United States over a continuous line of railroad part of which is free-haul and the remaining part is pay line, the character of the shipment fixes the rate and the Government can be charged a proportionate part of the through rate only, and not the local rate on that part of the haul which is over the pay line.

A provision in a railroad land grant statute that the government shall always have the right to ship over the line at fair and reasonable rates not to exceed those paid by private parties entitles the Government

to the benefit of the long haul rate and to pay the proportionate part of the rate and not be charged the local rate over the pay line.
48 Ct. Cl. 227, affirmed.

THE facts, which involve questions relating to the amount which the United States can be charged for transportation over a land grant railway, are stated in the opinion.

Mr. A. A. Hoehling, Jr., for appellant.

Mr. Assistant Attorney General Thompson for the United States.

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

The appellant, the Southern Pacific Company, operates under a lease a line of road from San Francisco, via Roseville Junction, to Portland. The line to Roseville Junction, a distance of 108.03 miles, was built as part of the main line extending from San Francisco to Ogden, Utah, by the Central Pacific Railroad Company under an act of Congress of July 1, 1862 (12 Stat. 489). By § 6 of that act the land grants for the construction of the road were made "upon condition that said company . . . shall at all times . . . transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service). . . ."

The line from Roseville Junction to Portland, a distance of 663.91 miles, was constructed under the act of

Congress approved July 25, 1866 (14 Stat. 239). Section 5 of that act provided:

"And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States: And the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States."

Between August, 1897, and March, 1902, the Southern Pacific Company transported for the United States persons and property over said line via Roseville Junction "from points on either side thereof to points on the other side; thus, from San Francisco, Ogden, and other points . . . to Portland via Roseville Junction. The shipments in question did not originate at Roseville Junction nor terminate at Roseville Junction, but were carried through on one continuous transit over both the free haul and the nonfree haul portions of the road precisely as any through shipment is carried for a private shipper." (Finding VI.)

For the services thus rendered the company presented its bills to the accounting officers of the Government in which, while nothing was charged for services rendered over the portion of the road which was free, the local rate was exacted between San Francisco and Roseville Junction. We say the local rate because it is certain that at the times in question the railroad had duly established and published schedules of rates embracing local rates to Roseville Junction as well as through rates to Portland and other points via Roseville Junction, the local rates being higher than the through rates. The accounting officers refused to allow the claims in full insisting that the Government was entitled to the benefit of the through rate. They therefore distributed the through rate over

the whole distance and deducted from the aggregate of the bills the difference between the sum which had been made up by charging the local rate and the sum which would be due charging only the through rate ascertained upon the mileage basis as above stated. The sum remaining due under the operation of this method was received by the railroad company under protest and this suit was commenced in the court below to recover the difference.

Upon the finding of the facts above stated and the legal conclusion that under the statutes the railroad was without right to refuse to allow the through, and charge the local, rate its claim was rejected. 48 Ct. Cls. 227. This appeal was then prosecuted.

There is no controversy concerning the method by which the sum of the applicable through rate was ascertained by the accounting officers of the Government. There are, hence, as stated in the argument of appellant, no disputed facts, and the question for decision is a narrow one since, as further stated in that argument:

"The present appeal presents but a single question of law, and that is as to the legal rate of compensation to which the railroad company is entitled for the transportation of property and troops of the United States over a continuous line of railroad, part of which is free-haul and the remaining part of which is pay line."

The entire theory upon which it is contended that the through shipments could be subjected to a local rate from San Francisco northward to Roseville Junction and southward from Roseville Junction to San Francisco finds clear expression in the argument on behalf of the railroad company as follows:

"While there is a continuous rail line between those two points [San Francisco and Portland] the line itself, from the standpoint of compensation or pay to the railroad company, *breaks* at Roseville Junction; *south* of that point it is 'pay' line; *north* thereof, it is 'free-haul' line; and it

so happens that appellant company, as lessee, operates *both* lines."

1. But the error of the proposition is manifest as it confounds cause and effect since it assumes the unassumable, that is, that the question of whether traffic is to have the benefit of the lesser through rate or be subjected to the higher local rate is to be determined by the sum of the compensation asked for its carriage instead of by the nature and character of the movement of the traffic, that is, whether it was a through or a local movement. In other words, the proposition is, not that the character of the movement fixes the rate, but that the rate determines the character of the movement. The confusion involved in, and the destructive results which would flow from, the proposition cannot be better illustrated than by considering that the foundation upon which a lesser charge is justified for a through shipment than is exacted for a local shipment is the less cost to the carrier of doing the through business than is incurred in doing the local business. Therefore, to adopt the proposition would require a reversal of the standards by which the character of traffic is fixed. And the terms in which the contention is stated bring out in bold relief the fallacy which it contains, since while it admits "there is a continuous rail line between those two points" (San Francisco and Portland), it yet declares that "the line itself, from the standpoint of compensation or pay to the railway company, *breaks* at Roseville Junction;" that is, not that the continuous physical line of rail over which the through transportation moves is in any way broken, but that by a break (change) in the line of compensation an imaginary break in the physical line itself is to be assumed to the end that a shipment which is inherently through may be converted into one which is essentially local.

2. But apart from the mere question of the abstract error in the proposition relied upon, it is clear that to

accept it would give rise to a plain violation of the provisions of the act of Congress governing the movement of traffic over the road from San Francisco to Roseville Junction, since that act exacts that the Government shall at all times have the right to ship over the road "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service." As the findings clearly establish that the schedules filed and published contained a through rate for a shipment from San Francisco to Portland via Roseville Junction, and *vice versa*, it would seem to be indisputable that by the very terms of the act such through rate so published and filed was open and available to the United States for its through shipments. This must be the case unless it can be said that because the United States had acquired an increased advantage concerning the movement of its shipments from Roseville Junction to Portland, therefore it had lost the right to have its through shipments treated as such from San Francisco to Roseville Junction. And it is to be observed that there is no ground for saying that the existence of the right in favor of the United States to a free haul beyond Roseville Junction to Portland subjected the road in hauling from Roseville Junction to San Francisco, or *vice versa*, to a greater cost, since the findings in express terms establish that the freight shipped through by the United States was carried by a continuous movement under exactly similar conditions as was all other through freight carried for private individuals.

Affirmed.

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

TEXAS & PACIFIC RAILWAY COMPANY *v.* HILL.

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

No. 482. Submitted March 1, 1915.—Decided April 12, 1915.

A corporation created by an act of Congress is inherently entitled to invoke the jurisdiction of this court to review a judgment of the Circuit Court of Appeals, even though such judgment would be final as against another defendant not so incorporated.

Nothing in the record indicates that the trial court erred in not taking the case from the jury.

Where the defendant after removing the case into the Federal court, obtains a continuance in order to prepare its defense on the merits, and does plead to the merits, such action amounts to a waiver of objections to the jurisdiction of the state court in which the action was originally commenced.

The exclusion of jurors and the granting or refusal of postponements are matters within the discretion of the trial court and this court will not interfere unless it appears that the limits of sound discretion were transcended.

Objections to the charge of the trial court to the jury in this case *held* unfounded.

Whether the trial court erred in refusing a remittitur because of the excessive amount of the verdict is not open in this court. *Southern Ry.* v. *Bennett*, 233 U. S. 80.

THE facts, which involve the validity of a judgment for damages for personal injuries, are stated in the opinion.

Mr. H. C. Carter, *Mr. Magus Smith* and *Mr. Perry J. Lewis* for defendant in error in support of the motion.

Mr. George Thompson and *Mr. T. D. Cobbs* for plaintiff in error in opposition to the motion.

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

As a corporation created by an act of Congress the plaintiff in error is inherently entitled to invoke our jurisdiction. Hence the motion to dismiss is without merit.

Both the record and the argument for reversal are voluminous, the latter covering about one hundred and thirty-five printed pages. We state some of the undisputed facts out of which the controversy arose and recapitulate such of the propositions relied on in argument as we think need to be considered to make clear our disposition of the case.

On December 22, 1911, while a passenger on a train of the Texas & Pacific Railway moving between Longview and Atlanta, Texas, a collision between two trains of the road took place which, it was alleged, occasioned the injuries to the defendant in error to compensate for which she brought this suit. She was travelling on a through ticket sold by the International & Great Northern Railway Company at Pearsall, Frio County, Texas, where the defendant in error resided and where she was employed as a clerk. The ticket covered a journey to Longview, where the International connected with the Texas & Pacific, and thence by that road to Atlanta. After the collision the defendant in error went to the home of her parents at Queen City near Atlanta, where she was treated by a local physician. Under his advice she went to a sanitarium at Texarkana. From there she returned to Queen City, remained under treatment a while and went to her home at Pearsall. Under the advice of a local physician and accompanied by him she subsequently went to San Antonio for consultation with surgeons there. They advised an operation but the advice was not immediately followed, as the defendant in error returned to Pearsall and remained there some time under the care of her physician.

Not improving, again under his advice and accompanied by him she went to San Antonio, submitted to an operation and after convalescence returned in an invalid condition to Pearsall where she was living at the time this suit was commenced on August 24, 1912, in the District Court of Frio County, Texas, against both the International and the Texas & Pacific, the liability of both being based on an allegation that they were partners. The International pleaded to the jurisdiction on the ground that although it operated a road and had an agent in Frio County, it was not susceptible of being sued there for an alleged injury to a passenger. It was asserted that if the jurisdiction was based on a law of Texas of 1905 which was referred to, it did not apply, and if it did, the law was void because repugnant to the state constitution for reasons which were named. In addition in the same paper a denial of the alleged partnership was made and the exclusive liability of the Texas & Pacific for the injury, if any injury had resulted, was asserted. On the same day the Texas & Pacific as a corporation created by an act of Congress, joined by the International, prayed and was granted the right to remove the cause to the District Court of the United States for the Western District of Texas and consequently filed the record in that court on the fourteenth of October, 1912. On the same day the Texas & Pacific filed a paper styled in its heading "Answer of Defendant," but on which was endorsed the title of the case and the words "Pleas, Demurrer, and Answer of the Defendant, T. & P. Ry. Co." The paper contained four separate paragraphs each signed by the attorney. The first, after referring to the plea to the jurisdiction of the state court filed in that court by the International and after alleging that the Texas & Pacific had no road and did no business in Frio County, asked that if the plea of the International should be sustained, the suit should abate as to the Texas & Pacific. The second paragraph

denied under oath the alleged partnership with the International. The third virtually demurred on the ground of no cause of action, and the fourth was an answer to the merits generally denying the averments of the petition and setting up particular grounds of defense. On the third of January, 1913, the plaintiff moved to remand to the state court which was resisted in writing by the Texas & Pacific in a paper in which it alleged that although it was an inhabitant of the Northern District of Texas it had the right to remove the cause to the District Court of the Western District. This pleading contained no reservation whatever of any question of jurisdiction of the state court, but on the contrary alleged that the removal was valid, had been joined in by the International and that said road "joins in this motion contending that the case is one under the law removable, and which controversy between the parties this court has the sole and exclusive jurisdiction by virtue of the removal therein." The motion to remand was denied. The case being at issue, and a term at which it could be tried having either commenced or being about to commence, the Texas & Pacific made a written application for a continuance to enable it to prepare its defense on the merits. The application was granted. Subsequently both the defendants in somewhat amplified form reiterated the pleadings previously filed by them except that the answer of the Texas & Pacific contained averments disputing the existence of the injury complained of, the necessity of the operation to which the plaintiff had submitted, the skill of the surgeon by whom it was performed and attacking the good faith of the plaintiff on the ground that she was feigning an injury not suffered for the purpose of recovering from the railroad damages to which she was not entitled.

When the case was called for trial on May 13, 1913, the defendants directed the court's attention to the alleged pleas in abatement concerning the jurisdiction of the

state court and asked a ruling on the same. The court thereupon overruled said pleas on the ground that the parties had waived them by voluntarily submitting themselves to the jurisdiction of the court. In signing the bill of exceptions on this subject the court said:

"The suit in this cause was filed jointly against the International & Great Northern Railway Company and the Texas & Pacific Railway Company in the District Court of Frio County, Texas; the International & Great Northern Railway Company joined the Texas & Pacific Railway Company in an application to remove the cause from said state court to this Court; the record in said cause was filed in this Court for the December term, 1912; at said term of this Court both defendants made a general appearance without reservation and pleaded to the merits of the cause. The plaintiff made a motion to remand the cause to the state court. In reply to the motion to remand, which was heard at the December term of this Court, defendants filed a written statement to the effect that this Court had sole jurisdiction to try the case. After the motion to remand to the state court was overruled at the December term, defendants made an application in writing for a continuance upon the ground that certain witnesses were necessary for a proper defense on the merits of the case. This motion was granted, and the cause continued to the May term, 1913. When the cause was again called for trial at the May term, 1913, defendants for the first time offered the pleas in abatement mentioned in the bill and the pleas were overruled. A reference to the pleas will show that the defendant, Texas & Pacific Railway Company, only insisted upon its plea in abatement in event the plea in abatement offered by the International & Great Northern Railway Company, was granted."

During the trial when the physician in charge of the sanitarium at Texarkana was testifying as a witness for the defendants, he was asked on cross-examination as to

the truth of statements that there had been improper or indelicate actions or conduct on his part towards the plaintiff while she was under his treatment. The defendants, claiming surprise, asked a postponement of the case in order to produce witnesses as to the doctor's character, which was refused and objection taken. Subsequently when the bill of exceptions was presented to the court on the subject, it directed attention to the fact that the bill embodied not only the objection as made but also referred to a later period in the trial when the plaintiff was testifying on her own behalf and therefore the court said that as no request was made at such later time for a postponement, the objection must be considered as confined to the subject upon which the ruling had been made.

The court instructed a verdict in favor of the International on the ground that there was no proof of its liability. There was a verdict against the Texas & Pacific and after an unavailing effort to obtain a new trial error was prosecuted from the Circuit Court of Appeals, seventeen grounds for reversal being assigned. The judgment was affirmed without a written opinion. This writ of error was then sued out, the assignments of error made for the Circuit Court of Appeals being repeated with an added ground predicating error on the fact that no opinion was written by the Circuit Court of Appeals in affirming the judgment.

After a consideration of all the assignments of error and the arguments advanced to sustain them in the light afforded by an examination of the entire record we are of opinion that there is no ground whatever for holding that reversible error was committed in the trial of the cause, and therefore our duty is to affirm. We might well content ourselves with this statement but we proceed to refer to what we deem to be the more salient of the propositions relied upon in order in the briefest possible way to

point out the reasons why we consider them to be wholly devoid of merit.

(a) In so far as any or all of the contentions, as one or more of them ultimately do, rest upon the proposition that the case should have been taken from the jury because there was no proof tending to show a right to recover, we think they are wholly devoid of merit and it is unnecessary to review the tendencies of the proof to point out the reasons which lead us to this conclusion. *Seaboard Air Line Ry.* v. *Padgett*, decided March 22, 1915, 236 U. S. 668.

(b) Without intimating in any degree that the contention as to want of jurisdiction was well founded on its merits, we think the correctness of the action of the court in overruling it is so manifestly clear from the statement which we have reproduced made by the court in signing the bill of exceptions and from a consideration of the state of the record which we have recapitulated that no further reference to the subject need be made.

(c) The action of the court complained of in excluding two jurors as a result of their preliminary examination and in refusing to permit a postponement of the case under the circumstances disclosed, it is elementary, involved matters within the sound discretion of the court concerning which the record discloses no semblance of ground for predicating a contention that the limits of sound discretion were transcended.

(d) The various contentions concerning the alleged want of liability on the part of the defendant as the result of any asserted malpractice on the part of the surgeon or surgeons who operated upon the plaintiff, we are of opinion, are likewise devoid of all merit. The correctness of this conclusion is adequately demonstrated by a consideration of the text of the charge given by the court to the jury on the subject. In substance the charge with clearness of statement excluded all liability on the part

of the defendant for any injury resulting from the intervening malpractice of the surgeon or surgeons, if such malpractice was found to exist, if the plaintiff had failed to exercise reasonable care in the selection of a competent surgeon or surgeons and had in any respect fallen below the standard which reasonable prudence would have exacted, not only in the employment of a reasonably competent surgeon but in following his advice concerning the necessity of the operation to relieve from the consequences of the injury suffered from the collision, if in fact such injury was found to have been suffered.

In conclusion we observe that the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open (*Southern Ry. Co.* v. *Bennett*, 233 U. S. 80), and it needs nothing but statement of the proposition to demonstrate the want of all foundation for the contention that there is ground for reversing the trial court because the court below affirmed the action of that court without opinion.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* MARCUS.

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

No. 790. Submitted March 1, 1915.—Decided April 12, 1915.

A corporation created by an act of Congress has an inherent right to invoke the jurisdiction of this court to review a judgment of the Circuit Court of Appeals.

On the record in this case this court sees no reversible error and affirms the judgment.

THE facts, which involve the validity of a judgment for damages for personal injuries, are stated in the opinion.

Mr. S. P. Jones for defendant in error in support of the motion.

When a passenger train blocks a public way and the vestibule openings between the coaches have, for many years, been left open as a passageway for the public, starting the train without closing the doors thereof or giving signal raises the issue of negligence. *Chicago & Ohio Ry.* v. *Steele,* 29 C. C. A. 81; 2 Thompson on Negligence, §§ 1568–1571, 1726.

Where the public has long used the openings between coaches as a passway, the railway company, in starting the train, owes the same duty to give signals as it would before starting the train across a public way. *Adams* v. *Southern Ry.*, 28 C. C. A. 495; *S. C.*, 84 Fed. Rep. 596; *Balt. & Pot. Ry.* v. *Cumberland,* 176 U. S. 232; *Del. Improvement Co.* v. *Steed,* 75 U. S. 161; *Ellsworth* v. *Metheny,* 44 C. C. A. 484; *Grand Trunk Ry.* v. *Ives,* 144 U. S. 408; *Tex. & Pac. Ry.* v. *Cody,* 166 U. S. 606.

Where the openings between coaches have been used with the acquiescence of the railway company for a number of years as a passway, starting the train with a jerk without giving signals raises the issue of negligence, though the engineer did not know that any person was passing through the opening, for he would be charged with notice of the probability of persons being in a position to be injured. 2 Thompson on Negligence, §§ 1472–1552–1562–1568–1571.

Mr. F. H. Prendergast for plaintiff in error in opposition to the motion.

The mere fact that the train started with a jerk when it backed out of a station, would not be negligence unless the jerk was unusual. *Boston Elevated Ry.* v. *Smith,* 168

Fed. Rep. 629; *Hogan* v. *Railroad*, 59 Wisconsin, 150; *Tex. & Pac. Ry.* v. *Breadow*, 90 Texas, 27; *Tex. & Pac. Ry.* v. *Staggs*, 90 Texas, 485.

After a passenger train has remained at a station the usual length of time, the conductor does not have to examine to see if persons not passengers, and not intending to become such, are climbing on or off the train. *Bennett* v. *Railroad*, 102 U. S. 584; *Griswald* v. *Chicago Railroad*, 23 Am. & Eng. R. R. Cas. 464; *Gardner* v. *Railroad*, 56 Connecticut, 143; *Gillis* v. *Railroad*, 59 Pa. St. 129; *Keller* v. *Railroad*, 27 Minnesota, 178; *Lucas* v. *New Bedford R. R.*, 6 Gray, 64; *Lucas* v. *New Bedford R. R.*, 66 Am. Dec. 406; *Lawton* v. *Little Rock R. R.*, 18 S. W. Rep. 459; *McKone* v. *Railroad*, 51 Michigan, 601; *Mitchell* v. *Railroad*, 51 Michigan, 238; *Railway* v. *Letcher*, 69 Alabama, 106; *Railway* v. *Miller*, 27 S. W. Rep. 905; Sherman & Redf. on Neg. 36; *Sutton* v. *Railway*, 66 N. Y. 248; *Tex. & Pac. Ry.* v. *McGilvray*, 29 S. W. Rep. 68.

Where a train headed east opened the vestibules on the north side to allow passengers to leave the car on that side and go to another train waiting on that side, then it is not negligence to allow the vestibules to remain open until the incoming train starts to back out. *Davis* v. *Railroad*, 58 Wisconsin, 657; *Davis* v. *Railroad*, 15 Am. & Eng. R. R. Cas. 424; *Gardner* v. *Railroad*, 51 Connecticut, 143; *Mitchell* v. *Railroad*, 51 Michigan, 238.

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

The Texas & Pacific Railway Company, a corporation created by an act of Congress, prosecutes this writ of error to reverse a judgment of the court below affirming one of the trial court entered on the verdict of a jury in favor of the defendant in error awarding damages alleged to have been by her suffered through the negligence of the Railway Company. We pass from the motion to

dismiss as there is jurisdiction. *Texas & Pacific Ry. Co.* v. *Hill, ante*, p. 208.

To understand the controversy a statement of the circumstances from which it arose is essential. Immediately north of the depot of the Railway Company at Marshall, Texas, two tracks run east and west. At the time here in question on the track farthest from the depot, the more northern of the two, there stood a train scheduled shortly to depart east for Shreveport, Louisiana. A party including the defendant in error, accompanying a friend who was leaving on such train, came to the depot and crossed over to the waiting train. While they were there a train bound west for Texarkana, which was behind time, came in and was stopped on the track immediately north of the depot and therefore stood between the track on which the Shreveport train was standing and the platform of the depot. When the party, after bidding goodbye to their friend started to return to the depot they found the Texarkana train barring their passage. The vestibules, however, between some or all of the cars of this train were open and most of the party crossed through an open vestibule to the depot platform. When, however, the defendant in error was doing so, by a sudden jerking movement of the train made without any notice or warning, as she alleged, she was thrown down and received the injury for which she sued. It is not traversed that usually persons wishing to go from the depot platform to a train standing on the northern track crossed the open vestibules on trains standing on the track nearest the depot. It was disputed, however, whether on coming from a train standing on the farthest track, it was usual to cross an open vestibule of an intervening train for the purpose of reaching the depot. There was dispute as to whether notice was given of the movement of the Texarkana train.

The trial court gave to the jury full instructions concerning every aspect of the case, some of which were

objected to on the ground that the tendency of the proof was not such as to justify the instructions. The court also refused to give certain instructions asked by the Railway Company which either depended upon assumptions as to the condition of the proof or were equivalent only to an expression in different form of the contention concerning the tendency of the proof which formed the basis of the exception to the charges which were given.

Examining the whole record and considering all the propositions and arguments deemed as sustaining them pressed at bar we are of opinion that all the contentions urged to show that reversible error exists in ultimate analysis rest upon assertions as to the existence or non-existence of tendencies of the proof; in other words, in substance but assert that there was nothing in the case to justify its going to the jury for decision. When the case is thus resolved, we are clearly of the opinion that the propositions relied upon are without merit and therefore that no reversible error exists and the judgment below should be affirmed. As the grounds upon which this conclusion rests involve only a consideration of the evidence and the tendencies of the proof resulting from it, matters of no doctrinal concern, we again say that we see no necessity of doing more than announce our conclusion. *Seaboard Air Line Ry. Co.* v. *Padgett,* decided March 22, 1915, 236 U. S. 668; *Texas & Pacific Ry. Co.* v. *Hill, supra.*

Affirmed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* RAILROAD COMMISSION OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 198. Argued March 12, 1915.—Decided April 12, 1915.

Where an order of a state railroad commission requiring interstate trains to stop at certain stations is based, not on its discretion, but on the requirements of a state statute, which has been sustained by the state court as a proper exercise of the power of the State, this court must pass upon the validity of the statute.

A State may require of carriers adequate local facilities even to stoppage of interstate trains or rearrangement of their schedules; but when local requirements have been met, the obligation of the carrier is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce, whether the order be by the legislature itself or by an administrative body.

This court may determine whether local facilities furnished by a carrier are sufficient, that fact being necessarily involved in determining the Federal question whether an order affecting interstate trains does or does not amount to a regulation of, and interference with, interstate commerce.

The statute of Wisconsin requiring interstate trains to stop at villages of a specified number of inhabitants without regard to the volume of business at that place does amount to a regulation of, and interference with, and is a burden upon, interstate commerce under the commerce clause of the Federal Constitution.

A railroad cannot escape a duty by pleading the expense of its performance; that expense, however, may be considered.

Unless explicitly so declared by the legislature of the State, this court will not regard every general law of the State applicable to corporations as an amendment to their charters.

This court will presume that where the highest court of the State has sustained a statute as constitutional on other grounds than as an amendment to the charter of a corporation affected thereby, it did not regard the statute as such an amendment.

To hold that corporations are subject to the police power of the State is quite another thing from holding that every general law is an amendment to their charters.

152 Wisconsin, 654, reversed.

THE facts, which involve the validity of an order of the Wisconsin State Railroad Commission requiring the stoppage of interstate trains at a local station and the constitutionality of the statute on which it was based, are stated in the opinion.

Mr. Robert Bruce Scott and *Mr. Andrew Lees*, with whom *Mr. Chester M. Dawes* was on the brief, for plaintiff in error.

Mr. Walter Drew, with whom *Mr. W. C. Owen* was on the brief, for defendant in error:

The passenger service furnished to small villages in Wisconsin prior to the enactment of § 1801, Wisconsin statutes, was not adequate or reasonable.

The question of the adequacy and reasonableness of a particular service is primarily one for the determination of the state legislature.

The decision of the highest court of the State, affirming the legislative determination of the question of reasonableness and adequacy of the service required, is well-nigh conclusive here.

The determination by the Wisconsin legislature and courts is clearly correct.

Section 1801, is not an unlawful interference with interstate commerce.

The statute may be fully complied with by running intrastate trains.

Even if construed to require the stoppage of interstate trains the statute is valid.

Section 1801 is neither arbitrary nor unreasonable.

Section 1801 is valid as an amendment to the charter

of the Chicago, Burlington & Northern Ry. Co., a Wisconsin corporation, and plaintiff's predecessor.

Section 1801 is not invalid because of its penalty provisions.

The penalty provisions are severable.

Plaintiff in error has had in this case a hearing on the question of the reasonableness of the service requirements of the statute.

The penalties prescribed for a violation of § 1801, are not excessive. Numerous authorities are cited in support of these contentions.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of the Supreme Court of Wisconsin sustaining an order of the railroad commission of that State requiring under a law of the State the railroad company to stop two of its passenger trains, each way daily, at the station of Cochrane.

The statute under which the order was made is as follows:

"Every corporation operating a railroad shall maintain a station at every village, whether incorporated or not, having a post office and containing two hundred inhabitants or more, through or within one-eighth of a mile of which its line or road runs, and shall provide the necessary arrangements, receive and discharge freight and passengers, and shall stop at least one passenger train each day each way at such station, if trains are run on such road to that extent; and, if four or more passenger trains are run each way daily, at least two passenger trains each day each way shall be stopped at each and every such station. Every such corporation neglecting or refusing fully to comply with this section, after demand therefor by any resident of such village, shall forfeit not

less than twenty-five nor more than fifty dollars for each and every day such neglect or refusal shall continue, one-half to the use of the person prosecuting therefor." Wisconsin Session Laws, 1911, amending § 1801.

The order was made in pursuance of a petition filed with the commission by an inhabitant of the town, alleging the inadequacy of the passenger service and praying for relief under the statute. The facts presented to the commission are, as stated by the Supreme Court, as follows:

"The passenger service at Cochrane was as follows: Northbound train No. 91, a freight, carrying passengers, daily, except Sunday, due at 10:17 a. m.; passenger train No. 53, north-bound, daily, due at 10:58 a. m.; south-bound passenger train No. 54, daily, due at 9:09 a. m.; and freight train No. 92, south-bound, carrying passengers, daily, except Sunday, due at 1:10 a. m. It is admitted that Cochrane has a post office. Further facts shown by the hearing are thus stated in the decision of the Railroad Commission: 'Cochrane is an incorporated village of about 260 inhabitants. It has four general stores, two saloons, two lumber yards and planing mills. The village of Buffalo, having a population of about 250, lies a short distance west of Cochrane. Alma, the county seat of Buffalo County, having a population of 1,000, is situated 8.3 miles north of Cochrane. Fountain City, having a population of approximately 1,000, lies about eight miles south of Buffalo. All of the limited trains on respondent's line stop at Alma. Two passenger trains each way daily stop at Fountain City. The respondent's road is located on the east bank of the Mississippi river, and runs through a territory that is sparsely settled. About 90 per cent. of all the passenger traffic over this line consists of people going from Chicago to St. Paul and points in Minnesota, the Dakotas, and the entire Northwest and Canada. Two trains are run each way daily between Chicago and

Portland and Seattle. One train leaves Chicago in the morning, and from St. Paul runs over the Northern Pacific line to the Northwest. Another train leaves Chicago in the evening, and from St. Paul goes over the Great Northern line to the Northwest. There are two corresponding trains eastbound. There is also a train each way daily between Chicago and Minneapolis, known as the Minnesota Limited, which serves the traffic to Minneapolis and St. Paul on the one hand, and to Chicago and St. Louis on the other. In addition to these interstate trains, there is a local train each way running between Savanna and Minneapolis, which takes care of the traffic in the state of Wisconsin. The west-bound train from Chicago to the Northwest by way of the Northern Pacific line from St. Paul is known as train No. 51, and is composed of standard Pullman and tourist cars. The number of cars in the train is 12. The corresponding east-bound train is known as No. 53, and contains the same number of cars. Similar trains routed over the Great Northern line from St. Paul to and from the Northwest are known as trains 49 and 52, respectively. Trains 47 and 48 are each known as the Minnesota Limited, and each is composed of one observation car, three standard sleeping cars, one St. Louis standard sleeping car, two Chicago coaches, one combined mail and baggage car, and two baggage cars. Train No. 58 consists of two sleeping cars, and from five to eight baggage and express cars. All of these interstate trains are heavy, and run at a maximum speed of 50 miles per hour in order to make connection with trains for the East at Chicago and with trains for the West at St. Paul. As the distance between Chicago and St. Paul over respondent's line is 33 miles greater than that over the line of the Chicago & Northwestern Railway Company, and 27 miles greater than that over the line of the Chicago, Milwaukee & St. Paul Railway Company, it becomes necessary for the respondent to

operate its trains at a high rate of speed in order to meet the schedule of time of its competitors' trains between such points as well as to make the connections mentioned.'"

The commission, expressing its view of the case presented, said: "Independent of any statutory provision on the subject, we should feel constrained to hold that the existing passenger service afforded the village of Cochrane was adequate under the circumstances, and that, therefore, interstate trains could not be required to stop at that station." And further: "This statute deprives the commission of any discretion in the matter. It fixes the quantum of passenger service for every station coming within the classification made."

The railroad company thereupon filed a petition in the Circuit Court of Dane County to set aside the order of the commission. The petition set forth the interstate character of its road, attacked the validity of the law and the order of the commission and represented their effect to be, if carried out, to stop two of its limited trains at thirteen additional stations in the State, and that such requirement would be an unwarrantable interference with interstate commerce.

The Circuit Court found that the passenger service at Cochrane was not adequate or reasonable and that the order of the commission was a reasonable exercise of the power vested in the commission, and entered a judgment dismissing the petition of the railroad company.

The Supreme Court of the State affirmed the judgment, 152 Wisconsin, 654. The court, however, disagreed with the Circuit Court in the view that the commission had exercised its discretion. The Supreme Court decided that such power was not vested in the commission nor exercised by it, and further decided that the trial court could not make an "order based upon the original exercise of its own discretion," and that the only jurisdiction con-

ferred upon it was "to pass upon the lawfulness or reasonableness of the railroad commission's order." And it was said, "In the instant case, therefore, since the railroad commission did not make an order based upon its discretion, but one based upon the statute, the only question presented by the action was the lawfulness of the order, which, of course, raised the question of the constitutionality of § 1801, Wisconsin Stats. 1911. And that question is the only one the appeal presents upon the merits." In other words, as we understand it, the statute expressed the legislative judgment of what facilities were necessary under the conditions described by the statute and left no discretion to the commission or the courts, but "deemed it best," to quote the court, "to exercise its own judgment as to what should be considered reasonably adequate passenger service for stations containing a population of 200 or more." We are brought, therefore, to a consideration of the statute and its measure.

The statute includes, necessarily, the Supreme Court held, interstate passenger trains and clearly excludes accommodation freight trains; and, so viewing it, the Supreme Court pronounced it a proper exercise of the power of the State.

In reviewing the decision we may start with certain principles as established: (1) It is competent for a State to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal

question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement. *Gladson* v. *Minnesota*, 166 U. S. 427; *Lake Shore R. R.* v. *Ohio*, 173 U. S. 285; *Atlantic Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1; *Mo. Pac. Ry.* v. *Kansas*, 216 U. S. 262; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514; *Mississippi R. R. Comm.* v. *Ill. Cent. R. R.*, 203 U. S. 335; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328.

Bearing these propositions in mind, let us consider the test of the statute. The statute expresses, it is said, the legislative judgment of the conditions of its application and would seem to preclude a consideration of anything else. In other words, the test of the adequacy or inadequacy of the local facilities is determined by the statute and their sufficiency as so determined becomes the question in the case. What, then, is the test? Every village having 200 inhabitants or more and a post office, and within one-eighth of a mile of a railroad, must be given by such railroad the accommodation of one passenger train each way, each day, if trains be run to that extent, and at least two trains if four or more passenger trains be run.

The test, on first impression, is certainly quite artificial. The effect of it is that the number of trains is not necessarily determined by the local needs of a village but, it may be, by the needs of other places; not by the demands of local travel but, it may be, by the demands of interstate travel and automatically to be increased as interstate travel increases. This is pointedly so in the case at bar for the railroad runs only interstate trains. It, however, is said that the population of a village is not only a fair index of its business but also of its tributary population, and that the number of passenger trains run daily measures the amount of passenger business done and, in a degree, the ability of the railroad to furnish additional facilities

to the station without financial loss or without undue interference with through traffic.

And it is urged that the statute contemplates an increase of facilities to the interstate business of the villages as well as to their local business, and a comparison of receipts from the respective businesses at Cochrane and other villages shows, it is said, that the railroad receipts from interstate passenger business is over one-third that of its total passenger receipts, and, therefore, it is not accurate to say that the additional service required is at the expense of interstate traffic.

The record, however, contains no complaint of insufficient interstate facilities. The complaint which induced the proceeding before the railroad commission was of the deficiency of local facilities. Residents of Cochrane and its vicinity, it was charged, were unable to go north or south from that village by rail and return the same day, and to display the extent of the asserted inconvenience the population tributary to Cochrane was represented to be 3,000. And this was adverted to by the Supreme Court as typical of the condition at other villages, though the court recognized that "the statute must stand or fall upon its main scope and upon its general application to villages throughout the State, and not upon its particular application to Cochrane."

We have seen what the "main scope" of the statute is, but to the actual population of every village must be added, it is said, a tributary population as the cause and justification of the statute. We may assume such outlying population, but we cannot assume definite transportation needs and a certain and invariable measure of accommodation for them. This must be established in each instance. In the present case it appears that the railroad runs through a sparsely settled country, that 90% of its business is interstate, and that the trains assigned to intrasate business are not self-sustaining. The revenue

at Cochrane from the passenger traffic for the year ending July, 1911, was only $1,751.63, of which $985.57 was from intrastate and $765.76 from interstate business. And yet for the local traffic, already insufficient to defray the expense of its service, there are required under the fixed and resistless test of the statute two additional trains, the expense of which will be $84,000.00 a year. And in mentioning the expense we do not wish to intimate that expense is determining but only to be considered. A railroad cannot escape a duty by pleading the expense of its performance.

But it is said that increased accommodation may bring an increase of revenue. If we may so suppose, may we further suppose that the increased receipts will defray the increased expense? It is by such generalities and inferences that the statute is attempted to be supported, and we are asked to accept their vagueness as against the actual situation. The complaint is, as we have seen, that persons residing at Cochrane cannot go north or south by rail and return the same day. Such condition might be corrected by an alteration of schedules or, if that present difficulties on account of the length of the road or the necessities of the traffic, by the stopping of one train either on signal or regularly; and such accommodation has been ordered and held sufficient in cases cited by the commission, as we shall presently see. But the imperative requirement of the Wisconsin statute precludes such accommodation or any accommodation short of its own measure of two additional trains a day each way, though the local needs may be satisfied with less.

Of course, there would be some convenience at times in two extra trains—indeed, in more than two—and they may be desired; but desire is not a test of requirement, nor is convenience, absolutely considered. There is a traffic to be considered which does not originate at Cochrane and its convenience cannot be put out of view. Besides, as

said by Timlin, J., in his dissenting opinion "'Convenience' is an elastic term, and no doubt it would be more convenient to have a train stop every hour at this village, and it would be confessedly inconvenient if no trains at all stopped there. Between these extremes there is no doubt a broad field of legislative discretion." This court has also felt and expressed the difficulty of giving an exact definition to "adequate and reasonable facilities." "It is a relative expression," it was said, "and is to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodation asked for, and to all other facts which would have a bearing upon the question of convenience and cost." *Atlantic Coast Line* v. *Wharton, supra*, p. 335.

These, then, are the factors, and we do not put out of view the difficulties which infest the case, but, considering them all and the deference due to state legislation, we are constrained to hold the Wisconsin statute invalid. It does not determine service by the volume of the business of the villages of the State but by the requirements of business elsewhere, and limits such requirements and, it may be, prevents them by the imposition of conditions which preclude their fulfillment. This is illustrated by the facts of the pending case. The interstate trains of the railroad are required by the necesssities of its interstate business. It is in competition with shorter roads, and the speed of its trains, which cannot be safely increased, and their schedule time are a necessity in this competition. This conformity to conditions must be strained or embarrassed and, it may be, prevented in order to give greater facilities than one train a day each way to villages having a post office and 200 inhabitants, not necessarily because they are not properly served but seemingly to give them a larger division of service.

The Supreme Court conceded that it was "no doubt true" that to require the railroad to stop one of its limited interstate trains would seriously interfere with its through traffic, as competition "was keen and time was of the essence of such traffic." The court, however, said that neither the statute nor the order of the railroad commission requires the railroad to stop one of its limited trains, but it has the option of doing that or of putting on an extra train; and *Lake Shore Ry.* v. *Ohio, supra,* is cited to sustain the alternative. Undoubtedly the alternative can be required, but only if the local facilities be inadequate. In other words, to justify the requirement the local conditions must justify the extra facility. *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 528. The alternative imposed as a condition of retaining interstate trains simply because of their number would be a burden upon interstate commerce, as we have already pointed out. And this is recognized by the cases cited by defendant in error.

In *State* v. *Railroad Commission,* 110 Pac. Rep. (Wash.) 1075, an order required an additional passenger train from a town of 5,000 or 6,000 people, and having a business by the railroad, of $20,000 per month for freight and about $800 for passengers, to connect at another place. The railroad attempted to remove the complaint of want of adequate facilities by an additional service between the places but not that required by the order. It was decided that the additional facility was not sufficient and that the order was reasonable, the railroad not showing that the service "ordered by the commission would be unreasonably burdensome upon the railway company by being operated at a loss." There was no question of interference with interstate commerce.

Another order of the commission in the same case was reviewed. It required a passenger train to stop on flag at a certain spur, the railway company to elect which of its trains it would stop. The court said that in view

of the population centered there and the very slight service required of the railway company, the order could not be pronounced by the courts to be unreasonable. And the same judgment was declared of other orders requiring a north-bound train at one place and a south-bound train at another to stop on flag. Against these last orders there was a charge that they would tend to lengthen the running time of the trains, which were through trains (it did not appear that they were interstate), and that other towns would demand similar service and thus result in preventing the making of connections and thereby inconvenience the public. To which it was replied that the evidence did not show that the stopping would result in breaking the then connections and that it would be time enough to consider the effect of other stops when they should be ordered.

In *Atchison &c. Ry.* v. *State*, 114 Pac. Rep. (Okla.), 721, an order of the railroad commission of the State required a passenger train to stop on flag at a station called Belva. That village had a population of 30, but the country around it was thickly settled and persons could reach the county seat only by means of the railroad. The conditions were in some respects like those in the case at bar. The court said that the evidence in support of and against the order consisted of generalities and conclusions rather than of facts necessary to enable the court to determine the reasonableness and justness of the order, but the court, yielding to the presumption due to the action of the commission, and there being no evidence that the trains were fast ones or that the stopping of them would interfere with their schedule or connections with other trains, sustained the order. And the court gave consideration to the fact that the trains were required to stop only when there were passengers desirous of entering or leaving them, and that no pecuniary loss would be entailed on the railway or its interstate connections hampered.

In *Missouri &c. Ry.* v. *Town of Wilcher*, 106 Pac. Rep. (Okla.), 852, trains were required to stop on flag. The order was sustained, it not appearing that there would be any pecuniary loss to the railway or that the order would "reasonably prevent or hamper the interstate connections contemplated."

Gulf, Col. &c. Ry. v. *State*, 169 S. W. Rep. (Texas), 385, was an action for penalties imposed by a statute of the State upon any railroad failing to obey an order of the commission of the State. The order required the railway company to stop two numbered trains at the town of Meridian, a county seat. It had a population of 1,500. The defense of the company was an attack on the order as an unlawful and direct interference with interstate commerce, the trains being interstate trains, and the local facilities it was asserted, being adequate. The case was considered in view of the established principles which we have stated and the order was sustained, the court deciding that the local facilities were inadequate and the order not a direct interference with interstate commerce.

Gladson v. *Minnesota*, 166 U. S. 427, sustained a statute which required every railroad corporation to stop all regular passenger trains running wholly within the State at all county seats long enough to take on and discharge passengers. The applicable principles were discussed and it was said that an order which entailed but a trifling expense and a few minutes of time was a reasonable exercise of the police power and could not be considered as a taking of property without due process of law or an unconstitutional interference with interstate commerce.

The other cases cited, not being closely applicable, need no comment. In those we have reviewed, it will be observed, the orders were made after investigation by administrative officers and the facilities required were adjusted to the local needs, not by an arbitrary formula prescribed in excess of such needs.

It is contended by defendant in error that the statute is valid as an amendment to the charter of the Chicago, Burlington & Northern Railway Company, a Wisconsin corporation, and plaintiff in error's predecessor. This contention seems not to have been urged on the Supreme Court, and we may, therefore, decline to consider it; and, besides, we would be very averse to deciding that, without explicit declaration, every general law of the State applicable to corporations is enacted as an amendment to their charters. If the Supreme Court of the State had so thought it would have accepted that short way to the decision of the case and not have occupied itself with other and more complex questions. It is one thing to decide that corporations are subject to the police power of the State, and quite another to hold that every general law is an amendment to their charters. See 97 Wisconsin, 418.

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

CHRISTIE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 204. Argued March 16, 17, 1915.—Decided April 12, 1915.

Where there is a deceptive representation in the specifications as to the material to be excavated which actually misleads the bidder who obtains the contract, and it is admitted by the Government that time did not permit borings to be made by the contractor to verify the representations, the latter is entitled to an allowance for the actual amount expended over what would have been the cost had the boring sheets been accurate, notwithstanding there *was* no sinister purpose whatever.

The legal aspects of such a case are not affected by the fact that the

omissions amounting to misrepresentations did not have a sinister purpose.

Under the contract involved in this case, all that is cast upon the Government in establishing the "angle of repose" for the slopes of the banks on each side of the excavation is an honest exercise of judgment by the engineers, and the contractors are not entitled to damages by reason of the sloughing of the banks on account of too sharp an angle.

In this case the findings do not support claimants' contention that the "angle of repose" was arbitrarily selected and adhered to.

The contractor, in this case, *held* not entitled under the terms of the contract to recover the cost of recovering buried concrete forms which according to the findings was done voluntarily so as to re-use the forms.

The Government is not responsible to the contractor for a promise of additional compensation for cofferdams to protect the work made by an officer not having authority and whose promise is subsequently revoked before the work of construction commences.

In this case *held* that the paragraph in a Government contract providing for extra work did not supersede the paragraph requiring work to be done by the contractor himself; and that as the conditions contemplated by the contract required the use of cofferdams to protect the work to the height ordered by the engineers, the contractor was not entitled to extra compensation therefor.

48 Ct. Cl. 293, reversed on account of error as to one item claimed and disallowed.

THE facts, which involve the rights of a contractor for compensation for work done under a contract with the United States for the construction of locks and dams on the Warrior River, are stated in the opinion.

Mr. George A. King and *Mr. Frank Boughton Fox*, with whom *Mr. Duane E. Fox* was on the brief, for appellants:

There were erroneous and deceptive borings. *Hollerbach* v. *United States*, 233 U. S. 165; *Pearson* v. *Dublin Corporation*, 1907, App. Cas. 351; *Boyd & Forrest* v. *Glasgow Ry.*, 1914, 1 Scots Law Times Rep. 176; *Hingston* v. *Smith Company*, 114 Fed. Rep. 294; *Simpson* v. *United States*, 192 U. S. 272. There were misrepresentations by

agents of United States which were rightly relied upon. The claim was made at the proper time and appellant is entitled to damages.

The banks were not sloped to angles of repose. The slope was not an angle of repose. The reasons for not sloping are insufficient. There was a protest and demand for compensation.

The order for additional cofferdams was a valid order for extra work.

In support of these contentions see cases *supra* and Abbot, Problems of the Panama Canal; *Bayne* v. *United States*, 195 Fed. Rep. 236; *Beckwith* v. *New York*, 148 N. Y. App. Div. 658; *Bowen & Dudy Co.* v. *United States*, 211 U. S. 176; *Callahan Constr. Co.* v. *United States*, 47 C. Cls. 177; *Central Trust Co.* v. *Louisville Ry. Co.*, 70 Fed. Rep. 282; *Chatham Furnace Co.* v. *Moffatt*, 147 Massachusetts, 404; *Cooper* v. *Schlesinger*, 111 U. S. 148; *Cramp & Sons Co.* v. *United States*, 216 U. S. 494; *Delafield* v. *Westfield*, 28 N. Y. Sup. 440; *S. C.*, 169 N. Y. 582; *Eaton* v. *Winnie*, 20 Michigan, 156; Floyd, Acceptances, 7 Wall. 666; *Fontano* v. *Robbins*, 22 App. D. C. 253; *Gleeson* v. *Va. Midland R. R.*, 140 U. S. 435; Isthmian Canal Commission Report, 1913; *Johnson* v. *Albany*, 86 N. Y. App. Div. 567; *Langley* v. *Rouss*, 77 N. E. Rep. 1168; *S. C.*, 185 N. Y. 201; *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298; *Nesbit* v. *L. C. & C. R. R.*, 2 Speers, 697; *Old Colony Trust Co.* v. *Dubuque Co.*, 89 Fed. Rep. 794; *Peterson* v. *New York*, 205 N. Y. 329; *Pickley* v. *United States*, 46 C. Cls. 77; *Railway Co.* v. *Donnegan*, 111 Indiana, 179; *Reynell* v. *Sprye*, 1 DeG., M. & G. 660; *Richards* v. *May*, 10 Queen's Bench Div. 400; *Ripley* v. *United States*, 223 U. S. 695; *Samley District* v. *Ricker*, 91 Fed. Rep. 833; *Sharp* v. *New York*, 40 Barbour, 256; *Smith* v. *Richards*, 13 Peters, 26; *Stage Co.* v. *United States*, 39 C. Cls. 420; Thomas & Watt, Improvement of Rivers, 2d ed. (1913), pt. 1, pp. 86, 199; *United States* v. *Garbish*, 222 U. S. 257; *United States*

v. *Plumley*, 226 U. S. 545; *United States* v. *Stage Company*, 199 U. S. 414; *Water Commissioners* v. *Robbins*, 74 Atl. Rep. 938.

Mr. Assistant Attorney General Thompson for the United States:

As to the erroneous and deceptive borings:

Appellants had actual and presumptive knowledge of the conditions, which was sufficient notice without indicating further on the drawings, and excluded charges of erroneous and deceptive representations of borings.

The findings contradict the statement in appellants' brief that a number of buried logs were discovered in the course of the borings.

The terms of the contract and the findings exclude the idea of a warranty. *Hollerbach* v. *The United States*, 233 U. S. 165, and other cases distinguished.

As to erroneous angles of repose:

The engineer officer being authorized to select the angle of repose, in the absence of a finding charging bad faith, his selection cannot be disputed.

No angle of repose would have remained stable during the abnormal season of 1900–1901.

The angle of repose selected being the customary one under ordinary conditions, and not having been objected to, appellants are foreclosed from asking damages.

Appellants have been paid the contract price for all excavation removed.

The claim for damages for excavating material which buried certain timber frames falls with the claim for damages because of an alleged incorrect angle of repose.

As to the construction of cofferdams:

The Government was not responsible for the cost of cofferdams since it was provided that the contractors should build them at their own expense.

In support of these contentions see *Bowe* v. *United*

States, 42 Fed. Rep. 778; *Bowers Dredging Co.* v. *United States*, 211 U. S. 176; *Boyd* v. *Glasgow Western Ry. Co.*, 1 Scots Law Times Rep., 1914, p. 171; *Clapham* v. *Shillito*, 7 Bevan's Rep. 149; *Farrar* v. *Churchill*, 135 U. S. 615; *Gleason* v. *United States*, 175 U. S. 602; *Hollerbach* v. *United States*, 233 U. S. 165; *Kihlberg* v. *United States*, 97 U. S. 398; *Nesbit* v. *L. C. & C. R. R. Co.*, 2 Speers, 697; *Pearson* v. *Dublin Corporation*, 1907, App. Cas. 351; *Plumley* v. *United States*, 226 U. S. 545; *Ripley* v. *United States*, 223 U. S. 695; *Chicago* v. *Ricker*, 91 Fed. Rep. 833; *Shapirio* v. *Goldberg*, 192 U. S. 232; *Simpson* v. *United States*, 172 U. S. 372; *Slaughter's Admr.* v. *Gerson*, 13 Wall. 379; *United States* v. *Barlow*, 184 U. S. 123.

Mr. Justice McKenna delivered the opinion of the court.

Action for damages in the sum of $207,304.50 brought by appellants against the United States, growing out of a contract with the United States on the nineteenth of February, 1900, for the construction of three locks and dams on the Warrior river in Alabama.

The work was completed and accepted in November, 1903.

The items of damage were: delay in permitting commencement of the work; for construction of wagon roads; greater expense of excavation and pile driving due to misrepresentation of the materials in the specifications and drawings; increase in excavation due to the "angle of repose" fixed by the officer in charge; extra work in the construction of additional cofferdams, and other items.

The court rendered judgment for claimants upon two items, based on findings 2 and 3, to-wit, $9,391.57 for "delays in permitting the commencement of work" and $100.00 for "construction of wagon roads," making a total of $9,491.57.

This appeal was then prosecuted, and three errors are assigned—(1) in refusing to allow for the extra expense due to the increased difficulty in pile driving and excavation on account of misrepresentation of the materials to be penetrated and excavated; (2) in refusing to allow $45,000.00 for excavation of material caused by defect in the "angle of repose," and in refusing to allow the further sum of $1,183.00 for excavation of material under which certain concrete forms were buried; and (3) in refusing to allow the cost of cofferdams built on the order of the officer in charge.

We shall take these items up in their order.

(1) This item is based on a charge of erroneous and deceptive borings and misrepresentations in the specifications and drawings.

By paragraph 48 of the specifications it is, among other things, provided: "The material to be excavated, *as far as known* [italics ours], is shown by borings, drawings of which may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material."

It is upon this paragraph the contention turns.

The allegations of the petition of claimants are to the effect that, invited by the above provision, claimants examined the drawings and they "showed gravel, sand and clay of various descriptions, and showed no other material."

That the material actually to be excavated "consisted largely of stumps below the surface of the earth, buried logs, of cemented sand and gravel (none of the sand or gravel being described in the said drawings as cemented), and of sandstone conglomerate," and that such materials were far more difficult and expensive to penetrate and excavate than ordinary sand and gravel such as was described in the drawings.

That the existence of the more difficult and expensive

material was known to the persons who made the borings and to the resident engineer of the United States under whose supervision they were made; and that the statement in the specifications was untrue in fact and misleading, causing the claimants to propose to do the work upon the basis shown by the drawings and not upon the basis of the more difficult and expensive work, which in point of fact existed and was known to the officers of the United States. That claimants were forced to rely wholly upon the information furnished them, the time not being sufficient to permit them to make their own borings, and they believed the information furnished them to be accurate and reliable. That the erroneous and deceptive drawings misled claimants and they were compelled to spend $10,510.30 over and above the rates named in their proposal and contract, which rates were based upon the materials shown by such drawings.

We think the findings substantially sustain the allegations. They establish that borings were made and that the drill met "obstructions which from the particles broken off and floating to the surface would indicate they might be logs." These obstructions, though in some instances noted because of the formation, were not indicated on the drawings.

And this was found: "When such obstructions were met, the apparatus was moved elsewhere until a place was found where the drill would penetrate, and the result was recorded as if taken at the place staked out." And, further: "The boring sheets referred to in paragraph 48 of the specifications contained only the record of completed borings and do not show any record of sunken logs, or of cemented sand and gravel, or conglomerate impenetrable by the drill."

The indications of buried logs were called to the attention of the resident engineer and he was asked if they should be noted in the record of borings, to which he replied

that he did not consider them of enough importance to be noted. It was, however, found that the evidence did not establish to the satisfaction of the court that the statement of the engineer was other than an honest expression of his opinion, nor was it made to induce the omission from the records of the borings of any logs actually encountered, or for the purpose of concealing the same from or misleading subsequent bidders.

It would seem as if there could be only one conclusion from these findings. There was a deceptive representation of the material, and it misled. In opposition to the seemingly irresistible conclusion that claimants were justified in their reliance upon the drawings, it is contended that the river was alluvial and its character warned claimants of the possible conditions which existed and that besides the court found "they admitted they had reason to, and did expect to, encounter some logs."

The contentions are attempted to be supported by the alluvial character of the river, as we have said, its tortuosity, its fluctuations between high and low water in winter and summer, and that for twenty years the United States had operated snag boats for the removal of stumps and sunken logs from the channel of the river. But inferences from such facts could only be general and indefinite, and were not considered by the Government as superseding the necessity of special investigations and special report. It assumed both were necessary for its own purpose and subsequently would be to those whom it invited to deal with it. Knowledge of the result of such investigations would protect the Government, it might be, against an extravagant price based on conjecture of conditions, and enable contractors confidently to bid upon ascertained and assured data. And how important it was to know the conditions is established by the finding that claimants were put to an expense of $6,150.00 over what would have been necessary "if the borings sheets

had represented the character of the ground with respect to logs."

It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive. *Hollerbach* v. *United States*, 233 U. S. 165. Besides it was admitted at the argument that time did not permit borings to be made by claimants. We think it was error, therefore, to have disallowed the damage resulting therefrom.

(2) The "angle of repose" is dealt with in the specifications as follows: "The limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose. The limits shown on the drawings and the amounts herein given are approximate, and may be greater or less as the local conditions may demand or justify."

The finding as to the "angles of repose" is that at the outset of the work, under direction of the engineer officer, "the slopes of all temporary excavation at the lock sites were staked out on an angle of 1 on 1, or 45° from horizontal." This angle, it was further found, was adopted by the engineer officer from his experience in similar work on the Mississippi river and was "an angle at which the banks would stand for the time necessary to complete the work when not submerged from rises in the river or when in a dry condition. There was no angle or slope which could have been adopted by which the banks would remain stable when subjected to such rises of the river as were liable to happen in times of flood." And, further, that the conditions actually encountered during the work were abnormal; floods, freshets and unlooked for rises of the river were more numerous and of greater height and longer duration than theretofore disclosed by the official records of the engineer's office relating to the river.

Other findings are as follows:

"To have sloped the banks to a flatter angle would have reduced the sloughing, but the evidence does not show to what extent. When the river rose the material in the banks became saturated and heavy with water, and as the river receded such material, being deprived of the support afforded by the water while up, sloughed or caved off into the lock pits below, where it had to be and was removed by claimants in a wet and slimy condition at a higher cost than if excavated from its natural position in the bank. The slopes of the excavation were not flattened by the engineer officers because, in their opinion, there was no practical angle at which the banks could have been sloped which would have caused them to remain stable under the abnormal conditions to which they were subjected, or have prevented the banks from sloughing and caving as the floods and rises in the river receded."

Claimants present a definition of an "angle of repose" from lexicons of authority as follows: "The maximum angle with the horizontal at which a mass of material, as in a cut or embankment, will lie without sliding." In addition to the definition reports of work on the Panama Canal are quoted from to show the efficacy of the proper angle and the necessity of varying it to meet conditions. This and the correctness of the definition may be conceded, but the question is, What were the demands of claimants' contract in the situation described by the findings? Or, to make it more special: Was the act of the engineering officer in prescribing the slope of the work as 1 on 1 or 45° from horizontal a violation of the contract?

As we have seen, the findings show that such angle had been selected from experience in other work of like kind, that it would have been adequate but for the extraordinary conditions which developed, and no angle under such conditions would have been sufficient and, therefore, "the

slopes of the excavation were not flattened by the engineer officers because, in their opinion, there was no practical angle at which the banks could have been sloped which would have caused them to remain stable under the abnormal conditions to which they were subjected, or have prevented the banks from sloughing and caving as the floods and rises in the river receded." And this judgment was honestly exercised.

We are brought, therefore, to the question whether such judgment was precluded by the contract, or did the contract impose an absolute duty on the Government to anticipate and provide for all conditions to which the banks of the excavation might be subjected?

Claimants insist upon an affirmative answer and rely upon paragraph 48 of the specifications, which provides that "all dredged or excavated materials, of whatever nature, will be classified as 'excavation.' All excavations shall conform to such lines, slopes, and grades as may be given by the engineer officer and anything taken out beyond such given limits will not be paid for by the United States. The price for excavation shall include the removal of the material to its place of deposit. . . . The limits of the excavation and quantities to be excavated will depend upon the ascertained angles of repose." There is nothing in this of definite obligation, or which prevented an exercise of judgment. The excavations, it is true, were required to conform to the lines, slopes and grades and their limits and quantities made to depend upon the ascertained angles of repose; but how the angles of repose were to be ascertained was not expressed. According to the findings they would depend upon the conditions, and as to these judgment had to be exercised, and the specifications pointed out by whom. "These specifications," it is provided in paragraph 89, "are intended to be full, clear and complete. Any doubt as to their meaning, or any obscurity in the wording of them, will be explained by the

Engineer Officer, who shall also have the right to correct any errors or omissions in them whenever such errors or omissions become apparent." Paragraph 78 declares: "In all cases of dispute, the decision of the United States Engineer Officer in charge will be accepted as final and without appeal."

Claimants were, therefore, admonished that the judgment of the officers would necessarily be exercised throughout the work and they were specially informed as to what angle of repose would be selected. Mr Justice Howry, speaking for the Court of Claims, said: "The letting plans did not show the slopes of the excavation. But the original cross-section sheets, from which the estimated quantities of excavation in the specifications had been calculated, show in pencil the different angles of all slopes at 1 on 1 behind structures for temporary work and a flatter slope of 1 on 1½ to 1 on 2 during the period of the contract for all permanent work. Both angles of repose were constructed accordingly. These cross-section sheets, although not made part of the letting plans, were on file in the office of the resident engineer and were open to examination by bidders prior to submitting proposals and were, in fact, examined by at least one of the prospective bidders. There was no concealment and plaintiffs do not say there was."

We do not think, therefore, that there is anything in the contract which cast upon the Government a prophecy and anticipation of abnormal conditions or which relieved claimants from the risks of their occurrence or of whatever they might encounter in the work. It is to be supposed that contemplation and judgment were exercised not only of certainties but of contingencies and allowance made for both at the time of bidding, with provision in the bid. Subsequent conditions could not lessen the obligation then incurred but, we may say, in order that all of the facts bearing on the claimants' contention may appear,

that the findings show that claimants, in July, 1900, prior to the time when any sloughing had occurred, in a letter to the resident engineer, suggested the use of sheathing to protect the slopes, and in 1902 complained that the Government had not complied with the suggestion as provided for in paragraph 51 of the specifications. But it is further found that the suggestion was not yielded to because, in the opinion of the engineer officer, paragraph 51 was not intended to provide for protecting the slopes.

The paragraph reads as follows:

"51. Sheathing.—Curbing of rough planks and scantlings or poles, shall be used to reduce excavation as directed by the Engineer Officer, and shall be paid for as 'sheating,' poles being estimated by standard log measure. It shall be left in the excavation or taken out at the option of the Engineer Officer, and when used again shall be paid for at half price."

It is further found that claimants made verbal protests and complained to the resident engineer in regard to the adoption of flatter slopes but no written protest or objection was made during the progress of the work and no appeal from the decision of the engineer concerning the same. Such an appeal seems to be provided for. It is to be observed that the protest was made to the resident engineer, but he was subordinate to the Engineer Officer in charge, and it is provided in paragraph 78 that "in all cases of dispute the decision" of that officer "will be accepted as final without appeal."

These findings, therefore, but exhibit the variant judgments of the resident engineer and the claimants as to what action should be adopted in view of the conditions, and, we repeat, we see nothing to cast inevitable obligation upon the Government for every exercise of judgment by its officer to whom was given the direction of its works and whose decision, honestly exercised, its contracts made final.

It is true, it is said that the "angle of repose" was arbitrarily selected and arbitrarily adhered to, but the findings, as we have seen, do not support the charge.

It follows that the court committed no error in rejecting the item. Nor, for the same reason, in refusing to allow the sum of $1,183.41, the cost of recovering certain buried concrete forms. It is found that this "was done voluntarily by claimants for the purpose of recovering the forms to be re-used by them."

(3) The amount claimed for additional cofferdams is $8,520.24.

It is said by the court in its opinion that claimants did not claim that this part of their demands was within the contract, but that they were "entitled to recover therefor on *quantum meruit*." The item was disallowed. This action, we have seen, is assigned as error, and to support the assignment paragraphs 45 and 88 of the specifications are invoked. They are, respectively, as follows:

"45. *Cofferdams.*—All pumping, bailing, and temporary works needed to protect the permanent work from water, during the construction, shall be done by the contractor at his own expense, the cost of same to be included in his prices for concrete, timber, etc. It is probable that the sheet piling entering into permanent construction can, with proper banking and shoring, be made to serve the purpose of cofferdams, but the contractor must rely upon his own judgment in regard to this. Should additional cofferdams be needed they shall be built on plans approved by the Engineer Officer, and, where liable to interfere directly or indirectly with navigation, shall be removed when no longer needed, the building, maintaining, and removal of same to be without cost to the United States."

"88. *Purchases Made or Work Done, Not Specified.*—If at any time it should become necessary, in the opinion of the Engineer Officer in charge, to do any work or to make any purchases not herein specified, for the proper

completion of this contract, the contractor will be required to furnish the same at the current rates existing at the time of said purchases or work. The current rates to be determined by the Engineer Officer in charge."

The findings state that certain hydrographs showing the gauge readings of the river taken at Tuscaloosa were shown claimants and that the slope of the river indicated the duration of the winter and spring floods and the effect of such floods upon the continuity of the work; that floods pass off rapidly at Tuscaloosa but their duration is several days longer at the locations of locks 4, 5 and 6. The hydrographs did not show the readings at those places, nor were claimants informed of them, though the resident engineer knew of them as they had been copied in a memorandum kept in his office at Tuscaloosa. In the court below a charge of fraudulent representation was based on those facts, but the court found adversely to it, and it is not repeated here. We shall pass, therefore, to contentions based on other considerations.

The facts found by the court may be stated narratively as follows: In order that the work might be continued during the winter the resident engineer, on November 17, 1900, directed claimants to build cofferdams at locks 4, 5 and 6 in accordance with plans furnished them, and informed claimants that they would be paid for the same at their contract price for sheet piles, and $3.00 per thousand feet board measure for such parts of the cofferdams as they might be required to remove when no longer needed. The order was accepted by claimants in writing on November 18, 1900, and the materials ordered for the same. Three days after the receipt of the order and before the construction of the dams had been commenced the river rose and remained at such height that it was not possible to build them that winter. It is found that doubts subsequently came to the officer as to his authority to pay for the cofferdams, as the emergency for which they were

intended to provide had passed—that is, their construction during the winter—and he expressed those doubts in a letter to claimants dated May 4, 1901. Claimants protested, and the matter was referred to the Chief of Engineers, who referred it to the Secretary of War, and the latter officer submitted it to the Judge-Advocate General of the Army for opinion. That officer decided that the Secretary of War had no authority to modify the contract. This view was approved by the Secretary and claimants were notified accordingly.

It will be observed that by paragraph 45 cofferdams are represented as temporary work to protect the permanent work, and the probability is expressed that the sheet piling entering into the permanent construction could serve the purpose of cofferdams, but as to this the claimants were to rely upon their own judgment. And it is also to be observed that if additional cofferdams should be needed they were to be built on plans approved by the engineer officer and to be built, maintained and removed without cost to the United States.

By paragraph 46 the probability is again expressed that the dams could be built without cofferdaming, but as to this the claimants were to rely on their own judgment, and if cofferdams proved to be necessary they were to be furnished by claimants without cost to the United States.

It seems very clear, therefore, that all cofferdams necessary for the protection of the permanent work were to be built by claimants at their own expense, and it is found that, in figuring on their bid, they allowed $2000 for cofferdams for each of the three locks, or, in all, $6000.

It is further found that "the cofferdams were afterwards constructed by the claimants to the heights necessary to protect the work against floods," and that their cost was $11,456.91, "of which amount the portion necessary to protect the work against a rise of more than 8 feet was $8,520.24. . . . And if claimants are entitled to

recover therefor on *quantum meruit* or otherwise," that amount would be due.

Claimants, however, contend that they are entitled to this cost as extra work and invoke paragraph 88 against paragraphs 45 and 46. The paragraphs accord, or, rather, each has its purpose. The extra work provided for in paragraph 88 was not intended to supersede the work provided for and contracted to be performed by claimants at their expense by paragraphs 45 and 46. Nor can we yield to the contention that claimants had a discretion to use or not use cofferdams which was taken away from them by the order of the engineer officer and to comply with which they incurred expense that they otherwise would have not incurred.

The findings demonstrate that the flood conditions made cofferdams necessary, and to the height that they were constructed. The promise of payment made by the engineer officer was subsequently revoked before construction was commenced, and its revocation left the original contract to prevail. The Court of Claims, therefore, did not commit error by disallowing the demand.

For the error in not allowing the demand of the greater expense of excavation and pile driving, due to the misrepresentation of materials in the specifications and drawings, the judgment is reversed and case remanded for further proceedings in accordance with this opinion.

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

GREENLEAF JOHNSON LUMBER COMPANY *v.* GARRISON, SECRETARY OF WAR.

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

No. 678. Argued February 24, 25, 1915.—Decided April 12, 1915.

The power of the sovereign State or Nation is perpetual—not exhausted by one exercise—and all privileges granted in public waters are subject to that power; the exercise of which is not a taking of private property for public use but the lawful exercise of a governmental power for the common good. *West Chicago R. R.* v. *Chicago*, 201 U. S. 506.

When one acting under state authority erects anything in navigable waters he does so with full knowledge of the paramount authority of Congress to regulate commerce among the States and subject to the exercise of such authority at some future time by Congress. *Union Bridge Co.* v. *United States*, 204 U. S. 364.

The power of the States over navigable waters is subordinate to that of Congress and the State can grant no right to the soil of the bed of navigable waters which is not subject to Federal regulation. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 269.

The power of Congress extends to the whole expanse of a navigable stream and is not dependent upon the depth or shallowness of the water.

The United States is not liable under the Fifth Amendment to compensate the owner of a wharf erected in navigable waters for the removal of that part of the structure outside of the new lines properly established by Federal authority, although the wharf was originally erected within the harbor lines then duly established by both the state and Federal authorities.

In this case the action of the Secretary of War in establishing new harbor lines within those previously established was not so wanton and arbitrary as to subject it to judicial review, if such action were subject to review.

The mooring of vessels is as necessary as is their movement and can equally be made the basis for increasing the navigability of a river whether for trading vessels or war vessels.

The judgment of Congress as to whether a construction in or over a river is or is not an obstacle and hindrance to navigation is an exercise of legislative power in respect to a matter wholly within its control and is conclusive. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 269.

208 Fed. Rep. 1022, affirmed.

THE facts, which involve the right of the owners of a wharf erected under state authority in navigable waters of the United States to compensation on the taking thereof by the United States, are stated in the opinion.

Mr. J. L. Jeffries, with whom *Mr. L. D. Starke* was on the brief, for appellant:

The appellant's right to recover damages is based on the character of this title and the ownership of the State in the submerged soil.

The State has authority as to the disposition of submerged lands and the character of ownership which is acquired under grants of rights and privileges from the State or from Congress is property that cannot be taken without compensation. Congress cannot now take such property when acquired and constructed under the authority of the State or of Congress granted in the interest of navigation.

In support of these contentions see Code of Virginia, §§ 1338, 1339, 2010, 2011; *Commonwealth* v. *Alger*, 7 Cush. 53; *Cummings* v. *Chicago*, 188 U. S. 410; 1 Farnham on Water Rights, pp. 50, 136, 510, 511, 551, 552, 569; *Gibson* v. *United States*, 166 U. S. 269; *Gring* v. *Ives*, 222 U. S. 365; *Grinnell* v. *Daniels*, 110 Virginia, 874; *Homer* v. *Pleasants*, 7 Atl. Rep. 691; *Illinois Cent. R. R.* v. *Illinois*, 146 U. S. 387; *Lake Shore &c. R. R.* v. *Ohio*, 165 U. S. 365; *Lewis* v. *Portland*, 35 Pac. Rep. 256.

Oyster Co. v. *Briggs*, 229 U. S. 82 and *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, can be distinguished from the case at bar. 1 Lewis Em. Domain, §§ 76–b, 78;

Monongahela Nav. Co. v. *United States*, 148 U. S. 312; *Montgomery* v. *Portland*, 190 U. S. 89; *Norfolk City* v. *Cook*, 27 Gratt. 430; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Prosser* v. *Nor. Pac. Ry.*, 159 U. S. 59; *American School* v. *McAnnulty*, 187 U. S. 94; *Scranton* v. *Wheeler*, 179 U. S. 141; *S. C.*, 57 Fed. Rep. 803; *Shiveley* v. *Bowlby*, 152 U. S. 1; *Stockton* v. *Balto. & N. W. R. R.*, 32 Fed. Rep. 19; *Sullivan Timber Co.* v. *Mobile*, 110 Fed. Rep. 186; *Taylor* v. *Commonwealth*, 102 Virginia, 759; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Buffalo Pitts. Co.*, 234 U. S. 228; *United States* v. *Lynah*, 188 U. S. 445; *Weems Steamboat Co.* v. *Peoples Co.*, 214 U. S. 345; *Yates* v. *Milwaukee*, 10 Wall. 497.

Mr. Assistant Attorney General Underwood for appellees:

The Secretary of War was authorized to establish harbor lines and require the removal of appellant's wharf under the act of March 3, 1899, 30 Stat. 1151.

The judgment of Congress and Secretary of War in this matter is not reviewable or if reviewable, no facts have been shown to warrant review.

The removal of appellant's wharf, without payment of compensation, will not contravene the Fifth Amendment.

The title to the bed of a navigable stream within the State, is subject to Congress's control over navigation.

The State's dominion over navigable waters ceases when the United States assumes control.

There is no estoppel in favor of appellant.

The State cannot limit the control of Congress over navigable waters.

The structure involved in this case was erected without state authority.

In support of the Government's contention see, *Atlee* v. *Packet Co.*, 21 Wall. 389; *Bloomfield* v. *Charter Oak Bank*, 121 U. S. 121, 135; *Boston Chamber of Commerce* v. *Boston*,

217 U. S. 189, 195; *C., B. & Q. Ry.* v. *Drainage Com'rs*, 200 U. S. 561, 593; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Gibson* v. *United States*, 166 U. S. 269, 272, 276; *Gilman* v. *Philadelphia*, 3 Wall. 713, 725; *Groner* v. *Foster*, 94 Virginia, 650, 651; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194; *Jackson* v. *United States*, 230 U. S. 1, 23; *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 303; *Oyster Co.* v. *Briggs*, 229 U. S. 82, 87, 88, 89; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177.

Mongahela Nav. Co. v. *United States*, 148 U. S. 312, 315 and *United States* v. *Lynah*, 188 U. S. 445, can be distinguished from the case at bar. See *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U. S. 453; *Pennsylvania* v. *Wheeling Bridge*, 18 How. 421; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 634, 637, 638; *American School* v. *McAnnulty*, 187 U. S. 94, 109, 110; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *Shively* v. *Bowlby*, 152 U. S. 1, 40; *South Carolina* v. *Georgia*, 93 U. S. 4; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, 20; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *Weems Steamboat Co.* v. *People's Co.*, 214 U. S. 345; *West Chicago R. R.* v. *Chicago*, 201 U. S. 506, 521, 523, 526; *Williamette Bridge Co.* v. *Hatch*, 125 U. S. 1, 12–13; *Yates* v. *Milwaukee*, 10 Wall. 497; see also 25 Stat. 400, 425; 26 Stat. 426, 455; 30 Stat. 1121, 1151; 36 Stat. 1265, 1275; Act of Virginia Assembly, February 18, 1875; Laws of Virginia, 1874–1875, p. 82; Code of Virginia, 1904, §§ 1338, 1339.

Mr. Justice McKenna delivered the opinion of the court.

Suit for injunction by appellant, which we shall call complainant, brought originally against Henry L. Stimson as Secretary of War and Robert Shaw Oliver as Assistant

Secretary of War, for whom the appellees were substituted and whom we shall refer to as defendants, to enjoin them and all persons acting under their authority from taking or removing or in any way interfering with complainant's wharf or other property "along or upon the water front of its said property upon the southern branch of the Elizabeth river" in the State of Virginia. It having been constructed, it is alleged, under the authority of the State and within and upon the harbor line subsequently established by the Secretary of War, it became, it is further alleged, property lawfully owned and could, therefore, be removed only upon payment of just compensation.

A preliminary injunction was granted in accordance with the prayer of the bill.

There was a demurrer to the bill, urging, among other grounds, that the court was without jurisdiction of the persons of the defendants and also without jurisdiction of the suit because it was one against the United States. These grounds were subsequently waived and the want of equity in the bill alone relied on.

The demurrer was overruled, 204 Fed. Rep. 489, and the present defendants, substituted as parties defendant, answered.

The answer, by certain denials and admissions, in effect repeated the propositions of the demurrer and asserted the control of Congress over the river, acting through the Secretary of War, adducing 30 Stat. 1153, and concluded with a prayer that the court order the demolition of such portions of the wharf and other property as might be found to be outside the re-established pier-head line and that the injunction theretofore granted be dissolved and complainant's bill dismissed.

Further detail of the pleadings is unnecessary as a statement of facts was made which presents all that are necessary for a decision. From the statement it appears that a board of harbor commissioners was created by

Virginia in 1875 and that in 1876, the exact date not known, the authorities of the State of Virginia established a harbor line which remained until 1890, when the same was adopted by the Secretary of War as the harbor line established by the Federal Government, and it so remained until "the recent establishment of the present harbor line June 12, 1911, which was so established by the Secretary of War, after notice, etc., and that until said new line was established, no part of complainant's property was outside of the same." It appears from the statement and diagram attached that complainant had constructed two certain fills into the Elizabeth river. It made extensions into the river from two points on the shore and connected at the outer extremities, the wall forming a continuous wharf of three sides surrounding the water they inclosed, the fourth side being the high land. The space so surrounded was called a log pond and designed for the storage of logs for the purposes of complainant's business. The following also appears from the statement:

"That on the 22nd day of July, 1911, the Navy Department wrote to the complainant stating that that Department intended making certain improvements in the Navy Yard and requesting the complainant to fix a price at which it would sell so much of its property or wharf and log pond as lay without the present port warden's line. The complainant answering said letter stated that the matter would be laid before its board of directors on July 26, 1911, and thereafter the attached correspondence was had between the Navy Department and the complainant. That while the above paragraph is admitted as a fact, it is nevertheless objected to by the defendants for the reason that the same is not relevant or material to the decision of this case and it is claimed by said defendants, Secretary of War and Assistant Secretary of War, that this admission does not bind them.

"That the water now immediately in front of complainant's property is navigable, but if the present structures are removed to the present harbor line as demanded by the Government the complainant will be cut off from navigable water unless the river is dredged where the structures now are. That an act of Congress approved March 4, 1911, entitled "An Act making Appropriations for the Naval Service for the year ending June 30, 1912, and for other purposes" (c. 239, 36 Stat. 1265, 1275), has been passed, in which Act an appropriation has been made for dredging the bottom of the river at the point in controversy, pursuant to which the Government proposes to widen the channel to the new port warden's line.

"It is further admitted that the fee simple title to the high land to low water mark adjacent to the port warden's line in question, is in the Greenleaf Johnson Lumber Company, the complainant in this suit.

"The reëstablished or new harbor line runs along the front of complainant's wharf at the northern end of the property, cutting off approximately two [200] feet of the same."

There was some oral testimony, of which it is enough to say that it identified certain descriptive maps of the property. It also showed the purpose for which the property was constructed and used, and its present condition, the description of the new line and its relation to the old one, and that "the entire change made by the establishment of the new harbor line is immediately in front of the Navy Yard," and that "the Government in recent years had used the channel of the river opposite the Navy Yard and in front of the property of complainant to a very large extent for the storage of its vessels," and a witness had seen as many as five abreast, ranging from torpedo boats to colliers.

The District Court overruled the demurrer, as we have said, expressing its views in an opinion. The court also

denied the mandatory injunction prayed by the United States and continued the temporary restraining order. Subsequently the court entered its decree adjudging that the Secretary of War had no authority under the law to remove or cause to be removed the structures mentioned in the pleadings and decreed that the temporary injunction be made permanent. The decree was reversed by the Circuit Court of Appeals. 208 Fed. Rep. 1022.

Two propositions are presented: (1) The power of Congress over navigable waters. (2) Whether the acts of the Secretary of War were done in the exercise of that power.

It would seem that the existence of the power of Congress has been withdrawn from the domain of discussion by many authorities, and that little room is left for debate as to the extent of that power. But a distinction is made by complainant between structures in a river which avail of its navigability and structures which may be an obstruction to its navigation. Upon this distinction, which will be explained more fully hereafter, complainant contends that a right of property by the privilege granted by the State of Virginia became vested in it which can only be taken upon payment of just compensation. And this distinction, it is further contended, explains the cases relied on by counsel for the United States and sustains the authority of the cases adduced by complainant. A review of the cases, therefore, is worth while.

The power of Congress is expressed in a general way in *Gilman* v. *Philadelphia*, 3 Wall. 713, 731, in which a certain power was conceded to the States but necessarily to be exercised, it was decided, in subordination to the supremacy of the national power. "Until the dominant power of the Constitution is awakened," it was said, "and made effective, . . . the reserved power of the States is plenary."

In *Gibson* v. *United States*, 166 U. S. 269, there was a further expression of the principle and an application of

it to riparian ownership, and it was decided that "all navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the Federal Government by the Constitution." Citing, among other cases, *Shively* v. *Bowlby*, 152 U. S. 1. The case was one for the recovery of damages caused by the construction of a dike in the Ohio river, by which the lands of Gibson were flooded. Relief was denied and the principle expressed that the exercise "of the dominant right of the Government" over navigation subjected riparian ownership to such consequence and it was said that an appropriation for improvement was an exercise of the power of Congress.

In *Scranton* v. *Wheeler*, 179 U. S. 141, access was cut off from a navigable river by improvements instituted by authority of Congress. This was said: "All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted, except by the limitations upon its authority by the Constitution." The words "except by the limitations upon its authority by the Constitution" were not intended to qualify the power expressed, as is made manifest by subsequent cases.

In *C., B. & Q. Ry.* v. *Illinois*, 200 U. S. 561, the railway company was required to reconstruct a bridge to subserve a public work. The bridge had been constructed under lawful authority. Compensation, however, was denied, the bridge being over a public highway. The latter and public waters were considered analogous.

In *West Chicago Railroad* v. *Chicago*, 201 U. S. 506, a tunnel was constructed by permission of Chicago under the Chicago river and was subsequently required to be lowered. It was held not a taking of property, the removal

of the tunnel having been required in the interest of navigation. In other words, the paramount right of navigation was decided to be superior to riparian rights or rights in the river—or, to put it more generally, to rights in the submerged lands. The case seems directly against complainant in the case at bar. Complainant asserts a right of compensation because it conformed to the harbor line as located by Virginia and by the United States; in other words, contends that it acquired a vested right. The case decides otherwise, and 200 U. S. 561, *supra*, so decides. The proposition announced was that the power of the sovereign, state or National, is perpetual—not exhausted by one exercise—and all privileges granted in public waters are subject to it; and that the exercise of the power was not a taking of private property for a public use but "the lawful exercise of a governmental power for the common good."

Union Bridge Co. v. *United States*, 204 U. S. 364, 400, conspicuously displays the principles of the prior cases cited and followed by it. A bridge was required to be altered or changed, the expense of which was great. It was contended that the bridge had been erected under state authority, to the exercise of which the United States had impliedly assented, and that, therefore, the requirement to alter it was a taking of property without compensation. The opposing contention of the United States was that the requirement was an exertion by Congress of its power to regulate commerce, and therefore navigation, upon the waterways on and over which such commerce was conducted. The latter contention was sustained upon a review of the prior cases. It was said that when the company "exerted the power conferred upon it by the State, it did so with the knowledge of the paramount authority of Congress to regulate commerce among the States" and subject to the possibility that Congress at some future time would exert its power.

In *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 194, again the doctrine of the other cases was repeated. A bridge erected over the navigable waters of a State by the authority of the State was declared subject to the paramount authority of Congress to regulate commerce and its right to remove unreasonable obstructions to navigation. Congress exerted its power in a provision in the river and harbor bill of March 3, 1899, giving authority to the Secretary of War, when he had good reason to believe a bridge over navigable waterways was an unreasonable obstruction to navigation, to order it to be removed after notice and hearing. The court declined to modify its holding in *Union Bridge* v. *United States,* and declared that it adhered "to what was said in that case" and sustained the Secretary without much discussion.

Hannibal Bridge Co. v. *United States,* 221 U. S. 194, was another case of bridge removal. It is not so positive an authority as the preceding cases, for Congress had reserved the right to alter or amend the act under which the bridge was constructed. But the *Union Bridge Case* was quoted from as correctly expressing the Congressional power.

Philadelphia Company v. *Stimson,* 223 U. S. 605, is directly to the effect that Congress may establish harbor lines, and is not precluded thereby from changing them. There was action by the State and twice by the United States and the relation of such actions and the rights derived therefrom were considered and determined. Rights under the action of the State were asserted by the Philadelphia Company and assumed to exist by the court in determining the power of Congress. It was said (page 634): "The exercise of this power [that of Congress] could not be fettered by any grant made by the State of the soil which formed the bed of the river, or by any authority conferred by the State for the creation of obstructions

to its navigation." And again, "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. . . . The principles applicable to this case have been repeatedly stated in recent decisions of this court." The cases which we have reviewed were cited. In speaking of the effect of the first action of the Secretary as affecting his second action, it was said, "That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And, in none of the acts complained of, did he exceed the power which had been conferred."

Philadelphia Company v. *Stimson, supra,* is an epitome of all prior cases. Indeed we might have relied upon it as furnishing all of the elements of decision of that at bar. It expressed the subordination of the power of the States to the power of Congress, that one exercise of the power by either does not preclude another exercise by either, and that the State can grant no right to the soil of the bed of navigable waters which is not subject to Federal regulation. There was a repetition of this doctrine in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

Yates v. *Milwaukee,* 10 Wall. 497, is not in antagonism to the principle announced in those cases. If it could be so regarded it would have to give way to the many cases decided since. But it cannot be so regarded. It was decided, it is true, that one of the rights of a riparian owner was that of access to a navigable river and of constructing a landing wharf or pier for his own use and that of the public, but the limitation or subordination of these rights to be regulated by the dominant power of Congress was not involved nor passed on. And certainly no limitation was implied. The case was referred to in *Scranton* v. *Wheeler, supra,* and "the point adjudged" said to be that, as there was no proof in the record that the wharf involved

was in fact an obstruction to navigation or a nuisance, except a declaration to that effect in the city ordinance attacked, the wharf could not be made such by a mere declaration. And it was observed that "a proper disposition of the case required nothing more to be said." See *Shively* v. *Bowlby*, 152 U. S. 1, 40.

We have recognized that the States have a certain control and management over the navigable streams within their territory, but subject to be superseded by the interference of Congress. *Gilman* v. *Philadelphia, supra; Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678. When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed. In *Scranton* v. *Wheeler*, 179 U. S. 141, the water was very shallow between the high land and the pier erected in the river by authority of Congress and which it was contended cut off access to navigability.

But, as we have said, complainant distinguishes between the rights a riparian owner may receive, "between those rights," to quote counsel, "which do not relate to navigation in any sense, and second, those which do relate thereto, and which contribute to the enjoyment thereof." To support the distinction *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 335, as construed in *Oyster Co.* v. *Briggs*, 229 U. S. 82, is adduced. The argument is that the right or privilege which complainant received from Virginia was given by the State "in the performance of the dominant trust for the benefit of the public" and not, as in the cases urged by defendant, "in the interest of the individual riparian owners." And it is declared that the cases referred to and *Ill. Cent. R. R.* v. *Illinois*, 146 U. S. 387, makes it clear "that when grants of rights or privileges are made within the authority of the

State, property acquired thereunder becomes as stable as any other property, and the rights and privileges so granted are irrevocable, and if taken for public use it must be upon the payment of just compensation." It is hence contended that when the State or Congress acts in fulfillment of its trust for the benefit of the public the structures it authorizes become fully protected under the Constitution, and in thus encouraging facilities for navigation and commerce "Congress loses none of its authority of regulation, because it can at any time exercise the right of eminent domain, and the expense will be a most profitable investment in the public interest."

The contention is plausible, but it is not supported by the cited cases, and the case relied on by complainant is reconcilable with them. It is true the instances in the cited cases were the removal of structures not facilities of commerce on the rivers. But the principle declared in the cases and which determined their decision was not dependent upon such instances, and the power of Congress was said to be analogous in its illimitable exertion to the police power. Illustrative cases were adduced. How then, it may be asked—indeed, is asked—shall we account for *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, as construed in *Oyster Company* v. *Briggs*, 229 U. S. 82? It was said in the latter case that the former rested upon estoppel.

A few words of explanation become necessary. The Monongahela Company, under the express authority of the State of Pennsylvania, expended large sums of money in improving the Monongahela River by means of locks and dams, which were also built at the instance and suggestion of the United States. By means of the improvements the river, which theretofore was navigable only for boats of small tonnage and at certain seasons of the year, accommodated large steamboats at all seasons and an extensive commerce by means thereof. Subsequently

Congress authorized the purchase of the property, or, if its price could not be agreed on, its condemnation, but excluded from the estimate of the sum to be paid for it a consideration of the franchise to collect tolls. It was held that the franchise was a part of the property and should be paid for, notwithstanding its exclusion by Congress, and that the franchise, the right to take tolls, could "no more be taken without compensation than" could "its [the company's] tangible, corporeal property." The court said, by Mr. Justice Brewer, "This lock and dam connected the lower improvements already made by the Navigation Company with the upper improvements proposed to be made by Congress, and the appropriation by the latter [act of March 3, 1881] was conditioned on the company's undertaking their construction. This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when in pursuance of that invitation, and under authority given by the State of Pennsylvania, the company constructed the lock and dam, it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company."

This language was quoted in *Oyster Co.* v. *Briggs* as sustaining the view that the case rested upon estoppel—rested upon the fact that the lock and dam had been constructed "at the instance and implied invitation of Congress." It is true a great deal was said by Mr. Justice Brewer which seemed to be of broader import, but we are now only concerned with the explanation of the case by the later case, and we may observe that the *Union Bridge Case, supra,* was referred to for comparison. It is manifest, therefore, that the *Monongahela Navigation Co. Case* can be distinguished from the other cases and its ruling

sustained upon the following grounds: (1) The lock and dam were built at the instance of Congress, not as a simple facility for the navigation of the river but as making its navigability, enlarging its capacity from the accommodation of boats of small tonnage at certain seasons of the year to the accommodation of large steamboats at all seasons. (2) The Navigation Company was invited to make the improvements, and so far invested with the rights of sovereignty. It did not, as did complainant in the case at bar, exercise the rights of a riparian owner, building to the harbor line and availing itself of the navigability of the river for its own interest. It, to repeat, constructed a public work, having no other power to do so but the authority conferred upon it by the State and by Congress—invited, indeed, to do so and given as its compensation a right to take tolls for the use of the works. This court well said that such right was as much the consideration of the service rendered as the material property constructed. The case, therefore, as Mr. Justice Lurton said in the *Oyster Co. Case*, rested on estoppel. Whatever was said beyond that may be left, as it was left in the latter case, to a comparison with the *Union Bridge Case*, the principle it declares and the cases it cites.

Something is attempted to be made of *Gring* v. *Ives*, 222 U. S. 365, by complainant in support of its distinction between rights held "subject to the dominant trust in which the beds of navigable streams are held, and those conferred in the exercise and in aid of the purpose of the dominant trust under which the submerged soil is held for the benefit of the public." The case does not support the distinction. A marine railway was constructed under state authority and had been in existence for eighteen years but projected beyond a harbor line subsequently established by Congress. It was run into recklessly and injured by a tugboat, and in defense of an action for the injury the fact of the projection beyond the harbor line was set

up. The defense was rejected, the lower court deciding that even if the railway had been erected illegally, even if it was a public nuisance, the tugboat was not authorized to run into it unnecessarily and negligently as the evidence tended to show. The case was brought here, a Federal question being based on the act of Congress under which the harbor line over which the marine railway projected was established. The question was pronounced frivolous and the writ of error was dismissed.

The contention of the tugboat owner was practically that the railway was an outlaw subject to be destroyed by anybody, although it had been erected by authority of the State and its existence indulged by the Secretary of War. Manifestly the contention was without any merit whatever, as was said by the court, and there was no implication of the existence of the distinction urged by complainant, nor implication of the want of power in the Secretary of War to have ordered the railway removed if he had thought it in the interest of commerce to have done so.

It is, however, contended that the jurisdiction to establish harbor lines is given by the statute only "where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors," and that it is shown by the agreed statement of facts and the correspondence attached thereto that the Secretary of War acted at the suggestion of the Navy Department for the improvement of the river opposite the Norfolk Navy Yard and in pursuance of the act making appropriations for the naval service for the year ending June 30, 1912, c 239, 36 Stat. 1265, 1275; and that this was "the sole purpose of the change in the harbor lines and the required removal of the company's [complainant's] property is shown by the additional fact that it appears that the United States moors abreast its war vessels, colliers and other vessels in front of its Navy Yard, so that

they project out in the channel which it so uses for the storage of its vessels."

We may grant that such was the inducement and such the occasional use, but neither militates against the validity of the power exercised. The mooring of vessels is as necessary as their movement, and the navigability of a river can be maintained or increased as legally for the accommodation of war vessels as for trading vessels, those of public ownership as well as those of private ownership, and we cannot enter into a consideration of what may be necessary for either purpose.

It was said in *United States* v. *Chandler-Dunbar Water Co.*, 229 U. S., at page 64: So unfettered is the "control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control." And in *Scranton* v. *Wheeler*, 179 U. S. 141, 162: "Whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; . . ." This power has been exercised by the act of March 3, 1899, delegating to the Secretary of War the power to establish harbor lines and, necessarily, to require the removal of structures which project beyond them. *Union Bridge Company* v. *United States*, 204 U. S. 364.

If it can be said that arbitrary or wanton action of the Secretary of War would be subject to judicial review, it cannot be said that his action in the case at bar reached that bad degree.

Decree affirmed.

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

MR. JUSTICE LAMAR, dissenting.

I dissent from the judgment by which the appellant's wharf is physically taken, its existing right of access to navigable water destroyed, and its private property appropriated to public use without compensation.

At, above and below the Norfolk Navy Yard, the navigable part of the Elizabeth River is 600 feet in width. In 1873 appellant's wharf was built opposite the Navy Yard, through shallow water out to the navigable channel of the stream. Several years afterward, under authority of the State of Virginia, the Norfolk Wardens established a port line which ran along the edge of this channel and left the Lumber Company's wharf and logging pond outside of the harbor.

In 1890, fourteen years later, the Secretary of War established exactly the same line; and thus by City, state and Federal authority the plaintiff's wharf was shown to be a lawful structure outside of the harbor and not an obstruction to navigation either in law or in fact. Since that date there has been no change in the condition of the stream; and the wharf remained a lawful structure until 1911 when,—having decided to widen the river at that point, as a place of storage for war vessels,—Congress in that part of the Act of March 4, 1911 (36 Stat. 1275) relating to the Navy Yard at Norfolk, made an appropriation of $80,000 "*for the purchase of land and widening the channel.*" Accordingly, on June 12, 1911, the harbor line was changed, at this particular point, so as to take in the part of the river intended to be widened, but leaving the Norfolk harbor line otherwise unaffected. No one understood, however, that fixing the line 200 feet further inland at this place for this naval purpose authorized the taking of plaintiff's wharf without compensation. And the act of Congress so obviously included the property of the plaintiff, as a part of that to be *purchased*, that the Secre-

tary of the Navy on July 22, 1911, "wrote to the complainant stating that that Department intended making certain improvements in the Navy Yard and requesting the complainant to fix a price at which it would sell so much of its property or wharf and logging pond as lay without the present Portwarden's line."

The complainant named a price which the Department considered exorbitant, and—the parties failing to agree—the Government began proceedings in the District Court of the United States

"to acquire title by condemnation to a certain piece of land, situated in the southern branch of the Elizabeth River, Virginia, held and owned by the Greenleaf Johnson Lumber Company, which is needed for public uses and purposes; that is to say for deepening and widening the said South Branch of the Elizabeth River, as authorized by Act of March 4, 1911 (36 Stat. 1275)."

The statutory notice was given the owner and a jury was impanelled to assess the value of complainant's property, when, suddenly, the proceedings were dismissed and, what was a wharf—lawfully erected in a non-navigable part of the stream and outside of the old line,—was declared to be "a menace to navigation."

The control which Congress has over navigable waters by virtue of the power to regulate commerce is practically unlimited, except in one particular. The Fifth Amendment was passed for the purpose of restraining the exercise of that or any other power by which private property was taken. *Monongahela Co.* v. *United States*, 148 U. S. 336; *McCray* v. *United States*, 195 U. S. 61 (3). That Amendment was intended to protect the citizen against the Government; and being the expression of the fundamental policy of a people, both able and willing to pay, should be given a broad and liberal construction. Congress in directing that the Elizabeth River should be widened distinctly indicated its intention that the private property

needed for that purpose should be "purchased." The Secretary of the Navy so understood the statute and began proceedings to ascertain the amount the Government should pay for the property of the appellant needed for widening the river. In the absence of absolutely controlling authority, requiring a different interpretation, the complainant should receive the payment intended by Congress and demanded by the Constitution wherever private property is taken for a public use. But there is no such authority cited, for none of the decisions relied on by the Government sustain the contention that, on facts like these, wharf property can be taken without compensation.

Some of the cases cited make a distinction between *taking* and *damaging*, and then hold that the owner cannot recover for consequential damages resulting from making public improvements in navigable waters (*Scranton* v. *Wheeler*, 179 U. S. 141). Another holds that the title of the riparian owner to oysters in the bed of a body of public water is inferior to the right of the Government to deepen the channel in the interest of commerce. *Lewis Oyster Co.* v. *Briggs*, 229 U. S. 82. Another related to a case where a power dam had been constructed under a revocable license. It was held that the owner acquired no such right in the flow in the stream as would give him a claim for damages when the Government, in the interest of navigation, caused the water to run in another channel. *United States* v. *Chandler*, 229 U. S. 53. Another holds that where the Government had constructed a dam, which raised the level of the river and backed the water beyond the old harbor line, the person who purchased *after the dam was built* could not complain because he was prevented from building a wharf inside the new harbor lines which had been changed to conform to the new line of deep water. But the right of the person who owned the land before the dam was built was expressly left open for future

decision. *Philadelphia Co.* v. *Stimson*, 223 U. S. 627. In some of the cases it appeared that bridges had been built subject to the power expressly reserved to order them removed. *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194. Several of the cases hold that those who build bridges or tunnels across the navigable channel of a stream can be required at their own expense to raise or lower the structures whenever they become obstructions to navigation. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *West Chicago R. R.* v. *Chicago*, 201 U. S. 506.

But no case has been cited which holds that a wharf, in shallow water, outside an established harbor line, can be declared an obstruction to navigation, the property taken and the owner ousted of possession without compensation.

On the contrary, *Yates* v. *Milwaukee*, 10 Wall. 497, distinctly holds that this cannot be done. There the City, by the act of 1854, had authority 'by ordinance to establish dock and wharf lines and to prevent obstructions in the river and to cause it to be dredged.' Thereafter Yates built a wharf, across the harbor line, through the shallow water out to the navigable channel of the Milwaukee River. Subsequently a new line was established (505) and in 1864, the city declared, as the Secretary did here, that the wharf (inside the harbor line), was an obstruction. This court said:

"The mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character." (505)

Again, speaking of the land-owner's right to build docks, the court said:

"This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously de-

stroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

There is a remarkable similarity between the facts in the *Yates Case* and the present. There the dock was to be 'removed in pursuance of a general scheme of widening the channel and in improving the navigation of the Milwaukee River.' Here Congress appropriated $80,000 'to purchase land and to widen the channel' of the Elizabeth River in the interest of the Navy Yard. But even such governmental purposes would not justify a taking without payment; for, in the *Yates Case,* the court concluded its opinion by the use of language which is absolutely applicable to the present controversy, saying:

"If the authorities of the city of Milwaukee deem its [the wharf's] removal necessary in the prosecution of any general scheme of widening the channel and improving the navigation of the Milwaukee River, they must first make him compensation for his property so taken for the public use."

That case has never been overruled and is a notable illustration of the meaning of the Fifth Amendment, which, standing between the Government and the private individual, provides a means by which the interests of the public can be secured without destruction of the rights of the citizen.

Most of the wharves in the United States were located many years before the adoption of the act conferring power upon the Secretary of War to establish harbor lines. Congress did not intend to destroy existing rights (*Montgomery* v. *Portland,* 190 U. S. 105) and it is inconceivable that it could have intended to vest that officer with the power to declare that these lawful structures, worth hundreds of millions of dollars and useful agencies of commerce, were obstructions to navigation merely because

they were inside of a line which he might decide to run in non-navigable water.

The present case is even stronger, for the complainant's wharf is located outside of a harbor line which had been established in 1890 by the Secretary of War himself. The wharf was not an obstruction to navigation when it was built in 1873; it was not an obstruction to navigation when the Secretary established the line in 1890; it has not become an obstruction to navigation during the years it has remained in shallow water, and, under the *Yates Case*, cannot be made an obstruction in fact by declaring (where there has been no change in the stream), that it is such in law.

Few cases directly in point can be found, but out of the multitude which deal with the principle involved, the facts and rulings in the following tend to sustain the appellant's right to compensation for the wharf taken for public use: *Dutton* v. *Strong*, 1 Black, 1; *Railroad Company* v. *Schurmeir*, 7 Wall. 272; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *Commonwealth* v. *Alger*, 7 Cush. 53, 103; *Langdon* v. *Mayor of New York*, 98 N. Y. 129, 161; *Kingsland* v. *Mayor of New York*, 110 N. Y. 570, 574; *Fitchburg R. Co.* v. *Boston & M. R. Co.*, 3 Cush. 71; *Hamlin* v. *Parpoint*, 141 Massachusetts, 57; *Lewis* v. *Portland*, 25 Oregon, 133, 167; *B. & O. R. R. Co.* v. *Chase*, 43 Maryland, 35–36; *Classen* v. *Chesapeake Co.*, 81 Maryland, 259.

The power of the Secretary of War to run harbor lines may not be exhausted when once exercised, and, from time to time, they may be relocated over unused and submerged land. But as against lawful structures, the line must be run to conform to the physical conditions of the stream and to meet changes occasioned by the washing of the water or other natural causes. But the public cannot determine to widen the river, artificially create a channel, and thus, by its own act, acquire a right to declare

that what was formerly a lawful structure in shallow water will be an obstruction to a storage basin to be artificially created.

In *Commonwealth* v. *Alger*, 7 Cush. 53, 103, it is strongly intimated that the power to establish harbor lines does not confer authority to take, without compensation, existing structures lawfully built out to the navigable channel. Other cases hold that the establishment of the line is in the nature of an invitation to fill in and build out to that line. *Sherman* v. *Sherman*, 18 R. I. 506. So here the action of the Secretary of War in 1890 "is to be construed as a regulation of the exercise of the riparian right; it settles the line of navigability above which the State will not interfere; and is an implied concession of the right to build, possess and occupy, which amounts practically to a qualified possessory title. *Miller* v. *Mendenhall*, 43 Minnesota, 95, citing *Hamlin* v. *Parpoint*, 141 Massachusetts, 51. See also *Langdon* v. *Mayor*, 98 N. Y. 129, 161; *City of Brooklyn* v. *New York Ferry Co.*, 87 N. Y. 204, 206, and *Williams* v. *Mayor of New York*, 105 N. Y. 429.

The action of the Secretary of War in 1890 in establishing a harbor line was, in effect, a declaration that wharves outside of the limits of that harbor thus marked and defined were not obstructions to navigation and, as against existing wharfs, the line could not thereafter be changed except to meet natural changes in the channel. Congress in authorizing the Secretary of War to *establish lines*, clearly indicated an intention to secure fixity and permanency. If such was not its intention, then—as shown by the actual results in the present case—nothing could be more unstable than the tenure by which riparian owners hold docks, piers and wharves. For, progressively, it is said that the builders cannot rely on grants from the State; they cannot rely on lines fixed by the Port Wardens of the State; and it is now decided that they cannot rely on a line fixed by the Secretary of War. For, under the

ruling in the present case, he can, by running a new line, take in 200 feet of a wharf outside of an old line and then oust the owner from the possession and use of that property without compensation.

The wharf here involved may not be of great value, but my view of the harm done the Appellant and of the possibility of like serious consequences to a multitude of persons who have built and invested in these costly and useful instrumentalities of commerce compel me to dissent from the judgment.

STATE OF NEW YORK, EX REL. INTERBOROUGH RAPID TRANSIT COMPANY *v.* SOHMER, COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 129. Argued January 18, 19, 1915.—Decided April 12, 1915.

An exemption from taxation of a person constructing and operating a railroad in respect to his or their interest therein under said contract and in respect to the rolling stock and other equipment of the railroad does not extend to a tax or the privilege to operate as a corporation in case the parties decide to operate the road in a corporate form.

The Court of Appeals of New York having held that the right to be a corporation was not an interest under the New York subway contract involved in this case, and that the exemption from taxation contained in that contract did not extend to such privilege, this court accepts that construction although it is not conclusive upon it.

207 N. Y. 270, affirmed.

THE facts, which involve the validity of certain assessments and provisions of the tax statutes of the State of

New York under the contract clause of the Federal Constitution, are stated in the opinion.

Mr. George W. Wickersham and *Mr. Ralph Norton*, with whom *Mr. James L. Quackenbush* was on the brief, for plaintiff in error:

The contracts authorized by the legislature of New York exempted the person, firm or corporation operating the railways constructed under their provisions from all taxation in any form, whether under the guise of a franchise tax or otherwise, in respect to his, its or their interest under the contract, and in respect to the rolling stock and all other equipment of said road, excepting real property owned or employed by it in connection therewith.

The legislature and the parties to the contract understood and intended that contracts under the Rapid Transit Act should be made between the city and a corporation, and that the exemption clause should protect the latter from any form of taxation which should affect its interest under such contracts.

The contract for exemption, binding upon the State in favor of the original contractors in contracts Nos. 1 and 2 respectively from the date of their execution, enured to the benefit of the plaintiff in error upon the assignment to it of those contracts pursuant to the provisions of the amending act of 1902, and became operative from and after the commencement of operation by it of the railways constructed under said respective contracts.

Until the effort to tax plaintiff in error on its franchises under the Consolidated Laws of 1909 (chapter 62), the decisions of the courts uniformly sustained its claim of immunity under the contracts and statutes above cited.

The literal construction given by the Court of Appeals to the provisions of §§ 182 and 184 of the Consolidated Tax Law of 1909 is as erroneous as was the literal construction of § 185 which was condemned by that court;

but if such construction is sound, or binding upon this court, the statute is void as against plaintiff in error, because it impairs the obligation of the contracts exempting it from taxation in respect to its interests under those contracts.

The impairment of the obligation of its contracts which exempt it from taxation, complained of by plaintiff in error, is occasioned by the construction given by the state courts of New York to statutes enacted subsequently to the acts of the legislature authorizing such contracts of exemption, and statutes enacted subsequently to the making of said contracts.

The assessments, in so far as they are based upon dividends on the capital stock of the plaintiff in error, all of which is invested in the equipment and operation of the rapid transit railways, and upon the gross earnings derived from such operation, are in direct violation of the exemption from taxation under which plaintiff in error entered into contracts for the equipment and operation of such railways, and constitute a taking of its property without due process of law, contrary to the Fourteenth Amendment.

On the whole case, therefore, it is submitted that the state court erred in holding plaintiff in error subject to taxation under §§ 182 and 184 of the Tax Law upon its capital stock, based upon the dividends earned and declared thereon, and upon its gross earnings from the rapid transit railways; and that the judgment of the state court should be modified accordingly.

In support of these contentions, see *Central R. R.* v. *Georgia*, 92 U. S. 655; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 226; *Delaware &c. R. R.* v. *Pennsylvania*, 198 U. S. 341; *Flint* v. *Stone Tracy*, 220 U. S. 107; *Gulf &c. R. R.* v. *Hewes*, 183 U. S. 66; *Grand Gulf &c. R. R.* v. *Buck*, 53 Mississippi, 246; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Hancock* v. *Singer Mfg. Co.*, 62 N. J. L. 326; *Home Ins.*

Co. v. *New York*, 134 U. S. 594; *McCoach* v. *Minehill R. R. Co.*, 228 U. S. 295; *Mobile & Ohio R. R.* v. *Tennessee*, 153 U. S. 486; *McCullough* v. *Virginia*, 172 U. S. 102; *Muhlker* v. *New York &c. R. R.*, 197 U. S. 544; *N. Y. Term. Co.* v. *Gaus*, 204 N. Y. 512; *N. Y. Cent. R. R.* v. *Miller*, 202 U. S. 584; *Nichols* v. *N. H. & Northampton Co.*, 42 Connecticut, 103; *Met. St. Ry.* v. *Tax Commissioners*, 199 U. S. 1; *Nor. Pac. R. R.* v. *Minnesota*, 208 U. S. 583; *People* v. *O'Brien*, 111 N. Y. 1; *Powers* v. *Detroit & G. H. Ry.*, 201 U. S. 543; *Ft. George Realty Co.* v. *Miller*, 179 N. Y. 49; *Wall & H. St. Realty Co.* v. *Miller*, 181 N. Y. 328; *Fifth Ave. Co.* v. *Williams*, 198 N. Y. 238; *Cornell Steamboat Co.* v. *Sohmer*, 206 N. Y. 651; *Vandervoort Realty Co.* v. *Glynn*, 194 N. Y. 387; *Pacific R. R.* v. *Maguire*, 87 U. S. 36; *N. Y. M. & N. T. Co.* v. *Gaus*, 198 N. Y. 250; *Interborough Transit Co.* v. *Tax Commissioners*, 126 App. Div. 610, 195 N. Y. 618; *Interborough Transit Co.* v. *O'Donnell*, 202 N. Y. 313, 321; *Ross* v. *Oregon*, 227 U. S. 150; *Railroad Co.* v. *Cleveland*, 235 U. S. 50; *State* v. *Balt. & Ohio R. R.*, 48 Maryland, 49; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Wilmington R. R. Co.* v. *Reid*, 13 Wall. 264; *Wright* v. *Georgia Ry. & Banking Co.*, 216 U. S. 420; *Worth* v. *Wilmington & Weldon R. R.*, 89 N. Car. 291; *Worth* v. *Petersburg R. R.*, 89 N. Car. 301; *Wilmington & Weldon R. R.* v. *Alsbrook*, 146 U. S. 279; *Yazoo &c. R. R.* v. *Thomas*, 132 U. S. 174.

Mr. Franklin Kennedy, Deputy Attorney General of the State of New York, with whom *Mr. Egburt E. Woodbury*, Attorney General for the State of New York, was on the brief, for defendant in error:

Assuming that this court has the right to construe, independently of the decision of the state court, § 35, yet it will construe it as not exempting plaintiff in error from corporate franchise taxation under the Tax Law of the State of New York.

Assignments of contracts to plaintiff in error did not carry with them the exemption under § 35.

No Federal question is involved, because there was no law involved subsequently passed impairing the obligation of contracts under the constitutional provision.

Neither the construction of the aforesaid tax laws by the Court of Appeals nor the assessment imposed upon the plaintiff in error under them, constitutes an impairment of the obligation of a contract under article I, § 10, clause 1 of the Constitution of the United States.

The corporate franchise taxes imposed upon the plaintiff in error for the years in question did not constitute a taking of property without due process of law, in violation of the Fourteenth Amendment.

Section 35 does not constitute a contract of the Federal Constitution under the constitutional provision as to the impairment of contracts.

This court will not disturb the construction given by a state court to a state statute, even if the statute constitute a contract under the constitutional provision, unless it is manifestly clear that the state court was in error.

In support of these contentions, see *Bacon* v. *Texas*, 163 U. S. 207; *New York* v. *Bryan*, 196 N. Y. 158; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632; *Interurban Railway* v. *Olathe*, 222 U. S. 187; *Lord* v. *Equitable Life Ins. Assoc.*, 194 N. Y. 212; *Maine* v. *Grand Trunk R. R.*, 142 U. S. 217; *New Orleans* v. *Stempel*, 175 U. S. 309; *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18; *Cornell Steamboat Co.* v. *Sohmer*, 206 N. Y. 651; *Interborough Transit Co.* v. *Williams*, 200 N. Y. 93; *Interborough Transit Co.* v. *Sohmer*, 207 N. Y. 270; *S. C.*, 151 App. Div. (N. Y.) 911; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *People* v. *Home Ins. Co.*, 92 N. Y. 328; *U. S. A. P. P. Co.* v. *Knight*, 174 N. Y. 475; *Penn. R. R.* v. *Wemple*, 138 N. Y. 1; *People* v. *O'Brien*, 111 N. Y. 1; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 335; *Vicksburg &c. Ry.* v. *Den-*

nis, 116 U. S. 665; *Michigan Ry.* v. *Powers*, 191 U. S. 379.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a certiorari to review assessments made by the Comptroller after a previous assessment had been set aside by the Court of Appeals. 200 N. Y. 93. The present assessments were upheld. 207 N. Y. 270. The plaintiff in error alleges that the tax laws construed to authorize them impair the obligation of contracts, contrary to Article I, § 10, of the Constitution of the United States.

Successive acts were passed by the legislature of New York for the establishment of a rapid transit system in cities of above one million inhabitants. Under c. 752 of the Laws of 1894 the City of New York determined to build a subway, and in pursuance of the statute made a contract with one McDonald, on February 21, 1900, by which he undertook to construct the railroad for $35,000,000. The statute required that the person, firm or corporation so contracting should, at his or its own expense equip, maintain and operate the road for a term of years, paying as rent a sum equal to the interest on the bonds to be issued by the City for the construction of the road, and a certain contribution to a sinking fund. By § 35, "The person, firm or corporation operating such road, shall be exempt from taxation in respect to his, their or its interest therein under said contract and in respect to the rolling stock and other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the construction or operation of said road." This section was amended by c. 729, § 4, Laws of 1896, to specify what the equipment to be furnished by the person, firm or corporation operating the road should include, and continued: "Such person,

firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road." Reënacted without change on April 23, 1900. Laws of 1900, c. 616, § 4. This is the contract relied upon and the statute may be assumed to have offered a contract that was accepted, as it seems to have been assumed to have by the state courts. We may assume also that the constitutional question is open, and that the only matter for us is whether the obligation of the contract has been impaired by what was done.

The petitioner was incorporated under the Statutes of New York for the purpose of equipping, maintaining and operating the rapid transit railroad in the City of New York, and, pursuant to the rapid transit act and the contract, the operating part of the latter was transferred to it on July 10, 1902. A second contract for an extension of the road made with an intervening corporation on July 21, 1902, also was assigned to it in like manner on August 10, 1905, since which time the petitioner has operated the road. It may be assumed that the petitioner is entitled to the benefit of the exemption recited above. The petitioner also operates under a lease the elevated railroads of the Manhattan Railway Co., and the earlier above-mentioned attempt to tax it was under § 185 of the tax laws for the years ending on June 30, 1907, 1908 and 1909. This section levied on corporations operating elevated railroads not operated by steam a franchise tax of one per cent. of gross earnings from all sources within the State, etc., and the attempt was to tax the petitioner upon its receipts from the subway as well as from the elevated road. The Court of Appeals held that the words 'from all sources' in the taxing act did not

extend to earnings from the distinct enterprise of the subway merely because it happened to be carried on by the same corporation that operated the elevated road. But it intimated an opinion that there was nothing to hinder a franchise tax.

The present taxes are levied under §§ 182, 184 and 185 of the tax laws for the years 1907, 1908, 1909 and 1910. The petitioner does not dispute the tax under § 185 in respect of its operation of the elevated railroad, but does dispute the taxes levied under §§ 182 and 184. By the former of these a tax computed on the basis of its capital stock is levied on every corporation doing businsss in the State, 'for the privilege of doing business or exercising its corporate franchises in this State'; and by § 184 an additional tax of five-tenths of one per cent. upon gross earnings within the State is imposed on transportation companies not liable to taxation under § 185. The petitioner contends that the contract made by the subway statute, § 35, exempts it from these taxes. It makes some preliminary argument as to the scope of the taxing acts, but we understand the Court of Appeals to read them as taxing the right to be a corporation and to operate as such, in the case of domestic companies, *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 558, 559, and we see no reason for attempting to go behind its decision. *New Orleans* v. *Stempel*, 175 U. S. 309, 316. Therefore the matter for this Court to consider is narrowed to whether the words of the exemption extend to a tax on the privilege to operate as a corporation under a charter from the State, in case the interested parties should decide to operate their road in corporate form. If such a tax is allowable we understand that there is no dispute as to amounts or the mode of measuring it. Whether it be admitted or not, if the franchise to operate the subway as a corporation can be taxed in this case, we can see no difference in the legitimacy of adopting as a measure of the tax property

that is exempted by contract or property exempted by a simple law. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165.

The petitioner's counsel put with great force the difficulties and apprehensions that beset the subway enterprise at the beginning, the need of attracting capital, and instances of popular understanding that the exemption was of universal scope for the time that the subway was to be run by a lessee before it went into the City's hands. But a business proposition involving the outlay of very large sums cannot be and is not taken by the parties concerned according to offhand impressions; it is scrutinized phrase by phrase and word by word. Scrutinizing it in that way the Court of Appeals observed that the exemption was from taxation in respect of the person's or corporation's interest under the contract. However probable and expected it may have been that a corporation would run the road, it was left possible for a natural person to do it, as in fact an individual took and held the first contract for two years. The exemption applied to one to the same extent as to the other—for either would have the same interest under the contract as the other. The right to be a corporation, even when the corporation was created and was expected to be created to carry out the purposes of the act, was not an interest under the contract, but only a very great convenience for acquiring and using that interest. For these reasons the Court of Appeals held that that right might be taxed. *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 558, 559.

The construction of the statute by the Court of Appeals although not conclusive upon its meaning as a contract is entitled to great deference and respect. As a literal interpretation it is undeniably correct, and we should not feel warranted in overruling it because of a certain perfume of general exemption. We must accept the words used in their strict sense.

Order affirmed.

McGOWAN *v.* PARISH.

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

No. 150. Argued January 25, 26, 1915.—Decided April 12, 1915.

The appellate jurisdiction of this court in all cases coming from the Court of Appeals of the District of Columbia, under § 250, Judicial Code, is general, except those coming under the first class specified in § 250 in which the jurisdiction of the trial court is in issue and is the only question certified.

Where, as in this case, the jurisdiction is invoked on a substantial ground, other than that of jurisdiction, it extends to the determination of all questions presented by the record, irrespective of the disposition that may be made of the particular question on which the appeal rests.

Where officers of the Government find that they do not have to invoke the protection of Rev. Stat. § 3477 and are willing to pay the amount of a claim upon the United States, or a portion thereof, into court and so protect the rights of one claiming an interest in the warrant, and all parties consent, and grounds for equity exist, and it is not clear that there is an adequate remedy at law, the court may acquire and exercise equity jurisdiction.

The right of defendant to object to equity jurisdiction on the ground that there is an adequate remedy at law may be waived. Even if the trial court might have dismissed the bill for want of jurisdiction of its own motion, if it did not do so, this court is not called upon to pass upon the question.

A consent decree that the claimed portion of a warrant be deposited in court not only amounts to a clear and express waiver of jurisdictional objections, but renders irrelevant all questions as to whether there was or was not an actual lien on the warrant.

A court of equity should do justice completely and not by halves, and should retain the cause for all purposes even though it be thereby called upon to determine legal rights otherwise beyond its authority. *Camp* v. *Boyd*, 229 U. S. 530, 551.

In this case *held* that attorneys originally employed, under a written contract containing a provision against revocation, to collect a claim against the Government and who had rendered substantial services

in connection therewith, but had been superseded by other attorneys over their objection after their offer to proceed with the case, were entitled to compensation to an amount equal to that provided by the contract.

39 App. D. C. 184, reversed.

THE facts, which involve the respective interests of various parties in a claim against the United States which had been adjudicated after a long litigation in the courts in which appellants had at divers times represented the claimants, are stated in the opinion.

Mr. Clarence R. Wilson and *Mr. J. J. Darlington*, with whom *Mr. Nathaniel H. Wilson* was on the brief, for appellants.

Mr. Leigh Robinson, with whom *Mr. Holmes Conrad* was on the brief, for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an equity suit that was commenced in the Supreme Court of the District of Columbia by Jonas H. McGowan and Elijah V. Brookshire, as complainants, against appellee as Executrix of Joseph W. Parish, deceased, together with the Secretary of the Treasury and the Treasurer of the United States, as defendants, in May, 1909, shortly after the decision by this Court of the case of *Parish* v. *MacVeagh*, 214 U. S. 124, and at a time when, pursuant to that decision, a mandate was about to be issued that would have resulted in paying to appellee, as Executrix, the sum of $181,358.95, the amount found by the Auditor for the War Department to be due to Joseph W. Parish in his lifetime upon his claim against the Government, known as the "ice claim," mentioned in the opinion of this court in the case just referred to. The object of the suit was to establish and enforce a lien upon the fund for services rendered in the prosecution of the claim. That claim had long been before the courts and

Congress (*Parish* v. *United States*, 12 Ct. Claims, 609; 100 U. S. 500; 16 Ct. Claims, 642; Act Feb'y 20, 1886, 24 Stat. 653, ch. 11), when, on August 4, 1900, an agreement in writing was made between Parish and McGowan whereby the former employed the latter as his attorney to prosecute and collect it, agreeing "in consideration of the professional services rendered and to be rendered by the party of the second part [McGowan], and others whom he may employ in the prosecution of said claim," that he, Parish, would pay to McGowan a fee equal in amount to fifteen per centum of whatever might be awarded or collected. McGowan was thereby given control of the prosecution of the claim to its final determination, with power to receive and receipt for any draft or other evidence of indebtedness that might be issued in payment of it, and to retain from the proceeds the amount of the stipulated fee; Parish was to furnish the evidence required and to execute from time to time and deliver to McGowan powers of attorney or other papers necessary for the prosecution and collection of the claim and the payment of the fee; Parish agreed that he would not assign or otherwise dispose of the claim, and that the agreement should not be vacated by any revocation of the authority granted to McGowan, "nor by any services rendered, or which may be rendered, by others, or by the party of the first part [Parish], his heirs or legal representatives, or by any of them;" and McGowan agreed to diligently prosecute the claim to the best of his professional ability to its final determination.

McGowan was a lawyer engaged in practice in the District of Columbia, and after the contract was made, he rendered professional services under it, before Congress and otherwise. In December 1902, McGowan and Parish being desirous of securing the services of the complainant Elijah V. Brookshire as attorney in coöperation with McGowan, the latter made an agreement with Brookshire

giving him an undivided one-third interest in the contract of August 4, 1900, the purpose being to give him 5% of whatever amount should be awarded or collected upon the claim. A short time after this, Parish and Brookshire entered into a written agreement between themselves, by which the former agreed that he would pay to the latter an additional 5% of the amount awarded or appropriated, and that Brookshire should have a lien for the amount due him upon the award when made; and Brookshire agreed to render necessary and proper legal services in the prosecution of the claim under the direction of Parish.

Thereafter McGowan and Brookshire coöperated, and unquestionably rendered services of value. Through their instrumentality, Congress was induced to pass the act of February 17, 1903 (c. 559, 32 Stat. 1612), referring the claim to the Secretary of the Treasury for examination and the payment of any balance found due to Parish under the rule of damages laid down by this court in *United States* v. *Behan*, 110 U. S. 338, after deducting payments already made. Thereafter, the Secretary of the Treasury referred it to the Auditor for the War Department, who on August 11, 1903, made a finding that there was a balance of $181,358.95 due to Parish, and notified him through McGowan. The Secretary, however, did not accept this finding, but made further investigation, with the result that on May 31, 1904, having concluded that under the rule in the *Behan Case*, and upon the evidence, no balance was due to Parish, he decided to refuse to pay the amount ascertained by the Auditor, or any sum. Shortly after this, friction and disagreements developed between Parish and the attorneys respecting the next steps to be taken, and they continued until Parish's death, which occurred on December 26, 1904, at his residence in the City of Washington. No active steps were taken, during this period, towards pressing the claim. Parish

left a will, but no estate other than the claim. His daughter, Emily E. Parish, proved the will and qualified as Executrix thereunder, and in the year 1905 she employed other counsel, through whom, in May, 1906, she filed in the Supreme Court of the District of Columbia a petition for a mandamus against the Secretary of the Treasury to require him to issue a draft in her favor for the amount of the award of the Auditor for the War Department. That court dismissed the petition, and the Court of Appeals of the District of Columbia affirmed its action. 30 App. D. C. 45. But this court, in the case first above mentioned, reversed this judgment, and remanded the cause with directions looking to the allowance of the mandamus.

At this point, as already mentioned, McGowan and Brookshire filed the present bill of complaint against the Executrix, joining the Secretary of the Treasury and the Treasurer of the United States as parties defendant. The bill set up the several contracts made between Parish and McGowan, between McGowan and Brookshire, and between Parish and Brookshire, respectively; set forth the services performed by complainants under those contracts, and the results of those services, including the passage of the act of February 17, 1903, the finding of the Auditor for the War Department, ascertaining a balance of $181,358.95 due to Parish, and the adverse decision of the Secretary of the Treasury; the subsequent death of Parish; the probate of his will by Emily E. Parish, his Executrix, and the proceedings taken by her in the courts. It also alleged that during Joseph W. Parish's lifetime complainants had advanced money to him for the benefit of himself and his family in sums aggregating $5,000, relying solely upon his promise to repay the loans out of what might be recovered in respect of the claim; that except for that claim he died insolvent, and was indebted in amounts aggregating about $25,000; that the defendant, Emily E.

Parish, and her brother, Grant Parish, had avowed and declared that complainants should never receive any part of the money realized upon the claim, and that they were both insolvent, and if they should receive into their hands the draft about to be issued by the Secretary of the Treasury they would immediately take it out of the jurisdiction of the court for the purpose of defrauding and defeating complainants of their rightful lien and claim on the fund; and that complainants were severally the equitable owners of one-tenth part of said sum of $181,358.95, and entitled to a lien upon the award and finding in respect of that part. The prayers were, in substance, that each of the complainants should be decreed to be the equitable owner of and entitled to one-tenth part of the amount of the award; that the Executrix, the Secretary of the Treasury, and the Treasurer of the United States should be enjoined from receiving or paying over the amount of the award to the detriment of complainants' interests; that a receiver should be appointed to collect the money from the United States and hold it subject to the order of the court; and for general relief. The bill was filed on May 22, 1909, and on the same day a restraining order was made enjoining the Executrix from receiving, and the officers of the Government from paying, the amount of the award. On June 2, with the consent of the respective solicitors for the complainants and the defendant, Emily E. Parish, Executrix, an interlocutory decree was made, dissolving the restraining order and dismissing the bill of complaint as against the Secretary of the Treasury and the Treasurer of the United States, and also dissolving the restraint as against the Executrix; "provided, however, and it is adjudged that in respect of the sum of forty-one thousand dollars and in respect of any warrant, draft or check that may be issued therefor by the Treasury Department, or any officer thereof, as being a part of the award or finding," etc., the Executrix was thereby directed to make a proper

power of attorney authorizing the Vice President of the American Surety and Trust Company to receive the warrant, draft or check, indorse it in her name as Executrix of Joseph W. Parish, deceased, collect the proceeds, and deposit them with the Trust Company "to the credit of this cause and subject to the further order of this court herein and subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint." This consent decree was complied with, to the extent that the Executrix collected from the Treasury Department for the use of the Estate the amount of the award over and above $41,000, and the latter amount was on June 7, 1909, placed with the Trust Company to the credit of the cause, subject to the order of the court. Jonas H. McGowan died on August 2, 1909, and his Executrix was substituted as a party complainant in his stead. An answer was filed in due course by the Executrix of Joseph W. Parish, proofs were taken, and the cause was brought on to final hearing. The Supreme Court of the District of Columbia made a decree awarding to each of the complainants a sum equal to one-tenth part of the amount of the award, with interest from June 7, 1909. 39 Wash. Law Rep. 586. The Court of Appeals reversed this decree (39 App. D. C. 184), and the present appeal was allowed under § 250, Jud. Code, upon the ground that the construction of Rev. Stat., § 3477, had been drawn in question by the defendant. 228 U. S. 312.

Section 250 allows a review by this court of the final judgments or decrees of the Court of Appeals of the District of Columbia upon writ of error or appeal in six classes of cases. The first is: "Cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the

question of jurisdiction alone shall be certified to said Supreme Court for decision." In the remaining five classes of cases the section imposes no similar restriction upon the scope of the review. In this respect the section is analogous to § 238, which regulates direct appeals and writs of error from the district courts of the United States. Under that section it is held that, in cases other than those that raise alone the question of the jurisdiction of the district court, the appellate review by this court is general. *Siler* v. *Louis. & Nash. R. R.*, 213 U. S. 175, 191; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 63; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 312, 316. The same rule obtains in cases coming here from a district court under § 266, Jud. Code, where the jurisdiction of that court is invoked upon constitutional grounds and a direct appeal is allowed. *Ohio Tax Cases*, 232 U. S. 576, 586; *Louis. & Nash. R. R. Co.* v. *Finn*, 235 U. S. 601, 604. A similar rule must be applied to appeals and writs of error taken under § 250, and in the present case our jurisdiction, properly invoked upon a substantial ground specified in the section, other than a question of jurisdiction covered by its first clause, extends to the determination of all questions presented by the record, irrespective of the disposition that may be made of the question respecting Rev. Stat., § 3477, or whether it is found necessary to decide that question at all.

The grounds upon which the Court of Appeals denied relief to complainants are, briefly: That contracts like those set out in the bill, so far at least as they attempt to assign or create a lien upon a claim against the United States, are prohibited by § 3477, and thereby made absolutely void; that although this court, in *Nutt* v. *Knut*, 200 U. S. 12, 21, permitted a similar contract to be employed as evidence of an agreed basis of compensation for an attorney's services in prosecuting a claim, yet that decision was rendered in a case coming from a state court,

where the complaint did not assert nor did the judgment establish any lien upon the fund claimed from the Government, and under the procedure in the state court the question of jurisdiction in equity to entertain the action did not arise, and perhaps could not have arisen; that the present case differed, because complainants sued upon the contracts as a whole, claiming the fees as fixed thereby, and also claiming a lien, and that "had there been an amendment abandoning the lien and relying on the *quantum meruit* solely, the equity court would have been without jurisdiction;" that aside from the contracts there was no attorney's lien upon which to found jurisdiction in equity, because complainants did not themselves reduce the fund to possession, the Executrix having employed other counsel to do this, as she had a right to do, although not thereby entitled to defeat complainants' right to compensation for the reasonable value of their services previously performed; that the allegation of the insolvency of the Executrix, and her intention to remove the fund from the jurisdiction, furnished no foundation for a resort to equity, because relief could have been given by the Supreme Court of the District as a probate court, which had authority to require the Executrix to give sufficient bond for the protection of creditors, or else to revoke her letters and thus prevent the collection of the judgment; that the interlocutory decree entered by consent of the parties did not help the position of complainants nor estop defendant from attacking the contracts as illegal and void or alleging the failure of complainants to prosecute the claim to final determination; that the decree and defendant's answer furnished a ground upon which complainants might have amended their bill so as to convert the suit into a claim for compensation upon a *quantum meruit*, but that no such amendment was made, the cause being heard upon the theory that the allegations of the original bill were sufficient for the purpose, and there being no

evidence of the reasonable value of the services of the attorneys aside from the express stipulations of the contracts, as to which it was held that they did not furnish a measure of the reasonable value of services which were not completely performed as the contracts contemplated; and thereupon, examining the evidence with a view to determining whether the attorneys had performed the contracts so far as permitted by the claimant and his Executrix, the court reached the conclusion that they had in effect abandoned the contracts during the lifetime of Joseph W. Parish, and had made no tender of further services to the Executrix after his death, and hence, upon the whole case, were entitled to no compensation.

As to the effect of § 3477, Rev. Stat.,[1] it has been several times declared by this court that the statute was intended solely for the protection of the Government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they in their judgment deem proper. *Goodman* v. *Niblack*, 102 U. S. 556, 560; *Bailey* v. *United States*, 109 U. S. 432, 439; *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Freedman's Saving*

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[1] Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

Co. v. *Shepherd*, 127 U. S. 494, 506; *Price* v. *Forrest*, 173 U. S. 410, 423. But see *Nutt* v. *Knut*, 200 U. S. 12, 20.

In this case, the officers of the Government, after the suit was commenced (the claim having already been allowed and finally adjudicated), found that they needed no protection from the statute and were safe in paying into court to the credit of the cause a sufficient amount to answer the claims of complainants. The amount being paid, the court took control of it, and, with the consent of the other parties, dismissed the Secretary of the Treasury and the Treasurer of the United States from the cause. Under these circumstances, and in view of the consent decree, we are not called upon to consider whether the present case is within the reasoning of either of the cases cited, if we decide—as we do—that in view of the contracts, and of the special facts set up in the bill of complaint as above recited, reasonable and sufficient grounds existed for invoking the equity jurisdiction, that the subject-matter was within the cognizance of a court of equity, and that it was by no means clear that an adequate remedy existed at law. The equity jurisdiction having thus been properly invoked, the right of defendant to object because of the alleged existence of a legal remedy could be waived. *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 536; *Re Metropolitan Railway Receivership*, 208 U. S. 90, 110. It is suggested in the opinion of the Court of Appeals that the trial court in its discretion might, of its own motion, have dismissed the bill for want of jurisdiction. This was not done, and hence we are not called upon to pass upon the question; but we must not be understood as assenting to the suggestion.

The consent decree not only amounted to a clear and express waiver of jurisdictional objections, but it rendered irrelevant, so far as the present parties are concerned, all questions as to the effect of the contracts in creating a

lien upon the proceeds of the ice claim, the effect of § 3477, Rev. Stat., as an obstacle to such lien, the right to a lien independent of the contracts, the right to an injunction or receivership, and other questions, if any, that simply relate to the ground or occasion for coming into equity. These were waived when the court, with the consent of the parties, took physical control of the $41,000 for the purpose, very clearly expressed in the interlocutory decree, of holding it for the benefit of the respective parties, "subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for and in respect of the matters described in the bill of complaint." This language excluded the idea that the determination of any other question—whether contract lien, attorney's lien, or what not—might control the ultimate disposition of the fund. The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal. But "a court of equity ought to do justice completely, and not by halves;" and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. *Camp* v. *Boyd*, 229 U. S. 530, 551–552, and cases cited. After the making of the consent decree and the deposit of the money in court, the situation of this case was substantially that of an interpleader suit after the making of a decree for interpleader and the dismissal of the stakeholder from the cause, with the issue as between the conflicting claimants limited by stipulation to the determination of the amount "justly due" from the one to the other. That question,

of course, was and is to be decided according to the equities of the claimants as between themselves, without regard to legal technicalities. *Whitney* v. *Cowan*, 55 Mississippi, 626, 645, 647.

We also think the ascertainment whether anything, and if so how much, was due to complainants was well within the prayer for general relief, and cannot agree with the Court of Appeals that there was any necessity for amending the bill. Nor could the Executrix, by her answer, raise any issue other than the simple one previously reserved by the consent decree.

The determination of that issue depends chiefly upon the disputed question of fact, whether the attorneys fairly and fully performed their agreements so far as permitted to do so by Joseph W. Parish in his life-time and his Executrix after his death, as the Supreme Court of the District found that they had done; or whether they in effect abandoned performance and refused to complete their duties under the contracts, as the Court of Appeals found that they had done. This in turn depends, for the most part, upon what took place between McGowan and Brookshire and Parish during the summer and autumn of the year 1904; and since two of these were dead at the time of the hearing, and the third (Brookshire) debarred from testifying as to transactions with or declarations by defendant's testator (Dist. Col. Code, § 1064), the evidence bearing upon the question is fragmentary and largely circumstantial. The Court of Appeals laid great stress upon the fact that, so far as appeared, McGowan made no written reply to a certain letter sent to him by Parish in the month of September, while McGowan was on vacation in Canada. It contained the statement: "You will remember before you left Washington for your summer respite, you said substantially that you had done your best to get the Auditor's report in my case paid by the Secretary of the Treasury, and failed, etc., 'that you

turned over to me the case to be managed in the future and do whatever I deemed best, etc.' Sometime next Congress I propose to organize a practical method and resurrect the claim from its unfortunate condition, and I must have unrestricted and unrestrained control"— with other matter intimating but not expressing a desire that McGowan should expressly abandon the case. The letter was rambling, and its purpose not plain. There was nothing in it to require an immediate reply, or to necessitate a reply in writing. McGowan returned to Washington within two weeks after its receipt, and soon afterwards made repeated efforts to obtain a personal interview with Mr. Parish, but without success. It would serve no useful purpose to rehearse the evidence that was introduced to throw light upon the situation and to show the conduct of the parties during this period. We content ourselves with saying that we are unable to concur in the view of the Court of Appeals, and, on the contrary, think that the weight of the evidence shows that up to the time of Mr. Parish's death the attorneys were ready and willing to proceed, but that because of his attitude, as well as by reason of doubts naturally arising from the adverse decision of the Secretary of the Treasury, they were embarrassed about deciding upon the proper course to be followed, among several that suggested themselves: mandamus to the Secretary of the Treasury, a re-hearing before him, a reference to the Court of Claims, or a further application to Congress. Their letter of November 19th, stating: "We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next we shall proceed as we deem best under the ample authority which we have," was, in view of all the circumstances, a reasonable though emphatic notice to Parish that, under the right conferred upon them by the

contracts and under the power of attorney that they had, they would exercise their own judgment and discretion as to the proper mode of proceeding, unless they could have an interview with him. And Parish's reply, under date November 22, in which, while not disputing their statement that they had sought and he had avoided an interview, he notified them that he would not submit to their proposed action, amounted in effect to a confirmation of what they already had reasonable ground to believe, that he intended to dispense entirely with their services. That they did not proceed without him, as they threatened to do, is easily explainable on the theory that his personal coöperation was practically, although not legally, indispensable.

The evidence further shows that the Executrix had been fully cognizant, during her father's lifetime, of the general situation respecting the ice claim and knew that McGowan and Brookshire were the attorneys in charge of it; she knew Mr. McGowan had advanced considerable sums to her father for his support and hers, and that these advances remained unpaid at his death; the letter of November 19th and a copy of the reply were among her father's papers and came to her knowledge not long after his death; and the circumstances show that she was not willing that McGowan or Brookshire should have anything further to do with the claim, and that they were made aware of this. We think they were not called upon to make an express offer of their services to the Executrix.

Complainants are therefore entitled to compensation; and since the attorneys' services were admittedly of great value, and resulted in securing to Mr. Parish, as this court in effect held in 214 U. S. 124, a complete right to the payment of the money, and since it was his fault and not theirs that the final steps to recover it were not taken by them, no reason is shown why complainants should not receive the entire amount stipulated for in the contracts.

Those instruments may be resorted to as a basis for calculating the compensation of the attorneys, irrespective of any question about their effect as assignments because of § 3477, Rev. Stat. *Nutt* v. *Knut*, 200 U. S. 12, 21. And the first and foundation agreement in terms provides that it shall not be affected by any revocation of the authority granted to Mr. McGowan, nor by any services rendered by others, or by Parish himself.

The decree of the Court of Appeals is reversed, and the cause remanded, with directions to affirm the decree of the Supreme Court of the District of Columbia and direct the latter court to take further proceedings thereon, if necessary, in accordance with the views above expressed.

Reversed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

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

No. 183. Argued March 9, 1915.—Decided April 12, 1915.

Where the jurisdiction of the District Court to which the case is removed from the state court depends entirely upon diverse citizenship, the judgment of the Circuit Court of Appeals is final under § 128, Jud. Code.

Where the foundation of the right claimed is a state law, the suit to assert it arises under that law, none the less because it has attached a condition that only Federal legislature can fulfil; such a case is not one arising under the law of the United States, under § 24, Jud. Code.

Where a proceeding brought by a telegraph company, permitted to operate within the State, against a railroad company, to acquire rights by judgment expropriation which is based on the state statute, is removed to the District Court on account of diverse citizenship,

the case is not one arising under the laws of the United States simply because the telegraph company in its bill alleged that it had accepted the provisions of the Federal Post Road and Telegraph Act of July 4, 1866.

Writ of error to review, 203 Fed. Rep. 1022, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the Circuit Court of Appeals and the finality of such judgments under § 128, Judicial Code, are stated in the opinion.

Mr. Victor Leovy and *Mr. John G. Johnson*, with whom *Mr. Henry L. Stone* and *Mr. George Denegre* were on the brief, for plaintiff in error.

Mr. Rush Taggart, with whom *Mr. Charles P. Fenner* and *Mr. George H. Fearons* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the Telegraph Company, originally in a state court, to acquire 'the right of use for a telegraph line over the right of way, bridges and property' of the Railroad Company, subject to the Railroad's dominant right, by 'judgment expropriation.' By an amendment filed on May 21, 1912, the Telegraph Company alleged that it had accepted the provisions of the Act of Congress of July 24, 1866 (c. 230; 14 Stat. 221; see Rev. Sts., §§ 5263, *et seq.*); but did not disclose the purpose of the allegation. The case was removed to the District Court of the United States on June 17, 1912. There was a trial, a condemnation of the right to the plaintiff upon payment of a sum fixed by verdict, and a judgment, subject to exceptions, which was affirmed without an opinion by the Circuit Court of Appeals. This statement is sufficient, or nearly so, to show that there is a question as to the jurisdiction of this court.

If the jurisdiction below was dependent entirely upon the opposite parties being citizens of different States—the Telegraph Company of New York, the Railroad of Kentucky—this writ of error must be dismissed under § 128 of the Judicial Code. Act of March 3, 1911, c. 231, 36 Stat. 1087. The only basis for any other ground of jurisdiction is the unexplained averment of acceptance of the Act of 1866. The question is whether that averment discloses such a ground.

The jurisdiction to be exercised was to expropriate by judgment. But it was well known to the Telegraph Company from a series of decisions to which it was party that the Act of 1866 was merely permissive and gave no power to exercise eminent domain. The latest decision, repeating many earlier ones, was rendered a month and a half before this amendment was filed. *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160. There was not even color of jurisdiction on the ground that the taking was by force of the Act of 1866. *West. Un. Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S. 239.

The only other that occurs to us is that, under the statutes of Louisiana as construed, the Telegraph Company could not maintain this suit if, by the law creating it, it was prohibited from operating in Louisiana, and that the power given by the Act of 1866 excluded such a prohibition and brought the Company within the benefit of the Louisiana expropriation statute. As we have said, the purpose of the allegation is not explained, and the plaintiff did not admit the necessity of resorting to laws other than those of New York for its powers. But supposing without implying that the Statute of 1866 had to be relied upon to bring the Telegraph Company within the Louisiana Act and would have that effect, still it would not be a ground of jurisdiction. If the jurisdiction of the United States court does not depend entirely upon diversity of citizenship it is because the suit arises under the laws of the

United States. Judicial Code, § 24. But when, as here, the foundation of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfil. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress but by virtue of the Louisiana statute that allows itself to be satisfied by that Act. See *Interstate Street Ry.* v. *Massachusetts*, 207 U. S. 79, 84.

Writ of error dismissed.

MR. JUSTICE MCKENNA and MR. JUSTICE LAMAR dissent.

ROUNDS *v.* CLOVERPORT FOUNDRY AND MACHINE COMPANY.

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

No. 669. Submitted February 23, 1915.—Decided April 19, 1915.

In an action *in personam* the state court has jurisdiction to issue an auxiliary attachment against the vessel whether or not the contract be of a maritime nature.

While a proceeding *in rem*, as one essentially against the vessel itself, is within the exclusive jurisdiction of the admiralty, an action *in personam* with concurrent remedy of attachment to secure payment of a personal judgment is within the jurisdiction of the state court even though such attachment, if auxiliary to the remedy *in personam*, runs specifically against the vessel under a state statute providing for a lien.

A specific attachment in a suit against the owners of a vessel for repairs made thereto, under the lien provisions of §§ 2480–2486, Kentucky statutes, *held* to be an auxiliary lien attachment in a suit *in personam* to protect the judgment and not a proceeding *in rem* and the case was, therefore, within the jurisdiction of the state court.

159 Kentucky, 414, affirmed.

THE facts, which involve the construction and validity of the laws of the State of Kentucky, relating to liens on vessels for repairs and the jurisdiction of the state court to enforce such liens, are stated in the opinion.

Mr. William T. Ellis, for plaintiffs in error, submitted:

Admiralty jurisdiction is not of obvious principle, or very accurate history. *Atl. Trans. Co.* v. *Imbrovek*, 234 U. S. 39; *The Blackheath*, 195 U. S. 365.

This is a suit on a contract and this court has jurisdiction. *The Philadelphia* v. *Towboat Co.*, 23 How. 209; *Alt. Trans. Co.* v. *Imbrovek*, 234 U. S. 59.

The state courts had no jurisdiction. *Brookman* v. *Hamill*, 34 N. Y. 554; *The General Smith*, 4 Wheat. 436; *Pelham* v. *Schooner Woolsey*, 3 Fed. Rep. 457; *Terrell* v. *Schooner Woolsey*, 4 Fed. Rep. 552; Kentucky Statutes, 2480; *Knapp* v. *McCaffrey*, 177 U. S. 640; *The Robert W. Parsons*, 191 U. S. 17.

This court is the sole judge as to whether or not a Federal question is here involved. 205 U. S. 360; *Railway* v. *Taylor*, 210 U. S. 281; *Cohen* v. *Virginia*, 6 Wheat. 264.

This is a suit in equity and proceeding is against the steam-boat. Kentucky Civil Code of Practice, § 249.

The cases cited by counsel for defendant in error are not applicable to the facts of this case. *Roach* v. *Chapman*, 22 How. 129; *People's Ferry Co.* v. *Beers*, 20 How. 393; *The Winnebago*, 205 U. S. 355.

Mr. Claude Mercer, for defendant in error, submitted.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Cloverport Foundry and Machine Company, the defendant in error, brought this suit against F. T. Rounds and S. A. Jesse, of Owensboro, Kentucky, in the Breckinridge Circuit Court of that State, to recover the sum of $5,668.65 for work and materials furnished under a contract to repair and rebuild a steamboat formerly known as the 'R. D. Kendall' and renamed the 'Golden Girl.' The defendants were the owners of the vessel. A specific attachment was issued under §§ 2480 to 2486 of the Kentucky Statutes which provided for a lien upon watercraft for work and supplies, etc., and the defendants procured a release of the boat by executing a forthcoming bond. By special demurrer, the defendants challenged the jurisdiction of the court to entertain the action upon the ground that the subject-matter was exclusively cognizable in the admiralty. The demurrer was overruled, and the defendants, reasserting the absence of authority in the court, answered denying the allegations of the petition and setting up a counter-claim for damages alleged to have been caused by defective work and by delay in completion. Upon the trial, the counter-claim was dismissed and the Company had judgment against the defendants for the amount demanded in its petition; it was further adjudged that, by virtue of the attachment and the applicable law, the plaintiff had a lien upon the vessel for the payment of the judgment and the vessel was ordered to be sold and the proceeds applied to the debt. The Court of Appeals of the State affirmed the judgment. 159 Kentucky, 414.

The question presented on this writ of error relates solely to the jurisdiction of the state court. It is contended by the plaintiff in error that the contract in suit was for repairs on the vessel and therefore was maritime in character; that the proceeding was *in rem* and beyond the

competency of the local tribunal. See *The Moses Taylor*, 4 Wall. 411; *The Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The J. E. Rumbell*, 148 U. S. 1; *The Glide*, 167 U. S. 606; *The Robert W. Parsons*, 191 U. S. 17; Act of June 23, 1910, c. 373, 36 Stat. 604. On the other hand, the defendant in error denies that the contract was maritime, contending that the old boat was dismantled, its identity destroyed, and a new boat built, and that the case in this aspect falls within the decisions relating to contracts for the original construction of a vessel. *The People's Ferry Co.* v. *Beers*, 20 How. 393; *Roach* v. *Chapman*, 22 How. 129; *Edwards* v. *Elliott*, 21 Wall. 532; *The Winnebago*, 205 U. S. 354. Further, it is urged in support of the judgment that the proceeding was *in personam*, and not *in rem;* that the attachment and direction for sale were incidental to the suit against the owners and for the purpose of securing satisfaction of the personal judgment. Accordingly, it is said, the proceeding was within the scope of the 'common law remedy' saved to suitors by the Judiciary Act. 1 Stat. 77; Rev. Stat., § 563; Judicial Code, § 24.

As the last point is plainly well taken, it is unnecessary to go further. It is well settled that in an action *in personam* the state court has jurisdiction to issue an auxiliary attachment against the vessel; and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transcended its authority. The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world and under it the property itself passes and not merely the title or interest of a personal defendant.

The Mary, 9 Cranch, 126, 144; *The Moses Taylor, supra; The Hine* v. *Trevor, supra; The Belfast, supra; The Glide, supra; The Robert W. Parsons, supra; The Josephine*, 39 N. Y. 19, 27. Actions *in personam* with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. *The Belfast, supra; Taylor* v. *Carryl*, 20 How. 583, 598, 599; *The Robert W. Parsons, supra.* And this is so not only in the case of an attachment against the property of the defendant generally, but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy *in personam. Leon* v. *Galceran*, 11 Wall. 185; see also *Johnson* v. *Chicago &c. Elevator Co.*, 119 U. S. 388, 398, 399; *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 646, 648.

In the case of *Leon* v. *Galceran, supra*, the suit was *in personam*, in a court of the State of Louisiana, to recover mariner's wages. Under a statute of the State the vessel was subject to a lien or privilege in favor of the mariner; and accordingly at the beginning of the suit, on the application of the plaintiff who asserted his lien, a writ of sequestration was issued and levied upon the vessel which was afterwards released upon the execution by the owner, the defendant in the suit, of a forthcoming bond, with surety. Judgment was recovered by the plaintiff for the amount claimed, and the vessel not being returned, suit was brought in the state court against the surety. Upon writ of error from this court to review the judgment in the latter action, it was contended, with respect to the issue and levy of the writ of sequestration, that the vessel had been seized under admiralty process in a proceeding *in rem* over which the state court had no jurisdiction *ratione materiæ* and hence that the bond was void. The contention was overruled and the jurisdiction of the state court maintained. As this court said in *Johnson* v. *Chicago &c. Elevator Co., supra*, in reviewing *Leon* v. *Galceran, supra,*

it was held that 'the action *in personam* in the state court was a proper one, because it was a common law remedy, which the common law was competent to give, although the state law gave a lien on the vessel in the case, similar to a lien under the maritime law, and it was made enforceable by a writ of sequestration in advance, to hold the vessel as a security to respond to a judgment, if recovered against her owner, as a defendant; that the suit was not a proceeding *in rem*, nor was the writ of sequestration; that the bond given on the release of the vessel became the substitute for her; that the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property; and that these views were not inconsistent with any expressed in *The Moses Taylor*, in *The Hine* v. *Trevor*, or in *The Belfast.*'

The result of the decisions is thus stated in *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 646, 648. 'The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (§ 563) of a common law remedy.'

In the present case, as we have said, the suit was *in personam* and the attachment was in that suit. It had no other effect than to provide security for the payment of the personal judgment which was recovered, and it was

for the purpose of satisfying this judgment that, in the same proceeding and by the terms of the judgment, the vessel was directed to be sold. It was within the scope of the common law remedy to sell the property of the judgment debtors to pay their debt. We are not able to find any encroachment upon the exclusive jurisdiction vested in the Federal court in admiralty.

Judgment affirmed.

FRANK *v.* MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 775. Argued February 25, 26, 1915.—Decided April 12, 1915.

Petitioner was formally indicted for murder, placed on trial before a court of competent jurisdiction with a jury lawfully constituted, had a public trial deliberately conducted and with counsel for defense, was found guilty and sentenced pursuant to law of the State; subsequently he twice moved the trial court to grant new trial, and once to set verdict aside as a nullity, and was heard three times on appeal by the court of last resort, and in all instances the trial court was affirmed. Petitioner alleged that a hostile public sentiment improperly influenced the trial court and jury against him and in the court-room took the form of mob domination; that his lawful rights were interfered with because he was not permitted to be present when the verdict was rendered. The state courts however held, on evidence presumably justifying such a finding but not produced in the *habeas corpus* proceeding, that the allegations as to mob violence and influence were not sustained and that the objection as to absence on rendering the verdict had been waived by failure to raise it in due season when fully informed as to the facts. Petitioner then applied to the District Court of the United States for release on *habeas corpus* on the ground that the conditions alleged to have existed in the court-room amounted to mob domination and de-

prived the court of jurisdiction to receive a verdict and pronounce sentence against him, that his involuntary absence from the court-room was a deprivation of an essential part of the right of trial by jury, and amounted to a denial of due process of law and that the decision of the state court overruling his objections to his enforced absence from court on rendition of verdict was so far inconsistent with previous decisions of the same court as to be equivalent in effect to an *ex post facto* law. His petition was denied and an appeal allowed by a justice of this court. *Held* by this court that:

The question of deprivation of liberty without due process of law involves not the jurisdiction of any particular court, but the power and authority of the State itself, and where there is no claim that the offense is based on an unconstitutional statute, the question of whether the petitioner in *habeas corpus* has been deprived of his liberty in violation of constitutional rights cannot be determined, with fairness to the State, until the conclusion of the course of justice in its own courts, and the United States courts must consider not merely the proceedings of the trial court, but also those in the appellate court of the State.

Due process of law guaranteed by the Fourteenth Amendment has regard to substance of right and not to matters of form and procedure; and in determining whether one convicted of crime has been denied due process, the entire course of proceedings, and not merely a single step, must be considered.

Although petitioner's allegation that mob domination existed in the trial court might, standing alone and if taken as true, show a condition inconsistent with due process of law, if the record in the *habeas corpus* proceedings in the Federal court also shows that the same allegations had been considered by the state court and upon evidence there taken but not disclosed in the Federal court, had been found to be groundless, that finding cannot be regarded as a nullity but must be taken as setting forth the truth until reasonable ground is shown for a contrary conclusion.

The due process of law clause of the Fourteenth Amendment does not preclude a State from adopting and enforcing a rule of procedure that an objection to absence of the prisoner from the court-room on rendition of verdict by the jury cannot be taken on motion to set aside the verdict as a nullity after a motion for new trial had been made on other grounds, not including this one, and denied. Such a regulation of practice is not unreasonable.

The due process of law clause of the Fourteenth Amendment does not impose upon the State any particular form or mode of

procedure so long as essential rights of notice and hearing or opportunity to be heard before a competent tribunal are not interfered with; and it is within the power of the State to establish a rule of practice that a defendant may waive his right to be present on rendition of verdict.

The right of the State to abolish jury trial altogether without violation of the Fourteenth Amendment includes the right to limit the effect to be given to an error respecting an incident of such trial—such as the presence of defendant when the jury renders its verdict.

The prohibition in the Federal Constitution against a State passing an *ex post facto* law is directed against legislative action only, and does not reach erroneous or inconsistent decisions of the courts of the State.

The petitioner in this case was not denied due process of law in the conduct of his trial by the courts of first instance or appellate, nor was the decision of the appellate court, by reason of inconsistency with prior decisions, equivalent to an *ex post facto* law.

Leo M. Frank, the present appellant, being a prisoner in the custody of the Sheriff in the jail of Fulton County, Georgia, presented to the District Court of the United States for the Northern District of Georgia his petition for a writ of *habeas corpus* under Rev. Stat., § 753, upon the ground that he was in custody in violation of the Constitution of the United States, especially that clause of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law. The District Court, upon consideration of the petition and accompanying exhibits, deeming that upon his own showing petitioner was not entitled to the relief sought, refused to award the writ. Whether this refusal was erroneous is the matter to be determined upon the present appeal.

From the petition and exhibits it appears that in May, 1913, Frank was indicted by the grand jury of Fulton County for the murder of one Mary Phagan; he was arraigned before the Superior Court of that county, and,

on August 25, 1913, after a trial lasting four weeks, in which he had the assistance of several attorneys, the jury returned a verdict of guilty. On the following day, the court rendered judgment sentencing him to death and remanding him, meanwhile, to the custody of the sheriff and jailer, the present appellee. On the same day, the prisoner's counsel filed a written motion for a new trial, which was amended about two months thereafter so as to include 103 different grounds particularly specified. Among these were several raising the contention that defendant did not have a fair and impartial trial, because of alleged disorder in and about the court-room including manifestations of public sentiment hostile to the defendant sufficient to influence the jury. In support of one of these, and to show the state of sentiment as manifested, the motion stated: "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered." But the absence of defendant at the reception of the verdict, although thus mentioned, was not specified or relied upon as a ground for a new trial. Numerous affidavits were submitted by defendant in support of the motion, including 18 that related to the allegations of disorder; and rebutting affidavits were submitted by the State. The trial court, having heard argument, denied the motion on October 31. The cause was then taken on writ of error to the Supreme Court of Georgia, where the review included not only alleged errors in admission and exclusion of evidence, and instructions to the jury, but also a consideration of the allegations of disorder in and about the court-room and the supporting and rebutting proofs. On February 17, 1914, the judgment of conviction was affirmed. (141 Georgia, 243.)

Concerning the question of disorder, the findings and conclusions of the court were, in substance (141 Georgia, 280): That the trial court, from the evidence submitted, was warranted in finding that only two of the alleged incidents occurred within the hearing or knowledge of the jury. 1. Laughter by spectators while the defense was examining one of its witnesses; there being nothing to indicate what provoked it, other than a witty answer by the witness or some other innocuous matter. The trial court requested the sheriff to maintain order, and admonished those present that if there was further disorder nobody would be permitted in the court-room on the following day. The Supreme Court held that, in the absence of anything showing a detrimental effect, there was in this occurrence no sufficient ground for a new trial. 2. Spectators applauded the result of a colloquy between the solicitor general and counsel for the accused. The latter complained of this conduct, and requested action by the court. The Supreme Court said: "The [trial] court directed the sheriff to find out who was making the noise, and, presumably from what otherwise appears in the record, the action by the court was deemed satisfactory at the time, and the orderly progress of the case was resumed without any further action being requested. The general rule is that the conduct of a spectator during the trial of a case will not be ground for a reversal of the judgment, unless a ruling upon such conduct is invoked from the judge at the time it occurs. [Citing cases]. . . The applause by the spectators, under the circumstances as described in the record, is but an irregularity not calculated to be substantially harmful to the defendant; and even if the irregularity should be regarded as of more moment than we give it, we think the action of the court, as a manifestation of the judicial disapproval, was a sufficient cure for any possible harmful effect of the irregularity, and deemed so sufficient by the counsel who,

at the time, made no request for further action by the court."

As to disorder during the polling of the jury, the court said (141 Georgia, p. 281): "Just before the jury was ushered into the court's presence for the purpose of rendering their verdict, the court had the room cleared of spectators. The verdict of the jury was received and published in the usual manner. A request was made to poll the jury, and just after the polling had begun loud cheering from the crowd in the streets adjacent to the court-house was heard. This cheering continued during the polling of the jury. The plaintiff in error insists that the cheering on the outside of the court-room, which was loud, and which was heard by the jury, could not have been interpreted otherwise than as expressive of gratification at the verdict which had been rendered, and of which the crowd on the outside had in some way been informed, and was so coercive in character as to affect the fairness of the poll of the jury which was taken. . . . [p. 282]. In order that the occurrence complained of shall have the effect of absolutely nullifying the poll of the jury taken before they dispersed, it must appear that its operation upon the minds of the jury, or some of them, was of such a controlling character that they were prevented, or likely to have been prevented, from giving a truthful answer to the questions of the court. We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result. Under such circumstances we do not think that the occurrence complained of amounts to more than an irregularity, which was not prejudicial to the accused. There is a wide difference between an irregularity produced by the juror himself, or by a party, and the injection into a trial of an occurrence produced by some one having no connection therewith."

After this decision by the Supreme Court, an extraor-

dinary motion for a new trial was made under Georgia Code 1910, §§ 6089, 6092, upon the ground of newly discovered evidence; and this having been refused, the case was again brought before the Supreme Court, and the action of the trial court affirmed on October 14, 1914 (142 Georgia, 617; *S. C.*, 83 S. E. Rep. 233).

On April 16, 1914, more than six months after his conviction, Frank for the first time raised the contention that his absence from the court-room when the verdict was rendered was involuntary, and that this vitiated the result. On that day, he filed in the Superior Court of Fulton County a motion to set aside the verdict as a nullity [1] on this ground (among others); stating that he did not waive the right to be present nor authorize anybody to waive it for him; that on the day the verdict was rendered, and shortly before the presiding judge began his charge to the jury, the judge privately conversed with two of the prisoner's counsel, referred to the probable danger of violence to the prisoner if he were present when the verdict was rendered, in case it should be one of acquittal, or if the jury should disagree, and requested counsel to agree that the prisoner need not be present when the verdict was rendered and the jury polled; that in the same conversation the judge expressed the view that even counsel might be in danger of violence should they be present at the reception of the verdict, and under these circumstances they agreed that neither they nor the prisoner should be present, but the prisoner knew nothing of the conversation

[1] The constitution of Georgia provides (Art. 1, § 1, Par. 8; Code 1911, § 6364): "No person shall be put in jeopardy of life, or liberty, more than once for the same offence, *save on his or her motion for a new trial* after conviction, or in case of mistrial." In some cases a distinction has been taken between a motion for a new trial, and a motion to set aside the verdict as a nullity. It seems that if a motion of the latter kind is granted upon grounds such as were here urged, defendant, if again put upon trial, can plead former jeopardy. *Nolan* v. *State*, 55 Georgia, 521; *Bagwell* v. *State*, 129 Georgia, 170.

or agreement until after the verdict and sentence; and that the reception of the verdict during the involuntary absence of defendant and his counsel was a violation of that provision of the constitution of the State of Georgia guaranteeing the right of trial by jury, and was also contrary to the "due process of law" clause of the Fourteenth Amendment. The motion was also based upon allegations of disorder in the court-room and in the adjacent street, substantially the same as those previously submitted in the first motion for a new trial. To this motion to set aside the verdict the State interposed a demurrer, which, upon hearing, was sustained by the Superior Court; and upon exception taken and error assigned by Frank, this judgment came under review before the Supreme Court, and, on November 14, 1914, was affirmed (83 S. E. Rep. 645; 142 Ga. 741).

The grounds of the decision were, briefly: That by the law of Georgia it is the right of a defendant on trial upon a criminal indictment to be present at every stage of the trial, but he may waive his presence at the reception of the verdict (citing *Cawthon* v. *State*, 119 Georgia, 395, 412); that a defendant has the right by motion for a new trial to review an adverse verdict and judgment for illegality or irregularity amounting to harmful error in the trial, but where such a motion is made it must include all proper grounds which are at the time known to the defendant or his counsel, or by reasonable diligence could have been discovered (citing *Leathers* v. *Leathers*, 138 Georgia, 740); that objections to the reception of a verdict during the enforced absence of defendant without his consent, or to the taking by the trial court of other steps in his absence and without his consent, can be made in a motion for a new trial (citing *Wade* v. *State*, 12 Georgia, 25; *Martin* v. *State*, 51 Georgia, 567; *Bonner* v. *State*, 67 Georgia, 510; *Wilson* v. *State*, 87 Georgia, 583; *Tiller* v. *State*, 96 Georgia, 430; and *Hopson* v. *State*, 116 Georgia,

90), and in such case the verdict rendered against the defendant will not be treated as a nullity, but will be set aside and a new trial granted; and since Frank and his counsel, when the motion for a new trial was made, were fully aware of the facts respecting his absence when the verdict of guilty was rendered against him, the failure to include this ground in that motion precluded him, after denial of the motion and affirmance of the judgment by the Supreme Court, from seeking upon that ground to set aside the verdict as a nullity. Respecting the allegations of disorder, the court held that the questions raised were substantially the same that were presented when the case was under review upon the denial of the first motion for a new trial (141 Georgia, 243), at which time they were adjudicated adversely to the contentions of defendant, and the court therefore declined to reconsider them. The result was an affirmance of the judgment of the trial court denying the motion to set aside the verdict.

Shortly after this decision, Frank unsuccessfully applied to the Supreme Court of Georgia for the allowance of a writ of error to review its judgment in this court. Thereafter he applied to several of the justices of this court, and finally to the court itself, for the allowance of such a writ. These applications were severally denied. (See 235 U. S. 694.)

Thereupon his application for a writ of *habeas corpus* was made to the District Court, with the result already mentioned. The petition purports to set forth the criminal proceedings pursuant to which appellant is detained in custody, including the indictment, the trial and conviction, the motions, and the appeals above set forth. It contains a statement in narrative form of the alleged course of the trial, including allegations of disorder and manifestations of hostile sentiment in and about the courtroom, and states that Frank was absent at the time the verdict was rendered without his consent, pursuant to a

suggestion from the trial judge to his counsel to the effect that there was probably danger of violence to Frank and to his counsel if he and they were present and there should be a verdict of acquittal or a disagreement of the jury; and that under these circumstances they consented (but without Frank's authority) that neither he nor they should be present at the rendition of the verdict. From the averments of the petition it appears that the same allegations were made the basis of the first motion for a new trial, and also for the motion of April 16, 1914, to set aside the verdict. Accompanying the petition, as an exhibit, was a copy of Frank's first motion for a new trial and the supporting affidavits. The rebutting affidavits were not included, nor were they in any way submitted to the District Court; therefore, of course, they have not been brought before this court upon the present appeal. The petition refers to the opinion of the Georgia Supreme Court affirming the conviction and the denial of the motion for a new trial (141 Georgia, 243); it also refers to the opinion upon the affirmance of the motion to set aside the verdict as a nullity (83 S. E. Rep. 645), and a copy of this was submitted to the District Court as an exhibit. From these opinions, and from the order of the Superior Court denying the motion for new trial, which is included among the exhibits, it appears that the rebutting affidavits were considered and relied upon by both of the state courts as the basis of their findings upon the questions of fact.

Mr. Louis Marshall, with whom *Mr. Henry C. Peeples* and *Mr. Henry A. Alexander* were on the brief, for appellant:

The reception by the Superior Court of Fulton County of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the Fourteenth

Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the court and the nullification of the verdict and judgment. *Hovey* v. *Elliott*, 167 U. S. 409; *Windsor* v. *McVeigh*, 93 U. S. 274; *B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Scott* v. *McNeal*, 154 U. S. 34; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 280-282; *Ex parte Riggins*, 134 Fed. Rep. 404; *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127; *Londoner* v. *Denver*, 210 U. S. 385; *Denver* v. *State Investment Co.*, 49 Colorado, 244; *S. C.*, 112 Pac. Rep. 789; *Ong Chang Wing* v. *United States*, 218 U. S. 280, distinguishing *Hurtado* v. *California*, 110 U. S. 516; *Allen* v. *Georgia*, 166 U. S. 138; *Brown* v. *New Jersey*, 175 U. S. 172; *Maxwell* v. *Dow*, 176 U. S. 581; *Simon* v. *Craft*, 182 U. S. 427; *West* v. *Louisiana*, 194 U. S. 258; *Howard* v. *Kentucky*, 200 U. S. 164; *Twining* v. *New Jersey*, 211 U. S. 78; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Jordan* v. *Massachusetts*, 225 U. S. 167; *Garland* v. *Washington*, 232 U. S. 642.

The right of the accused to be present at every stage of his trial, including the reception of the verdict, is essential to the right to be heard. *Nolan* v. *State*, 55 Georgia, 522; *Prine* v. *Commonwealth*, 18 Pa. St. 103; *Lewis* v. *United States*, 146 U. S. 372; *Rex* v. *Ladsingham*, Sir T. Raym. 193; *Dunn* v. *Commonwealth*, 6 Pa. St. 384; *Temple* v. *Commonwealth*, 14 Bush (Ky.), 769; *Rhodes* v. *State*, 128 Indiana, 189; 2 Moore on Facts, §§ 991–995; Cooley's Const. Lim., 2d ed., § 452; McGehee on Due Process, pp. 164, 165, 168; 1 Bishop's New Cr. Proc., 1913, §§ 265–274; *Nolan* v. *State*, 53 Georgia, 137; *Bonner* v. *State*, 67 Georgia, 510; *Barton* v. *State*, 67 Georgia, 653; *Bagwell* v. *State*, 129 Georgia, 170; *Cawthon* v. *State*, 119 Georgia, 395; *Lyons* v. *State*, 7 Ga. App. 50; *Hopt* v. *Utah*, 110 U. S. 574; *Ball* v. *United States*, 140 U. S. 118; *Schwab* v. *Berggren*, 143 U. S. 442, 448; *Dowdell* v. *United States*, 221 U. S. 321; *Diaz* v. *United States*, 223 U. S. 442, 455, and the decisions of the courts of twenty-eight States.

Not only was the appellant deprived of due process of law, because he was by the action of the court, kept out of the court-room when the verdict was rendered, but the entire proceedings became *coram non judice*, because of mob domination, to which the presiding judge succumbed and which in effect wrought a dissolution of the court. *People* v. *Wolf*, 183 N. Y. 472; 5 Cyc. U. S. S. C. Rep. 618, and cases cited; *Massey* v. *State*, 31 Tex. Cr. Rep. 371; *State* v. *Welden*, 91 S. Car. 29; *Sanders* v. *State*, 85 Indiana, 319; *People* v. *Fleming*, 136 Pac. Rep. 291; *Myers* v. *State*, 97 Georgia, 76; *Collier* v. *State*, 115 Georgia, 803; *Ex parte Riggins*, 134 Fed. Rep. 404; *Ellerbee* v. *State*, 75 Mississippi, 522; *Blend* v. *People*, 41 N. Y. 604; *People* v. *Shaw*, 3 Hun, 272, aff'd 63 N. Y. 36; *Hinman* v. *People*, 13 Hun, 266; *Hayes* v. *Georgia*, 58 Georgia, 35; *O'Brien* v. *People*, 17 Colorado, 561; *McClure* v. *State*, 77 Indiana, 287; *Pennoyer* v. *Neff*, 95 U. S. 714; *United States* v. *Shipp*, 203 U. S. 563.

The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one which neither he nor his counsel could waive or abjure. *Barton* v. *State*, 67 Georgia, 653; *Robson* v. *State*, 83 Georgia, 171; *Cawthon* v. *State*, 119 Georgia, 395; *Lyons* v. *State*, 7 Ga. App. 50; *Hopt* v. *Utah*, 110 U. S. 579; *Schwab* v. *Berggren*, 143 U. S. 449; *Lewis* v. *United States*, 146 U. S. 373; *Thompson* v. *Utah*, 170 U. S. 343; *Kepner* v. *United States*, 195 U. S. 100, 135; *Cancemi* v. *People*, 18 N. Y. 128; *Ball* v. *United States*, 140 U. S. 118; *Dickinson* v. *United States*, 159 Fed. Rep. 801; *Diaz* v. *United States*, 223 U. S. 456.

It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel. *Thompson* v. *Utah*, 170 U. S. 343.

If, therefore, Frank's absence at the reception of the verdict constituted an infraction of due process of law, which could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack the judgment as a nullity.

Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned can be raised, then, we contend, that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an *ex post facto* law. *Nolan* v. *State*, 53 Georgia, 137; *Lyons* v. *State*, 7 Ga. App. 50; *Rawlins* v. *Mitchell*, 127 Georgia, 24; *Hopt* v. *Utah*, 110 U. S. 579; Laws of Georgia, Acts of 1858, p. 74, Georgia Code, 1882, § 217; Georgia Code, 1910, § 6207; *Muhlker* v. *N. Y. & H. R. Co.*, 197 U. S. 544.

It follows from the propositions thus far discussed that appellant's application for a writ of *habeas corpus* is squarely based on the contention that, when the verdict against him was received and judgment was rendered against him the court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making *habeas corpus* the proper remedy to test the validity of his detention thereunder. Rev. Stat., §§ 751–756; *Matter of Hans Nielsen*, 131 U. S. 176; *Ex parte Bain*, 121 U. S. 1; *In re Bonner*, 151 U. S. 242, 256; *Felts* v. *Murphy*, 201 U. S. 123; *Valentina* v. *Mercer*, 201 U. S. 131; *Rogers* v. *Peck*, 199 U. S. 425; *Ex parte Bridges*, 2 Woods, 428; *S. C.*, 4 Fed. Cas. 105, 106; *McClaughry* v. *Deming*, 186 U. S. 49; *Oakley* v. *Aspinwall*, 3 N. Y. 547; *Kaizo* v. *Henry*, 211

U. S. 146; *Harlan* v. *McGourin*, 218 U. S. 442; *Stevens* v. *McClaughry*, 207 Fed. Rep. 18; *Matter of Spencer*, 228 U. S. 652; *Rogers* v. *Alabama*, 192 U. S. 226, 230.

The appellant had, before applying for a writ of *habeas corpus*, exhausted all of his remedies in the state courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this court has pointed out as controlling in like cases. *Ex parte Royall*, 117 U. S. 241; *Ex parte Charles W. Fonda*, 117 U. S. 516; *Wood* v. *Brush*, 140 U. S. 278; *Cook* v. *Hart*, 146 U. S. 183; *Ex parte Frederich*, 149 U. S. 70; *New York* v. *Eno*, 155 U. S. 89, 95; *Pepke* v. *Cronan*, 155 U. S. 100; *In re Chapman*, 156 U. S. 211; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284; *Tinsley* v. *Anderson*, 171 U. S. 101; *Fitts* v. *McGhee*, 172 U. S. 516; *Markuson* v. *Boucher*, 175 U. S. 184; *Minnesota* v. *Brundage*, 180 U. S. 499; *Urquhart* v. *Brown*, 205 U. S. 179; *Glasgow* v. *Moyer*, 225 U. S. 420; *Ex parte Spencer*, 228 U. S. 652; *Stevens* v. *McClaughry*, 207 Fed. Rep. 18; *Nolan* v. *State*, 53 Georgia, 136; *Nolan* v. *State*, 55 Georgia, 521; Georgia Laws, 1906, p. 24, Georgia Code, 1910, § 6506; *Lyons* v. *State*, 7 Ga. App. 50; Georgia Code, 1873, § 3719; Georgia Code, 1910, § 6089; *Lampkin* v. *State*, 87 Georgia, 517.

Judge Newman entirely misconceived the decisions which led to the denial of a writ of error to review the judgment of the Supreme Court of Georgia, and misapplied them. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *Allen* v. *Arguimbau*, 198 U. S. 149; *Garr, Scott & Co.* v. *Shannon*, 223 U. S. 458.

In the present case, the Superior Court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings, being nullities, he is entitled

to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial under the indictment. *Ex parte Badgley*, 7 Cowen, 472; *Medley, Petitioner*, 134 U. S. 160, 174; *In re Bonner*, 151 U. S. 256–259, 261, 262; *Ex parte Scott*, 70 Mississippi, 247; *People ex rel. Devoe* v. *Kelly*, 97 N. Y. 212; *Michaelson* v. *Beemer*, 72 Nebraska, 761.

Mr. Warren Grice and *Mr. Hugh M. Dorsey*, for appellee:

Appellant is asking this court to grant him a writ of *habeas corpus* which will virtually overturn his conviction in the state court without submitting to the United States courts important portions of the record on which the judgment is based, and on which he is being held.

The decision of the Supreme Court of Georgia holding that Frank had not adopted the correct procedure in invoking in the state court the effect of his absence when the verdict was received was not the passage of an *ex post facto* law but followed prior decisions.

Every question presented by the application for *habeas corpus* having already been presented by him to the state court and its decision invoked and its judgment rendered adverse to him, the principle of *res judicata* applies and for that reason alone the questions cannot be reopened here.

Where oral evidence is required to show want of jurisdiction, *habeas corpus* will not discharge the prisoner.

The writ of *habeas corpus* cannot be made use of to perform the functions of a writ of error.

Irregularities, no matter how gross, will not be sufficient to obtain a release on *habeas corpus*.

The due process clause in the Fourteenth Amendment does not overturn well settled principles and established usages prevailing in States, nor deprive the States of the

power to establish other systems of law and procedure, or alter the same at their will.

The Fourteenth Amendment does not require the presence of a defendant in court at the reception of a verdict as such presence does not go to the jurisdiction of the court.

Waivers such as were made in this case by the prisoner's counsel are binding on the prisoner.

Petitioner Frank cannot repudiate the acts of his counsel.

The Supreme Court of the United States will not grant the relief asked by Frank in this application in view of what has heretofore taken place in the Supreme Court of Georgia and by the Supreme Court of the United States in denying him a writ of error.

The Supreme Court of the United States will not permit Frank to do by indirection that which it already has held Frank could not do directly.

The Supreme Court of Georgia had jurisdiction to determine whether Frank's counsel could waive his presence, and even if this court should think that ruling error, *habeas corpus* cannot correct it.

The action of the court in permitting Frank's counsel to waive his presence, if erroneous, was a mere irregularity in the matter of procedure, and certainly *habeas corpus* cannot avail to discharge the prisoner.

Numerous authorities support these propositions.

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

The points raised by the appellant may be reduced to the following:

(1) It is contended that the disorder in and about the court-room during the trial and up to and at the reception of the verdict amounted to mob domination, that not only

the jury but the presiding judge succumbed to it, and that this in effect wrought a dissolution of the court, so that the proceedings were *coram non judice*.

(2) That Frank's right to be present during the entire trial until and at the return of the verdict was an essential part of the right of trial by jury, which could not be waived either by himself or his counsel.

(3) That his presence was so essential to a proper hearing that the reception of the verdict in his absence, and in the absence of his counsel, without his consent or authority, was a departure from the due process of law guaranteed by the Fourteenth Amendment, sufficient to bring about a loss of jurisdiction of the trial court and to render the verdict and judgment absolute nullities.

(4) That the failure of Frank and his counsel, upon the first motion for a new trial, to allege as a ground of that motion the known fact of Frank's absence at the reception of the verdict, or to raise any jurisdictional question based upon it, did not deprive him of the right to afterwards attack the judgment as a nullity, as he did in the motion to set aside the verdict.

(5) And that the ground upon which the Supreme Court of Georgia rested its decision affirming the denial of the latter motion (83 S. E. Rep. 645),—viz., that the objection based upon Frank's absence when the verdict was rendered was available on the motion for new trial and under proper practice ought to have been then taken, and because not then taken could not be relied upon as a ground for setting aside the verdict as a nullity,—was itself in conflict with the Constitution of the United States because equivalent in effect to an *ex post facto* law, since, as is said, it departs from the practice settled by previous decisions of the same court.

In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of *habeas*

corpus under § 753, Rev. Stat. Under the terms of that section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. *Rogers* v. *Peck*, 199 U. S. 425, 434. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on *habeas corpus*. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error. *Ex parte Parks*, 93 U. S. 18, 21; *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Royall*, 117 U. S. 241, 250; *In re Frederich, Pet'r*, 149 U. S. 70, 75; *Baker* v. *Grice*, 169 U. S. 284, 290; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Markuson* v. *Boucher*, 175 U. S. 184.

As to the "due process of law" that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. *Walker* v. *Sauvinet*, 92 U. S. 90, 93; *Hurtado* v. *California*, 110 U. S. 516, 535; *Andrews* v. *Swartz*, 156 U. S. 272, 276; *Bergemann* v. *Backer*, 157 U. S. 655, 659; *Rogers* v. *Peck*, 199 U. S. 425, 434; *Drury* v. *Lewis*, 200 U. S. 1, 7; *Felts* v. *Murphy*, 201 U. S. 123, 129; *Howard* v. *Kentucky*, 200 U. S. 164.

It is, therefore, conceded by counsel for appellant that

in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of *habeas corpus* will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. And since no question is made respecting the original jurisdiction of the trial court, the contention is and must be that by the conditions that surrounded the trial, and the absence of defendant when the verdict was rendered, the court was deprived of jurisdiction to receive the verdict and pronounce the sentence.

But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the State of Georgia (as will appear from decisions elsewhere cited), provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases (*McKane* v. *Durston*, 153 U. S. 684, 687; *Andrews* v. *Swartz*, 156 U. S. 272, 275; *Rogers* v. *Peck*, 199 U. S. 425, 435; *Reetz* v. *Michigan*, 188 U. S. 505, 508), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment.

In fact, such questions as are here presented under the due process clause of the Fourteenth Amendment, though sometimes discussed as if involving merely the jurisdiction of some court or other tribunal, in a larger and more ac-

curate sense involve the power and authority of the State itself. The prohibition is addressed to the State; if it be violated, it makes no difference in a court of the United States by what agency of the State this is done; so, if a violation be threatened by one agency of the State but prevented by another agency of higher authority, there is no violation by the State. It is for the State to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their several jurisdictions and authority as between themselves. And the question whether a State is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts. *Virginia* v. *Rives*, 100 U. S. 313, 318; *Civil Rights Cases*, 109 U. S. 3, 11; *McKane* v. *Durston*, 153 U. S. 684, 687; *Dreyer* v. *Illinois*, 187 U. S. 71, 83–84; *Reetz* v. *Michigan*, 188 U. S. 505, 507; *Carfer* v. *Caldwell*, 200 U. S. 293, 297; *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107; *In re Frederich, Petitioner*, 149 U. S. 70, 75; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *Baker* v. *Grice*, 169 U. S. 284, 291; *Minnesota* v. *Brundage*, 180 U. S. 499, 503; *Urquhart* v. *Brown*, 205 U. S. 179, 182.

It is, indeed, settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for *habeas corpus* is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the State not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error. *Ex parte Royall*, 117 U. S. 241, 251; *In re Frederich*,

Petitioner, 149 U. S. 70, 77; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *Baker* v. *Grice*, 169 U. S. 284, 291; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Markuson* v. *Boucher*, 175 U. S. 184; *Urquhart* v. *Brown*, 205 U. S. 179. And see *Henry* v. *Henkel*, 235 U. S. 219, 228. Such cases as *In re Loney*, 134 U. S. 372, 376; and *In re Neagle*, 135 U. S. 1; are recognized as exceptional.

It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in *Ex parte Royall*, 117 U. S. 241, 252—applying in a *habeas corpus* case what was said in *Covell* v. *Heyman*, 111 U. S. 176, 182, a case of conflict of jurisdiction:—"The forbearance which courts of coördinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity." And see *In re Tyler, Petitioner*, 149 U. S. 164, 186.

It is objected by counsel for appellee that the alleged loss of jurisdiction cannot be shown by evidence outside of the record; that where a prisoner is held under a judg-

ment of conviction passed by a court having jurisdiction of the subject-matter, and the indictment against him states the case and is based upon a valid existing law, *habeas corpus* is not an available remedy, save for want of jurisdiction appearing upon the face of the record of the court wherein he was convicted. The rule at the common law, and under the act 31 Car. II, c. 2, and other acts of Parliament prior to that of July 1, 1816 (56 Geo. III, c. 100, § 3), seems to have been that a showing in the return to a writ of *habeas corpus* that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry. So it was held, under the judiciary act of 1789 (ch. 20, § 14, 1 Stat. 73, 81), in *Ex parte Watkins*, 3 Pet. 193, 202. And the rule seems to have been the same under the act of March 2, 1833 (ch. 57, § 7, 4 Stat. 632, 634), and that of Aug. 29, 1842 (ch. 257, 5 Stat. 539). But when Congress, in the act of February 5, 1867 (ch. 28, 14 Stat. 385), extended the writ of *habeas corpus* to all cases of persons restrained of their liberty in violation of the Constitution or a law or treaty of the United States, procedural regulations were included, now found in Rev. Stat., §§ 754–761. These require that the application for the writ shall be made by complaint in writing signed by the applicant and verified by his oath, setting forth the facts concerning his detention, in whose custody he is detained, and by virtue of what claim or authority, if known; require that the return shall certify the true cause of the detention; and provide that the prisoner may under oath deny any of the facts set forth in the return or allege other material facts, and that the court shall proceed in a summary way to determine the facts by hearing testimony and arguments, and thereupon dispose of the party as law and justice require. The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the

act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him. *Cuddy, Petitioner*, 131 U. S. 280, 283, 286; *In re Mayfield*, 141 U. S. 107, 116; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *In re Watts and Sachs*, 190 U. S. 1, 35.

In the light, then, of these established rules and principles: that the due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a State on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the State, and

not merely a single step in those proceedings; and that it is incumbent upon the prisoner to set forth in his application a sworn statement of the facts concerning his detention and by virtue of what claim or authority he is detained; we proceed to consider the questions presented.

1. And first, the question of the disorder and hostile sentiment that are said to have influenced the trial court and jury to an extent amounting to mob domination.

The District Court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. There is no doubt of the jurisdiction to issue the writ of *habeas corpus*. The question is as to the propriety of issuing it in the present case. Under § 755, Rev. Stat., it was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it. And see *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 2, 110; *Ex parte Terry*, 128 U. S. 289, 301.

Now the obligation resting upon us, as upon the District Court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it. Thus, the petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view. The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light upon the question whether the State of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his

life without due process of law. Dealing with the narrative, then, in its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the Supreme Court of the State, as a ground for avoiding the consequences of the trial; that the allegations were considered by those courts, successively, at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination, or the like; and that the facts were examined by those courts not only upon the affidavits and exhibits submitted in behalf of the prisoner which are embodied in his present petition as a part of his sworn account of the causes of his detention, but also upon rebutting affidavits submitted in behalf of the State and which, for reasons not explained, he has not included in the petition. As appears from the prefatory statement, the allegations of disorder were found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant and therefore insufficient in law to avoid the verdict. 141 Georgia, 243, 280. And it was because the defendant was concluded by that finding that the Supreme Court upon the subsequent motion to set aside the verdict declined to again consider those allegations. 83 S. E. Rep. 645, 655.

Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice

and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in *habeas corpus* cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction over the prisoner, see *Ex parte Terry*, 128 U. S. 289, 305, 310; *Ex parte Columbia George*, 144 Fed. Rep. 985, 986.

However, it is not necessary, for the purposes of the present case, to invoke the doctrine of *res adjudicata*, and, in view of the impropriety of limiting in the least degree the authority of the courts of the United States in investigating an alleged violation by a State of the due process of law guaranteed by the Fourteenth Amendment, we put out of view for the present the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort.

But this does not mean that that decision may be ignored or disregarded. To do this, as we have already pointed out, would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the State, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to

be heard according to the usual course of law in such cases.

We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

But the State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial. *Myers* v. *State*, 97 Georgia 76 (5), 99; *Collier* v. *State*, 115 Georgia, 803.

Such an appeal was accorded to the prisoner in the present case [*Frank* v. *State*, 141 Georgia, 243 (16), 280], in a manner and under circumstances already stated, and the Supreme Court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the States and the Federal Government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial

through disorder and manifestations of hostile sentiment cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence upon which the determination was rested is withheld by him who attacks the finding.

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the Supreme Court. This, we think, embodies more than one error of reasoning. It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such disorder as to cause a loss of jurisdiction in the trial court; which should not be assumed, in the face of the decision of the reviewing court, without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter, instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the State before coming to the courts of the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed judgment upon them.

We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated.

The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the "due process of law" provision of the Fourteenth Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the State, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt.

To establish this doctrine would, in a very practical sense, impair the power of the States to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle but is in conflict with the practice that prevails in all of the States, so far as we are aware. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court or as rendering the proceedings *coram non judice*, in any such sense as to bar further proceedings. In *Myers* v. *State*, 97 Georgia, 76, (5), 99; *Collier* v. *State*, 115 Georgia, 803; *Sanders* v. *State*, 85 Indiana, 318; *S. C.*, 44 Am. Rep. 29; *Massey* v. *State*, 31 Tex. Cr. Rep. 371, 381; *S. C.*, 20 S. W. Rep. 758; and *State* v. *Weldon*, 91 S. Car. 29, 38; *S. C.*, 39 L. R. A., N. S., 667, 669;—in all of which it was held that the prisoner's right to a fair trial had been interfered with by disorder or mob violence—it was not held that jurisdiction over the prisoner had been lost; on the contrary, in each instance a new trial was

awarded as the appropriate remedy. So, in the cases where the trial judge abdicated his proper functions or absented himself during the trial (*Hayes* v. *State*, 58 Georgia, 36 (12), 49; *Blend* v. *People*, 41 N. Y. 604; *Shaw* v. *People*, 3 Hun, 272; aff'd 63 N. Y. 36; *Hinman* v. *People*, 13 Hun, 266; *McClure* v. *State*, 77 Indiana, 287; *O'Brien* v. *People*, 17 Colorado, 561; *Ellerbe* v. *State*, 75 Mississippi, 522; *S. C.*, 41 L. R. A. 569) the reviewing of the State in each instance simply set aside the verdict and awarded a new trial.

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.

2. We come, next, to consider the effect to be given to the fact, admitted for present purposes, that Frank was not present in the court-room when the verdict was rendered, his presence having been waived by his counsel, but without his knowledge or consent. No question is made but that at the common law and under the Georgia decisions it is the right of the prisoner to be present throughout the entire trial, from the commencement of the selection of the jury until the verdict is rendered and jury discharged. *Wade* v. *State*, 12 Georgia, 25, 29; *Martin* v. *State*, 51 Georgia, 567; *Nolan* v. *State*, 53 Georgia, 137; *S. C.*, 55 Georgia, 521; *Smith* v. *State*, 59 Georgia, 513; *Bonner* v. *State*, 67 Georgia, 510; *Barton* v. *State*, 67 Georgia, 653; *Cawthon* v. *State*, 119 Georgia, 395, 412; *Bagwell* v. *State*, 129 Georgia, 170; *Lyons* v. *State*, 7 Ga. App. 50. But the effect of these decisions is that the prisoner may personally waive the right to be present when the verdict is rendered, and perhaps may waive it by authorized act of his counsel; and that where, without his consent, the verdict is received in his absence, he may

treat this as an error, and by timely motion demand a new trial, or (it seems) he may elect to treat the verdict as a nullity by moving in due season to set it aside as such. But we are unable to find that the courts of Georgia have in any case held that, by receiving a verdict in the absence of the prisoner and without his consent, the jurisdiction of the trial court was terminated. In the *Nolan Case, supra*, the verdict was set aside as void on the ground of the absence of the prisoner; but this was not held to deprive the trial court of its jurisdiction. On the contrary, the jurisdiction was treated as remaining, and that court proceeded to exercise it by arraigning the prisoner a second time upon the same indictment, when he pleaded specially, claiming his discharge because of former jeopardy; the trial court overruled this plea, the defendant excepted, and the jury found the defendant guilty; and, upon review, the Supreme Court reversed this judgment, not for the want of jurisdiction in the trial court, but for error committed in the exercise of jurisdiction. To the same effect is *Bagwell* v. *State, supra.*

In most of the other States, where error is committed by receiving a verdict of guilty during the involuntary absence of the accused, it is treated as merely requiring a new trial. In a few cases, the appellate court has ordered the defendant to be discharged, upon the ground that he had been once in jeopardy and a new trial would be futile.

However, the Georgia Supreme Court in the present case (83 S. E. Rep. 645) held, as pointed out in the prefatory statement, that because Frank, shortly after the verdict, was made fully aware of the facts, and he then made a motion for a new trial upon over 100 grounds, without including this as one, and had the motion heard by both the trial court and the Supreme Court, he could not, after this motion had been finally adjudicated against him, move to set aside the verdict as a nullity because of his absence when the verdict was rendered. There is

nothing in the Fourteenth Amendment to prevent a State from adopting and enforcing so reasonable a regulation of procedure. *Dreyer* v. *Illinois*, 187 U. S. 71, 77–80.

It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the Amendment, in that it took from him at a critical stage of the proceeding the right or opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the "due process" clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process (*Hurtado* v. *California*, 110 U. S. 516, 532, 538; *Lem Woon* v. *Oregon*, 229 U. S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (*Walker* v. *Sauvinet*, 92 U. S. 90), or in criminal (*Hallinger* v. *Davis*, 146 U. S. 314, 324; *Maxwell* v. *Dow*, 176 U. S. 581, 594, 602, 604).

It is argued that a State may not, while providing for trial by jury, permit the accused to waive the right to be heard in the mode characteristic of such trial, including the presence of the prisoner up to and at the time of the rendition of the verdict. But the cases cited do not support this contention. In *Hopt* v. *Utah*, 110 U. S. 574, 578 (principally relied upon), the court had under review a conviction in a territorial court after a trial subject to the local code of criminal procedure, which declared: If "the indictment is for a felony, the defendant *must be* personally present at the trial." The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant, and his counsel. The ground of the decision of

this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement as to his personal presence was denied on the ground that his life could not be lawfully taken except in the mode prescribed by law. No other question was involved. See *Diaz* v. *United States*, 223 U. S. 442, 455, 458.

The distinction between what the common law requires with respect to trial by jury in criminal cases, and what the States may enact without contravening the "due process" clause of the Fourteenth Amendment, is very clearly evidenced by *Hallinger* v. *Davis*, 146 U. S. 314, and *Lewis* v. *United States*, 146 U. S. 370, which were under consideration by the court at the same time, both opinions being written by Mr. Justice Shiras. In the *Lewis Case*, which was a conviction of murder in a Circuit Court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of a statute, this right as it existed at common law must not be abridged. But in the *Hallinger Case*, where a State by legislative enactment had permitted one charged with a capital offense to waive a trial by jury and elect to be tried by the court, it was held that this method of procedure did not conflict with the Fourteenth Amendment. So in *Howard* v. *Kentucky*, 200 U. S. 164, 175—a case closely in point upon the question now presented—this court, finding that by the law of the State an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not

amount to a denial of due process within the meaning of the Fourteenth Amendment.

In fact, this court has sustained the States in establishing a great variety of departures from the common law procedure respecting jury trials. Thus, in *Brown* v. *New Jersey*, 175 U. S. 172, 176; a statute providing for the trial of murder cases by struck jury was sustained, notwithstanding it did not provide for twenty peremptory challenges. *Simon* v. *Craft*, 182 U. S. 427, 435, while not a criminal case, involved the property of a person alleged to be of unsound mind, and it was held that an Alabama statute, under which the sheriff determined that Mrs. Simon's health and safety would be endangered by her presence at the trial of the question of her sanity, so that while served with notice she was detained in custody and not allowed to be present at the hearing of the inquisition, did not deprive her of property without due process of law. In *Felts* v. *Murphy*, 201 U. S. 123, 129, where the prisoner was convicted of the crime of murder and sentenced to imprisonment for life, although he did not hear a word of the evidence given upon the trial because of his almost total deafness, his inability to hear being such that it required a person to speak through an ear-trumpet close to his ear in order that such person should be heard by him, and the trial court having failed to see to it that the testimony in the case was repeated to him through his ear-trumpet, this court said that this was "at most an error, which did not take away from the court its jurisdiction over the subject-matter and over the person of the accused." In *Twining* v. *New Jersey*, 211 U. S. 78, 101, 111, it was held that the exemption of a prisoner from compulsory self-incrimination in the state courts was not included in the guaranty of due process of law contained in the Fourteenth Amendment. In *Jordan* v. *Massachusetts*, 225 U. S. 167, 177, where one of the jurors was subject to reasonable doubt as to his

sanity, and the state court, pursuant to the local law of criminal procedure, determined upon a mere preponderance of the evidence that he was sane, the conviction was affirmed. In *Garland* v. *Washington*, 232 U. S. 642, 645, it was held that the want of a formal arraignment, treated by the State as depriving the accused of no substantial right and as having been waived and thereby lost, did not amount to depriving defendant of his liberty without due process of law.

Our conclusion upon this branch of the case is, that the practice established in the criminal courts of Georgia: that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making that motion; is a regulation of criminal procedure that it is within the authority of the State to adopt. In adopting it, the State declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and since the State may, without infringing the Fourteenth Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it and holding him bound by the waiver amounts to a deprivation of "due process of law."

3. The insistence that the decision of the Supreme Court of Georgia in affirming the denial of the motion to set aside the verdict (83 S. E. Rep. 645) on the ground that Frank's failure to raise the objection upon the motion for a new trial amounted to a waiver of it, was inconsistent with the previous practice as established in *Nolan* v.

State, 53 Georgia, 137; *S. C.*, 55 Georgia, 521; and therefore amounted in effect to an *ex post facto* law in contravention of § 10 of Article I of the Federal Constitution, needs but a word. Assuming the inconsistency, it is sufficient to say that the constitutional prohibition: "No State shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts. *Calder* v. *Bull*, 3 Dall. 386, 389; *Fletcher* v. *Peck*, 6 Cr. 87, 138; *Kring* v. *Missouri*, 107 U. S. 221, 227; *Thompson* v. *Utah*, 170 U. S. 343, 351; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632, 638; *Ross* v. *Oregon*, 227 U. S. 150, 161.

4. To conclude: Taking appellant's petition as a whole, and not regarding any particular portion of it to the exclusion of the rest—dealing with its true and substantial meaning and not merely with its superficial import—it shows that Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the State; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that State, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court-room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury

rendered its verdict, has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts. In all of these proceedings the State, through its courts, has retained jurisdiction over him, has accorded to him the fullest right and opportunity to be heard according to the established modes of procedure, and now holds him in custody to pay the penalty of the crime of which he has been adjudged guilty. In our opinion, he is not shown to have been deprived of any right guaranteed to him by the Fourteenth Amendment or any other provision of the Constitution or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under "due process of law" within the meaning of the Constitution.

The final order of the District Court, refusing the application for a writ of *habeas corpus*, is

Affirmed.

MR. JUSTICE HOLMES with whom concurred MR. JUSTICE HUGHES, dissenting.

Mr. Justice Hughes and I are of opinion that the judgment should be reversed. The only question before us is whether the petition shows on its face that the writ of *habeas corpus* should be denied, or whether the District Court should have proceeded to try the facts. The allegations that appear to us material are these. The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending

danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning. On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and claping of hands, and the judge before beginning his charge had a private conversation with the petitioner's counsel in which he expressed the opinion that there would be 'probable danger of violence' if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from Court when the verdict was brought in. At the judge's request they agreed that the petitioner and they should be absent, and they kept their word. When the verdict was rendered, and before more than one of the jurymen had been polled there was such a roar of applause that the polling could not go on until order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them. With these specifications of fact, the petitioner alleges that the trial was dominated by a hostile mob and was nothing but an empty form.

We lay on one side the question whether the petitioner could or did waive his right to be present at the polling of the jury. That question was apparent in the form of the trial and was raised by the application for a writ of error; and although after the application to the full Court we thought that the writ ought to be granted, we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States. But *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

The argument for the appellee in substance is that the trial was in a court of competent jurisdiction, that it retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the state court as to the fact of such domination cannot be reviewed. But the argument seems to us inconclusive. Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general but particular, and proceeds from the control of a hostile influence.

When such a case is presented, it cannot be said, in our view, that the state court decision makes the matter *res judicata*. The State acts when by its agency it finds the prisoner guilty and condemns him. We have held in a civil case that it is no defence to the assertion of the Federal right in the Federal court that the State has corrective procedure of its own—that still less does such procedure draw to itself the final determination of the Federal question. *Simon* v. *Southern Ry.*, 236 U. S. 115, 122, 123. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. *Kansas Southern Ry.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 591. *Nor. & West. Ry.* v. *Conley*,

March 8, 1915, 236 U. S. 605. Otherwise, the right will be a barren one. It is significant that the argument for the State does not go so far as to say that in no case would it be permissible on application for *habeas corpus* to override the findings of fact by the state courts. It would indeed be a most serious thing if this Court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution. If, however, the argument stops short of this, the whole structure built upon the state procedure and decisions falls to the ground.

To put an extreme case and show what we mean, if the trial and the later hearing before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this Court would allow itself to be silenced by the suggestion that the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation and that the Supreme Court of the State on writ of error had discovered no error in the record, we still imagine that this court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the Supreme Court of the State might have said. We therefore lay the suggestion that the Supreme Court of the State has disposed of the present question by its judgment on one side along with the question of the appellant's right to be present. If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And notwithstanding the principle of comity and convenience (for in our opinion it is nothing more, *United States* v. *Sing Tuck*, 194 U. S. 161, 168), that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of *habeas corpus*, when, as here, that resort has been had in vain, the power to secure fundamental rights

that had existed at every stage becomes a duty and must be put forth.

The single question in our minds is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result, is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command. This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be heard. Upon allegations of this gravity in our opinion it ought to be heard, whatever the decision of the state court may have been, and it did not need to set forth contradictory evidence, or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the state court. There is no reason to fear an impairment of the authority of the State to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are

of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death.

STEWART MINING COMPANY *v.* ONTARIO MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 205. Argued March 17, 18, 1915.—Decided April 26, 1915.

The locator of a mining claim has the right under § 2322, Rev. Stat., to the surface included within the lines of his claim; and, if a vein has its top or apex within the claim, he may follow such vein downward, although it may depart from a perpendicular in its downward course, outside of the vertical side lines of the location that is, into adjoining grounds within the limited lines expressed in the statute.

The strike and the dip of a vein must not be confounded nor the rights dependent upon them confused.

Where the state court does more than merely decide whether the apex of a vein is or is not within the location, but also construes the statute under which plaintiff in error asserts its rights there is a question of law as well as of fact and this court has jurisdiction under § 237, Judicial Code.

Extralateral rights to a vein under § 2322, Rev. Stat., depend upon the position of its top or apex.

Accepting the proper definition of apex of a vein as all that portion of a terminal edge of a vein from which the vein has extension downward in the direction of the dip, it does not appear that the apex of the vein involved in this action was within plaintiff's claim and therefore no extralateral rights exist under § 2322, Rev. Stat.

Quære whether under § 2322 Rev. Stat. a vein can be pursued in the direction of its strike at an angle of less than 45 degrees to the course thereof.

23 Idaho, 724, affirmed.

THE facts, which involve the construction of Rev. Stat., § 2322, and the right of the locator of a mining claim to follow the vein downward, are stated in the opinion.

Mr. Milton S. Gunn and *Mr. Charles S. Thomas*, with whom *Mr. Edgar T. Brackett*, *Mr. Nash Rockwood* and *Mr. William E. Cullen, Jr.*, were on the brief, for plaintiff in error.

Mr. Myron A. Folsom and *Mr. John P. Gray*, with whom *Mr. James E. Gyde* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Contest between the mining companies (they were respectively plaintiff and defendants in the trial court and we shall so designate them) as to certain ore bodies lying beneath the surface of the mining claim of defendants, called the Ontario. Plaintiff asserts ownership to the ore bodies by reason of being owner in fee and in possession of a quartz lode mining claim named the Senator Stewart Fraction Lode Claim. It is alleged that within such claim there "is a certain vein or lode bearing silver, lead and other valuable minerals of which said vein or lode and the ore and mineral therein contained this plaintiff is the owner in possession and entitled to the possession. That the top or apex of said vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners Nos. 1 and 2 and extends within the boundaries of said claim in a westerly direction, following the general course of said claim, for a distance of seven hundred five (705) feet, more or less. That said vein or lode has a downward course and descends into the earth southerly and beyond the south boundary and side line of said claim into and beneath the surface of the Ontario quartz lode mining claim, designated as Survey No. 755."

Plaintiff prayed for an accounting and for an injunction against the further mining or extracting of the ore.

Defendants' answer set up opposing contentions and denied the rights alleged by plaintiff. In a cross-complaint defendants asserted title and prayed that it be quieted against the claim of plaintiffs. The judgment of the trial court responded to this prayer. The judgment was affirmed by the Supreme Court of the State, 23 Idaho, 724. This writ of error was then granted.

The case is not embarrassed by any dispute of facts of the title to the respective claims, or of their boundaries or of the mining of the ore by defendants. The controversy turns entirely upon the construction of § 2322, Rev. Stat., of the United States. It provides that locators of mining locations "shall have the exclusive right of possession and enjoyment of all of the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It will be observed, therefore, to summarize the rights conferred by the section, that the locator of a mining claim

has the right to the surface included within the lines of his claim and if a vein has its top or apex within the claim he may follow such vein downward, though it may depart from a perpendicular in its downward course outside "of the vertical side lines" of the location—that is, into adjoining grounds. The length of the side lines and the claim they bound are limited by the end lines, or, as it is expressed in the statute, by vertical planes drawn downward through the end lines. *Iron Silver Mining Co.* v. *Cheesman*, 116 U. S. 529; *Iron Silver Mining Co.* v. *Elgin Mining Co.*, 118 U. S. 196.

The statute would seem to call for no effort of construction, and the distinction which obtains in the parlance of miners and in the cases, between the strike or course and the dip of a vein, is compelled by the statute and marks accurately the linear and extralateral rights of a location. This certainly, as far as any language can do it, expresses the distinction which must be observed, however various may be the natural conditions. In other words, the strike and the dip of a vein must not be confounded nor the rights dependent upon them confused.

What, then, do they determine in the present case? The plaintiff asserts, as we have seen, that the vein has its top or apex within one of its claims (the Senator Stewart Fraction Lode) and asserts further that the vein extends downward beyond the side lines, within the limits of the end lines extended vertically, to and beneath the claim of defendants, and includes the ore bodies mined by the latter.

These are the facts as found by the trial court:

"That no part of the apex of the said ore bodies lies within the lines of the Senator Stewart Fraction lode mining claim.

"That the plaintiff is the owner, in the possession and entitled to the possession of the Senator Stewart Fraction lode mining claim described in the complaint, with the exception of that part thereof in conflict with the Quaker

lode mining claim, which conflict is not material to any issue involved in this case.

"That within said Senator Stewart Fraction lode mining claim there is a vein or lode of mineral-bearing rock in place which on its onward course crosses the south side line of said Senator Stewart Fraction lode mining claim, and has a course about North 30° East, and the said vein on its onward course does not reach any other line of said claim. That the said vein is cut off on its onward course by a large fault near the north line of said claim, called the Osburn fault in this case. That the said vein on its downward course passes underneath the east line of said claim, which is described in the patent as the end line of said claim, which line connects Corners 1 and 2 of said claim. That the fault which cuts off said vein on its northerly end has a northwestwardly and southeastwardly course and dips southwestwardly. That the end of the vein against said fault has a course North 41° West. That the end of said vein against said fault has a steeply inclined downward course southeasterly.

"That the end of the vein as the same is terminated on the onward course of the said vein against the fault hereinbefore referred to is the end of the vein on the line of its dip, and the said vein is undercut by the said fault in such manner that if the country below the fault was eroded, it would present the appearance of an overhanging cliff.

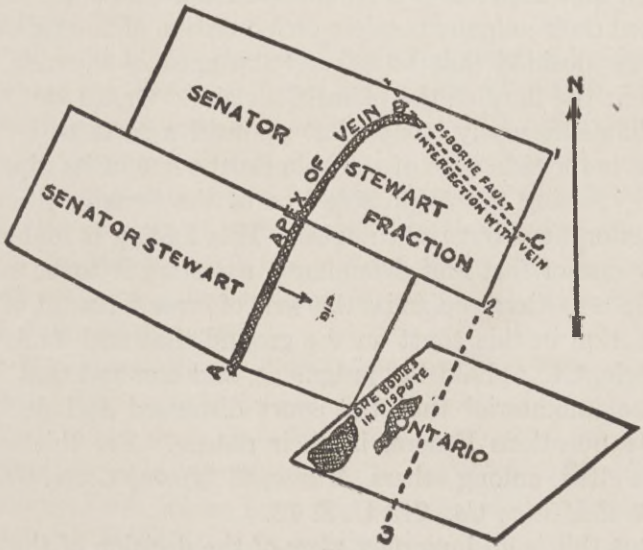
"That the said fault which terminates the said vein upon its onward course is a fault of great magnitude, and for a short distance above the fault has disturbed and broken and slightly deformed the vein, and enclosing rocks in close *proximately* [proximity] to said fault in some places for a greater distance from the fault than in others. That the vein is also at various places cut by other faults which tend in places to flatten the vein somewhat upon its downward course.

"That the said vein is continuous on its onward course

from the line of contact with the said great fault in this case called the Osburn fault southerly to the ore bodies within the Ontario lode mining claim and has been followed upon the level in the drifts by the miners from the said edge of the vein to the ore bodies in the Ontario mining claim.

"That the top or apex of said vein which on its onward course crosses the south side line of said claim is practically level."

The Supreme Court affirmed the findings and added that the end of the vein against the Osborne fault was "turned, curled, or cupped upward, caused by the disturbance which created the fault and cut off the vein." And also said: "It further appears that this vein is undercut by the Osborne fault in such a manner that if the fault were eroded or washed away, it would leave the vein standing out as an overhanging cliff." The following diagram exhibits the relations of the claims, the location of the vein and the Osborne fault:



The contention of plaintiff is that the vein A-B runs along the Osborne fault on the dotted line b-c and passes across the end line 1-2 at right angles. It is further contended that the apex of the vein is along the line A-B to the Osborne fault and continues with what is asserted to be the edge of the vein along the dotted line b-c and that, therefore, the claim is entitled to an extralateral right on the vein measured between the vertical plane 1-2-3 and a plane parallel to that plane drawn through the point where the vein passes through the southerly side line of the claim. These planes include the ore bodies in dispute.

Defendants oppose the contention and insist that the vein terminates at the Osborne fault and that the edge of the vein along the fault does not constitute the apex of the vein of the ore bodies. The Supreme Court accepted this view, as we have pointed out, and, in emphasis of it, said: "We cannot understand how an overhanging end edge of a vein, cut off as the evidence shows this has been, can in any sense be called the top or apex of the vein."

On first impression it would seem that the state courts rested their judgments solely on a question of fact; in other words, decided that no part of the apex of the vein lay within the lines of the plaintiff's claim. Or, to state the finding differently, that what plaintiff asserts to be the apex is the side edge of the vein on the line of its dip, the vein crossing the south side line of the Senator Stewart Fraction at about right angles. This finding is undoubtedly one of fact and defendants, asserting it to be such, make a motion to dismiss the writ of error for want of jurisdiction in this court on the ground that such fact was sufficient to uphold the judgment, and contend that it is hence immaterial that the court discussed and decided other questions Federal in their nature. For this cases were cited, among others, *Mammoth Mining Co.* v. *Grand Central Mining Co.*, 213 U. S. 72.

But this is an imperfect view of the decision of the Su-

preme Court. The court observed that the decisive assignment of error was lodged against the finding that the vein had not its apex in the Senator Stewart Fraction claim, and, after referring to the testimony of witnesses as to the inclination and apparent strike of the vein at certain points, said: "But, taken as a whole, the evidence supports the findings, and the controversy arising on this appeal becomes a question as to the correct interpretation and application of the rule of law that should apply to the facts of the case. The whole question rests on the correct application of the apex and extralateral rights provisions of § 2322, U. S. Revised Statutes." The court further observed that it would attempt no new application of the statute but would seek and apply the construction which this court had made; and, after consideration of the decisions and an analysis of § 2322, and especially of the words "downward course," said: "To pursue a vein in the direction of its strike at an angle of less than 45 degrees to the course thereof would clearly not be following the vein on its 'downward course' as authorized by the statute."

It is manifest, therefore, that the court did more than decide the question of fact, and made its judgment to depend as well upon a question of law. The motion to dismiss, therefore, is denied.

The view expressed by the Supreme Court that the angle of a vein of less than 45 degrees to its course would not be downward "'as authorized by the statute'" is especially attacked by plaintiff as the capital error of the decision of the court.

We pretermit for the present a consideration of the ruling and go back to the statute for the elements of decision. They are simple enough in expression, but the contests of interest and ingenuity, induced or justified by physical conditions, have given rise to much litigation, and quite a body of jurisprudence has been erected in the

exposition of the rights conferred by the statute. The number and fullness of the cases spare us much discussion, and we may rapidly indicate the elements which determine the decision of this case.

The statute gives a right of possession to the locator of a vein, the apex of which lies within the lines of his location, not exceeding in extent 1,500 feet in length by 600 feet in width, § 2320, Rev. Stat. And a vein is a well-defined body of mineral within enclosing rocks. It has an onward course and a downward course, and at what angle to the former the latter may be followed in the exercise of the extralateral right has been made a question in this case and argued at much length by plaintiff. The Supreme Court of the State decided, as we have seen, that the vein could not be pursued downward at an angle of less than 45 degrees to its course. We, however, are not required to pass upon the question.

The findings of fact afford a simpler ground of decision. The primary condition which plaintiff, to justify a claim to the ore bodies in controversy, had to establish was that the apex of the vein was within the Senator Stewart Fraction claim; but the fact was found the other way.

The findings are graphically represented by the diagram which we have given. It will be observed from it, and to quote the findings, that the vein on its onward course (strike) crosses the south line of the Senator Stewart Fraction claim and continues northeasterly (N. 30° E.) to the Osborne fault. It reaches no other line of the claim, being cut off by that fault. The vein on its "downward course" (dip) passes underneath the east end line (so described in the patent) of the claim. And both the trial court and the Supreme Court found that the termination of the vein at the Osborne fault is not the top or apex of the vein. In other words, what plaintiff claims to be the apex of the vein is its side edge on the line of the dip.

From this it follows that no extralateral rights can be

predicated upon it, and we may put to one side the view expressed by the Supreme Court that a vein cannot be pursued along its strike at an angle of less than 45°. And the conclusion of the court that the top or apex of the vein was not within the Senator Stewart Fraction claim has the concurrence of the judgment of the Circuit Court of Appeals of the Ninth Circuit in *Stewart Mining Company* v. *Bourne*, 218 Fed. Rep. 327, where the same ore bodies were in controversy upon rights asserted to appertain to that claim. That case was submitted on the evidence in this, supplemented by an agreement as to certain facts. The court, by Circuit Judge Ross, remarked that a diagram introduced in evidence (substantially like that given above) and a certain model (not exhibited here, counsel explaining that it had been broken), the correctness of which was practically conceded, demonstrated the situation of the vein by actual development and made it "plain that this vein was not turned or bent at the point of its contact with the Osborne fault, and did not and does not extend from that point along that fault, but, on the contrary, came to an abrupt end there. True, further to the northeasterly and at much greater depth the ore is shown by the model to have extended to the Osborne fault, and from that point to have followed the fault northeasterly to and out of the easterly end line of the claim [the dotted line b and c of the diagram]. But we think it is manifest that such portion of the ore body cannot in any proper sense be regarded as any part of the apex of the vein."

The court also referred to the allegation of the plaintiff in that case, which is identical with the allegation in the present case, that the vein was in Senator Stewart Fraction claim and that its apex crossed the easterly end line of the claim at approximately the center thereof, and said: "The evidence showing, as has been above pointed out, that there is no such apex, the suit of the plaintiff must necessarily fail."

A like declaration may be made in the case at bar. The fact is fundamental. It is rudimentary that extralateral rights to a vein depend upon the position of its top or apex.

But principles of law are asserted by plaintiff which, it is insisted, determine against the conclusion of both courts. It is difficult to state or estimate the principles singly. An apex is, on cited authority, defined to be "all that portion of the terminal edge of a vein from which the vein has extension downward in the direction of the dip." And it is further said that the definition has been approved in Lindley on Mines, because as therein expressed it "involves the elements of terminal edge, and downward course therefrom." We may accept the definition. In its application, however, it immediately encounters a question of fact—the locality of the terminal edge; and in this case the state courts did not find it to be where plaintiff asserted it to be.

But counsel make much of—indeed, appear to give absolute effect to—the other element of the definition, that is, "extension downward" or "downward course" from the terminal edge. But this element again has no significance whatever independently of the "terminal edge" of the vein, found, as we have said, not to be where plaintiff contended it to be. Plaintiff's contention is that the terminal edge extends 200 feet along the Osborne fault and from thence there is a pronounced downward course to the southerly boundary of the Stewart Fraction claim, and that therefore the two elements essential to an apex in the accepted definition exist, namely, "terminal edge and downward course" within "vertical planes parallel with the vertical planes of the end lines of the claim extended downward." If it could be conceded that the apex of the vein runs along the Osborne fault, the conclusion plaintiff contends for might also be conceded, but the fact is found the other way by the state courts in this case. The finding is dominating, and on account of it the judgment must be

sustained. It is immaterial what view the court had or expressed of the angle the downward course of the dip must be to the strike.

The next contention of plaintiff is that there is neither allegation nor proof of the discovery vein in the Senator Stewart Fraction claim but that a presumption arises from the patent that a discovery was made and the claim properly located with reference thereto. In other words, that a discovery vein existed and that the claim was located lengthwise with it, and that the first presumption is conclusive, and the other also, in the absence of anything to the contrary appearing. And it would seem to follow from the contention that the presumption includes as well the position of the apex and other attributes necessary for the assertion of extralateral rights. It would, indeed, be difficult to entertain such a presumption in view of the conduct of the plaintiff, its pleadings and testimony and the careful investigation and consideration which the state courts gave to the case. We may omit, therefore, a detailed consideration of plaintiff's contention. The rights asserted in the pleadings and to which the testimony was directed to sustain were based upon the possession of the vein which we have described. *Stewart Mining Co.* v. *Bourne*, 218 Fed. Rep. 359.

Judgment affirmed.

DORAN *v.* KENNEDY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 224. Argued April 16, 1915.—Decided April 26, 1915.

Where the homesteader has made final proof before his death and become entitled to the patent, his heirs under § 2448, Rev. Stat., take as such heirs and not directly under § 2291, Rev. Stat., and as its beneficiaries.

The provision in Rev. Stat., § 2296, that no land acquired under the Homestead Law shall be liable for debts contracted prior to the issuing of the patent does not deprive the probate court of jurisdiction over land of which decedent was entitled to have the patent issued, he having made final proof before death.

The probate court has jurisdiction to order a sale in compliance with the law of the State of the property within a homestead entry on which the homesteader had made final proof and become entitled to patent before his decease.

If the probate court having jurisdiction to order a sale, erred in regard to application of the proceeds, the remedy is by appeal, the judgment cannot be collaterally attacked.

The fact that a party is entitled to a day in court does not entitle him to two days in court.

THE facts, which involve the construction of Rev. Stat., § 2296, and the jurisdiction of the state probate court over the homestead entry of a deceased homesteader dying after full payment and before patent has issued, are stated in the opinion.

Mr. John E. Samuelson, with whom *Mr. Wm. E. Culkin* was on the brief, for plaintiff in error:

The probate court had no jurisdiction over the land.

The land involved in this case was not the homesteader's property; the homesteader had no title in fact and none passed by the so-called deed of the administrator. The

facts were matters of public record and the defendants were bound thereby.

The decree of the probate court being void is subject to collateral attack. The probate court had no jurisdiction to issue letters of administration.

These are not mere irregularities. The court's action in the attempted appointment of the administrator and the attempted sale of the property of the heirs was in excess of its jurisdiction, therefore null and void.

As the property could not be sold to pay debts incurred prior to patent, it could not be sold for expenses of administration incurred in attempting to enforce such debt.

Even though the homesteader had such property rights in the land involved that it vested in his heirs, by descent, the same was exempt from sale under both state and Federal laws for debts incurred by him prior to patent.

Mr. F. J. McPartlin, with whom *Mr. Marshall A. Spooner* was on the brief, for defendant in error:

The probate court had full jurisdiction over the land embraced in the homestead entry.

The words of the statute explain themselves.

Plaintiff in error confuses § 2291, Rev. Stat., with § 2448, Rev. Stat., and the former is not in point.

The equitable title to this land passed to the homesteader as soon as he had complied with the terms of his contract of purchase by offering final proof and payment.

The equitable title having vested in the homesteader prior to his death, and patent having confirmed it in his estate subsequent to his death, the probate court had jurisdiction which might be invoked by the application of any person claiming an interest in the estate or otherwise as disclosed by the record.

Plaintiff in error waived her rights of exemption under § 2296, Rev. Stat., by acquiescence or failure to appeal.

The question of waiver is not a Federal question and the decision of the state court on that point must stand as conclusive, there being no question of the right of plaintiff in error to waive her statutory exemption under § 2296, Rev. Stat.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to quiet title to certain described lands brought by plaintiff in error against defendants in error. The parties were respectively plaintiff and defendants in the state courts and we shall so designate them.

The facts are as follows:

On November 12, 1904, Edward O. Norton made a homestead entry under the laws of the United States of the land in controversy. On April 10, 1906, he duly made final proof upon his entry. September 6, 1906, he died, leaving the plaintiff and four others as next of kin and sole heirs at law.

The final receipt of the Receiver of the United States Land Office was issued to and in the name of Norton on March 17, 1908, and on the eighth of September following a patent was issued in his name.

After the death of Norton the other heirs conveyed their respective rights, title and interest to plaintiff.

On March 2, 1909, letters of administration upon the estate of Norton were issued out of the probate court of Koochiching County, Minnesota, to the defendant John A. Kennedy, and on February 11, 1910, an order of license to sell the real estate here involved for an alleged indebtedness incurred and contracted by Norton prior to his death, and for the expense of the administration, was by the court issued to John A. Kennedy as administrator.

On April 16, 1910, Kennedy, as such administrator and by virtue of the order of license, made a public sale of the

land for the consideration of $650 to the defendant George N. Millard, and on the twenty-ninth of that month the court made an order confirming the sale.

On May 2, 1910, Millard conveyed the property to the defendant Paul Kennedy.

From the facts found as above the trial court concluded that plaintiff was the owner in fee simple of the land and that the defendants had no estate or interest in it, resting the conclusion upon the fact that the indebtedness for which it was sold was contracted by Norton before the patent was issued; that under § 2296 of the Revised Statutes the land was protected from liability for "the satisfaction of any debt contracted prior to the issue of the patent therefor," and that, therefore, the order of sale exceeded the jurisdiction of the probate court and was void.

Upon the appeal of the defendants the Supreme Court of the State reversed the judgment. The latter court decided (1) that Norton was the equitable owner of the land at the time of his death and that it descended according to the laws of the State and was part of Norton's estate to be administered. (2) The probate court having jurisdiction, its order of sale could not be attacked in a collateral proceeding such as, the court said, the proceeding at bar was, and that it was unnecessary to determine whether the land was exempt from liability under § 2296 of the Revised Statutes. A member of the court dissented from the decision of the majority that the land was a part of the estate of Norton when it was sold.

To review the judgment of the Supreme Court this writ of error is prosecuted.

Plaintiff contends: (1) That the probate court had no jurisdiction, the land being no part of Norton's estate. (2) Even if part of his estate it was not subject to sale for the payment of debts contracted before the patent was issued.

As an element in the first contention of plaintiff is the extent of the estate, if any, Norton had in the land. None whatever, is the assertion of plaintiff, and she adduces §§ 2289, 2290 and 2291 of the Revised Statutes.

The first two sections provide who shall be entitled to enter land as a homestead and upon what conditions. The last section provides when a certificate shall be given or patent shall issue and to whom upon certain contingencies. It shall not be issued until the expiration of five years after entry and may be at any time within two years thereafter, to "the person making such entry." If, however, he be dead then to his widow or, in case of her death, to his heirs or devisee, upon proving the necessary settlement and qualification for the time prescribed.

This section, it is contended, made the heirs of Norton (there being no widow) the direct beneficiaries of the statute—that is, the plaintiff and her grantors. In other words, they took directly under the statute, not from Norton; and such, it is further contended, is the effect of the decisions of this court, citing *McCune* v. *Essig*, 199 U. S. 382; *Wadkins* v. *Producers' Oil Company*, 227 U. S. 368.

But it will be observed the cited section provides for cases where the homesteader dies before final proof, other sections applying when such proof has been made and nothing is yet to be performed to entitle to a patent.

By § 2448 it is provided that "where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee as if the patent had issued to the deceased person during life."

Such are the circumstances in the present case. Norton had made his final proof before his death and had become entitled to the patent. Plaintiff and her grantors, there-

fore, could only receive the land as his heirs and not directly under § 2291 and as its beneficiaries.

Upon such proof Norton certainly became the equitable owner of the land. Indeed, it practically became his absolute property, subject to his disposition by assignment or by will or to the disposition of the law (*United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 328), and subject, therefore, upon his death, to the probate jurisdiction of the State.

But, it is contended that even if he became such owner, the land was not subject to sale for the satisfaction of debts contracted before the patent was issued. The debt for which it was sold was so contracted.

Section 2296 provides that "no land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The prohibition is clear and direct, but does it involve the consequences plaintiff asserts? Her contention is that it took from the probate court all jurisdiction or power over the land and that its order of sale was absolutely void and can be collaterally attacked. The Supreme Court of the State decided otherwise, as we have seen. It rejected all of the contentions of plaintiff against the jurisdiction of the court based on the laws of the State, and so far its decision is binding here. It said that there was no pretense at either pleading or proof that Norton left no other property or that such was the fact. It decided that the probate court had jurisdiction over Norton's estate. "That court," it was said, "had the unquestioned power to authorize a sale of it to pay certain classes of obligations. It might be sold to pay liabilities arising out of torts of deceased, 32 Cyc. 1084; *Brun* v. *Mann*, 131 Fed. Rep. 145. Had the patent issued when it should have issued it might have been sold to pay debts incurred thereafter and before the death of the deceased. Whether there were

facts to warrant a sale in any given case was a question which the probate court was obliged to determine and which that court and no other had jurisdiction to determine. This question was considered by the probate court and was determined adversely to plaintiff. Then was the time for the plaintiff to present her contention in court. No fraud or artifice was practiced to prevent her doing so. In fact, in her brief she claims that she did in fact appear. If the determination of the probate court was wrong, her remedy was to appeal from that determination. The heirs were entitled to one day in court but not to two. When a probate court with jurisdiction over property for purposes of administration, and for purposes of sale in certain cases, orders and confirms a sale of the same, it is the right and duty of an heir to litigate the propriety of such orders in that proceeding. The heir cannot sit by, permit the sale to be made, and then bring another and collateral action in another court to litigate again the propriety of the sale, and to procure a decree declaring it to be void. Such a practice would place no end to litigation."

The court further decided that certain sections of the Revised Laws of the State accorded to the orders of the probate court in the matter of administrators' sales the same presumption as to the judgments of courts of superior common law jurisdiction.

It would be difficult to add anything to the reasoning of the court, and it is in accord with the rulings in other States. *Watkins Land Mortgage Co.* v. *Mullen*, 62 Kansas, 1; *Gjerstadengen* v. *Van Duzen*, 7 N. Dak. 612. See also *Sigmond* v. *Bebber*, 104 Iowa, 431, and § 319b, Freeman on Judgments, 4th ed., and cases cited.

Judgment affirmed.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* POPPLAR, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 223. Submitted April 14, 1915.—Decided April 26, 1915.

In this case the court finds no ground for reversal in the ruling of the trial court that there was enough to go to the jury upon the question whether in fact the appliance complained of was defective.

Where the power of this court to review the judgment is controlled by § 237, Judicial Code, questions non-Federal in character may not be considered, nor can this court pass on whether a rule of the carrier was or was not disobeyed in a case dependent upon the Safety Appliance Act.

The defense of contributory negligence is not dealt with by the Safety Appliance Act.

121 Minnesota, 1413, affirmed.

THE facts, which involve the validity of a judgment of the state court for damages for personal injuries, are stated in the opinion.

Mr. M. D. Munn, with whom *Mr. A. H. Bright* and *Mr. J. L. Erdall* were on the brief, for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

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

This action was brought in the state court by an administrator to recover damages for an injury causing the death of the intestate. The injury was received, September 6, 1909, by the decedent, a brakeman, while he was un-

coupling a car which was being 'kicked' to a siding, and recovery was sought because of noncompliance with the Federal Safety Appliance Act, c. 196, 27 Stat. 531; c. 976, 32 Stat. 943. Upon the trial a motion was made for a direction of a verdict upon the grounds that the evidence failed to show neglect on the part of the Railroad Company and did establish contributory negligence. Apart from the exception to the denial of this motion, there were no exceptions to the instructions given to the jury. There was a finding for the plaintiff and the Railroad Company moved for judgment notwithstanding the verdict, or for a new trial; the motions were denied. The Supreme Court of the State affirmed the judgment. 121 Minnesota, 413.

There was testimony that the decedent, on giving the stop signal, attempted to uncouple the 'head car' that was to be left to run of its own momentum on the siding; he tried repeatedly to do this by pulling the coupling pin with the lifter at the end of the next car, but without success, and then, stepping between the two cars, while they were moving at the rate of about four miles an hour, in order to effect the uncoupling by hand, he was run over and killed. The conductor, a witness for the Company, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he would have reported it as a 'bad coupler' had it been brought to his attention. Without going into the evidence in detail, it is sufficient to say that we find no ground for reversal in the ruling that there was enough to go to the jury upon the question whether, in fact, the coupler was defective. See *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668.

It is urged that the right of recovery was barred by reason of the fact that the decedent disobeyed a rule of the Company which forbade him from going between moving cars. The state court held that the jury might find

that a practical necessity existed for the disobedience of this rule and that the course which the decedent followed in the emergency was that of a reasonably prudent man. Our power to review the judgment is controlled by § 237 of the Judicial Code (Rev. Stat., 709) and we may not consider questions which are not Federal in character. *St. Louis & Iron Mountain Rwy. Co.* v. *Taylor*, 210 U. S. 281, 291; *Seaboard Air Line Railway* v. *Duvall*, 225 U. S. 477, 487; *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668. In the present case a Federal question could arise only under the Safety Appliance Act; while the cars were upon a railroad which was a highway of interstate commerce and hence this Act was applicable (*Southern Railway Co.* v. *United States*, 222 U. S. 20), it is agreed that there was no evidence that the decedent at the time of the accident was engaged in interstate commerce and no question is presented under the Employers' Liability Act,—an enactment which has a wider field. It is apparent that the ruling referred to does not involve the construction of the Federal statute or any right, or immunity from liability, which is thereby conferred. The question is *dehors* the statute. True, the state court said that the rule of the Company should be construed in connection with the Safety Appliance Act, but, as the context shows, the court remarked this in pointing out that the statute was designed to prevent the necessity of going between the cars for the purpose of uncoupling them, whether they were standing or moving, and that the only way in which the decedent could uncouple the cars without going between them was to stop the train and walk around to the pin lifter on the other side. In the light of the testimony, the court concluded that it could not be said as matter of law that the decedent in the circumstances was bound to do this. The statute was concerned only in so far as it defined the duty of the Company to have couplers meeting the positive requirement; it did not preclude the defense of contributory

negligence, as distinguished from that of assumption of risk. As this court has said,—'The defense of contributory negligence was not dealt with by the statute.' *Schlemmer* v. *Buffalo, Rochester & Pittsburg Rwy. Co.*, 220 U. S. 590, 595. Whether the rule of the Company applied in such an emergency as that in which the decedent found himself,—whether he was guilty of contributory negligence as matter of law, or could be excused upon the ground that in an exceptional situation he acted with reasonable care, were questions which the Federal act left untouched.

The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State. It cannot be said, from any point of view, that any right or immunity granted by the Act was denied to the plaintiff in error.

Judgment affirmed.

McDOUGAL *v.* McKAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 676. Argued April 14, 1915.—Decided April 26, 1915.

In construing an Act of Congress, its known purpose must be effectuated as nearly as may be.

This court will not disregard the effect of decisions of the state and Federal courts in regard to descent of Indian allotments which have become rules of property and on which many titles have been acquired.

Under the Supplemental Creek agreement of June 20, 1902, the descent

and distribution of allotments is in accordance with chapter 49, Mansfield's Digest of the Laws of Arkansas, provided, however, that only Creek citizens and their descendants shall inherit lands of the Creek nation unless there are no Creek citizen heirs.

The provisions in Mansfield's Digest, distinguishing between ancestral estates which came to a decedent by a parent and new acquisitions and prescribing different rules of inheritance, apply to allotments of a Creek infant born in May, 1901, and dying in November 1901, and whose name was placed on the tribal rolls in October, 1902 pursuant to the provision in the Supplemental Creek agreement of 1902.

An allotment made under the Supplemental Creek agreement of 1902 must be treated, not as a new acquisition, but as an ancestral estate within the meaning of chapter 49 of Mansfield's Digest.

Where a Creek infant, whose allotment was made under the supplemental agreement of 1902, died leaving a father of Creek blood and a mother not of Creek blood the father takes a fee simple to such allotment; had both parents been of Creek blood and duly enrolled each would have taken one-half.

43 Oklahoma, , affirmed.

THE facts, which involve the construction and effect of the Supplemental Creek Agreement of June 30, 1902, and the ascertainment of heirs of an infant of the Creek Nation enrolled after death, are stated in the opinion.

Mr. M. E. Rosser, with whom *Mr. Wm. S. Cochran* was on the brief, for plaintiff in error:

As to the Arkansas statutes and the construction thereof in Arkansas and Indian Territory see c. 49 Mansfield's Digest; *Robinson* v. *Belt*, 107 U. S. 41; *Sanger* v. *Flow*, 48 Fed. Rep. 152; *Blaylock* v. *Muskogee*, 117 Fed. Rep. 152; *S. C.*, 64 S. W. Rep. 609; *McFadden* v. *Blocker*, 48 S. W. Rep. 1043; *Boyd* v. *Mitchell*, 64 S. W. Rep. 610; *Zufall* v. *United States*, 43 S. W. Rep. 760; *Randolph* v. *United States*, 43 S. W. Rep. 1098; *Carter* v. *Barton*, 48 S. W. Rep. 1017; *LeBosquet* v. *Myers*, 103 S. W. Rep. 770; *Bostic* v. *Eggleston*, 104 S. W. Rep. 566; *Western Investment Co.* v. *Davis*, 104 S. W. Rep. 573; *Kelly* v. *Mc-*

Guire, 15 Arkansas, 555; *Hogan* v. *Finley*, 52 Arkansas, 55; *Magness* v. *Arnold*, 31 Arkansas, 103; *Wheelock* v. *Simons*, 75 Arkansas, 19.

The land was a new acquisition in the allottee and not an ancestral estate. Act June 28, 1898, 30 Stat. 495; Original and Supplemental Creek Agreements, 31 Stat. 861, 32 Stat. 500; Act April 26, 1906, 34 Stat. 137; *Sizemore* v. *Brady*, 235 U. S. 441; *Reynolds* v. *Fewell*, 236 U. S. 58; *Magness* v. *Arnold*, 31 Arkansas, 103; *Hogan* v. *Finley*, 52 Arkansas, 55; *McKee* v. *Henry*, 201 Fed. Rep. 74.

Citizenship in Creek Nation is not a property right at all. *Cherokee Intermarriage Cases*, 203 U. S. 76; *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Stephens* v. *Cherokee Nation*, 174 U. S. 445.

The lands of the Creek Nation prior to allotment belonged to the Creek Nation as a political body and not to the individual members. 2 Kappler's Indian Laws, 1904 ed.; *Eastern Cherokees* v. *United States*, 117 U. S. 312; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Journeycake*, 155 U. S. 197; *Fleming* v. *McCurtain*, 215 U. S. 56; *Ligon* v. *Johnson*, 164 Fed. Rep. 670; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Sizemore* v. *Brady*, 235 U. S. 441; 2 Minors' Institute, 3d ed., pp. 78 and 86; 2 Blackstone, Lewis ed. 569, *p. 109, and see p. 208; *Kelly* v. *McGuire*, 15 Arkansas, 555.

George Franklin Berryhill not only never owned the land but he never could have owned it had Andrew J. Berryhill not lived at the proper time to obtain it as an allotment. Original Creek Agreement, 31 Stat. 861.

The Supreme Court of the State of Oklahoma erred in holding that the evidence offered to the effect that the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* had not been followed or acquiesced in by the bar of the State of Oklahoma, or by the *nisi prius* judges, was not admissible. 11 Cyc. 755.

The Supreme Court of Oklahoma erred in holding that the decision in *Shulthis* v. *McDougal* had become a rule of property. 69 Central Law Journal, 217; *Roberts* v. *Underwood*, 127 Pac. Rep. 261; *Barnes* v. *Keys*, 127 Pac. Rep. 261.

Rules of property can be created only by courts of last resort. 11 Cyc. 756; *Ocean Beach Association* v. *Brinley*, 34 N. J. Eq. 438, 448; *American Mortgage Co.* v. *Hopper*, 64 Fed. Rep. 553; *The Madrid*, 40 Fed. Rep. 677; *Gannon* v. *Johnston*, 140 Pac. Rep. 430.

To establish a rule of property the doctrine must be acquiesced in. Bledsoe's Land Laws, 1st ed., § 62.

Justice requires reversal of the rule in *Shulthis* v. *McDougal*. *Mason* v. *Nelson*, 18 L. R. A. (N. S.) 1221.

In support of these contentions see cases cited *supra* and Chamberlayne on Evidence, §§ 849–850; Oklahoma Bar Assn. Report, 1909, p. 161; *Pigeon* v. *Buck*, 38 Oklahoma, 101; *Shulthis* v. *McDougal*, 170 Fed. Rep. 529; *S. C.*, 225 U. S. 561; 2 Minors' Insts., 3d ed., p. 519; Rev. Stat., § 2289; 32 Stat. 500; 34 Stat. 137.

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

The land in question was allotted to the heirs of Andrew J. Berryhill, and while the heirs take by purchase technically, yet the Arkansas law of descent should be applied just the same as if the heirs of Andrew J. Berryhill had actually inherited the allotment.

There should be no difference in the application of the Arkansas law of descent to a case where the heirs take by purchase technically, instead of by actual descent.

The heirs take *per stirpes* and not as a class *per capita*—discussed with cases and authorities cited.

The allotment of a Creek citizen is not a new acquisition under the Arkansas law, but in the nature of an ancestral estate, his allotment being his birthright, and his right

to the same being acquired by virtue of being a member of the tribe.

Under the Arkansas law of descent it becomes necessary to determine whether or not the estate is ancestral or a new acquisition when there are no descendants—when the allotment passes in the ascending line it is absolutely material to first determine whether the estate is ancestral or new in order to discover the course of descent, that is, whether to the maternal or paternal side, but this is immaterial so long as there are descendants.

To allot the lands of an Indian tribe among the citizens thereof is not the grant or donation of a new title, but is more in the nature of a partition of prior rights.

That an allotment is not a new acquisition and not analogous to the acquisition of title to the public domain of the United States, see opinion of the Eighth Circuit Court of Appeals in *Shulthis* v. *McDougal.*

As said by this court in *Worcester* v. *Georgia*, 6 Pet. 515, "To contend that the word 'allotted' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged would . . . do injustice to the understanding of the parties."

Indian allottees are not donees of the Government.

In support of these contentions, see *Brown* v. *Belmarde*, 3 Kansas, 35; *Bassett* v. *Granger*, 100 Massachusetts, 348; *Baskin's Appeal*, 3 Pa. St. 304; *Bailey* v. *Bailey*, 25 Michigan, 185; *Beecher* v. *Wetherby*, 95 U. S. 517; *Beam* v. *United States*, 162 Fed. Rep. 260; *Campbell* v. *Wiggins*, Rice's Eq. 10 (S. Car.); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; Const. & Laws of Muskogee Nation by McKellop, 57; *Choate* v. *Trapp*, 224 U. S. 671; *Duffy* v. *Hargan*, 50 Atl. Rep. 678; *Dunlap's Appeal*, 9 Atl. Rep. 936; *Dukes* v. *Faulk*, 37 S. Car. 255; *S. C.*, 34 Am. St. Rep. 745; *Delaware Indians* v. *United States*, 193 U. S. 129; *Davidson* v. *Gibson*, 56 Fed. Rep. 443; *France's Estate*, 75 Pa. St. 220;

Forrest v. *Porch*, 45 S. W. Rep. 676 (Tenn.); *Fleming* v. *McCurtain*, 215 U. S. 56; *Fairbanks* v. *United States*, 223 U. S. 215; *Goat* v. *United States*, 224 U. S. 458; *Harvey* v. *Beach*, 38 Pa. St. 500; *Houghton* v. *Kendall*, 7 Allen (Mass.), 72; *Holbrook* v. *Harrington*, 16 Gray (Mass.), 102; *Henry* v. *Thomas*, 20 N. E. Rep. 519; *Hockett* v. *Alston*, 58 S. W. Rep. 675; *S. C.*, 110 Fed. Rep. 910; *Jones* v. *Meehan*, 175 U. S. 1; *Johnson* v. *Bodine*, 79 N. W. Rep. 348; *James* v. *Smith*, 58 S. W. Rep. 715; *Johnson* v. *McIntosh*, 8 Wheat. 543; *Kendall* v. *Gleason*, 152 Massachusetts, 457; *Kelly* v. *McGuire*, 15 Arkansas, 555; *Lipman's Appeal*, 30 Pa. St. 180; *Lott* v. *Thompson*, 15 S. E. Rep. 278 (S. Car.); *Lawton* v. *Corlies*, 27 N. E. Rep. 847; *Ligon* v. *Johnston*, 164 Fed. Rep. 670; *Mullen* v. *Read*, 64 Connecticut, 240; 42 Am. St. Rep. 174; *Minter's Appeal*, 40 Pa. St. 114; *Minnesota* v. *Hitchcock*, 185 U. S. 396; *Martin* v. *United States*, 168 Fed. Rep. 205; *Nivens* v. *Nivens*, 64 S. W. Rep. 604; *Parr* v. *United States*, 153 Fed. Rep. 462; *Russell* v. *Hall*, 101 U. S. 503; *Reynolds* v. *Fewell*, 236 U. S. 58; *Rand* v. *Sanger*, 115 Massachusetts, 124; *Ruggles* v. *Randall*, 38 Atl. Rep. 885; *Richards* v. *Miller*, 62 Illinois, 417; *Rush* v. *Thompson*, 53 S. W. Rep. 333; *Sizemore* v. *Brady*, 235 U. S. 441; *Shulthis* v. *McDougal*, 170 Fed. Rep. 530; *S. C.*, 162 Fed. Rep. 331; *Sweet* v. *Dutton*, 109 Massachusetts, 589; *Sheetz's Appeal*, 82 Pa. St. 213; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Spalding* v. *Chandler*, 160 U. S. 394; *Templeton* v. *Walker*, 55 Am. Dec. 646; *Thorn* v. *Cone* (Okla.), not yet reported; *United States* v. *Cook*, 19 Wall. 591; *Washington* v. *Miller*, 235 U. S. 422; *White* v. *Stanfield*, 146 Massachusetts, 424; *Wood* v. *Robertson*, 15 N. E. Rep. 457; *Woodward* v. *James*, 22 N. E. Rep. 150; *Wilson* v. *Owens*, 86 Fed. Rep. 572; *Worcester* v. *Georgia*, 6 Pet. 515.

Mr. John B. Meserve filed a brief as *amicus curiæ:*

The lands allotted and with which we are concerned in this case were allotted and conveyed by the United

States and the Creek Nation directly to the "heirs of Andrew J. Berryhill, deceased," and such heirs acquired title to said lands by purchase and not by descent. Supp. Creek Agreement, §§ 6 and 7; *Towner* v. *Rodegeb*, 75 Pac. Rep. 50; *Gould* v. *Tucker*, 100 N. W. Rep. 427; *S. C.*, 105 N. W. Rep. 624; *McCune* v. *Essig*, 122 Fed. Rep. 588; *Warnell* v. *Finch*, 15 Texas, 163; II Blackstone, Com., pp. 209, 240; 3 Washburn on Real Property, p. 4; *Tate* v. *Townsend*, 16 Mississippi, 316, 319; *Johnson* v. *Norton*, 10 Pa. St. 245; *Borgner* v. *Brown*, 33 N. E. Rep. 92; *Starr* v. *Hamilton*, 22 Fed. Cases, 1107; *Sizemore* v. *Brady*, 235 U. S. 441; *Hayes* v. *Barringer*, 168 Fed. Rep. 221; *Cook* v. *Childs*, 145 Pac. Rep. 406; Act of April 26, 1906, § 5; *Malissa Wiley Case*, July 13, 1908, Sec'y Interior Opinion; *Hall* v. *Russell*, 101 U. S. 503; *Hershberger* v. *Blewett*, 55 Fed. Rep. 170; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Franklin* v. *Lynch*, 233 U. S. 505; *Woodbury* v. *United States*, 170 Fed. Rep. 302.

George Franklin Berryhill, as the father of Andrew J. Berryhill and as the heir nearest in the line of succession to Andrew J. Berryhill, acquired, under the laws of descent of the State of Arkansas, an estate in fee simple in the lands in controversy. *Auman* v. *Auman*, 21 Pa. St. 348; Mansfield's Digest § (1) 2522; *Kelly's Heirs* v. *McGuire*, 15 Arkansas, 555; *Brown* v. *Belmarde*, 3 Kansas, 40; *Ward* v. *Stowe*, 27 Am. Dec. 239 (N. Car.); *Cooper* v. *Wilder*, 43 Pac. Rep. 591; *Braun* v. *Mathieson*, 116 N. W. Rep. 789; *Wittenbrook* v. *Wheadon*, 60 Pac. Rep. 664; *Walker* v. *Ehresman*, 113 N. W. Rep. 218 (Neb.); *Aspey* v. *Barry*, 83 N. W. Rep. 91 (S. D.); Mansfield's Digest § (10) 2531.

Mr. E. G. McAdams and *Mr. Norman B. Haskell* filed a brief as *amici curiæ:*

No rule of property has been established by the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* and the Oklahoma decisions following it.

Had Andrew J. Berryhill lived to receive an allotment he would have taken the same, not technically merely, but substantially, by purchase from the United States and the Creek Nation, and not by descent from his tribal parent.

Under those circumstances, he would have taken the allotment as a new acquisition, by purchase from the United States and from the Creek Nation, even if it be assumed for the purpose of the argument that he took an equitable estate therein by descent from his tribal parent, because the source of the legal title is the controlling factor in determining whether an estate be a new acquisition or an ancestral estate.

Andrew J. Berryhill having died prior to the enactment of the legislation authorizing the making of an allotment to his heirs, and no estate, therefore, having vested in him, said allotment was not an acquisition, new or otherwise, in Andrew J. Berryhill; hence the allotment did not descend to his heirs either as an ancestral estate or as a new acquisition, under § 2531, Mansfield's Digest, but vested in his heirs, under § 2522, Mansfield's Digest, by direct grant from the United States and the Creek Nation, becoming a new acquisition in said heirs.

In support of these contentions, see *Anglo-American Land Co.* v. *Lombard*, 132 Fed. Rep. 721; *Barker* v. *Swenson*, 66 Texas, 408; *Calhoun Mining Co.* v. *Ajax Mining Co.*, 27 Colorado, 1; *S. C.*, 182 U. S. 499; *Collins* v. *Durwood*, 4 Tex. Civ. App. 389; *Goodright* v. *Wells*, 2 Doug. K. B. 771; *Hall* v. *Russell*, 101 U. S. 503; *Hill* v. *Heard*, 104 Arkansas, 23; *Kelly* v. *McGuire*, 15 Arkansas, 555; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Nicholson* v. *Halsey*, 1 Johns. Ch. 417; *Robinson* v. *Belt*, 107 U. S. 41; *Selby* v. *Alston*, 3 Ves. Jun. 339; *Shulthis* v. *McDougal*, 170 Fed. Rep. 529; *S. C.*, 225 U. S. 561; *Sizemore* v. *Brady*, 235 U. S. 441; *Wilson* v. *Beckwith*, 140 Missouri, 359; *Woodbury* v. *United States*, 170 Fed. Rep. 302; Devlin on Deeds, §§ 9, 15.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The solution of this controversy requires ascertainment of the *heirs* of an infant who was enrolled after death, within the intendment of the Supplemental Creek Agreement—Act of June 30, 1902 (c. 1323, 32 Stat. 500).

Andrew J. Berryhill, born in May, 1901, died during the following November leaving his father—George Franklin Berryhill—an enrolled Creek Indian, his mother, a non-citizen of that Nation, and seven paternal uncles and aunts. His name was duly placed on the tribal rolls in October, 1902, and during the years 1904 and 1905 the land presently in controversy (with others) was allotted and patented to his heirs. The father claiming to be Andrew's sole heir—the mother joining—conveyed it June 5, 1906, to defendants in error, Edmond and Perry McKay. Afterwards the paternal uncles and aunts undertook to convey the fee subject to a life estate in the father to McDougal, plaintiff in error. The McKays and parties claiming under them being in possession of the property and extracting oil and gas therefrom, McDougal instituted this proceeding to restrain them and to have his remainder interest declared and confirmed.

The Supreme Court of Oklahoma (43 Oklahoma, 261) held the land must be treated as an ancestral estate in Andrew J. Berryhill and declared the father sole heir. Plaintiff in error maintains that it passed as a new acquisition and the father took a life estate with remainder over to the uncles and aunts. Counsel appearing as *amici curiæ* insist Andrew J. Berryhill had no estate therein, and that the word *heirs* designates persons who themselves took as purchasers.

Under treaty stipulations with the United States the Creek Tribe of Indians as a community for a long time owned and occupied large areas now within the borders of

Oklahoma and maintained there an organized government. Congress finally assumed complete control over them and undertook to terminate their government and distribute the tribal lands among the individuals. *Washington* v. *Miller*, 235 U. S. 422.

The act of March 1, 1901,—Original Creek Agreement (c. 676, 31 Stat. 861, 870)—effective May 25, 1901 (32 Stat. 1971), provided for the enrollment of members living on April 1, 1899, and their children born up to July 1, 1900, and also for allotment of tribal lands. It prescribed further (§ 28) that "if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

The Supplemental Creek Agreement—Act of June 30, 1902, c. 323, 32 Stat. 500, 501, effective August 8, 1902 (32 Stat. 2021), repealed that portion of the Original one establishing descent and distribution under the Creek Law and directed that thereafter these "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." It also extended the right of enrollment to children born after July 1, 1900, and up to May 25, 1901, and declared "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."

The pertinent sections of Mansfield's Digest are copied in the margin.[1] They sharply distinguish between an es-

[1] *Section 2522.* When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children, or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts.

Section 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his life-time, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her life-time; then to descend to the collateral heirs as before provided.

Section 2532. The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation.

Section 2533. Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Section 2534. In all cases not provided for by this act, the inheritance shall descend according to the course of the common law.

Section 2543. The expression used in this act, "where the estate

tate which came to a decedent by a parent and a new acquisition and prescribe different rules of inheritance.

In *Shulthis* v. *McDougal* (170 Fed. Rep. 529), decided June 3, 1909, by the Circuit Court of Appeals for the Eighth Circuit, title to another portion of the Andrew J. Berryhill allotment was involved and it became necessary to ascertain his heirs. Having carefully considered the whole subject that court summed up its conclusions thus (pp. 534–535):

"So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he

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shall have come to the intestate on the part of the father," or "mother," as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent.

derived his right, and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question." An appeal to this court was dismissed June 7, 1912, for lack of jurisdiction (225 U. S. 561).

The Supreme Court of Oklahoma in *Lena Pigeon* v. *William Buck*, 38 Oklahoma, 101 (April 23, 1913), determined the heirs of a full-blooded Creek citizen who, having been duly enrolled, received a patent to her allotment and then died intestate, without descendants, leaving father, mother, brothers, sister and her husband. After reference to the above-quoted portions of Mansfield's Digest it said (pp. 103–104): "That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal*, 170 Fed. Rep. 529. . . . Many titles to lands on the eastern side of this State have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there (*De Walt* v. *Cline*, 35 Oklahoma, 197; *S. C.*, 128 Pac. Rep. 121; *MaHarry* v. *Eatman*, 29 Oklahoma, 46; *S. C.*, 116 Pac. Rep. 935; *Duff* v. *Keaton*, 33 Oklahoma, 92; *S. C.*, 124 Pac. Rep. 291), we hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein."

We recognize the unusual difficulties surrounding the problem presented upon the record, and appreciate the very forceful arguments offered in support of the conflicting theories. The circumstances are novel, and the canons

of descent contained in Mansfield's Digest are not precisely applicable thereto; but these rules must be accommodated to the facts and the great purpose of Congress effectuated as nearly as may be. And not only would it be improper for us to disregard the effect of the decisions already announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, which are supported by cogent reasoning, but considering the peculiar and rapidly changing conditions within that State especial consideration must be accorded to them. We accordingly accept the doctrine announced therein and hold: (*1*) The property must be treated as an ancestral estate which passed in accordance with the applicable provisions of chapter 49, Mansfield's Digest. (*2*) As the father, George Franklin Berryhill, was of Creek blood, and the mother not, he took a fee simple title to all the land in question. If both parents had been of Creek blood and duly enrolled each would have taken one-half.

Sizemore v. *Brady*, 235 U. S. 441, has been referred to as in conflict with the doctrine herein approved. In that case lands were allotted and patented after August 8, 1902, to the heirs of Grayson, an enrolled Creek, who died March 1, 1901, and a contest arose between a paternal cousin and cousins on the maternal side. The former—Brady—claimed descent should be determined according to Mansfield's Digest and that he was sole heir. The latter—Sizemore and Newberry—maintained the Creek Law applied and that they were the only heirs. The Supreme Court of Oklahoma decided in favor of Brady (33 Oklahoma, 169) and in this court the plaintiffs in error expressly admitted that he should prevail "in event the court should hold said lands passed under Chapter 49 of Mansfield's Digest of the Laws of Arkansas, in accordance with the Act of Congress known as the Creek's Supplemental Agreement." We concluded the Arkansas statute controlled and of course did not undertake to decide the

question here presented. Moreover, it is not possible from the record in the cause accurately to trace the blood of the maternal relatives.

The judgment of the court below must be

Affirmed.

PIGEON *v.* BUCK.

ROBERTS *v.* UNDERWOOD.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 199. Argued March 12, 15, 1915.—Decided April 26, 1915. No. 275. Submitted March 15, 1915.—Decided April 26, 1915.

McDougal v. *McKay*, *ante*, p. 372, followed to the effect that an allotment made to a full blooded Creek Indian is, for purposes of descent and distribution, to be considered, not as a new acquisition, but as an ancestral estate and passes as such under chapter 49 of Mansfield's Digest of the Laws of Arkansas.

The same ruling also applies to an allotment of a full blooded Chickasaw Indian.

38 Oklahoma, 37 and 101, affirmed.

THE facts, which are similar to those involved in the preceding case, are stated in the opinion.

Mr Lewis C. Lawson for plaintiff in error in No. 199, submitted.

Mr. H. H. Rogers, with whom *Mr. J. L. Skinner* and *Mr. Geo. C. Crump* were on the brief, for defendant in error in No. 199.

Mr. H. A. Ledbetter, *Mr. Winfield S. Farmer* and *Mr. Gordon Fryer* for plaintiff in error in No. 275.

Mr. James R. Wood, *Mr. George A. Fooshee* and *Mr. D. D. Brunson* for defendant in error in No. 275.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The opinion in *McDougal* v. *McKay*, announced today, *ante*, p. 372, considers and decides the questions involved in these writs of error and necessitates affirmation of the judgments of the Supreme Court of Oklahoma in both causes.

In No. 199, *Pigeon* v. *Buck*, all parties were enrolled full-blooded Creek Indians. The allottee, Lowiney Harjo, having received a patent to certain land, died July 12, 1905, intestate, without descendants, leaving father, mother, brothers, sister and her husband. Thereafter the father and mother—John and Mate Pigeon—claiming the land must be treated as an ancestral estate which passed to them in fee, conveyed their interest therein to Buck. The brothers and sister, maintaining that it was a new acquisition in the deceased and the father and mother took only a life estate with remainder in themselves, instituted suit to have their rights declared. The Supreme Court of Oklahoma (38 Oklahoma, 101) held the estate was ancestral and went half to the father and half to the mother according to the applicable provisions of chapter 49, Mansfield's Digest, Statutes of Arkansas.

In No. 275, *Roberts* v. *Underwood*, the land in question was allotted and patented to a full-blooded Chickasaw Indian who thereafter and in 1907 died intestate, leaving no descendants. A contest arose between his paternal relatives, Underwood and Byrd, and a maternal relative, Roberts, concerning their respective interests in the property. Under the Act of April 28, 1904, § 2, c. 1824, 33 Stat. 573, the devolution depended upon chapter 49, Mansfield's Digest, Statutes of Arkansas. The Supreme Court of Oklahoma (38 Oklahoma, 376) adjudged the estate must be treated as ancestral and that half passed to the paternal relatives and half to the maternal one.

Affirmed.

EXPORT AND IMPORT LUMBER COMPANY *v.* PORT BANGA LUMBER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 686. Argued March 15, 1915.—Decided April 26, 1915.

Where the jurisdiction of this court depends on the amount involved, the appeal must be dismissed unless the record fairly shows that the value in controversy exceeds the amount fixed by statute, the criterion being that which is actually in dispute.

Where defendant appeals from a judgment against it and plaintiff does not appeal although its prayer was for a larger amount, the amount in controversy is the amount of such judgment and the total amount of appellant's claim against plaintiff, and unless they aggregate the statutory amount there is no jurisdiction.

Under the Act of July 1, 1902, § 10, c. 1369, 32 Stat. 691, 695, this court has no jurisdiction of an appeal from the Supreme Court of the Philippine Islands unless the amount in controversy exceeds $25,000, and as that amount is not shown to be in controversy in this case the appeal is dismissed.

THE facts, which involve the jurisdiction of this court of appeals from the Supreme Court of the Philippine Islands, are stated in the opinion.

Mr. Clement L. Bouve and *Mr. James Ross* for defendant in error in support of the motion.

Mr. A. D. Gibbs for plaintiff in error in opposition to the motion.

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

This is an appeal from the Supreme Court of the Philippine Islands, allowed May 13, 1914. Our jurisdiction de-

pends on the amount involved; and a motion to dismiss must be sustained unless from a consideration of the whole record it fairly appears that "the value in controversy exceeds twenty-five thousand dollars." Act of July 1, 1902, § 10, c. 1369; 32 Stat. 691, 695. What is actually in dispute here is the criterion. *Bowman* v. *Chicago & Northwestern Railway Co.*, 115 U. S. 611, 613; *Martinez* v. *International Banking Corporation*, 220 U. S. 214, 221.

To avoid possible confusion their United States currency equivalents are used herein instead of the Philippine peso and centavo.

The Port Banga Lumber Company instituted a proceeding November 14, 1910, and afterwards filed an amended complaint, against appellant, the Export and Import Lumber Company, wherein it alleged that in March or April, 1910, the two companies entered into an oral arrangement to sell logs in the China trade upon joint account—the proceeds to be appropriated first to expenses and then equally divided; appellant on May 6, 1910, agreed to furnish to the China Import and Export Lumber Company logs at ninety cents per cubic foot; thereafter falsely pretending such stipulated price was twenty-seven and one-half cents appellant induced complainant to consent to an annulment of the oral arrangement between them and enter into a written one dated June 10, 1910, under which the latter agreed to supply the logs for twenty cents per cubic foot; and that at an expense of $7,211.43 it delivered 32,032 cubic feet and appellant collected therefor ninety cents per foot—$28,828.80. The complainant accordingly asked that the writing of June 10th be annulled; the oral contract be declared in force; and in harmony therewith judgment for $18,020.12.

The Export and Import Lumber Company denied the allegations in the complaint, except as specifically admitted, but said the written contract of June 10th was in

force and $2500.00 had been paid thereunder and accepted by complainant. It further set up that by the contract of May 6th it became obligated to furnish the China Import and Export Lumber Company designated logs within a specified time; on June 10th it transferred this duty to the complainant which failed fully to comply therewith; and as a consequence $8,750.00 had to be deducted from the sale price which otherwise would have been received. It therefore claimed damages to that extent and asked judgment accordingly.

Counsel admitted of record that 32,032 cubic feet of logs were delivered by complainant to the China Import and Export Lumber Company; and unquestionably appellant collected therefor 90 cents per foot, $28,828.80, less $8,750.00.

The court below held (26 Phil. Rep. 602; 27 Phil. Rep. *) the contract of June 10th was procured by fraud; the rights of the parties depended upon the oral agreement; the deduction of $8,750.00 from stipulated sale price should be taken into consideration; complainant was entitled to its expenses of $7,211.43; and that the balance of amount actually collected by appellant should be equally divided. A certain credit of $450.00, explanation of which is now unnecessary, having been allowed, judgment was entered April 3, 1914, against appellant for $13,195.12, together with $2,683.01 interest from November 14, 1910, when the original complaint was filed—in all $15,878.13. The Port Banga Lumber Company has not appealed and this is the maximum recovery which appellant can suffer.

According to appellant's theory the written contract of June 10th remained in force. A settlement thereunder would require a debit against it for logs delivered—32,032 cubic feet at twenty cents—of $6,406.40, and necessitate credits of $2,500.00, alleged payment on account, and $8,750.00, damages sustained. The resulting balance of $4,843.60, with interest from November 14, 1910, to

* Volume 27, not yet published and received.

April 3, 1914, $984.87, or $5,828.47, is the greatest sum for which it could have recovered judgment.

The maximum amount fairly in dispute is therefore the judgment of $15,878.13 against appellant, plus $5,828.47 which it sought to recover from appellee—a total of $21,706.60. *Dushane* v. *Benedict*, 120 U. S. 630, 636; *Buckstaff* v. *Russell*, 151 U. S. 626, 628; *Harten* v. *Löffler*, 212 U. S. 397, 403; *Keller* v. *Ashford*, 133 U. S. 610, 617; Philippine Code of Civil Procedure, § 510.

The value in controversy being under $25,000.00, the appeal must be

Dismissed.

BOOTH *v.* STATE OF INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 231. Argued April 19, 1915.—Decided May 3, 1915.

As the police power of the State extends to regulating coal mining, it cannot be limited by moments of time and differences of situation.

Where the highest court of the State has sustained a police statute under the State Constitution, this court is only concerned with questions of constitutionality under the Federal Constitution.

The Fifth Amendment is not applicable to the States.

The decision of the highest court of the state that the method of calling a police statute into operation is proper does not involve a Federal question reviewable by this court.

A police statute requiring owners of the mine to furnish certain conveniences for coal miners on request of a specified number of employés is not unconstitutional as denying equal protection of the law because it may be applied to one mine where some of the employés demand it, and not to another where such demand is not made by the specified number. *McLean* v. *Arkansas*, 211 U. S. 539.

The statute of Indiana requiring owners of coal mines to erect and maintain wash-houses for their employés at the request of twenty or more employés is not unconstitutional under the Fourteenth Amendment either as depriving the mine owners of their property without due process of law or as denying them the equal protection of the law.

100 N. E. Rep. 563, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection provisions of the Fourteenth Amendment of the coal mine wash-house law of Indiana, are stated in the opinion.

Mr. Henry W. Moore, with whom *Mr. Ulric Z. Wiley* and *Mr. T. J. Moll* were on the brief, for plaintiff in error:

The act under which plaintiff in error was convicted is not a valid exercise of police power; it does not serve the purpose for which it was intended.

The act is not in harmony with the principles of popular government; it goes beyond what is necessary and violates the purpose of the Fourteenth Amendment.

The act deprives a citizen of property without compensation or due process of law; is class legislation and violates both state and Federal Constitutions; it discriminates between persons equally entitled to its protection.

The legislature cannot delegate its authority to another body or private person or persons, nor can it abdicate its functions except to lawful public agencies.

A police regulation cannot be established except by the law-making power.

The act is in the nature of a "referendum" and is therefore invalid. It is also an arbitrary exercise of police power as applied to plaintiff in error.

Numerous authorities support these contentions.

Mr. Richard M. Milburn and *Mr. Leslie R. Naftzer,* with whom *Mr. Thomas M. Honan,* Attorney-General for the

State of Indiana, and *Mr. Thomas H. Branaman*, were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Error to review a judgment of conviction for the violation of a statute of Indiana entitled "An act requiring the owners and operators of coal mines and other employers of labor to erect and maintain wash-houses at certain places where laborers are employed, for the protection of the health of the employés, and providing a penalty for its violation." Section one reads as follows:

"*Coal Mining—Wash-houses for Laborers.*

"Section 1. Be it enacted by the General Assembly of the State of Indiana, That for the protection of the health of the employés hereinafter mentioned, it shall be the duty of the owner, operator, lessee, superintendent of, or other person in charge of every coal mine or colliery, or other place where laborers employed are surrounded by or affected by similar conditions as employés in coal mines, at the request in writing of twenty (20) or more employés of such mine or place, or in event there are less than twenty (20) men employed, then upon the written request of one-third (1/3) of the number of employés employed, to provide a suitable wash-room or wash-house for the use of persons employed, so that they may change their clothing before beginning work, and wash themselves, and change their clothing after working. That said building or room shall be a separate building or room from the engine or boiler room, and shall be maintained in good order, be properly lighted and heated, and be supplied with clean cold and warm water, and shall be provided with all necessary facilities for persons to wash, and also provided with suitable lockers for the safe-keeping of clothing. Provided, however, that the owner, operator, lessee, super-

intendent of or other person in charge of such mine or place as aforesaid, shall not be required to furnish soap or towels."

It is provided in § 2 that a violation of the act shall be a misdemeanor and punished by a fine, to which may be added imprisonment.

The prosecution was started by an affidavit charging Booth, he being the superintendent of a mine belonging to the Indiana Coal Company in one of the counties of the State, with a violation of the act for failure to provide a wash-house or wash-room as required by the statute after request in writing from twenty of the employés of the mine.

A motion to quash the affidavit and dismiss the charge was made on the grounds, stated with elaborate specifications, that the affidavit did not state an offense against the State of Indiana or the United States and that the statute violated both the constitution of the State and the Constitution of the United States.

The motion having been overruled, upon trial Booth was found guilty and fined one dollar and costs. He made a motion in arrest of judgment, repeating without details the grounds that he had charged in his motion to dismiss. The conviction was affirmed by the Supreme Court of the State. (100 N. E. Rep. 563.)

The record contains seventeen assignments of error. Plaintiff in error, however, waives five of them and is content to present his contentions in the other twelve. These contentions are, stated in broad generality, that the statute under review is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and certain articles of the constitution of the State of Indiana.

We are concerned only with the contention based on the Fourteenth Amendment, as the Fifth Amendment is not applicable to the States and the conformity of the

statute to the constitution of the State of Indiana has been adjudged by the Supreme Court of the State.

The specifications under the Fourteenth Amendment are: (1) That the statute deprives plaintiff in error of his property without due process of law; and (2) denies him the equal protection of the law.

The Supreme Court rejected both contentions, deciding that the statute was a legal exercise of the police power of the State, and the specific objection that the statute was invalid because it only applies to coal mines and not to other classes of business the court said was disposed of by *Barbier* v. *Connolly*, 113 U. S. 27, and *Soon Hing* v. *Crowley*, 113 U. S. 703, 708. The court quoted from the latter case as follows: "The specific regulation for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind."

Plaintiff in error, to sustain his contentions and to combat the conclusions of the Supreme Court, enters into a wide consideration of the police power. It has been so often discussed, that we may assume that both its extent and limitations are known. Their application in the present case can best be determined by considering the objections to it.

The first objection in the case at bar seems to be that the statute "applies solely and specifically to a particular class, engaged in a particular business, and is not in the interest of the public generally, as distinguished from a particular class." And it is further said that "it is a matter of common knowledge, of which courts take judicial notice, that the 'class' to which the act applies constitutes a very small percentage of population, and this being true, the act could not possibly be in the interest of the public health of the commonwealth."

The objection is answered by the cases already cited, by

Holden v. *Hardy*, 169 U. S. 366, and *McLean* v. *Arkansas*, 211 U. S. 539; and further comment is unnecessary.

But a distinction is sought to be made between what a legislature may require for the safety and protection of a miner while actually in service below ground and that which may be required when he has ceased or has not commenced his labors. Cases are cited which, upon that distinction, have decided that when a miner has ceased his work and has reached the surface of the earth his situation is not different from that of many other workmen and that, therefore, his rights are not greater than theirs and will not justify a separate classification.

We are unable to concur in this reasoning or to limit the power of the legislature by the distinctions expressed. Having the power in the interest of the public health to regulate the conditions upon which coal mining may be conducted, it cannot be limited by moments of time and differences of situation. The legislative judgment may be determined by all of the conditions and their influence. The conditions to which a miner passes or returns from are very different from those which an employé in work above ground passes to or returns from, and the conditions of actual service in the cases are very different, and it cannot be judicially said that a judgment which makes such differences a basis of classification is arbitrarily exercised, certainly not in view of the wide discretion this court has recognized, and necessarily has recognized, in legislation to classify its objects.

It is further said that the act "is inoperative in itself, for the reason that it can only be put into operation by the will and election of a specific number of the 'class' to which it applies, and consequently it fastens a burden upon the owners and operators of coal mines, which is 'a manifest injustice by positive law.'" The purpose of the comment, other than to give accent to the contention that the act has special operation, is part of the view elsewhere

urged that the provision is a delegation of legislative power. But with this objection we are not concerned. The Supreme Court of the State decided that the law could be called into operation by petition, and in the decision no Federal question is involved.

It is, however, further objected that the law discriminates because it may be applied to one mine and not to another, all other conditions being the same but the desire of the miners—indeed, discriminates upon a distinction more arbitrary than that, upon the desire of twenty in one mine as against a lesser number, nineteen, it may be, in another. The objection is a familiar one and has an instance and answer in *McLean* v. *Arkansas*, 211 U. S. 539. It is the usual ground of attack upon a distinction based on degree, and seems to have a special force when the distinction depends upon a difference in numbers.

But there are many practical analogies. The jurisdiction of a court is often made to depend upon amounts apparently arbitrarily fixed. For instance, the jurisdiction of the District Court of the United States (formerly the Circuit Court) is limited to civil suits in law and equity in certain instances in which the amount in controversy is $3,000. It could be objected, as it is here objected, that the amount is arbitrary and that there cannot be any difference in principle between suits for $3,000 and suits for $2,999, a distinction dependent upon one dollar. Indeed, in more acute illustration, the distinction may be made of one cent only. And so might there be objection to any amount which might be selected, as it might be also to any number of petitioning miners which the legislature of Indiana might have selected. Indeed, would not an objection have the same legal strength if the law had been made to depend upon anything less than unanimity of desire? To require that it might well have been thought by the legislature would render the legislation nugatory, and that a lesser number would call it into exercise and

attain its object. The conception, no doubt, was that a lesser number—indeed, the number selected—would be fairly representative of the desire and necessity of the miners and that use would breed a habit, example induce imitation and a healthful practice starting with a limited number might become that of all. And such consummation justified the effort, the manner adopted attaining the end sought as well as if not better than a direct and peremptory requirement of the miners and mine owners. The choice of manner was under the circumstances for the legislature and its choice was legal if it had the power to enact the law at all. Plaintiff in error disputes such power and thereby presents in its most general form his contention against the validity of the statute.

The contention seems to be independent of the objections that we have considered, and yet in counsels' discussion those objections and others are so mingled that it is impossible to discern which they consider especially vitiate the law and take it out of the power of government to enact.

The charge of its special application to coal mines and its other features of discrimination we have passed upon. The charge that it has no relation to health, we are not disposed to dwell upon. Counsel seem to think if the washing places were required to be put underground in connection with or in proximity to the working places, the law would be relieved from some criticism.

There remains to be considered only the contention that the law "is, within itself, a dead letter." And it is said that "it would forever lie dormant if not called into exercise and activity by the request of private persons." Or, as plaintiff in error otherwise expresses what he thinks to be the evil of the law, it "is not enforceable by any power which the state government possesses, under its constitution, or its laws enacted thereunder, but it is enforceable only upon the demand, the whim or the election

of a limited number of employés in the coal mining business." And it is declared that "this is the exercise of an arbitrary power, for an arbitrary private right, and against a private business."

We have quoted counsels' language in order to give them the strength of their own expressions of what they consider the vice of the law, but manifestly it is but a generalization from the particular objections which we have considered, and those objections we have sufficiently discussed.

Judgment affirmed.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* GRAY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 232. Argued April 19, 20, 1915.—Decided May 3, 1915.

This court will not express an opinion on the question of whether or not the trial court should have found that the injured employé was engaged in interstate commerce, where the error, if any, did the appellant no harm.

Where the claim of defendant railroad company against whom the verdict was rendered is that the plaintiff was engaged in interstate commerce and the case should have been tried under the Federal instead of the state statute, and the finding of the jury was warranted by the evidence, this court will not reverse if it does not appear that the defendant's position was worse because the state, instead of the Federal, law governed the case.

Under the Wisconsin law assumption of risk is merely a case of contributory negligence, and a finding of the jury that the plaintiff was not guilty of contributory negligence excludes the possibility that he assumed the risk.

THE facts, which involve the validity of a judgment for damages for personal injuries, are stated in the opinion.

Mr. Edward M. Smart for plaintiff in error.

Mr. Stephen J. McMahon for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for personal injuries. The plaintiff, Gray, was a hostler at Antigo, Wisconsin, having various duties as to receiving and preparing engines for departure, including the emptying of their ashes into the cinder pit and seeing that the coals in the pit were wet down. Just before the accident he had visited the cinder pit, to see whether the cinder pit man was doing his work, and had walked northward a short distance along a path between the track and a coal shed to a point opposite a rest house where he would await his next call to duty. He started to cross the track to the rest house and was struck by an engine coming from the south. The defendant offered evidence showing that it was an interstate road and that the round house and cinder pit served indifferently engines that passed the state line and those moving within the limits of the State, but did not attempt to show how the engine that struck the plaintiff was engaged. The evidence was rejected and the Supreme Court of the State sustained the rejection on the ground that it did not appear that the plaintiff's entire work consisted in the dispatching of engines engaged in interstate commerce or that he was employed in such commerce at the moment. It may be assumed that the railway company sufficiently saved its rights. The plaintiff got a large verdict, the jury finding specially that the engine that hit the plaintiff went north of the cinder pit in violation of the order of the defendant, that the engineer's negligence was the proximate cause of the injury, and that the plaintiff was guilty of no negligence that proximately contributed to the harm.

Of course the argument for the railway company is that Gray's employment on the cinder pit was employment upon an instrument of interstate commerce and so an employment in interstate commerce as fully as that of the track repairer in *Pedersen* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; see also *St. Louis, San Francisco & Texas Ry.* v. *Seale*, 229 U. S. 156; and that he was on duty at the time when he was struck as much as the fireman in *North Carolina R. R.* v. *Zachary*, 232 U. S. 248. But we find it unnecessary to express an opinion upon this argument since if there was an error it seems to have done the railway company no harm.

There are differences and similarities between the Wisconsin and Federal statutes, but we do not perceive that there is any difference that made the railway company's position worse if tried on the hypothesis that the state law governed. It is suggested that under the law of the United States the defendant could have argued that the plaintiff assumed the risk of this kind of negligence because he knew that it was a common occurrence for engines to run north of the cinder pit, not giving the proper signals. Without considering whether the testimony at all warranted a finding that Gray assumed the risk of a fellow servant's negligence, we deem it enough to say that by the Wisconsin law assumption of risk is merely a case of contributory negligence and that the finding of the jury that the plaintiff was not guilty of contributory negligence excludes the possibility that he assumed the risk. It also makes it unnecessary to consider differences between state and United States law that would have assumed importance had the finding upon contributory negligence been the other way. It is enough to add that the finding of the jury was warranted by the evidence. The plaintiff in error suggests that the special verdict required under the state law was improper under the United States law, but we see no ground for complaint in that. We need go no

farther as to the rest of the case than to say that no plain error appears. *Yazoo & Miss. Val. R. R.* v. *Wright*, 235 U. S. 376, 378.

Judgment affirmed.

UNITED STATES *v.* ERIE RAILROAD COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 580. Argued December 18, 1915.—Decided May 3, 1915.

Railroad yards belonging to the same railroad but several miles apart, such as those of the Erie Railroad at Jersey City, Weehawken and Bergen, although important accessories of the same terminal are not actually one yard, and trains moving between them are not engaged merely in switching operations, but are engaged in transportation within the purview of the air-brake provisions of the Safety Appliance Act.

212 Fed. Rep. 853, reversed.

THE facts, which involve the construction and application of the Safety Appliance Acts, are stated in the opinion.

Mr. Assistant Attorney-General Underwood for the United States.

Mr. George S. Hobart and *Mr. Gilbert Collins* for defendant in error.

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

This was a civil action by the United States to recover from the Erie Railroad Company a penalty for each of

several alleged violations of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended and supplemented by the acts of April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943; and April 14, 1910, c. 160, 36 Stat. 298.

The declaration contained twenty-six counts. The first seven were based upon the use of that number of cars having defective couplers, the eighth upon the use of a car without grab irons or handholds at one end, and the remaining eighteen upon the operation of that number of transfer trains in which less than eighty-five per cent. of the cars were controlled by air brakes. All of these acts were charged as having occurred in January and February, 1911, on the defendant's railroad while it was being used and operated in moving interstate traffic. The plea interposed was the general issue.

The case was tried twice. The first trial resulted in a judgment for the Government which was reversed by the Circuit Court of Appeals. 197 Fed. Rep. 287. At the second trial there was a directed verdict for the defendant and the judgment thereon was affirmed by that court. 212 Fed. Rep. 853. This writ of error challenges the judgment of affirmance.

There was no real conflict in the evidence, the material facts being as follows: The defendant operates an interstate railroad extending from New York City via New Jersey to Buffalo and Chicago. In that connection it maintains railroad yards, with docks for ferries and floats, on the west bank of the Hudson River, at Jersey City and Weehawken, where cars are received from and forwarded to various points around New York Harbor; and it maintains another yard at Bergen—inland two miles from Jersey City and three and one-half miles from Weehawken—where cars are received from and forwarded to western points. In the Jersey City yard there are 60 tracks, in the Weehawken yard 80 and in the Bergen

yard 115. Between the Bergen yard and the others is a hill about 250 feet high, which is pierced by a tunnel almost a mile in length. The three yards are connected by double tracks extending from Jersey City and Weehawken to the eastern portal of the tunnel and then passing through the tunnel to Bergen. The situation may be illustrated by treating the three yards as located at the outer points of the letter Y—Weehawken and Jersey City at the upper points and Bergen at the base—and connected by tracks conforming to the lines of that letter, the tunnel being along part of the lower line. The connecting tracks are not used by passenger trains but are the main tracks over which freight is moved from and to points around New York Harbor. Jersey City, Weehawken and Bergen are all stations at which freight, both local and interstate, is accepted and delivered, and are so shown in the defendant's tariff schedules. While the yards at these places are all used for receiving, storing, handling and forwarding cars, the work of classifying, distributing and assembling the cars preparatory to sending them to their ultimate destinations, west and east, is principally done in the Bergen yard. Most of the regular west-bound freight trains are made up and started in that yard and most of the regular east-bound freight trains are stopped and broken up there. Some regular trains carrying high-class freight pass Bergen without more than a temporary stop, but the greater part of the traffic is moved between the yards at Jersey City and Weehawken and the one at Bergen in transfer trains which only run between those yards and are operated over the double tracks before described. These transfer trains usually have about twenty-five cars, do not carry a caboose, are drawn and operated by engines and crews specially engaged in that service, and have flags and signal lights differing somewhat from those on other trains but answering the same purpose. They are not

run according to fixed schedules but at irregular intervals under the orders of yard masters and according to block signals. Their speed is from seven to eighteen miles an hour and they move great numbers of cars in each direction every day. All go through the tunnel, which is admitted to be very dark, and upon each trip they pass over several switches leading to other tracks, traverse part of the same line over which fifteen regular through and local freight trains are moved each day, and cross at grade tracks which are in daily use by approximately thirty-five passenger trains.

The cars named in the first eight counts of the declaration were defective in the particulars charged and while thus defective were hauled—six from Jersey City to Bergen and two from Weehawken to Bergen—in transfer trains along with other cars in commercial use. All of the defects were discovered in the yards from which the cars were moved and those in six of the cars could have been readily repaired in those yards by the local force of car repairers, consisting of seven men at Jersey City and five at Weehawken. The defects in two of the cars were serious and as to them Bergen may have been the nearest available point for making the necessary repairs. These cars were hauled by means of chains instead of draw-bars and there was no claim that they contained live stock or perishable freight.

The transfer trains named in the remaining eighteen counts were hauled—nine from Jersey City to Bergen, two from Weehawken to Bergen, one from Bergen to Jersey City and six from Bergen to Weehawken—without the requisite number of air brakes being in use or connected for use. On fourteen of these trains there was no attempt to connect any of the air brakes and on the remaining four less than 55 per cent. were connected. Brakemen were required to be on the cars and in some instances rode on the tops of box cars pursuant to a rule

of the defendant. No cars were switched out of or into these trains while they were on the way from one yard to the other.

The Circuit Court of Appeals rested its judgment upon the conclusions (a) that the three yards are not separate or distinct, but with the connecting tracks constitute a single and extensive yard, (b) that the movements of the transfer trains from Jersey City and Weehawken to Bergen and *vice versa* were mere switching operations and therefore not within the air-brake provision in the statute, and (c) that it was permissible under the statute to haul the cars with defective equipment in the circumstances disclosed.

We cannot assent to the view that the yards at Jersey City, Weehawken and Bergen are but a single yard. They doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from two to three and one-half miles apart, are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intra-yard movements, and are in actual practice treated as separate yards.

The original Safety Appliance Act is entitled "An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes. The first section makes it unlawful, among other things, for a railroad company engaged in interstate commerce "to run any train" in such commerce without having a sufficient number of the cars so equipped with train brakes—commonly spoken of as air brakes—that the engineer on the locomotive can control the speed of the train "without requiring brakemen to use the common hand brake for that purpose." The second section pro-

hibits such a carrier from hauling or using on its line in moving interstate traffic any car not equipped with couplers which can be coupled and uncoupled automatically "without the necessity of men going between the ends of the cars;" and the fourth section forbids the use in interstate commerce of any car not provided with secure grab irons or handholds in the ends and sides of the car "for greater security to men in coupling and uncoupling cars." The sixth section imposes for every violation of the act a penalty of $100, to be recovered by suit. The act of 1903, by its first section, provides that the requirements of the original act respecting train brakes, automatic couplers and grab irons shall be held to apply to "all trains" and cars "used on any railroad engaged in interstate commerce," unless falling within a minor exception without bearing here. By its second section this act requires that not less than 50 per cent. of the cars in a train shall have their train brakes used and operated by the engineer on the locomotive, confers upon the Interstate Commerce Commission authority to increase this minimum percentage to the end that the objects intended may be more fully accomplished, and makes the penal provision before named applicable to violations of the requirement as enlarged by the Commission. By an order promulgated June 6, 1910, and becoming effective September 1, following, the Commission increased the minimum number of cars whose train brakes must be under the engineer's control to 85 per cent.

It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the

air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo Ry.*, 205 U. S. 1; *S. C.*, 220 U. S. 590; *St. Louis, I. Mtn. &c. Railway* v. *Taylor*, 210 U. S. 281; *Chi., B. & Q. Ry.* v. *United States*, 220 U. S. 559; *Delk* v. *St. Louis &c. R. R., Id.*, 580; *Southern Railway* v. *United States*, 222 U. S. 20, 22; *Chicago &c. Ry.* v. *King, Id.*, 222; *Southern Railway* v. *Crockett*, 234 U. S. 725; *Minn. &. St. Paul Ry.* v. *Popplar*, *ante*, p. 369.

We are persuaded that the transfer trains moving from Jersey City and Weehawken to Bergen and *vice versa* came within the purview of the air-brake provision. They were made up in yards like other trains and then proceeded to their destinations over main-line tracks used by other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main-line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks and across passenger tracks whereon trains were frequently moving. Thus it is plain that, in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements. The original act prescribed that these appliances should consist of air brakes controlled by the engineer on the locomotive, and the act of 1903 declared that this requirement should

"be held to apply to all trains." We therefore conclude and hold that it embraced these transfer trains. Its applicability to this class of trains was considered and sustained in *Atchison, Topeka & Santa Fe Ry.* v. *United States,* 198 Fed. Rep. 637; *United States* v. *Grand Trunk Ry.,* 203 Fed. Rep. 775; *United States* v. *Pere Marquette Railroad,* 211 Fed. Rep. 220; and *La Mere* v. *Railway Transfer Co.,* 125 Minnesota, 159.

The hauling of the cars with defective equipment was clearly in contravention of the statute. While § 4 of the act of 1910 permits such cars to be hauled, without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars "by means of chains instead of drawbars" in association with other cars in commercial use, unless the defective cars "contain livestock or 'perishable freight.'" Six of the cars that were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of drawbars in association with other cars in commercial use, and it is not claimed that they contained livestock or perishable freight.

It follows that the District Court erred in directing a verdict for the defendant and the Circuit Court of Appeals erred in sustaining that ruling. The judgments of both courts must therefore be reversed and the case remanded to the District Court for a new trial.

It is so ordered.

UNITED STATES *v.* CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

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

No. 630. Argued January 7, 8, 1915.—Decided May 10, 1915.

Railroad yards belonging to the same railroad but several miles apart, such as those of the Chicago, Burlington & Quincy Railway at Kansas City on opposite sides of the Missouri River, are not actually one yard, and trains moving between them are not engaged merely in switching operations, but are engaged in transportation within the purview of the air-brake provision of the Safety Appliance Act.

211 Fed. Rep. 127, reversed.

THE facts, which involve the construction and application of the Safety Appliance Acts, are stated in the opinion.

Mr. Assistant Attorney General Underwood for the United States.

Mr. H. M. Langworthy, with whom *Mr. William Warner*, *Mr. O. H. Dean*, *Mr. W. D. McLeod* and *Mr. O. M. Spencer* were on the brief, for respondent.

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

This was an action for penalties under the law of Congress relating to safety appliances. Four violations were charged. One consisted in using a car with a defective coupler and the others in running certain transfer trains without having the requisite percentage of air brakes so connected that they could be operated by the engineer.

The first is no longer in controversy. As to the others the controverted question at the trial was not whether the air-brake requirement, if applicable, was violated, but whether it applied to such trains. The District Court, deeming the requirement applicable, directed a verdict and entered a judgment for the Government, and the Circuit Court of Appeals, being of a different opinion, reversed the judgment, one judge dissenting. 211 Fed. Rep. 12. A writ of certiorari granted under § 262 of the Judicial Code brings the case here.

The facts disclosed by the evidence are these: The defendant operates a railroad which passes through Kansas City, Missouri, and is used largely in interstate commerce. Among its terminal facilities at that point are two freight yards known as the Twelfth Street yard and the Murray yard. These yards are on opposite sides of the Missouri River, the distance between their nearest points being about two miles. The track connecting them is one by which passenger and freight trains enter and leave the city, in other words, a main-line track. For a distance of 3,000 feet it is upon a single track bridge spanning the river, and off the bridge it intersects at grade twelve or fifteen tracks of other companies and passes through the Union Depot tracks. Besides its use by the defendant's trains, a considerable portion of it is also the line by which the passenger trains and some of the freight trains of the Rock Island and Wabash railroads enter and leave the city.

Both yards are used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing and distributing cars. To reach their ultimate destinations, whether on the defendant's road or on those of other carriers, a large proportion of the cars have to be moved from one yard to the other, and this is accomplished by transfer trains which are run over the main-line track connecting the yards. These

trains usually consist of an engine and about thirty-five cars, are operated by what are termed yard or switching crews, and carry no caboose or markers. They have no fixed schedules and are not controlled by a train dispatcher but by block signals, as are all other trains moving over the same track. Each train is moved as a unit from one yard to the other and not infrequently is both preceded and followed by other trains, passenger and freight.

The three trains, the running of which is charged to have been violative of the statute, were transfer trains of the class just described. They were run from one yard to the other on August 9, 1910, and were composed respectively of 42, 36 and 39 cars, of which only 9 in one train and 10 in each of the others had their air brakes connected for use by the engineer. At that time air brakes were required to be used on 75 per cent. of the cars in a train. 11 I. C. C. 429, 437.

Giving effect to the views quite recently expressed in *United States* v. *Erie Railroad Company*, *ante*, p. 402, we think these trains came within the air-brake requirement, which the amendatory act of 1903 declares "shall be held to apply to all trains . . . on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally de-

signed to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it.

The judgment of the Circuit Court of Appeals must therefore be reversed and that of the District Court affirmed.

It is so ordered.

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

COE *v.* ARMOUR FERTILIZER WORKS.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 140. Submitted January 20, 1915.—Decided May 3, 1915.

Where the case was tried twice below and twice went to the highest court of the State and the Federal question was decided adversely to plaintiff in error on the first appeal, he is not concluded thereby because he failed to then take a writ of error if it appears that the first judgment of the higher court did not finally dispose of the case but required further proceedings in the court below.

Not until the judgment of the court of last resort is final will a writ of error lie to this court under § 237 Judicial Code.

The contention that under the local practice on a second writ of error to the Supreme Court of the State a Federal question that was passed on at the first hearing is not open, cannot be sustained in this court if as a matter of fact the state court did pass on the question on the second hearing and decide it adversely to plaintiff in error.

Any course of procedure having for its object the taking of property to satisfy an alleged legal obligation without according any hearing to a respectful protest invoking the supreme law of the land cannot be regarded as due process of law.

Section 2677, General Statutes of Florida of 1906 as amended in 1909, as construed by the highest court of the State, is repugnant to the due process provision of the Fourteenth Amendment in so far as it allows, after execution has been returned "no property" against a corporation, an execution to issue against a stockholder for the same debt to be enforced against his property to the extent of his unpaid subscription as the same appears on the books of the corporation without notice to such stockholder or other preliminary step.

While a judgment against a corporation without fraud or collusion in a court having jurisdiction may be made conclusive upon the stockholder, as to existence and amount of the debt, the property of a third party may not be taken to satisfy that debt upon the ground that he is a stockholder and indebted to the corporation without granting him an opportunity to be heard.

One protesting against his property being taken without due process of law cannot be denied such process on the ground that due process would lead to the same result as he had no defense on the merits.

Extra-official or casual notice, or a hearing granted as matter of favor or discretion, does not take the place of the notice with right and opportunity to be heard which the due process provision of the Federal Constitution requires.

In this case the execution was not a mere attachment establishing a lien without going further until after opportunity to be heard.

Where defendant comes into court for the sole purpose of objecting on jurisdictional grounds to the execution of final process against his property his petition cannot, under the due process provision of the Fourteenth Amendment, be converted into a tender of an issue of fact respecting his status as a stockholder so as to conclude him on a matter not within the pleadings and which was not litigated.

63 Florida, 64, reversed.

THE facts, which involve the constitutionality of § 2677, General Statutes of Florida of 1906, as amended by the act of 1909, c. 5892, relating to the liability of stockholders for judgment debts of the corporation to the extent of their subscriptions remaining unpaid, are stated in the opinion.

Mr. W. A. Carter for plaintiff in error:

The statute is unconstitutional, as violating the Fourteenth Amendment. *In re Rosser*, 101 Fed. Rep. 562, 567; *Louisville Trust Co.* v. *Cominger*, 184 U. S. 18; *Rouse* v. *Donovan*, 62 N. W. Rep. 359; *Lauder* v. *Tillia*, 11 Atl. Rep. 86; *Lauder* v. *Logan*, 16 Atl. Rep. 44; *Wilson* v. *Seligman*, 36 Fed. Rep. 154; *Pennoyer* v. *Neff*, 95 U. S. 714.

Notice to stockholder is necessary to charge him for corporate debts. Thompson on Corps., §§ 3596, 3598, 3591, 3602.

Hampson v. *Weare*, 4 Iowa, 12; *Donworth* v. *Coolbaugh*, 5 Iowa, 300; *Bank of Columbia* v. *Okely*, 4 Wheat. 326; *Bernheimer* v. *Converse*, 206 U. S. 5–16; *Straw Co.* v. *Kilbourne Boot Co.*, 80 Minnesota, 125, relied upon by defendant in error can be distinguished.

Mr. O. K. Reaves for defendant in error:

The first decision of the Supreme Court of Florida has become the law of this case and cannot be changed by this writ of error from the second decision of said Supreme Court. *Valdosta Mercantile Co.* v. *White*, 56 Florida, 704; *Anderson* v. *Northrop*, 44 Florida, 472; *McKinnon* v. *Johnson*, 57 Florida, 120; *Knight* v. *State*, 44 Florida, 94; *Clark* v. *Keith*, 106 U. S. 464; *Supervisors* v. *Kennicott*, 94 U. S. 499; *Browder* v. *McArthur*, 7 Wheat. 55; *Ogden* v. *Saunders*, 12 Wheat. 332; *Bell* v. *Niles*, 61 Florida, 114; *Hoopes* v. *Crane*, 56 Florida, 395; *Dunellon Phosphate Co.* v. *Crystal River Co.* (Fla.), 58 So. Rep. 787.

The statute does not contravene the Fourteenth Amendment. 10 Cyc., p. 670, note 47; *Eames* v. *Savage*, 77 Maine, 212; *Stanley* v. *Stanley*, 26 Maine, 191; *Vial* v. *Penniman*, 103 U. S. 714; *Bernheimer* v. *Converse*, 206 U. S. 516; *Hampson* v. *Weare*, 4 Iowa, 13; *Armour Fertilizer Works* v. *Parrish Vegetable Co.*, 63 Florida, 64; *Bank* v. *Okely*, 4 Wheat. 233; Cooley's Const. Lim., 7th ed., 506; *Dutton Phosphate Co.* v. *Priest* (Fla.), 65 So. Rep. 282;

Castillo v. *McConnico*, 168 U. S. 674; *Blanchard* v. *Burrus*, 20 Florida, 467; *Louis. & Nash. R. R.* v. *Schmidt*, 177 U. S. 230; *State ex rel. Canfield*, 40 Florida, 36; *Barnett* v. *Hickson* (Fla.), 41 So. Rep. 606; *Ex parte Scudamore*, 55 Florida, 211.

Wilson v. *Seligman*, 36 Fed. Rep. 154; *Pennoyer* v. *Neff*, 95 U. S. 714; *Rouse* v. *Donovan*, 62 N. W. Rep. 359; *Lauder* v. *Tillia*, 11 Atl. Rep. 86, relied upon by plaintiff in error distinguished.

Mr. Justice Pitney delivered the opinion of the court.

The Armour Fertilizer Works, having recovered in the Circuit Court for Manatee County, Florida, a judgment for about $3,000 against the Parrish Vegetable & Fruit Company, a corporation, sued out a writ of execution against the goods and lands of that company and placed it in the hands of the sheriff, who returned that he was unable to find any property of the judgment debtor whereon to levy. Thereupon, pursuant to § 2677, Gen. Stat. Fla. 1906, as amended by act of 1909, c. 5892, the Fertilizer Works sued out an execution against the goods and lands of the plaintiff in error, Henry L. Coe, as a stockholder of the Vegetable Company. This writ set forth the recovery of the judgment by the Fertilizer Works against the Company, mentioning the date, the amount, and the court in which it was recovered, the issuing of execution against that company and the return thereon, and commanded that there be made of the property of Coe, as one of the stockholders of the Company, "an amount equal to the amount remaining unpaid upon the subscription of the said Henry L. Coe to the stock of said corporation." A formal levy was made upon a parcel of land, the property of Coe, but there was no interference with his possession, nor had any step been taken towards selling the land, when Coe filed in the Circuit Court a petition to quash the execution as issued

illegally, alleging that it had been issued without notice to him and amounted to the taking of his property without due process of law, and that the statute permitting it was void under the constitution of Florida, and was also repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment. The Circuit Court entered judgment in the following words: "The execution is quashed, but not on the ground of unconstitutionality of the statute. The statute is constitutional, but the execution cannot issue till some preliminary steps are taken." The Fertilizer Works removed the cause by writ of error to the Supreme Court of Florida, and that court reversed the judgment (63 Florida, 64), holding that the statute required no preliminary step to be taken before an execution might be issued against a stockholder, and that there was no general law or rule requiring previous notice to him. The court further said:

"A stockholder of a corporation becomes such charged with knowledge that under the statute upon the return of *nulla bona* upon an execution issued against the corporation an execution may be issued against him for the unpaid subscription to the stock he holds. . . . . The statute above quoted [sec. 2678, Gen. Stat. 1906, set forth below] affords the means by which the officer holding the execution may obtain definite information as to the stockholders and the unpaid subscriptions on the stock. If the person against whom the execution is issued is not in fact a holder of stock upon which there is unpaid subscription, or if the amount of the execution is in excess of the unpaid subscription, the stockholder may have appropriate relief under the statute providing for the testing of the legality of executions. See Sections 1624 and 1625, Gen. Stats. of 1906."

The case went back to the Circuit Court with a mandate "that such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme

Court, and the laws of the State of Florida, ought to be had." It was again brought on for hearing before the Circuit Court, when, without further pleadings or evidence on either side, judgment was rendered denying the motion to quash. Upon Coe's writ of error, the Supreme Court affirmed this judgment, for reasons expressed as follows:

"Coe does not claim that he was [not] in fact a stockholder, nor that there remains no balance due upon his stock, nor seek to interpose any of the defenses pointed out as open to him upon the former hearing, but stands boldly on his attack upon the constitutionality of the act, and by a proceeding unknown to our practice. There does not appear to have been any forcible seizure of any property of the said Coe, other than the formal levy upon realty, which does not interfere with the owner's possession. The statute presents many difficulties, that may arise as to others not similarly situated, and may as such be beyond the power of the legislature; but the party now before this court has not brought himself within the class who may justly complain, and the judgment as to him, upon the authority of our former holding, is, therefore, affirmed."

The present writ of error was then sued out.

Defendant in error moves to dismiss, upon the ground that, according to the local practice, the opinion delivered by the Supreme Court upon the first writ of error decided the question involved and became the law of the case, so that plaintiff in error, having failed to take a writ of error upon that judgment, was thereafter concluded by it. But, as appears from what has been stated, the first decision did not conclude the litigation; it called for further proceedings in the Circuit Court, and not until the judgment rendered by that court on the going down of the mandate had been affirmed upon the second writ of error did there exist a final judgment in the court of last resort of the state, such as might be brought under

the review of this court by virtue of § 237, Jud. Code, act of March 3, 1911, § 237, c. 231, 36 Stat. 1087, 1156. Besides, the contention that, by the local practice, the Federal question was not open for discussion or consideration upon the second writ of error is conclusively disposed of by the fact that the Supreme Court did, on that occasion, again consider it, with the result that the state law and the authority exercised under it were upheld as valid and not repugnant to the Constitution of the United States, and the immunity especially set up and claimed by plaintiff in error under that Constitution was overruled. *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248, 257, and cases cited. The statement in the second opinion, that the attack of plaintiff in error upon the constitutionality of the act was "by a proceeding unknown to our practice," does not, we take it, mean that the court did not necessarily pass upon the constitutional question. We are not sure we clearly comprehend the meaning of the expression quoted, in view of the effect attributed to §§ 1624 and 1625 in this case and in earlier decisions cited below. It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed "due process of law." The constitutional guaranty is not to be thus evaded, and we cannot believe there was any purpose to evade it in this case. Upon the whole, the right of review in this court is clear, and the motion to dismiss the writ of error must be denied.

The Florida statutes upon which the controversy turns are set forth in the margin.[1] That we may not

[1] GEN. STAT. FLORIDA 1906

SEC. 2677. (2152.) MAY ISSUE AGAINST STOCKHOLDERS.—If any execution shall issue against the property or effects of any corporation,

misapprehend the construction placed upon them by the state court of last resort, or the ground of its opinion that they afforded due process of law to plaintiff in error,

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and there cannot be found whereon to levy, then such execution may be issued against any of the stockholders to an extent equal in amount for so much as may remain unpaid upon the subscription and no further; and all property whether real or personal of any stockholder in any corporation aforesaid shall be exempt from the debts and liabilities of such corporation contracted in its corporate capacity, except the stock of said stockholder of or in said corporation to the extent mentioned aforesaid.

[Amended by Florida Laws 1909, Ch. 5892, to read as follows:

2677. (2152.) May Issue Against Stockholders.—If any execution shall issue against the property or effects of any corporation, and there cannot be found whereon to levy, then such execution may be issued against any of the stockholders to an extent equal in amount for so much as may remain unpaid upon their subscription to capital stock and no further.]

2678. (2153.) Custodian of Records to give Sheriff Necessary Information.—The clerk or other officer having charge of the books, records and papers of any corporation, on demand of any officer holding execution against the same, shall furnish such officer with the name, places of residence and the amount of liability of every person liable as aforesaid, and if such officer refuses so to do he shall, upon complaint thereof, be liable to a fine not exceeding five hundred dollars.

1624. (1195.) Upon Affidavit of Illegality and Bond.—If any execution shall issue illegally, the defendant in execution, his agent or attorney, may procure a stay of the same by making and delivering to the officer having the execution an affidavit stating the illegality and whether any part of the execution be due, and a bond payable to the plaintiff with two good and sufficient sureties in double the amount of the execution or the part of which a stay is sought. Upon receipt of such affidavit and bond the officer shall stay any proceeding on the execution and return the bond and affidavit to the court from which the execution issued, and such court shall pass upon the question of illegality as soon as possible. If the execution be adjudged illegal in any part the court shall make an order staying it as to such part, but if it be adjudged legal in whole or in part, the court shall (or if it has a clerk, shall direct such clerk to) enter up judgment against the principal and sureties on such bond for the amount of so much

it will be well to briefly review their history. Sections 2677 and 2678 trace their origin to §§ 22 and 23 of an act of 1868 (Laws, p. 123, ch. 1639), which followed the model of § 36 of the Companies Clauses Consolidation Act 1845 (8 & 9 Vict. Cap. 16), except that they permitted execution against the stockholder to an extent "equal in amount to the amount of stock by him owned, together with any amount unpaid thereon." There was a proviso, as in the English act, that no such execution should issue except upon an order of the court, "made upon motion in open court after good and sufficient notice in writing to the person upon whom execution is desired." These sections were repealed in 1874 (Laws, p. 95, ch. 2016), and reënacted in 1879, with insignificant verbal modifications (Laws, p. 118, ch. 3165, §§ 9 and 10). By an act of 1887 (Laws, p. 96, ch. 3729), the liability of stockholders to the creditors of the corporation was limited to "so much as may remain unpaid upon his or her subscription." In the Revision of 1892 this limitation of the liability was engrafted upon the act of 1868 as reënacted in 1879, and at the same time the provision for notice to the stockholder prior to the issuing of the execution was omitted. The result appeared as §§ 2152 and 2153 of that Revision, found as §§ 2677 and 2678 in the General Statutes of 1906. The amendment of 1909 was apparently passed for the purpose of bringing the phraseology of the section into conformity with the judicial construction, as declared in *Knight & Wall Co.* v. *Tampa S. L. B. Co.*, 55 Florida, 728, 743, 744.

Meanwhile, and from an early period, the laws of Florida

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of the execution as shall be adjudged to be legal, and execution shall forthwith issue thereon.

1625. (1196.) UPON MOTION.—The court before which an execution is returnable may, on a motion and notice to the adverse party, for good cause, upon such terms as the court may impose, direct a stay of the same, and the suspension of proceedings thereon.

have contained provisions for testing the legality of any writ of execution upon application of the defendant made after its issue. Sections 1624 and 1625, Florida Gen. Stats. 1906, referred to in the opinion of the Supreme Court above quoted, originated in acts of 1834 (Laws, p. 13, ch. 742), and of 1844 (Laws, p. 54, § 6), concerning which the court has repeatedly held that they provide separate, consistent, and independent remedies; the one by proceeding before the sheriff, the other before the court or a judge in vacation; and that the courts of law have full power to revoke, correct, restrain, or quash their own process in the course of their ordinary jurisdiction, so that no recourse to a court of equity is necessary. *Mitchell* v. *Duncan*, 7 Florida, 13, 19; *Robinson* v. *Yon*, 8 Florida, 350, 354; *Mathews* v. *Hillyer*, 17 Florida, 498, 500; *Barnett* v. *Hickson*, 52 Florida, 457, 460.

We understand, therefore, that in the present case the court held that under § 2677, as amended in 1909, on a return of "no property" upon an execution against a corporation, an execution may be issued against any stockholder without notice to him or other preliminary step; that the writ is to be enforced against his property to the extent of his unpaid subscription to the stock that he holds in the company, and this amount the officer ascertains from the custodian of the records of the corporation, in accordance with § 2678; that if the person against whom the execution is issued is not in fact a holder of stock upon which there is an unpaid subscription, or if the amount of the execution exceeds the unpaid subscription, he may have relief under §§ 1624 or 1625; and that, in the absence of such objection on his part, the execution is enforced, although there may have been only a formal levy, without even such notice to the owner of the property as might be implied from a forcible seizure or an interference with his possession.

Thus construed, and as applied in this case, we think

§ 2677 is repugnant to the "due process of law" provision of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect.

It may be conceded that a judgment recovered against a corporation, without fraud or collusion, in a court having jurisdiction over the subject-matter and the party, may consistently with the Fourteenth Amendment be treated as concluding the stockholder respecting the existence and amount of the indebtedness so adjudged. *Sanger* v. *Upton, Assignee,* 91 U. S. 56, 59; *Hawkins* v. *Glenn,* 131 U. S. 319, 329; *Glenn* v. *Liggett,* 135 U. S. 533, 544; *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329, 337. But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself. See *Great Western Telegraph Co.* v. *Purdy, ubi supra; Bernheimer* v. *Converse,* 206 U. S. 516, 528, 532; *Converse* v. *Hamilton,* 224 U. S. 243, 256; *Selig* v. *Hamilton,* 234 U. S. 652, 660.

The suggestion that because, under §§ 1624 and 1625, a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues and before interference with his possession or his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not "within the class who may justly complain," will not withstand critical analysis.

The statute mentions no classes, and the state court

merely distinguished between those who complain and those who do not. Against one and all, execution may be issued without notice or hearing; the judgment against the corporation, and the record of stockholdings and stock subscriptions found upon the books of the corporation, being treated as conclusive against those named as stockholders. If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or receiving it makes no objection, his property is taken in satisfaction of the corporation's debt—manifestly without due process of law. But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* v. *Watertown*, 19 Wall. 107, 123.

Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart* v. *Palmer*, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an op-

portunity to be heard." The soundness of this doctrine has repeatedly been recognized by this court. Thus, in *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute" (citing the New York case). So, in *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127, 138, the court said: "This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace." In *Roller* v. *Holly*, 176 U. S. 398, 409, the court declared: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." And in *Louis. & Nash. R. R.* v. *Stock Yards Co.*, 212 U. S. 132, 144, it was said: "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

The writ of execution cannot of itself be treated as equivalent to a writ of attachment, establishing a lien upon the stockholder's property, but going no further until he has had an opportunity to show cause why that property should not be applied to the payment of the corporation's debt. Not only is such a purpose wholly unexpressed in the writ, but such is not its normal function or effect, no "day in court" is named, and there is no provision for notice or monition by service, publication, mailing, or otherwise. *Windsor* v. *McVeigh*, 93 U. S. 274, 279, *et seq.; Grannis* v. *Ordean*, 234 U. S. 385, 393.

This case bears no proper analogy to *York* v. *Texas*, 137 U. S. 15, 21; *Kauffman* v. *Wootters*, 138 U. S. 285; and *Western Indemnity Co.* v. *Rupp*, 235 U. S. 261, 272;

where it was held that a State, without violence to the due process clause of the Fourteenth Amendment, may so regulate its practice that a person who voluntarily enters one of its courts to contest any question in a pending action—even a person appearing specially to object that the court has not acquired jurisdiction over him—may be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and hence be bound by its determination of the merits if his objection to the jurisdiction be overruled. For in this case there was no pending action or issue; plaintiff in error came into court to object, on jurisdictional grounds, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state constitution and the Fourteenth Amendment into a tender of an issue of fact respecting his status as a stockholder and the amount of his unpaid subscription, if any, and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this, without his consent—and the record shows no consent—is contrary to fundamental principles of justice. *Reynolds* v. *Stockton*, 140 U. S. 254, 268, 269.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ERIE RAILROAD COMPANY *v.* SOLOMON.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 559. Argued February 24, 1915.—Decided May 10, 1915.

Writ of error to review the judgment of a state court, in an action for personal injuries based on the Safety Appliance Law of the State substantially identical with the Federal law, and affirmed by the intermediate appellate and the highest court of the State without opinion, dismissed for want of jurisdiction under § 237, Judicial Code.

Even if the highest court of the State, after affirmance, certified as part of the record the fact that it had been necessary to consider the Federal Safety Appliance Act and to determine whether the Ohio Safety Appliance Act, as construed by the trial court, is not repuguant to the Fourteenth Amendment, the Federal questions suggested as the basis for the writ of error in this case are so frivolous as not to afford jurisdiction under § 237, Judicial Code.

THE facts, which involve the construction and application of the Safety Appliance Act and the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. Leroy Manchester, with whom *Mr. C. D. Hine* was on the brief, for plaintiff in error:

A right, privilege and immunity from liability was asserted and denied under the provisions of the Safety Appliance Act of the United States. The Federal Safety Appliance Act controls. The coupler satisfies the statute.

A right, privilege, and immunity from liability was asserted and denied under the Fourteenth Amendment.

In support of these contentions see *Atlantic Coast Line* v. *United States*, 168 Fed. Rep. 175; *Binns* v. *United States*, 194 U. S. 486, 495; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 463; *Chicago, M. & St. P. Ry.* v. *Voelker*, 129 Fed. Rep. 522; *C., B. & Q. R. R.* v.

United States, 211 Fed. Rep. 12; *Chicago &c. Ry. Co.* v. *Chicago*, 166 U. S. 226, 241; *Chicago, Milw. & St. P. R. R.* v. *United States*, 165 Fed. Rep. 423; *Coggs* v. *Bernard*, 2 Ld. Ray. 911; *Devine* v. *Chicago & C. R. R.* (Ill.), 102 N. E. Rep. 803; *Davidson* v. *New Orleans*, 96 U. S. 97, 102; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Morris* v. *St. Louis S. W. Ry.* (Texas), 158 S. W. 1055; *Pennell* v. *Phila. & Reading R. R.*, 231 U. S. 675; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754; *St. Louis & I. Mtn. R. R.* v. *Taylor*, 210 U. S. 281; *Siegel* v. *N. Y. Cent. & H. R. R.*, 178 Fed. Rep. 873; *Southern Railway* v. *Crockett*, 234 U. S. 725; *United States* v. *Harris*, 177 U. S. 309; *Un. Pac. R. R.* v. *Brady*, 161 Fed. Rep. 719; *United States* v. *Erie R. R.*, 197 Fed. Rep. 287; *S. C.*, 212 Fed. Rep. 853; *United States* v. *Boston & Maine R. R.*, 168 Fed. Rep. 148; *United States* v. *Rio Grande Ry. Co.*, 174 Fed. Rep. 399; *United States* v. *Atchison, T. & S. F. Ry.*, 150 Fed. Rep. 442; *United States* v. *Illinois Cen. R. R. Co.*, 170 Fed. Rep. 542, 549; *United States* v. *Kirby*, 7 Wall. 482; *Wetmore* v. *Markoe*, 196 U. S. 68, 77.

This court has jurisdiction as Federal questions exist, and were properly raised.

A right, privilege, and immunity from liability was asserted and denied under the provisions of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531; as amended by the act of March 2, 1903, 32 Stat. 943, 976; 16 Cyc., 861, and cases cited; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

A right, privilege, and immunity from liability was asserted and denied under the Fourteenth Amendment.

These Federal questions were properly raised. *Rector* v. *City Deposit Bank*, 200 U. S. 405, 412; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142; *San Jose Land* v. *San Jose Ranch Co.*, 189 U. S. 177; *Haire* v. *Rice*, 204 U. S.

291; *Atchison, T. &c. R. R.* v. *Sowers,* 213 U. S. 55, 63; *Carlson* v. *Washington,* 234 U. S. 103; *Arkansas Southern Ry.* v. *German Bank,* 207 U. S. 270; *Furman* v. *Nichols,* 8 Wall. 44; *Crapo* v. *Kelly,* 16 Wall. 610; *Andrews* v. *Andrews,* 188 U. S. 14; *Pennywit* v. *Eaton,* 15 Wall. 380; *Louis. & Nash. R. R.* v. *Higdon,* 234 U. S. 592; *Mo. Pac. Ry. Co.* v. *Larabee,* 234 U. S. 459; *Western Turf Ass'n* v. *Greenburg,* 204 U. S. 359; *Ill. Cent. R. R.* v. *Chicago,* 176 U. S. 646; *Blythe* v. *Hinckley,* 180 U. S. 333; *Meyer* v. *Richmond,* 172 U. S. 82; *East Tenn. &c. Ry.* v. *Frazier,* 139 U. S. 288; *Home for Incurables* v. *New York,* 187 U. S. 155; *Eau Claire Bank* v. *Jackman,* 204 U. S. 522; *Hammond* v. *Whittredge,* 204 U. S. 538; *Nutt* v. *Knut,* 200 U. S. 12; *McCormick* v. *Market Bank,* 165 U. S. 538; *California Bank* v. *Kennedy,* 167 U. S. 362; *Ill. Cent. R. R.* v. *McKendree,* 203 U. S. 514; *St. Louis & I. M. Ry.* v. *Taylor,* 210 U. S. 281, 293; *Southern Ry.* v. *Crockett,* 234 U. S. 725; *Nor. Car. R. R.* v. *Zachary,* 232 U. S. 248; *Miedreich* v. *Lauenstein,* 232 U. S. 236; *Grannis* v. *Ordeau,* 234 U. S. 385; *International Harvester Co.* v. *Missouri,* 234 U. S. 199; *Louis. & Nash. R. R.* v. *Higdon,* 234 U. S. 592.

Mr. Emil J. Anderson for defendant in error.

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

Solomon, the defendant in error, sued to recover for personal injuries suffered by him while he was working as a brakeman on a switch engine in the yard of the defendant company at Youngstown, Ohio. The negligence charged was that the tender of the engine had a defective coupler in that the knuckle and pin on the same could not be worked without going between the cars and that the draw-bar had so much side play that it would not meet the couplers of other cars and therefore would not

automatically couple by impact. The first defect may be put out of view as the jury found it did not exist. As to the second, the respective contentions at the trial were, on the part of the plaintiff, that the play of the draw-bar was so great as to cause the coupler to be defective, and on the part of the defendant, that while the draw-bar may have had some side play it only existed to the degree which was essential in such an appliance and therefore there was no defect. The trial court submitted the case to the jury on the theory that the coupler was defective if it had an unusual side play and conversely that it was not if it did not have such a degree of side play. From the pleadings and the course of the trial there is no room for dispute that the case was tried upon the theory that the right to recover was based on the Safety Appliance Law of Ohio, substantially identical in its terms with the Safety Appliance Law of the United States. The judgment on the verdict of the jury in favor of the plaintiff was affirmed without opinion by the Circuit Court and again affirmed without opinion by the Supreme Court of Ohio to which judgment the writ of error now before us was prosecuted.

Confining the case to the statement just made it is beyond dispute that there is no jurisdiction to review, but it is insisted that the case is not so confined because after affirmance the court below entered an order which it directed should be made part of the record certifying that in deciding the case it became necessary for it to consider whether the United States Safety Appliance Law was applicable and whether as construed by the trial court the state law if applicable was not repugnant to the due process clause of the Fourteenth Amendment. But assuming that the recited Federal questions are in the record and require consideration, they are so without merit and frivolous as not to give basis for jurisdiction: First, because such plainly is the result of the contention that error to

the prejudice of the defendant company concerning the United States Safety Appliance Law, if that law applied, was committed by instructing that it exacted a usual, that is, ordinary degree of care in the appliances to which that act related. And second, because a like view inevitably is necessary concerning the contention that the State Safety Appliance Law, if it applied, would be repugnant to the Fourteenth Amendment if it exacted a usual and ordinary degree of care. But this is not adequate to dispose of the case since the argument is that error as to the recited Federal question directly arose from the refusal of the court to instruct a verdict for the Railroad Company on the ground that there was no proof tending to show an unusual or any defect in the coupler, thereby permitting the jury to find a liability under the law of the United States where none existed, and under the theory of the application of the state law, causing such law to impose a liability for an appliance which was not defective, and hence to take property without due process of law. But while the proposition changes the form of the contention, it does not change the substance of things since we are of the opinion after an examination of the record that the contention that the case should have been taken from the jury on the ground stated is so wholly devoid of merit and wanting in substance as to afford no basis for jurisdiction. As a proposition which is unsubstantial and frivolous cannot be made substantial by asserting another proposition of the same character, it results that there is no ground for the exercise of jurisdiction and the writ of error is therefore

Dismissed for want of jurisdiction.

PENNSYLVANIA RAILROAD COMPANY *v.* KEYSTONE ELEVATOR AND WAREHOUSE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 683. Argued April 24, 1915.—Decided May 10, 1915.

In a suit against a carrier for services for handling grain through plaintiff's elevators, the referee rejected evidence as to the ownership of almost the entire stock of the elevator company by a member of the firm which shipped the grain, and also an opinion of the Interstate Commerce Commission of later date than the services rendered: *held* that as the offer of evidence did not bring in the Act to Regulate Commerce and allege that the plaintiff was merely acting as a tool for the shipper to obtain rebates, the action was merely one for services, and, no Federal question being involved, this court has no jurisdiction under § 237, Judicial Code, to review the judgment of the state court.

Writ of error to review 246 Pa. St. 336, dismissed.

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

Mr. M. Hampton Todd for defendant in error in support of the motion

Mr. John Hampton Barnes for plaintiff in error in opposition to the motion.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the defendant in error to recover reasonable compensation for services rendered in handling grain through its elevators. The plaintiff proved to the sat-

isfaction of the referee to whom the parties agreed to submit the case that thirty-five cents a ton, the rate demanded, was a reasonable rate. To meet this the defendant offered to prove that Harvey C. Miller owned 93.6 per cent. of the plaintiff's stock; that he also was a member of the firm of L. F. Miller & Sons, for which 90 per cent. of the plaintiff's business now in question was done; that the grain handled came from other States over the defendant's lines; that competitors of L. F. Miller & Sons received grain from the same point at the same rate but did not have any elevator, perform any elevator service or receive compensation for such service; that the plaintiff's books showed that the plaintiff and Harvey C. Miller had received from the payments already made by the defendant and consignees the actual cost of the services rendered, with a reasonable profit, the defendant contending that further payment would be contrary to the Act to Regulate Commerce; and finally an opinion and order of the Interstate Commerce Commission of later date than the service rendered and the bringing of this suit. This evidence was rejected and the Supreme Court of Pennsylvania sustained the referee, rightly observing that the one question before him was what the plaintiff's services were reasonably worth. 246 Pa. St. 336.

There was no complaint that the rate was unreasonable, but only a wrong conception of the grounds upon which an advantage might be pronounced undue. There was no offer to prove that L. F. Miller & Sons were using the plaintiff as a tool for the purpose of obtaining a rebate. The offer did not go far enough to bring in the act of Congress and was not made in an effort to prove that an unreasonable rate was charged.

Writ of error dismissed.

ELLIS *v.* INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 712. Argued April 12, 15, 1915.—Decided May 10, 1915.

The definition of transportation in § 1 of the Act to Regulate Commerce includes the instrumentalities enumerated, but as a preliminary a requirement that the carriers shall furnish them upon reasonable request; the definition does not mean however that the owners and builders of such instrumentalities shall, contrary to truth, be regarded as carriers.

The control of the Interstate Commerce Commission over private cars and such instrumentalities of commerce is effected by its control over the carriers subject to the Act and not over the builders and owners of such instrumentalities who are not subject to the Act.

An appeal lies to this court from a final order of the District Court made upon petition of the Interstate Commerce Commission directing a witness to answer certain questions and produce certain documents. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Alexander* v. *United States*, 201 U. S. 117, distinguished.

The Interstate Commission may not in a mere fishing expedition interrogate a witness in regard to the affairs of a stranger on the chance that something discreditable may be disclosed.

An intervening corporation may be a means by which an owner of property transported incidentally renders services and if so its charges therefor are subject to the supervision of the Commission and, as unreasonable charges may be used as a device to obtain a forbidden end, the Commission should be allowed a reasonable latitude in interrogating a witness in a proper proceeding to ascertain if any such device is used. *Int. Com. Comm.* v. *Brinson*, 154 U. S. 447.

Every advantage which may enure to a shipper as the result of the position of his plant, his ownership or his wealth is not necessarily a preference within the prohibitions of the Act to Regulate Commerce.

In this case *held* that until the corporation, not a carrier, furnishing instrumentalities to shippers was shown to be a mere tool of the latter for obtaining preferences, a witness need not answer questions concerning private business of the corporation, but also *held* that he

should answer questions in regard to the furnishing of instrumentalities so far as they affected matters which under § 15 of the Act to Regulate Commerce are subject to the Commission.

THE facts, which involve the construction and application of § 12 of the act to regulate commerce and the power of the court to compel witnesses to answer questions propounded, and to produce documents demanded, by the Interstate Commerce Commission, are stated in the opinion.

Mr. Frank B. Kellogg, with whom *Mr. C. A. Severance*, *Mr. Robert E. Olds*, *Mr. Alfred R. Urion* and *Mr. Charles J. Faulkner* were on the brief, for appellant:

Armour Car Lines is not a common carrier, nor is it engaged in transportation, within the meaning of the act to regulate commerce.

The demands of the Commission involved an unwarranted extension of its inquisitorial powers and constitute an unlawful invasion of the private rights and affairs of the respondent and of the company he represents.

The demands involved in this proceeding do not fall within the scope of the Commission's orders.

In support of appellant's contention, see *Baird Case*, 194 U. S. 25; *Balt. & Ohio S. W. Ry.* v. *Voigt*, 176 U. S. 498; *Boyd* v. *United States*, 116 S. W. Rep. 616; *Cattle Raisers' Assn.* v. *Fort Worth Ry.*, 7 I. C. C. 513; *Consolidated Forwarding Co.* v. *Southern Pac.*, 9 I. C. C. 182, 206; *Cotting* v. *Kansas City Stockyards*, 183 U. S. 95; *Employers' Liability Cases*, 207 U. S. 463; *Enterprise Transp. Co.* v. *Penna. R. R.*, 121 I. C. C. 236; *Ex parte Koehler*, 36 Fed. Rep. 867; *Gracie* v. *Palmer*, 8 Wheat. 605; *Harriman* v. *Int. Com. Comm.*, 211 U. S. 407; *Hirsch* v. *New England Nav. Co.*, 113 N. Y. Supp. 395; *Hopkins* v. *United States*, 171 U. S. 578; *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447, 448; *Int. Com. Comm.* v. *Railway Co.*, 167 U. S. 506; *Int. Com. Comm.* v. *Reichmann*, 145

Fed. Rep. 235; *Kentucky Bridge Co.* v. *Louis. & Nash. R. R.*, 37 Fed. Rep. 573; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Lemon* v. *Pullman Co.*, 52 Fed. Rep. 262; *Long* v. *Lehigh Valley R. R.*, 130 Fed. Rep. 870; *Nor. Pac. Ry.* v. *Adams*, 192 U. S. 440; *Omaha Street Ry.* v. *Int. Com. Comm.*, 230 U. S. 324; *Pacific Ry. Comm. Case*, 32 Fed. Rep. 241; *Parmelee Transfer Co.*, 12 I. C. C. 40; *Parmelee* v. *Lowitz*, 74 Illinois, 116; *Parmelee* v. *McNulty*, 19 Illinois, 556; *Pullman Co.* v. *Linke*, 203 Fed. Rep. 1017; *State* v. *Union Stockyards Co.*, 115 N. W. Rep. 627, 631; *Santa Fe* v. *Grant Bros.*, 228 U. S. 177; *San Diego* v. *National City*, 174 U. S. 757; *Smyth* v. *Ames*, 169 U. S. 546; *Southern Pacific Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *Tap Line Cases*, 234 U. S. 1; *Tex. Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 438; *United States* v. *Louis. & Nash. R. R.*, 234 U. S. 314; *United States* v. *Mil. Refrigerator Transit Co.*, 145 Fed. Rep. 1007; *United States* v. *Union Stockyards*, 226 U. S. 286; *Union Stockyards* v. *United States*, 169 Fed. Rep. 404.

Armour Car Lines is not a common carrier subject to the act to regulate commerce.

The demands of the Commission amount to an unlawful invasion of the private rights and affairs of the appellant and of the company he represents.

The question is one of power, not of relevancy of evidence. The evidence demanded is not relevant to any legitimate inquiry the Commission may undertake. The Act to Regulate Commerce nowhere provides that railroads shall only pay reasonable compensation for cars, materials, labor, etc. The Government's suggestion of possible rebates is not justified. *Brimson Case*, 154 U. S. 447; *Gracie* v. *Palmer*, 8 Wheat. 605; *Harriman Case*, 211 U. S. 407; *Louis. & Nash. Case*, 236 U. S. 318; *Pacific Railway Commission Case*, 32 Fed. Rep. 241; *Union Stockyards Co.* v. *United States*, 169 Fed. Rep. 404; *S. C.*, 226 U. S. 286; 40 Cong. Rec., pt. 2, pp. 1828, 1843–4, 1910, 1997,

2004; 40 Cong. Rec., pt. 3, pp. 2020–1; 40 Cong. Rec., pt. 7, p. 6438.

Mr. E. W. Hines, with whom *Mr. Joseph W. Folk* was on the brief, for appellees:

The order of the District Court requiring Ellis to testify in the proceeding before the Commission is not appealable. *Brimson, Baird,* and *Harriman Cases* distinguished. Final decrees only are appealable. An order requiring the production of testimony is not a final decree. *Alexander* v. *United States*, 201 U. S. 117; *Webster Coal Co.* v. *Cassatt*, 207 U. S. 181; *Wise* v. *Mills*, 220 U. S. 549; *Haight* v. *Robinson*, 203 U. S. 581; *Hultberg* v. *Anderson*, 214 Fed. Rep. 349; *Logan* v. *Penna. R. R.*, 19 Atl. Rep. 13. Greater rights should not be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court. *Alexander* v. *United States*, 201 U. S. 117.

The orders of the Commission on which the investigation was based were sufficient to authorize the Commission to inquire whether or not Armour Car Lines was being used as a device to procure favors for Armour & Co. from the railroads.

The purpose of the hearing at which appellant refused to testify, as indicated in the Commission's order providing therefor, was to determine whether or not the allowances paid by carriers for the use of private cars and the practices governing the handling and icing of such cars were unjust, unreasonable, unduly discriminatory, or otherwise in violation of the act. The interest of Armour & Co., and of other shippers, in the car lines furnishing such facilities was of the essence of the inquiry.

Investigations on the part of the Commission should not be hampered by the technical rules of the common law. *Int. Com. Comm.* v. *Baird*, 194 U. S. 25, 44. As to

questions in issue Armour Car Lines was not taken by surprise.

The investigation in which appellant was called as a witness related to specific matters which might be made the object of a formal complaint, and was therefore one in which witnesses could be required to testify.

See §§ 1, 2, 12, 13, and 15 of the Act to Regulate Commerce and §§ 1 and 2 of the Elkins Act.

The Elkins Act authorized inclusion as parties, "in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration." Armour Car Lines and Armour & Co. were served with copies of the Commission's orders and were made formal parties to the investigation in which appellant refused to testify.

One purpose of the inquiry was to determine whether or not the practices under investigation were resulting in unlawful discrimination. *Harriman* v. *Int. Com. Comm.*, 211 U. S. 407, distinguished.

The information which the witness was asked to give was relevant to the inquiry which the Commission was making.

The questions in issue were material as tending to show the relation between Armour & Co., the shipper, and Armour Car Lines, the corporation furnishing transportation and refrigeration facilities to common carriers; also as tending to show a practice of rebating under the guise of allowances from common carriers to Armour & Co. through the instrumentality of Armour Car Lines.

Cotting v. *Stock Yards Co.*, 183 U. S. 79, illustrative rather than exclusive of this proposition.

If the questions had a legitimate bearing upon the identity of Armour & Co. and Armour Car Lines, answers thereto were properly to have been compelled. *Int. Com. Comm.* v. *Baird*, 194 U. S. 25, 47; *Nelson* v. *United States*, 201 U. S. 92.

It is not contended that a corporation selling supplies to a railroad common carrier thereby subjects itself to the jurisdiction of the Commission. The contention is that a shipper may, through a corporation furnishing transportation facilities to such a common carrier, obtain rebates or concessions in the guise of allowances therefor, and that the Commission has jurisdiction to investigate the relations between such shipper and the corporation furnishing such facilities, in order to determine whether or not the latter is being used as a device to conceal rebates.

The questions asked were material as tending to advise the Commission as to the reasonableness of the allowances paid by common carriers for the services rendered by Armour Car Lines. It is the duty of the Commission to abate discriminative practices, "whatever form they may take and in whatsoever guise they may appear." *Tap Line Cases*, 234 U. S. 1.

The power of the Commission to inquire into the allowances of a tap line is based not upon the fact that the tap line is a common carrier, but upon the fact that it is owned by a shipper. A shipper owning a tap line is subject to the jurisdiction of the Commission with respect to the relations between the tap line, the shipper, and railroad common carriers. It is the duty of the Commission to inquire fully into such relations in order to determine whether or not the shipper by means of the tap line is securing concessions from the published rates. *Tap Line Cases*, 234 U. S. 1.

The Elkins Act was designed to place all shippers upon equal terms. *United States* v. *Union Stock Yards*, 226 U. S. 286; *Int. Com. Comm.* v. *Reichmann*, 145 Fed. Rep. 235.

A witness, not a party to the proceeding, may not question on behalf of the corporation, a party thereto, the materiality of evidence. *Nelson* v. *United States*, 201 U. S. 92.

The witnesses who may be compelled by the courts to give testimony before the Commission and to produce documents, books, and papers are not limited to officers and agents of common carriers.

The Commission may require any person to testify before it if the testimony required relates to a matter under investigation, if such matter is one which the Commission is legally entitled to make, and if the witness is not excused on some personal ground from compliance with the Commission's order to testify. *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447.

Congress, in excluding private car lines from the operation of the statute, was endeavoring to conserve the interests, not of private car lines, but of shippers. Clearly it did not intend thereby to deny to the Commission the power to require such corporations to disclose any information which might be necessary to enable the Commission to enforce the provisions of the act.

Jurisdiction over interstate transportation gives to the Commission jurisdiction over any person furnishing any part of that transportation, as to the transportation so furnished, whether or not such person is a common carrier.

To require Armour Car Lines, or its officer, to state what its books show, as to the result of its operations relating to its business of renting and leasing cars and furnishing refrigeration and icing service, would not unnecessarily invade the privacy of that corporation.

Congress has the same authority to require Armour Car Lines to furnish to the Commission any information which may be necessary to enable it to determine whether or not the act is being violated as it would have if that corporation had been created by an act of Congress. *Hale* v. *Henkel*, 201 U. S. 43; *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194. *United States* v. *Louis. & Nash. R. R.*, 236 U. S. 318, distinguished.

The services furnished by car lines are furnished by them either as agents for the carriers or as agents for the shippers, and the Commission may investigate the charges for and the practices relating to such services as if such services were furnished directly by the carriers or the shippers.

The act requires common carriers to furnish everything defined therein as transportation. A shipper may furnish on behalf of a carrier certain facilities required to be furnished, receiving therefor a reasonable allowance. Any person who performs such a service thereby subjects himself to the jurisdiction of the Commission to the extent necessary to enable the Commission to determine what is a reasonable allowance for the service so rendered.

Armour Car Lines furnish a transportation service which it is the duty of common carriers to provide, and must be regarded as performing that service on behalf of such carriers within the purview of § 1 of the Elkins Act. The jurisdiction of the Commission therefore, for the purposes of this case, extends to Armour Car Lines as fully as if it were a common carrier subject to the act.

The questions propounded to, and which appellant declined to answer and which he was required by the order of the District Court to answer, were material to issues cognizable by the Commission. Answers to such questions, if furnished, might have disclosed a violation of the act to regulate commerce or of the Elkins Act. Appellant not being a party to the proceeding before the Commission, could not properly refuse to answer on the ground of personal privilege, nor could he plead the privilege of the corporation. Armour Car Lines, for the purposes of this proceeding, was as clearly amenable to the inquisitorial jurisdiction of the Commission as if it were a common carrier subject to the act. A reversal by this court of the judgment of the District Court would go far towards defeating the purposes for which the Commission was

created. Wherefore it is respectfully submitted that the order of the District Court requiring appellant to testify and to produce the documents in issue should be sustained.

In support of these contentions see cases *supra*, and also *Brown* v. *Walker*, 161 U. S. 591; *Canada Southern Ry.* v. *International Bridge Co.*, 8 App. Cases, 723; *Consol. Rendering Co.* v. *Vermont*, 207 U. S. 541; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Gibbons* v. *Ogden*, 9 Wheaton, 1; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *New York &c. R. M. Co.* v. *Int. Com. Comm.*, 26 Sup. Ct. 272; *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585; *United States* v. *Milwaukee Refrigerator Co.*, 145 Fed. Rep. 1007.

Mr. Assistant Attorney General Underwood for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from an order of the District Court made upon a petition of the appellee, the Interstate Commerce Commission, filed under the act to regulate commerce, § 12, c. 104, 24 Stat. 379, 383. The order directs the appellant to answer certain questions propounded and to produce certain documents called for by the appellee. There is no doubt that this appeal lies. The order is not like one made to a witness before an examiner or on the stand in the course of a proceeding *inter alios* in court. *Alexander* v. *United States*, 201 U. S. 117. It is the end of a proceeding begun against the witness. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. Therefore, we pass at once to the statement of the case.

The Interstate Commerce Commission, reciting that it appeared from complaint on file that the allowances paid for the use of private cars, the practices governing the handling and icing of such cars, and the minimum carload weights applicable to the commodities shipped

therein, on the part of carriers subject to the act to regulate commerce, violated that act in various ways, ordered that a proceeding of investigation be instituted by the Commission of its own motion to determine whether such allowances, practices, or minimum carload weights were in violation of the act as alleged, with a view to issuing such orders as might be necessary to correct discriminations and make applicable reasonable weights. It ordered that carriers by railroad subject to the act be made parties respondent, and, later, that all persons and corporations owning or operating cars and other vehicles and instrumentalities and facilities of shipment or carriage of property in interstate commerce be made parties also. In the proceedings thus ordered the questions propounded were put to the appellant, the vice president and general manager of the Armour Car Lines.

The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, tank and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines of railway, and from these ices and re-ices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, &c., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request,

not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, &c., is to be effected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself. The petition of the Interstate Commerce Commission to compel an answer to its questions hardly goes on any such ground.

The ground of the petition is that it became the duty of the Commission to ascertain whether Armour & Company, an Illinois corporation shipping packing-house products in commerce among the States, was controlling Armour Car Lines and using it as a device to obtain concessions from the published rates of transportation, and whether Armour Car Lines was receiving for its refrigerating services unreasonable compensation that enured to the benefit of Armour & Co., all in violation of §§ 1, 2, 3, and 15 of the act.

If the price paid to the Armour Car Lines was made the cover for a rebate to Armour & Co., or if better cars were given to Armour & Co. than to others, or if, in short, the act was violated, the railroads are responsible on proof of the fact. But the only relation that is subject to the Commission is that between the railroads and the shippers. It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor. It was argued that the Commission might look into the profits and losses of the Armour Car Lines (one of the matters inquired about), in order to avoid fixing allowances to it at a confiscatory rate. But the Commission fixes nothing as to the Armour Car Lines except under § 15 in the event of which we shall speak.

The appellant's refusal to answer the series of questions

put was not based upon any objection to giving much of the information sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the Armour Car Lines—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up. This was beyond the powers of the Commission. *In re Pacific Railway Commission*, 32 Fed. Rep. 241. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 478, 479. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407. The Armour Car Lines not being subject to regulation by the Commission its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the Company a party to the proceedings and serving it with notice. Therefore the matter to be considered here, subject to the qualification that we are about to state, is how far an ordinary witness could be required to answer the questions that are before the court.

We have stated the nature and object of the investigation, and it is to be observed that not every advantage that may enure to a shipper as the result of the position of his plant, his ownership or his wealth is a preference. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46. But the intervening corporation may be a means by which an owner of property transported indirectly renders the services in question, and in that event its charges are subject to the Commission by § 15. The supposed unreasonable charge may be used as a device to attain the forbidden end and therefore reasonable latitude should be allowed to see if any such device is used. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 464. But still until Armour Car Lines is shown to be merely the tool of Armour & Company it has the general immunities that we have stated. With the

foregoing general principles in view we proceed to dispose of the questions asked.

It is not necessary to repeat the many pages of questions at length. They are grouped by the Government into classes and numbered so that the result may be stated in comparatively few words. The first group concerning interlocking officers and relations between Armour Car Lines, Armour & Company and Fowler Packing Company, questions 1, 2, 3 and 7, should be answered. The only objection was on account of the general intent avowed as we have stated. So also questions 4, 5, 6, concerning the acquirement of cars previously owned by Armour and Company and Armour Packing Co., making the second group. Also questions 8, 9, 12 and 13, as to contracts of Armour Car Lines with Armour & Company and Colorado Packing Company for furnishing cars and icing service. The next group, so far as the questions concern the ownership, manufacture and repair of cars, Nos. 10, 11, 14, 16, 17 and 19, need not be answered, except 11 "where are the cars of Armour Car Lines repaired when not repaired in shops of railroads?" The last two groups concern matters into which the Commission was not authorized to inquire. The fifth, questions 15, 20, 21, 25, 26, 27, and 28, called for statements showing profit and loss, credits and debits to income &c., so far as the same related to transportation as defined in the act; and the sixth, Nos. 22, 23, and 24, for statements showing the amount invested in each icing plant and the detailed results of the operation of each, amount invested in each, cost per ton of ice at the source of supply &c., &c., all matters belonging to the private business of the Armour Car Lines and not open if our interpretation of the law is correct. Our decision, however, must be without prejudice to the possibility that the case may be brought within § 15 by evidence to the effect stated above.

Decree reversed without prejudice.

MR. JUSTICE DAY, while not differing from the general views taken by the court, is of opinion that the nature of the inquiry under § 15 made it proper that all the questions should be answered.

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

CUMBERLAND GLASS MANUFACTURING COMPANY *v.* DE WITT AND COMPANY.

ERROR TO COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 191. Argued March 10, 1915.—Decided May 10, 1915.

A plea of former judgment in a Federal court adjudicating a right of Federal origin, asserts a right which if denied makes the case reviewable here under § 237, Judicial Code. *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The effect of a composition proceeding as provided in the Bankruptcy Act is to substitute that proceeding for the bankruptcy proceeding and in a measure to supersede the latter, and, when the composition is confirmed, to reinvest the bankrupt with all his property free from claims of his creditors.

Composition proceedings arise from the bankruptcy proceedings and this part of the statute is to be construed with the entire act. *Wilmot* v. *Mudge*, 103 U. S. 217.

The restoration of his estate to the bankrupt after a composition restores to him the right of action upon choses in action. *Cf. Stone* v. *Jenkins*, 176 Massachusetts, 544.

The object of the set-off provision in § 68-a of the Bankruptcy Act is to permit the statement of accounts between the bankrupt and his creditor with a view to the application of the doctrine of set-off between mutual debts and credits; it is permissive rather than mandatory, does not enlarge the doctrine of set-off and cannot be invoked where the general principles of set-off would not justify it.

The set-off provision in § 68-a of the Bankruptcy Act is not self-

executing and its benefit is to be had only upon the action of the District Court when it is properly invoked.

After composition had been affirmed by the Bankruptcy Court against the opposition of a creditor, a claim against whom by the bankrupt had been scheduled as an asset, the creditor, without applying to the District Court to set off the mutual claims, accepted the composition dividend, after which the bankrupt sued on the scheduled claim. *Held* that:

The effect of the composition was to reinvest the bankrupt with all of his assets including the right to maintain a suit on the choses of actions including this claim against this creditor.

There was no automatic set-off under § 68-a of the Bankruptcy Act.

The effect of the composition was not to extinguish the claim of the bankrupt against the creditor on his claim against the latter and there was no adjudication that could be pleaded as *res judicata* in a Federal court, and the state court did not err in respect to any Federal question in rejecting the plea of *res judicata.*

120 Maryland, 381, affirmed

THE facts, which involve the construction and application of certain provisions of the Bankruptcy Act in regard to appeals of mutual claims of the bankrupt and the creditors, are stated in the opinion.

Mr. Henry H. Dinneen and *Mr. Arthur L. Jackson* for plaintiff in error.

Mr. Thomas G. Hayes and *Mr. Lewis W. Lake* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Defendant in error, Charles De Witt, trading as Charles De Witt & Company, plaintiff in the court below and hereinafter spoken of as the plaintiff, brought his action in the Superior Court of Baltimore City, Maryland, to recover of the Cumberland Glass Manufacturing Company, hereinafter called the Glass Company, upon the ground that De Witt, having entered into a written contract with the Mallard Distilling Company of New

York to supply them with certain lettered flasks, the Glass Company, with knowledge of that contract, by and through the medium of their agents, did visit the Mallard Distilling Company, and maliciously and without just cause, with the intent to injure the plaintiff and to derive a benefit for itself, did cause, induce, and procure the said Mallard Distilling Company to rescind, break and violate its contract with the plaintiff. Pleas were interposed, and a trial was had in the Superior Court, resulting in a verdict and judgment in favor of the plaintiff, which judgment was affirmed in the Court of Appeals of the State of Maryland (120 Maryland, 381), and the case was brought here.

Summing up the defenses made in the state court, the Maryland Court of Appeals said (120 Maryland, 386) "The defendant interposed three pleas—first that it did not commit the wrong alleged; secondly, limitations; thirdly *res judicata*, based upon certain proceedings had in the United States District Court for Maryland, and particularly set out in the pleas."

The Federal question, which is the basis of jurisdiction here, arises upon the plea of *res judicata* to which a demurrer was sustained in the Maryland court of original jurisdiction which judgment was affirmed by the Court of Appeals. This presents a Federal question because the plea of former judgment in a Federal court adjudicating a right of Federal origin, asserts a right which if denied made the case reviewable here under § 709, Revised Statutes, § 237, Judicial Code. *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

From this plea, it appears that the plaintiff, trading as Charles De Witt and Company, was adjudicated a bankrupt in the United States District Court of Maryland, on the eighth day of February, 1910; that in the list of creditors, plaintiff listed the Glass Company as a creditor in the sum of $790.03 (which claim was upon a

promissory note); that proof was duly made of this claim against the plaintiff, in the bankruptcy proceeding; and that among the unliquidated assets reported to the bankruptcy court by the plaintiff was a chose in action against the Glass Company, listed as a claim of De Witt's against the defendant, of unliquidated damages for commissions and breach of contract, in the sum of $940. (The testimony showed that this was the same claim sued upon in the Maryland state court so far as the demand for $800 damages is concerned.) The plea shows that afterwards, on the twenty-sixth day of March, 1910, the plaintiff filed a petition in the United States District Court, setting out that he had submitted a composition to his creditors whereby they were to accept twenty cents on each dollar of their respective claims in full settlement of their demands against him and his bankrupt estate; further, that a majority in amount of said creditors had agreed to accept the terms of the composition agreement, wherefore he prayed that the same be ratified by the court; that the Glass Company did not agree in writing, pursuant to the provisions of the Bankruptcy Act, or otherwise, to accept said settlement, but as a majority in amount of said creditors did accept the same, it was ratified by the Federal court, and there was allowed to the defendant the sum of $158.01, as a dividend on its claim of $790.03; that no debit was made against the Glass Company by reason of the alleged claim of De Witt against it for the sum of $940.

Further, "that under and by virtue of the provisions of § 68-a of said Federal Bankruptcy Act it was and became the duty of the referee in bankruptcy and the trustee in bankruptcy representing the bankrupt estate of said De Witt to investigate and determine the existence and validity of any claim asserted by said bankrupt against any creditor filing his claim against said estate; and thereupon to set off the claim of such bankrupt

against his said creditor against the claim of said creditor against the bankrupt, and pay, or demand the payment to the bankrupt estate the difference between the accounts thus stated; that as the said referee, trustee and bankrupt De Witt, the latter the plaintiff herein, did not assert or claim, in said composition account, that any portion of the aforesaid sum of $940 was justly due and owing by this defendant to the then bankrupt estate of the said plaintiff, as claimed by said De Witt in his schedule of assets; that this defendant, being led to believe by the action of the said referee, trustee and bankrupt in remaining silent and ignoring said bankrupt's alleged claim against this defendant when it was their duty to have spoken and set out the same, if it was found by them or any of them to be due, against said defendant in said composition agreement, did not exercise its right to except to the ratification of said composition account, but suffered said composition account to be finally ratified and confirmed, and unwillingly accepted the settlement of twenty cents on the dollar made according to the tenor of said composition agreement; that this defendant received and accepted its dividend of twenty per cent. therefrom in satisfaction of all its claims against said De Witt and in exoneration by said De Witt from any and all claims which said De Witt at that time had or claimed to have, and this defendant says that the payment to it by said bankrupt of said dividend and its acceptance by this defendant operated as a final settlement and adjustment, in a court of competent jurisdiction, of any and all claims which the parties to this suit then had, or claimed to have, against each other. Wherefore, this defendant says that the alleged cause of action set out in the plaintiff's amended narr. is *res judicata*."

As it was the effect of the judgment of the state court to deny this plea of *res judicata*, it will be necessary to consider somewhat the nature of the proceeding.

Compositions in bankruptcy are provided for by the Bankruptcy Act of 1898, c. 541, 30 Stat. 544. By § 12 of the Act, the bankrupt is permitted to offer a composition after he has been examined in open court or at a meeting of his creditors, and after he has filed in court a schedule of his property and a list of his creditors. Since the Amendment of 1910 the offer may be made either before or after adjudication. In order that the composition be effectual, it must be accepted in writing by a majority in number of all the creditors, and the consideration to be paid by the bankrupt to his creditors and the money necessary to pay debts having priority and the cost of proceeding must be deposited in a place to be designated by, or subject to the order of, the judge. The judge shall confirm the composition if satisfied that it is for the best interests of the creditors, that the bankrupt has not been guilty of any of the acts nor failed to perform any of the duties which would be a bar to his discharge, and that the offer and acceptance are in good faith and have not been made or procured by the means prohibited in the Act. Upon confirmation of the composition, the consideration is distributed as the judge shall direct, and the case dismissed. Whenever the composition is not confirmed, the estate shall be administered as otherwise provided in the Bankruptcy Act.

Under § 70-f of the Act, it is provided that, upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him. By § 21-g of the Act it is also provided that a certified copy of the order of confirmation shall constitute evidence of the revesting of the title, and when recorded, shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. The order of confirmation becomes in effect a discharge, and is pleaded in bar with like effect. It operates to discharge the bankrupt from all debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

It is thus apparent that, although the composition is provided for by the Bankruptcy Act, it is in some respects outside of the Act, for it is provided that, if the composition is not confirmed, the estate shall be administered in bankruptcy, as in the Act provided.

The nature of composition proceedings is nowhere better stated than by Judge Lowell in *In re Lane*, 125 Fed. Rep. 772, 773, in which it is said:

"The case of composition is in some respects exceptional. It is a proceeding voluntary on both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee. The creditors may accept this offer or they may refuse it. For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary. Section 12-e (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides: 'Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.' Composition is thus treated, even in the act, as in some respects outside of bankruptcy. In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no bargained release by the creditor. The creditor takes all his debtor's property whether the debtor likes it or

not. . . . The bankrupt's rights of property arise only in the event of a payment of his creditors in full. If a creditor will not prove his claim, the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. Section 66 of the act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3448]) has the same purpose, and does not apply to composition. But if the composition is paid the creditors have no further claim upon the debtor or his property. In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more."

The effect of the composition proceeding is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the latter proceeding, and to reinvest the bankrupt with all his property free from the claims of his creditors. True the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire act. *Wilmot* v. *Mudge*, 103 U. S. 217. That the restoration of the estate to the bankrupt restores to him his right of action upon choses in action there is no question. *Stone* v. *Jenkins*, 176 Massachusetts, 544.

With this general view of the nature and effect of composition proceedings, we come to a consideration of § 68-a of the Bankruptcy Act, under which it is claimed the set-off was adjudicated in the bankruptcy court by reason of the proceedings we have already set forth. Section 68-a of the Bankruptcy Act of 1898 provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The object of this provision is to permit, as its terms declare, the statement of the account between the bankrupt and the creditor, with a view to the application of the

doctrine of set-off between mutual debts and credits. The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. Black on Bankruptcy, § 544; *In re Kyte*, 182 Fed. Rep. 166. The matter is placed within the control of the bankruptcy court, which exercises its discretion in these cases upon the general principles of equity. *Hitchcock* v. *Rollo*, Fed. Cas. 6,535. The section was taken almost literally from § 20 of the act of 1867. In *Sawyer* v. *Hoag*, 17 Wall. 610, in considering that section of the act of 1867, this court said: "This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it." While the operation of this privilege of set-off has the effect to pay one creditor more than another, it is a provision based upon the generally recognized right of mutual debtors, which has been enacted as part of the Bankruptcy Act, and when relied upon should be enforced by the court. *Bank* v. *Massey*, 192 U. S. 138.

It hence appears that the object of this section was to give the District Court the right to apply the established principles of set-off to mutual credits, when its action was invoked for that purpose.

The language of the act indicates the necessity of action by the court, for the statute provides that "the account shall be stated" and the one debt set off against the other and the balance only allowed to be paid. This statute recognizes the nature of set-off, as established in common law and equitable procedure.

"By the civil law, when there are cross-claims between a plaintiff and defendant which are so connected with each other that the establishment of one can legitimately defeat, reduce, or modify the other, the defendant is always entitled to insist that his own claim shall be liti-

gated with that of the plaintiff; that both shall be disposed of by one sentence; and that the plaintiff's recovery shall be limited to what he shall be entitled to, if anything, as the result of adjusting both claims and striking a balance, if necessary, between them; and he does this by bringing a cross-action (*reconventio*). Mutual debts do not, indeed, properly constitute cross-claims by the civil law, for they extinguish each other *ipso jure*, and the party alone in whose favor the balance is, has a claim which can be enforced by action, and his claim is only to the extent of such balance. Therefore a defendant who, at common law, would have recourse to a statutory set-off, would not, by the civil law, bring a cross-action, but he would plead payment (*compensatio*). Nor is a defendant, who has a genuine cross-claim, bound to assert it by a cross-action; he may assert it by a wholly separate and independent action. How, then, does a cross-action differ from one which is not a cross-action, and which nevertheless is brought by a defendant against a plaintiff? It is conceived that the essential difference is in the judgment. If a defendant wishes to have his own claim and the plaintiff's disposed of by one sentence, in the manner before stated, he brings a cross-action. If he wishes to have his own claim disposed of by a separate sentence, and without any reference to the plaintiff's claim, he brings a separate action. In the latter case he may of course choose his own time for suing, and his own court, and may prosecute his action slowly or speedily, as he sees fit, and without any reference to the plaintiff's action; but in the former case, as he wishes to have his action and the plaintiff's disposed of together, he must comply with the conditions necessary for that purpose." Langdell, Equity Pleading, § 118.

In the present case, the Glass Company made no attempt to invoke the action of the District Court in the bankruptcy proceedings. If it had the right to do so,

it did not seek the action of the bankruptcy court to state the account or make the settlement, and we have been unable to find any case, and none is called to our attention, in which it is held that simply because of the bankruptcy proceedings and the filing of the schedule and proofs of debt the set-off is automatically made between parties holding mutual credits. On the other hand, as the section indicates, and so far as we know, all the authorities hold, this section is not self-executing, but its benefit is to be had upon the action of the District Court, only when it is properly invoked, and that court has the primary duty of determining for itself whether there are "mutual debts or credits" that should be set off one against the other according to the true intent and meaning of the Bankruptcy Act.

We have no means of knowing what the court would have held had it been asked to order a set-off of the bankrupt's claim for damages against the creditor's claim upon a promissory note. (See *Libby* v. *Hopkins*, 104 U. S. 303; *In re Becker Bros.*, 139 Fed. Rep. 366; *Palmer* v. *Day*, 2 Q. B. 618; and the discussion of the subject in *Morgan* v. *Wordell*, 178 Massachusetts, 350.) We need not, therefore, inquire what that court would have done had its action been properly invoked, nor whether the Glass Company could have refused the amount of the composition and applied to the District Court for an order of set-off, nor what would be the right of the Glass Company had it refused to take the composition and undertaken to set off its debt when sued in this case. Indeed, the Glass Company in this suit denied and contested the validity of the plaintiff's claim. Nor need we discuss the right of the Glass Company to set off this claim had it tried to do so in the state court.

The question arose in that way in *Wasey* v. *Whitcomb*, 167 Michigan, 58, in which a suit was brought by the trustee in bankruptcy to recover upon a claim in the

state court. This was also the situation in *Wagner* v. *Burnham*, 224 Pa. St. 586. In the English case of *West* v. *Baker*, 1 Law Reports, Exch. Div. 44, the action was brought by one in whom, under a composition proceeding the court had by order vested the estate, such person having furnished the consideration to carry out the composition, a proceeding authorized by § 81 of the English Bankruptcy Act of 1869. It was held that in such action the effect of the order was to vest the property of the bankrupt in the plaintiff, subject to the right of set-off as to debts which would have been provable in bankruptcy. No such question arises here, as the plea in this case set up former adjudication in the Federal court, and no attempt was made to plead the right of set-off independently of such plea.

There is lacking in this case the first and most essential element of *res judicata*, namely, former judgment of a competent court, adjudicating the matter in controversy between the parties, yet *res judicata* in the bankruptcy court by the former proceedings was the sole contention of Federal right here put in issue.

As already said, it appears in this plea, that the Glass Company took the amount of the composition, twenty per cent. of its full debt, after the composition had been carried by the majority of the creditors, and approved by the court. If, as is now contended, set-off had been automatically worked between these opposing claims, one would substantially have satisfied the other, and the Glass Company would be in no position to claim or receive the dividend that it did receive in the composition. It certainly cannot maintain these inconsistent positions. This point was adjudicated under the former Bankruptcy Act, which for this purpose is substantially the same as the present one, in the case of *Hunt* v. *Holmes*, decided in the District Court of Massachusetts, 16 N. B. Rep. 101; *S. C.*, Fed. Cas. 6890, in which the opinion was by Judge

Lowell, then District Judge. The learned judge ruled that a creditor who took his composition dividend after the composition was finally passed over his objections, making no attempt to have mutual claims adjusted and set off, thereby waived his claim of set-off; there being no evidence that he received the amount under protest or by mistake or under any other circumstance which would entitle him to a re-hearing or readjustment. In *In re Ballance*, 219 Fed. Rep. 537, where a creditor filed a petition to vacate a composition upon the ground of fraud, it was held that the petitioner, after a demurrer to his petition had been overruled, could not take the amount of the composition and also take the chance of proving the allegations of his petition to set aside the composition for fraud, but that he must make election as to which form of relief he would accept, and that he could not take his share of the composition as a partial payment and proceed to recover upon the unpaid balance of his claim.

So, in this case, although the composition was carried, as the plea avers, against the objection of the Glass Company, it made no attempt to have the set-off adjudicated in the bankruptcy court, made no opposition to the confirmation of the composition as was its right if it saw fit to do, and took and holds its proportion of the composition offered, in the same manner as other creditors.

As the only Federal question is presented because of the alleged *res judicata* in the District Court, and for the reasons stated that plea was not good, it follows that there is no error of a Federal nature in the judgment of the Court of Maryland, and the same is

Affirmed.

MR. CHIEF JUSTICE WHITE, with whom concurred MR. JUSTICE HUGHES, MR. JUSTICE LAMAR and MR. JUSTICE MCREYNOLDS, dissenting.

I am unable to conclude that the plaintiff in error, the

Glass Company, was not secured the right by the Bankrupt Law of the United States to set off a claim held by it against the claim which was sued on by De Witt, the defendant in error, who was plaintiff below. These are the undisputed facts: De Witt, a jobber in glass, thinking that the Glass Company for the purpose of making the profit itself, had wrongfully induced a person with whom he had a contract for the sale of a lot of glass bottles not to comply with the sale, thereby causing him a loss of a profit of $800, determined not to pay the Glass Company for merchandise which he had bought from it or to buy from it merchandise and not pay for it in order thus to be in a position to set off his claim in damages against the purchase price and thereby make himself whole. De Witt was declared an involuntary bankrupt. The Glass Company was stated in the schedules as a creditor on a note for $790.03 which it is established was the purchase price of merchandise bought from the company. There was scheduled as an asset of the bankrupt estate an unliquidated claim against the Glass Company for damages, commissions and breach of contract stated as amounting to $940. De Witt proposed a composition of twenty cents on the dollar which was sanctioned by the requisite vote of creditors, the Glass Company voting in the negative, and the composition, after being approved by the court, was carried out. In doing so De Witt without liquidating the surrendered claim against the Glass Company for damages or attempting to have it set off against the claim of that company, paid the twenty per cent. upon the face value of the claim. Thereupon deeming that by the composition he had been reinvested with full ownership of the claim for damages, De Witt brought this suit against the Glass Company to liquidate and enforce the same. The suit originally included an alleged sum for commissions, etc., but the demand was reduced before judgment to the asserted right to liquidate and recover the damages

alleged to have been occasioned by the cause previously stated. And it is to the judgment of the court below allowing the amount of damages claimed against the company without any deduction whatever for the contract price of the goods admitted to be due in the bankruptcy proceedings that this writ of error is prosecuted.

I am admonished that it may be that my view is obscured by what seems to me the wrongful result which the judgment below accomplishes, that is, allowing De Witt as a result of the bankruptcy to hold on to and enforce as against the Glass Company his surrendered claim for damages while at the same time treating the bankruptcy as having relieved him of the duty of paying for the goods bought; that is to say, not confining him to doing that which he contemplated when he refused to pay for the goods, to set off his alleged claim for damages against the price, but permitting him to obtain the goods of the company practically without paying for them and at the same time to recover the full amount of his damage claim.

The views which control my judgment in the case are covered by two general propositions which I state separately.

(a) *Did the bankrupt law confer upon the Glass Company the right to have the scheduled claim against it for damages when liquidated set off against the debt which it proved for the price of the goods by it sold?* That the comprehensive provisions of §§ 68*a* and *b* of the bankrupt law relating to set-offs and counter claims are coincident with the scope of the act and therefore give the power to the bankruptcy court to determine whether or not the right of set-off exists as between all and any claims required to be surrendered as assets of the estate on the one hand and all debts proved against the estate on the other is, I submit, self-evident, for to hold to the contrary would deprive the bankruptcy court of authority to exert its powers over matters to which its jurisdiction in the nature of things

must extend. It is equally indisputable, as long since settled by this court, that in exerting its powers when occasion requires it as between all or any of the items of the active or passive side of the bankrupt estate it is the duty of the court of bankruptcy not merely to determine the right of set-off by strict common law principles, but to govern the subject by the broad doctrines of set-off as administered by courts of equity. *Sawyer* v. *Hoag*, 17 Wall. 610. It is also clear that in order to additionally accomplish the public purposes just stated the bankrupt act in some respects narrows the operation of set-off since it prevents it from automatically operating by subjecting it in every case to judicial control. Under these principles there is no reason for doubting that the proved claim of the Glass Company against the bankrupt estate was subject under the law to be set off against the scheduled claim held by the estate against the Glass Company whenever the latter claim was so liquidated as to enable the set-off to be made and that the duty of accomplishing this essential result by the terms of the statute primarily rested upon the bankruptcy court. I say the terms of the statute since it in express words commands that the set-off for which it provides shall be accomplished to the end that a distribution shall be made not upon the original claims, but upon the balances resulting from carrying out the commands of the statute as to set-off. This being true, the question at once arises:

(b) *Was the effect of the composition to prevent the set-off or to relieve the duty concerning it expressly commanded by the statute?*

The only theory upon which this question can be answered in the affirmative must be the conception that a composition completely terminates bankruptcy and that therefore whatever rights or duties arose from the bankrupt law which were not fully executed when the composition took place passed out of existence and therefore the

rights granted by the composition have no ancestral relation to the prior bankruptcy proceedings. But to say this is to misconceive the nature of composition proceedings which, as this court has long since pointed out, are but a part of bankruptcy and a means not for destroying the express command of the bankrupt law, but for giving effect to its provisions and rendering them more efficacious for accomplishing the just ends which they have in view. *Wilmot* v. *Mudge*, 103 U. S. 217. This being true, what is the situation? The bankrupt estate had a scheduled claim against the Glass Company which was unliquidated and the Glass Company had a proved claim against the estate which was liquidated. The bankrupt proposed by composition to have the assets turned over to him on paying a percentage on the claims due by the estate. By the very terms of the bankrupt act the duty was to set off the one against the other so that only the balance between them would be due on the one side or the other. But as the claim held by the estate was unliquidated and this could not be done without liquidation, it follows either that the acceptance of the composition and turning over the estate without liquidation was an abandonment of the unliquidated claim or that it was transferred to the bankrupt subject to the duty to set off whenever as a result of a liquidation following the composition the condition arose which made it possible to obey the express command of the statute. One or the other of these conclusions, I submit, is absolutely required by the plain terms of the statute unless it is to be recognized that the bankrupt law provides that a bankrupt may discharge himself by bankruptcy from all that he owes one of his creditors and yet by operation of that statute retain and after the bankruptcy enforce in his own right all the claims he had against such creditor. But the subject does not depend for its solution upon original reasoning since it is well demonstrated by authority.

Certain is it that the provisions as to composition which were first enacted by Congress in 1874, (§ 17, ch. 390, 18 Stat. 178, 182) as an amendment to the existing bankruptcy act, were in substance taken from the English bankrupt act of 1869. *In re Scott*, Fed. Cas. No. 12,519.

In *West* v. *Baker*, 1 Ex. D. 44, the facts were these: West was adjudicated a bankrupt and a composition was accepted by his creditors and the bankruptcy was annulled. Under a provision of the bankrupt act on the approval of the composition the property was turned over to a trustee, presumably for his security as he had advanced the sum necessary to enable the bankrupt to pay to his creditors the amount offered in composition. This trustee then in the name of the bankrupt sued one Baker to recover an amount claimed to be due from Baker for work and labor done for him by West before the bankruptcy. By way of defense it was pleaded that before the adjudication in bankruptcy West was indebted to Baker for debts and damages which were provable in bankruptcy against the bankrupt estate and which could have been set off in bankruptcy against the claim of West and therefore the defendant, Baker, was entitled as a defense to the suit to set off his claim against the one which the trustee in the name of West sought in the suit to enforce. A demurrer to the plea was overruled, the views of the court being stated as follows:

"Kelly, C. B. . . . The whole estate of the bankrupt was undisposed of; and the Court has power under the 81st section, in the case of an adjudication being annulled, to order that the property of the debtor shall vest in such person as the Court may appoint, or, in default of such appointment, revert to the bankrupt. This latter has not been done; but the court has transferred the whole estate of the bankrupt to the plaintiff, no doubt in consideration of the plaintiff having guaranteed a dividend of 7s. 6d. in the pound. Does this transfer

entitle the plaintiff to recover debts freed from the right of the debtor to set off such claims as the present? I think not; because in bankruptcy the debtor could have set off this very claim; and if the Court has transferred to the plaintiff all the authority itself had, that was to sue the defendant subject to the right to set off not only any specific sum, but any claim to unliquidated damages provable under bankruptcy. If this were otherwise, much injustice would be done. I apprehend the substance of the clauses of the Act is, that what passed to the plaintiff was a right to receive debts, but subject to the right to set off counter claims whether of specific sums or of unliquidated damages provable in bankruptcy.

"Cleasby, B. . . . The question is, whether the effect of the 28th section was to alter the status of the defendant because of the substitution of a scheme of settlement for the bankruptcy. On looking at the section the effect appears to be that, instead of the trustee dealing with the estate, the creditors shall be at liberty to accept a composition. This, though accompanied by the annulling of the bankruptcy, does not take the matter out of the Bankruptcy Court, so as to prevent the general rules of bankruptcy applying, or alter the position of the parties except so far as it may be altered by the agreement they have come to to take the composition instead of the estate. By § 28 the provisions of a composition or general scheme made in pursuance of the Act may be enforced by the Court in a summary manner, and are to be binding on all the creditors so far as relates to any debts due to them and provable under the Bankruptcy Act. That clearly shows that the Bankruptcy Court still retains the scheme under its control, and therefore it is subject to the ordinary rules of that court as to set-off."

In *Ex parte Howard National Bank*, 2 Lowell, 487, *S. C.*, Fed. Cas. No. 6764, without going into detail, the case was this: There was a bankruptcy and a composition.

After the composition the bankrupt sought to enforce a claim which had passed to him in virtue of the composition and was confronted with an alleged right to set off as against such claim on his part, a claim against him which had been in the bankruptcy a claim against the estate. The court under these conditions in upholding the right to set-off directed attention to the provisions of the bankrupt law on the subject and to its command that only the balance should be paid and the inherent relation which that requirement of the act created between the claims scheduled in the bankruptcy on the one hand and proved on the other and the character which was affixed to them for the purpose of set-off even after a composition had been ordered. The court said:

"I have treated this as a case between an assignee and a creditor, because the bankrupt in a composition case stands, as to set-off, in the position of an assignee, if none has been appointed." In other words, treating the allowance of the composition as having, so to speak, irrevocably stereotyped the rights of the parties in conformity with the bankrupt law and to the end that its purposes might be carried out, the bankrupt holding under the composition was treated for such purposes as but an assignee in bankruptcy and therefore so far as set-off was concerned as having no greater right under the composition than existed in the bankruptcy in favor of the estate at the time the composition was made.

These cases as well as the principles upon which they rest clearly make manifest the fact that it was not only within the power but it was the duty of the court below as an inevitable result of the liquidation of the claim against the Glass Company which it made to treat the set-off as accomplished since that result was necessary to give vitality to the order of composition and to secure the right of set-off which inhered in the nature of the title given by the bankruptcy court to the bankrupt as the

result of the composition. From this conclusion it necessarily follows that the duty to enforce the set-off integrally inhered in the order and judgment which sanctioned the composition since otherwise the order would have embodied within itself a refusal to obey and give effect to the express command of the bankrupt law as to the nature and character of what could be transferred under the composition. And this consequence is obvious when it is borne in mind that the result of the composition was to recognize and fix the right of set-off although not denying the power to liquidate as a means of carrying out the established right of set-off. This being true, it is also true that the moment the court below liquidated the claim, in and by virtue of the order of composition the duty arose to give effect to the right of set-off established by the order of composition in conformity with the express command of the bankrupt law. And this fully answers the suggestion that as the right to the set-off was not asserted *eo nomine* but the decree in composition was pleaded as *res judicata*, therefore there was no denial of the right of set-off even if secured as the result of the composition. Certainly it must be that the plea of the decree in composition as *res judicata* was a plea advancing the right which that decree necessarily secured.

This in my judgment leaves it necessary only to consider the assertion that even although the right was secured by the bankrupt law and even although that right was preserved by the composition and inhered in the very nature of the title which the composition passed, it nevertheless does not here exist because of what was done at the time the composition was adopted. This rests upon the theory that as the Glass Company took the dividend upon its claim and did not insist upon a liquidation of the claim in damages held by the bankrupt estate, it therefore waived any right to future set-off concerning said claim. I must confess I find difficulty

in precisely grasping the proposition. The Glass Company disputed the claim in damages and the duty of liquidation was on the bankrupt or the bankrupt estate but not on the Glass Company, and if waiver or estoppel was the result of what was done, the waiver was not as to the right of the Glass Company, but as to the claim for damages and against the estate which held it. Indeed, the tender to the Glass Company of the full percentage due on its claim without liquidating the claim for damages against it so as to accomplish a set-off, if waiver is to control, was a waiver by the bankrupt of a right to liquidate and assert his claim in the future. The proposition otherwise stated is this: If the composition is to be considered as having irrevocably excluded the right to set-off, then of course the consequences of the failure to ask for it must fall upon the one holding the unliquidated claim and not be cast upon the one who had no duty or concern with that subject until the liquidation was accomplished, especially in view of the payment made of the percentage upon the amount proved, a payment which was only consistent with the theory that the unliquidated claim was abandoned. If on the other hand it be considered in consonance with the principles and authorities to which I have referred that the composition did not terminate the bankruptcy but that a liquidation for the purpose of set-off could thereafter be accomplished, then it clearly follows that the effect of the bankruptcy and of the judgment of composition was to fix and secure that right and it cannot be held consistently with the statute that the composition proceedings taken conformably with the statute were a waiver of the right which those proceedings inevitably secured and made effective.

For these reasons I dissent, and am authorized to say that Mr. Justice Hughes, Mr. Justice Lamar, and Mr. Justice McReynolds concur in this dissent.

PARKER *v.* McLAIN, EXECUTRIX OF McLAIN.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 220. Submitted April 14, 1915.—Decided May 10, 1915.

In order to give this court jurisdiction to review the judgment of a state court under § 237, Judicial Code, the assertion of a Federal right must not be frivolous or wholly without foundation; otherwise an utterly baseless Federal right might be made the basis for invoking the jurisdiction of this court merely for purposes of delay.

Whether a consent by a defendant to a revivor amounts to an estoppel against challenging the capacity of the substituted plaintiff to continue the action is purely a question of local law or practice and the decision of the state court is controlling.

Nothing in the full faith and credit clause of the Federal Constitution or in the statute enacted thereunder requires the authenticated proof of a decree to include all the pleadings and proceedings.

Where the original decree entered in one State and sued on in another does not purport to lay a reciprocal duty on the judgment creditor, but simply recites that on performance the judgment debtor becomes entitled to papers in the registry of the court, full faith and credit is not denied because the judgment entered on the decree in the latter State does not impose an actual reciprocal duty on the judgment creditor.

In this case the Federal questions raised being so plainly devoid of merit as to be frivolous the writ of error is dismissed.

Writ of error to review 88 Kansas, 717 and 873, dismissed.

THE facts, which involve the application of the full faith and credit clause of the Federal Constitution and the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. Edward P. Garnett and *Mr. Isaac O. Pickering* for plaintiff in error.

Mr. W. R. Thurmond for defendant in error.

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

In a suit in the Circuit Court of Jackson County, Missouri, wherein the court had jurisdiction of the parties and the subject-matter, Carey McLain secured a decree against M. V. B. Parker for a considerable sum of money. The suit was brought and the decree rendered upon the theory that Parker had fraudulently induced McLain to join him in the purchase of certain property; that by falsely overstating the value of the property, the price at which it was being purchased and the amount he was contributing to the price, Parker had secured from McLain several sums as the latter's share of the purchase money when in truth these sums greatly exceeded his share, and that in consequence McLain was entitled to surrender his interest in the property to Parker and call upon him to refund what was paid to him. Before beginning the suit McLain executed and tendered to Parker appropriate deeds for the property, and when the suit was begun the deeds were brought into court and lodged with the clerk to be disposed of by the decree when rendered. Following a recital of these matters and a finding that McLain had been damaged to the extent of his payments to Parker, the decree ordered that the former have and recover from the latter the amounts paid—each being definitely stated—with interest at six per cent. per annum from the date of the decree, and directed that upon the satisfaction of the decree the deeds lodged with the clerk be delivered by him to Parker. The latter carried the case to the Supreme Court of Missouri, which affirmed the decree and in doing so pointed out the nature of the suit in these words, 229 Missouri, 68, 87, 93: "Plaintiff whilst charging fraud and deceit in the petition, and having the right to sue for damages without rescinding the contract, has taken the precaution in this, as in other counts, to

make a tender of such instruments as would place the defendant *in statu quo*. . . . The gist of these several counts is fraud and deceit, and money paid out to defendant in consequence thereof, and the prayer of the petition is to recover the money so obtained, with interest thereon. The judgment responds to the petition, its prayer and the proof."

After securing that decree McLain brought an action thereon in the District Court of Johnson County, Kansas, and during the pendency of the action died leaving a will. The will was duly probated in Kansas, the State of his residence, and letters testamentary were issued in that State whereby his widow became his executrix. An ancillary administrator was also appointed by the Probate Court of Jackson County, Missouri. Thereafter the action in Kansas was revived in the name of the executrix, with the defendant's express consent, and in regular course a trial was had at which all questions of fact and law were resolved in the plaintiff's favor, save that it was held that the real party in interest was not the executrix but the Missouri administrator and that the action ought not to have been revived in the name of the executrix. Judgment was rendered for the defendant and upon appeal to the Supreme Court of Kansas was reversed with a direction to enter judgment for the plaintiff. 88 Kansas, 717, 873. The present writ of error was then sued out by the defendant.

Our jurisdiction to review the judgment of the highest court of a State turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision. Judicial Code, § 237. And to be effective for this purpose the assertion of a Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of this court invoked merely

for purposes of delay. *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Wilson* v. *North Carolina*, 169 U. S. 586, 595; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Sawyer* v. *Piper*, 189 U. S. 154, 156.

The contentions advanced by the defendant in the Supreme Court of Kansas upon which the jurisdiction of this court is sought to be rested are (a) that under the law of Missouri where the decree sued on was rendered the administrator appointed in that State was the real party in interest and therefore the executrix was without legal capacity to maintain the action; (b) that the decree was not proved conformably to the law of Congress (Rev. Stat., § 905), because, as was objected when the proof was offered, the authenticated record produced in evidence did not contain all the pleadings and proceedings in the suit but only the decree with its recitals and findings; and (c) that by the terms of the decree the payment of the money by the defendant and the execution and delivery of the deeds by McLain were intended to be reciprocal, interdependent and concurrent acts and that to make the decree the basis of a judgment in Kansas against the defendant for the payment of the money without requiring performance of the reciprocal obligation imposed upon McLain would contravene the full faith and credit clause of the Federal Constitution (Art. IV, § 1) and the law enacted thereunder by Congress (Rev. Stat., § 905), and would deprive the defendant of the due process of law and the equal protection of the laws secured by the Fourteenth Amendment.

The first contention was overruled because, as was said in the opinion, "the defendant explicitly consented to the revivor in the name of the executrix and in view of that fact cannot be heard to question her capacity to maintain the action." Whether by consenting to the revivor and thus recognizing the executrix as the real party in interest (see Gen. Stat. Kan. 1909, § 6023) the defendant

was estopped from subsequently challenging her capacity to maintain the action was purely a question of local law or practice, and its decision by the Supreme Court of the State is controlling.

The next contention was wholly without any support and was so held by the Supreme Court of the State. There is nothing in the full faith and credit clause of the Constitution or in the statute enacted thereunder which requires that the authenticated proof of a decree shall include all the pleadings and proceedings in the suit, or which attempts to specify what parts of the proceedings in a state court shall be included in making up the record in an adjudicated cause. While there may be instances in which a decree or judgment could not well be understood, or would not clearly show what was determined, unless read in connection with the pleadings or other proceedings, this was not such an instance. The recitals and findings were so full and explicit and the terms of the decree so direct that nothing more was required to disclose its full purpose or what was determined by it.

The remaining contention was equally without color, because it rested upon an obviously false assumption. The decree did not purport to lay any reciprocal duty or obligation upon McLain but, on the contrary, proceeded upon the theory that he had done all that could be required of him. This was recognized by the Supreme Court of Kansas, which said in its opinion (pp. 720, 721): "He was given an absolute and unconditional judgment for the recovery of a specific sum of money. . . . Its enforcement was not made to depend upon any act to be subsequently performed. When it was paid or satisfied the defendant was entitled to receive the deeds from the clerk." And again, p. 874, "If collection is made here it must be presumed that the defendant, upon showing that fact to the Missouri court, can obtain his deeds, just as he might do if the judgment had been satisfied in any

other manner, and just as he might procure a discharge of any judgment against him, the amount of which had been collected by suit thereon in another State."

What has been said sufficiently discloses that the Federal questions raised in the case were so plainly devoid of merit as to afford no basis for a review in this court.

Writ of error dismissed.

STATE OF GEORGIA *v.* TENNESSEE COPPER COMPANY AND DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED.

MOTION TO ENTER A FINAL DECREE AGAINST THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED.

No. 1, Original. Argued April 6, 7, 1915.—Decided May 10, 1915.

The defendant Ducktown Sulphur Copper & Iron Company and the State of Georgia not having agreed as to the method of operation of the furnaces of the former and additional testimony having been taken relating to alleged changed conditions since 1907 and it appearing that the furnaces are emitting fumes in excess of what is proper *held* that:

A final decree against the Ducktown Company be now entered restraining it from operating its plant except upon the terms specified therein; the cause to be retained for further action and either side may present a decree in conformity with this decision.

Final decree ordered in 206 U. S. 230, against defendant Ducktown Company.

THE facts, which involve questions of nuisance arising from fumes from smelting ore and the power of the court to enjoin the same at the instance of a State, are stated in the opinion.

Mr. Warren Grice and *Mr. J. A. Drake*, with whom *Mr. Lamar Hill* was on the brief, for complainant.

Mr. J. A. Fowler and *Mr. W. B. Miller* for defendant Ducktown Company.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Both defendants are smelting copper ores in Polk County, East Tennessee, near the Georgia line. The works of the Tennessee Company, much the larger of the two, are situated within half a mile of the line; those of the Ducktown Company are some two and one-half miles away. The ores contain a very large amount of sulphur—around 20%—and in the process of smelting great quantities of sulphur dioxide are formed; if allowed to escape into the air this becomes sulphurous acid, a poisonous gas destructive of plant life.

In October, 1905, the State of Georgia began this Original proceeding alleging that defendants permitted discharge from their works of noxious gases which being carried by air currents ultimately settled upon its territory and destroyed the vegetation, and asking for appropriate relief. The case was heard on the merits and the issues determined in complainant's favor, May, 1907. We then said: "If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making, to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next." 206 U. S. 230, 239.

Hope was entertained that some practical method of subduing the noxious fumes could be devised and by consent the time for entering a final decree was enlarged. Both companies installed purifying devices. The Tennessee Company and the State finally entered into a stipula-

tion whereby the former undertook annually to supply a fund to compensate those injured by fumes from its works, to conduct its plant subject to inspection in specified ways, and between April 10th and October 1st not to "operate more green ore furnaces than it finds necessary to permit of operating its sulphuric acid plant at its normal full capacity." The State agreed to refrain from asking an injunction prior to October, 1916, if the stipulation was fully observed. The Ducktown Company and the State were unable to agree, and in February, 1914, the latter moved for a decree according a perpetual injunction. Consideration of the matter was postponed upon representation that conditions had materially changed since 1907, and leave was granted to present additional testimony "to relate solely to the changed conditions, if any, which may have arisen since the case was here decided." A mass of conflicting evidence has been submitted for our consideration.

The Ducktown Company has spent large sums—$600,000 and more—since the former opinion in constructing purifying works (acid plant); and a much smaller proportion of the sulphur contained in the ores now escapes into the air as sulphur dioxide—possibly only 41½% as against 85½% under former conditions. Similar improvements have been installed by the Tennessee Company at great expense, but we are without adequate information concerning the effect produced by them. As it asked and was granted opportunity to show material changes the burden is upon the Ducktown Company. A full and complete disclosure of the improvements installed by it and the results continuously obtained has not been presented.

Counsel maintain that escaping sulphur fumes now produce no substantial damage in Georgia, and further that if any such damage is being done the Tennessee Company alone is responsible therefor. We think the

proof fails to support either branch of the defense, and the State should have a decree adequate to diminish materially the present probability of damage to its citizens.

The evidence does not disclose with accuracy the volume or true character of the fumes which are being given off daily from the works of either company. Averages may not be relied on with confidence since improper operations for a single week or day might destroy vegetation over a large area, while the emission of great quantities of fumes during a short period would affect but slightly the average for a month or year.

It appears that in 1913 the total ores smelted by the Ducktown Company amounted to 152,249 tons, or 304,498,000 pounds—20% sulphur; total matte shipped was 12,537,000 pounds—about 4% of the ore; the total sulphur in the smelted ores not accounted for and which escaped into the air in the form of sulphur dioxide was 13,102 tons, or 26,204,000 pounds—over two pounds of sulphur for each pound of matte and an average of more than 35 tons per day.

During July, 1913, the total matte shipped (approximately the production) was 846,000 pounds—more was shipped in June and less in August. The July production was thus approximately 7% of the year's total. The sulphur in the fumes generated in connection with the production for this month, not redeemed by the acid plant and emitted into the air, may be fairly estimated as not less than 7% of 13,102 or 917 tons—substantially 30 tons per day. This amount produced harmful results and must be diminished.

It is impossible from the record to ascertain with certainty the reduction in the sulphur content of emitted gases necessary to render the territory of Georgia immune from injury therefrom; but adequate relief, we are disposed to think, will follow a decree restraining the Duck-

town Company from continuing to operate its plant otherwise than upon the terms and conditions following: (1) It shall keep daily records showing fully and in detail the course and result of the operations. (2) A competent inspector to be appointed by this court shall have access to all the books and records of the Company, shall make frequent careful observations of the conditions—at least once each fortnight—during the next six months, and at the end of that time shall make full report with appropriate recommendations. An adequate sum to cover the necessary costs and expenses must be deposited with the Clerk by the Company. (3) It shall not permit the escape into the air of fumes carrying more than 45% of the sulphur contained in the green ore subjected to smelting. (4) It shall not permit escape into the air of gases the total sulphur content of which shall exceed 20 tons during one day from April 10th to October 1st of each year or exceed 40 tons in one day during any other season.

The cause will be retained for further action and either party may apply hereafter for appropriate relief.

Within ten days either side may present a decree in conformity herewith, together with such suggestions as seem desirable.

MR. JUSTICE HUGHES, dissenting: I do not think that the evidence justifies the decree limiting production as stated.

THE CHIEF JUSTICE and MR. JUSTICE HOLMES join in this dissent.

See page 678, *post*, for decree entered in conformity with this opinion.

HEALY *v.* SEA GULL SPECIALTY CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 253. Argued May 3, 1915.—Decided May 17, 1915.

Where it appears from the plaintiff's statement that his case is for infringement and arose under the patent laws, the District Court has jurisdiction, notwithstanding the fact that he may also rely upon a contract as furnishing the mode in which the damages grounded on infringement should be ascertained.

THE facts, which involve the jurisdiction of the District Court in a case involving infringement of patent, are stated in the opinion.

Mr. Charles Rosen and *Mr. Henry B. Gayley* for appellant.

Mr. Randolph Barton, Jr., with whom *Mr. James E. Zunts* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellants, alleging that Healy is the owner of patents for improvements in boxes and machines for making boxes, and that the Healy Box Corporation is the grantee of the exclusive right to make and use the machines and to make, use and sell the boxes containing the patented improvements. The bill next alleges that the defendant is infringing the patents and will continue to do so unless restrained. Then, anticipating a defence, it sets forth a license to the defendant, a breach of its conditions and a termination of

the same. It adds that the license contained a stipulation that in case of any suit for infringement the measure of recovery should be the same as the royalty agreed upon for the use of the inventions, and another for the return of the machines let to the defendant while the license was in force. The bill prays for an injunction against making, using or selling the boxes or machines, for an account of profits received by reason of the infringement, for triple the damages measured as above stated, and for the surrender of the machines. The jurisdiction depended upon this being a case arising under the patent laws, and the District Court thinking that it was merely a matter of contract dismissed the bill. In our opinion its decision was wrong.

It may be that the reasoning of *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, is more consistent with that of Mr. Justice Bradley's dissent in *Hartell* v. *Tilghman*, 99 U. S. 547, 556 (a decision since explained and limited, *White* v. *Rankin*, 144 U. S. 628), than with that of the majority, but it is the deliberate judgment of the court and governs this case. As stated there, the plaintiff is absolute master of what jurisdiction he will appeal to; and if he goes to the District Court for infringement of a patent, unless the claim is frivolous or a pretence, the District Court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious disputes. *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282. Jurisdiction generally depends upon the case made and relief demanded by the plaintiff, and as it cannot be helped, so it cannot be defeated by the replication to an actual or anticipated defence contained in what used to be the charging part of the bill. For the same reason it does not matter whether the validity of the patent is admitted or denied.

As appears from the statement of it, the plaintiffs' case arose under the patent law. It was not affected by

the fact that the plaintiffs relied upon a contract as fixing the mode of estimating damages or that they sought a return of patented machines to which if there was no license they were entitled. These were incidents. The essential features were the allegation of an infringement and prayers for an injunction, an account of profits and triple damages —the characteristic forms of relief granted by the patent law. The damages were grounded on the infringement, and the contract was relied upon only as furnishing the mode in which they should be ascertained.

Decree reversed.

BOOTH-KELLY LUMBER COMPANY *v.* UNITED STATES.

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

No. 258. Argued May 4, 5, 1915.—Decided May 17, 1915.

Judgment of the Circuit Court of Appeal cancelling patents for timber lands on the ground of fraud affirmed, the explanations of the grantee who claimed to be a *bona fide* purchaser without notice failing to escape the effect of incontrovertible facts which showed participation in the fraud.

203 Fed. Rep. 423, affirmed.

THE facts, which involve the validity of patents to land alleged by the United States to have issued as the result of fraud in the entries, are stated in the opinion.

Mr. A. H. Tanner, with whom *Mr. A. C. Woodcock* and *Mr. John Van Zante* were on the brief, for appellant:

There is nothing in the Timber and Stone Act to prevent the entrymen from borrowing the money to pay the ex-

penses of making the entries and to pay the government price for the land. *United States* v. *Detroit Timber Co.*, 124 Fed. Rep. 393; *Lewis* v. *Shaw*, 70 Fed. Rep. 289, 294; *Hoover* v. *Salling*, 110 Fed. Rep. 43, 47; *United States* v. *Richards*, 149 Fed. Rep. 443; *United States* v. *Barber Lumber Co.*, 172 Fed. Rep. 948, 960; *United States* v. *Williamson*, 207 U. S. 425; *United States* v. *Biggs*, 211 U. S. 507; *S. C.*, 32 L. D. 349; *S. C.*, 34 L. D. 129; *Larson* v. *Weisbecker*, 1 L. D. 422; *Appeal of Ray*, 6 L. D. 340; *Halling* v. *Eddy*, 9 L. D. 337; *Church* v. *Adams*, 37 Oregon, 355; *Wilcox* v. *John*, 21 California, 267; *Norris* v. *Heald*, 12 Montana, 282; *James* v. *Tainter*, 15 Minnesota, 512; *Gross* v. *Hofeman*, 91 Minnesota, 4; *Fuller* v. *Hunt*, 48 Iowa, 163.

Upon making his initial filing on a timber claim the entryman may sell or agree to sell the claim, or borrow money on it, or do as he pleases with it without violating any of the provisions of the Timber and Stone Act. *United States* v. *Williamson*, *supra; United States* v. *Barber Lumber Co.*, 172 Fed. Rep. 948, 960; *United States* v. *Kettenbach*, 175 Fed. Rep. 463, 466.

A deed, though absolute in form, if intended as security, is a mortgage, and it may be shown to be such by parol evidence. *Peugh* v. *Davis*, 96 U. S. 332; *Brick* v. *Brick*, 98 U. S. 514; *Cabrera* v. *Bank*, 214 U. S. 224, 230; *Russell* v. *Southard*, 12 How. 139; *Hall* v. *O'Connell*, 52 Oregon, 164; *Kramer* v. *Wilson*, 49 Oregon, 333.

When the Government calls the entryman as a witness on its behalf it is bound by his testimony unless overcome by countervailing evidence. *United States* v. *Barber Lumber Co.*, 172 Fed. Rep. 948, 960; *Choctaw &c. Ry. Co.* v. *Newton*, 140 Fed. Rep. 225, 250; *United States* v. *Budd*, 144 U. S. 154.

As to the character of evidence required by a court of equity to set aside a patent attention is called to the following decisions: *United States* v. *Budd*, 144 U. S.

154, 162; *Maxwell Land Grant Case*, 121 U. S. 325, 379; *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 317; *United States* v. *Marshall Mining Co.*, 129 U. S. 579, 589; *United States* v. *Stinson*, 197 U. S. 200, 204; *United States* v. *Clarke*, 200 U. S. 601, 608.

The declarations of a person after he has parted with the title to real estate are not admissible against his grantee to defeat or destroy the title. *Dodge* v. *Freedman's Bank*, 93 U. S. 379, 383; *Phillips* v. *Laughlin*, 99 Maine, 26; *Vrooman* v. *King*, 36 N. Y. 477.

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

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the United States for the cancellation of five patents for timber lands issued to the four individual appellants and one Jordan, all of whom subsequently conveyed the lands to the Booth-Kelly Lumber Company. The ground of the bill is that the entries were made pursuant to an understanding with the Company for the purpose of conveying the title to it, in fraud of the law. The defendants, except Jordan, answered jointly, denying the fraud, and the Company set up that it was a purchaser for value without notice. The answer was sworn to by the manager of the Company. Afterwards it was amended by agreement so as to allege that the defendants Ethel and Lucy La Raut were still the equitable owners of the land patented to them and that their warranty deeds to the Company were in fact mortgages to secure repayment of advances made to them. The bill was taken for confessed against Jordan, and both courts found for the Government as to the land conveyed by him. The Circuit Court of Appeals, reversing the decree of the Circuit Court, found for the Government as to

the other lands also and ordered a decree for the United States. 203 Fed. Rep. 423.

The issue is purely one of fact upon matters with regard to which the Circuit Court seems to have been prevented from coming to the same conclusion as the Circuit Court of Appeals rather by the presumption in favor of the patents than by its belief in the testimony for the defence. As both courts agreed about Jordan in accordance with his own statement on the stand, we shall reëxamine only the cases of the La Rauts.

The La Rauts were poor, two of them being in the employment of the Company, and they were connected by marriage with the manager of the Company, Booth. As the result of an arrangement with Booth, the nature of which is the point in controversy, by Booth's direction the man who was looking out for the Company's timber purchases reported claims for the La Rauts in the neighborhood of the Company's extensive tracts. Booth directed Dunbar, the bookkeeper of the Company, to see to the furnishing of the money. The La Rauts were taken to inspect the land, so that they might make the necessary affidavits, but beyond that appear to have known nothing and to have made no inquiries at any time. The Company paid their expenses and, through their hands, the land office fees, the cost of publication and the purchase price—all the bills, in short. On May 7 and 8, 1902, they received their certificates of title and in July executed deeds, Booth testifies, to him, certainly either to him or to the Company. At or about the same time each received $100 just as Jordan did, whose claim was one of the same group and filed at about the same time. These deeds were not recorded, and were destroyed; there is some indication in the evidence that the destruction was at the time of a Government investigation into land frauds, but the proof is not clear. In 1904 the patents were issued and were delivered to one Alley by the Land Office. Alley secured

them at the request to John F. Kelly, vice president of the Company. The Company ever since has paid the taxes and exercised dominion over the land. In 1907 new warranty deeds were executed to the Company by the La Rauts, Ethel and Lucy receiving $25, seemingly in connection with their conveyances, and later Stephen and his wife $50, each.

Booth and Ethel La Raut, now Mrs. Lewis, meet the inference naturally to be drawn from the facts thus far stated, by testifying that it was agreed between them that Booth would get timber claims for her and the other three, carry them, and advance the money necessary until they were able to dispose of the property—which would seem to imply that they bought the land for speculation, contrary to their affidavits, but of course denies that they bought for the Company. Both Ethel and Lucy La Raut were called by the Government and both asserted that they bought for themselves, that they still owned the land, and that their deeds were executed only as security for the advances that the Company had made, and there is some corroboration of Booth as to details, but the evidence for the defendants is overborne by the whole course of what was done. A part of it is discredited by the established falsity of similar testimony in the matter of Jordan. The claims of Stephen A. La Raut and Alice La Raut his wife, are disposed of by Mrs. Applestone, daughter of Alice by a former husband, if she is believed. She says that in 1902 her mother told her that she had taken up a claim for Mr. Booth and was to get $100 and that her step-father took up his claim for the same reason, and that he said that he had received $100 also. The story is confirmed by the behavior of the parties concerned. For after Stephen La Raut and his wife had made their last deeds to the Company, when, according to Booth, Stephen wanted to go to Canada and to dispose of his land, and applied to Booth, Booth turned him over to Kelly, gave him no information as to the value of the

claims and let him sell them for fifty dollars in addition to the hundred dollars that each had received in 1902, although they clearly were worth a great deal more. Booth's actual conduct is inconsistent with his having entertained a benevolent scheme, and the sum paid is hardly reconcilable with Stephen and his wife being owners of the land.

If the defendants' case fails as to these two claims it hardly can succeed as to the others, for according to them all were taken under a single arrangement for all. And there is further evidence that Booth's account cannot be accepted. We will not encumber the reports with lengthy statement of details, but apart from evidence of other fraudulent claims in the same group with these, the books of the Company which were under Booth's eye tell a different story from his. The ledger showed no names, but the journal account under each name charges them with $400, the price of the land, and $100 which each received (with a small additional item for Stephen) and then on July 31, 1902, charges the whole $500 to stumpage, the general account of the Company for the purchase of land. There the accounts end, and thereafter the lands were carried on the Company's land account. The actual expenses other than the foregoing never were charged to them at all, but all, including the later payments of $25 and $50 went without specification into the stumpage account. There are attempts to explain all this by alleged oral statements that Booth held himself responsible, as there is a lame effort also to get rid of the original sworn answer, the inconsistencies of which with the subsequent testimony we have not stated at length. We think it enough to say that the explanations fail to escape the effect of the incontrovertible facts.

Decree affirmed.

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

SPOKANE AND INLAND EMPIRE RAILROAD COMPANY *v.* WHITLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 206. Argued March 18, 1915.—Decided May 17, 1915.

Decedent, who met his death in Idaho from the wrongful act of defendant railroad company left a wife and mother who under the laws of Idaho were his sole and equal heirs. The wife qualified as administratrix in Tennessee, and, having obtained power from the probate court of that State, to settle with defendant, sued as administratrix in Washington and recovered, without contest, a judgment which was paid. The mother applied in the Tennessee probate court for one-half of the recovery but the demand was contested by the wife successfully. The mother had already sued in Idaho and defendant set up the judgment in Washington but the Idaho state court held that the mother's right was not barred as the administratrix did not represent her in the Washington suit. *Held* that

While the right given by the law of one State may be enforceable in another State, if the law is not opposed to its policy, when so enforced, as the liability springs from the law of the enacting State, it is governed thereby.

When suit is brought in another jurisdiction, such provisions of the law of the place of the wrongful act as are merely procedural may be treated as non-essential, but the obligation itself has its source in that law; and if it is an action for damages for wrongful death that law must be looked to, to determine not only what the obligation is, but to whom it runs and the persons for whose benefit recovery may be had.

The statute of Idaho giving a remedy for the wrongful death, as construed by the highest court of the State, is similar to Lord Campbell's Act in that the recovery is not for the benefit of the estate of the decedent but for the benefit of his heirs as established by the law of the State.

The attempt of the mother to obtain a part of the proceeds of the Washington judgment did not, as her right to do so was successfully denied, amount to a ratification.

The Idaho court was not bound to regard the Washington judgment as having been prosecuted by or on behalf of the mother and in so doing did not fail to give to such judgment full faith and credit under the Constitution of the United States.

23 Idaho, 642, affirmed.

THE facts, which involve the right of enforcement in one State of a liability created under the statute of another State and the extent to which a judgment recovered by an administratrix may affect a claim by an heir of the intestate, are stated in the opinion.

Mr. W. G. Graves, with whom *Mr. B. B. Adams*, *Mr. F. H. Graves* and *Mr. B. H. Kizer* were on the brief, for plaintiff in error:

Under a statute like that of Idaho, where the right to recover damages for death by wrongful act is given to the "heirs or personal representatives" of the decedent, there is but one right of action and there can be but one recovery. Either of the designated classes may sue in the first instance, there being no prior right of suit in either, and a recovery by one is a bar to a second suit by the other. *Hartigan* v. *So. Pac.*, 24 Pac. Rep. 851; *Daubert* v. *Meat Co.*, 73 Pac. Rep. 244; *Salmon* v. *Rathjens*, 92 Pac. Rep. 733; *Alder Co.* v. *Fleming*, 159 Fed. Rep. 593; *McBride* v. *Berman*, 79 Arkansas, 62; *St. Louis &c. Co.* v. *Needham*, 52 Fed. Rep. 371; *Whelan* v. *Railway Co.*, 111 Fed. Rep. 326; *Hawkins* v. *Barber Pav. Co.*, 202 Fed. Rep. 340; *Beard* v. *Skeldon*, 113 Illinois, 584; *Louisville &c. Co.* v. *Sanders*, 86 Kentucky, 259; *Willis &c. Co.* v. *Grizzell*, 100 Ill. App. 480; *Peers* v. *Water Co.*, 119 Fed. Rep. 400; *Con. Coal Co.* v. *Dambrowski*, 106 Ill. App. 641; *Louisville &c. Co.* v. *McElwain*, 98 Kentucky, 700; *Di Paolo* v. *Lumber Co.*, 178 Fed. Rep. 877; *Roberts* v. *Railway Co.*, 124 Fed. Rep. 471; *Keele* v. *Railway Co.*, 131 S. W. Rep. 730; *Foster* v. *Hicks*, 46 So. Rep. 533; *Tenn. Cent. R. R.* v. *Brown*, 143 S. W. Rep. 1129; *In re Taylor*, 204 N. Y.

135; *Kling* v. *Torello*, 87 Connecticut, 301; *Marquezo* v. *Koch*, 161 S. W. Rep. 648; *Shawnee &c. Co.* v. *Motesenbacker*, 138 Pac. Rep. 790; *Riggs* v. *Nor. Pac. Railway Co.*, 60 Washington, 292; *Benson* v. *Lumber Co.*, 71 Washington, 616.

A right of action conferred by a state statute to recover damages for death by wrongful act is transitory, and may be maintained in another State whose laws give a similar remedy under a similar state of facts. *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Tex. & Pac. Ry.* v. *Cox*, 145 U. S. 593; *Stewart* v. *Railroad Co.*, 168 U. S. 443.

The right of action is enforced in another State upon the theory that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of tort that accompanies the person of the defendant elsewhere. *West. Un. Tel. Co.* v. *Brown*, 234 U. S. 542. Therefore the right to recover and its incidents are governed by the *lex loci* and not by the *lex fori*. *Cuba R. R.* v. *Crosby*, 222 U. S. 473; *Nor. Pac. R. R.* v. *Babcock*, 154 U. S. 190; *Stewart* v. *Railroad Co.*, 168 U. S. 445; *Reynolds* v. *Day*, 140 Pac. Rep. 681.

The rule extends to all substantial incidents of the action, so that distribution of the amount recovered should be made in accordance with the laws of the State where the cause of action arose. *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Leenan* v. *Railroad Co.*, 128 Fed. Rep. 191; *Denver & R. G. Co.* v. *Warring*, 86 Pac. Rep. 305; *Hartley* v. *Hartley*, 81 Pac. Rep. 505; *McDonald* v. *McDonald*, 28 S. W. Rep. 482; *Texas &c. Co.* v. *Miller*, 128 S. W. Rep. 1165; *Bolinger* v. *Beacham*, 106 Pac. Rep. 1094; *Cowen* v. *Ray*, 108 Fed. Rep. 320; *Florida &c. Co.* v. *Sullivan*, 120 Fed. Rep. 799.

The administratrix, though appointed under the laws of Tennessee, was authorized to recover from defendant

in Washington upon the right of action given by the statute of Idaho for the following reasons:—

Because the statute conferring it does not require that it be enforced in the Idaho courts, or by a personal representative appointed by the Idaho courts. It may therefore be enforced in the courts of another State, and by a representative appointed by the courts of another State. *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Hodges* v. *Kimball*, 91 Fed. Rep. 845; *Mo. Pac. R. R.* v. *Lewis*, 40 N. W. Rep. 401; *Higgins* v. *Railroad Co.*, 29 N. E. Rep. 534; *Chandler* v. *Railroad Co.*, 35 N. E. Rep. 89; *Ill. Cent. R. R.* v. *Crudup*, 63 Mississippi, 291; *Leonard* v. *Nav. Co.*, 84 N. Y. 48.

Because a personal representative who sues upon a right of action given by the Idaho statute does so as trustee for the heirs, is at least a *quasi* trustee, and the rule that a receiver or an administrator appointed by the courts of one State will not be permitted to sue in the courts of another State, does not apply to a *quasi* assignee or *quasi* trustee. *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243; *Kansas Co.* v. *Cutter*, 16 Kansas, 568; *Jeffersonville Co.* v. *Hendrix*, 41 Indiana, 48; *Memphis &c. Co.* v. *Pikey*, 40 N. E. Rep. 527; *Wabash &c. Co.* v. *Shacklet*, 105 Illinois, 364; *Bouldin* v. *Railroad Co.*, 54 Atl. Rep. 906; *Robertson* v. *Railroad Co.*, 99 N. W. Rep. 433; *St. Louis &c. Co.* v. *Graham*, 102 S. W. Rep. 700; *Kelly* v. *Railroad Co.*, 125 S. W. Rep. 818; *Voris* v. *Railroad Co.*, 157 S. W. Rep. 835; *Knight* v. *Moline &c. Co.*, 140 N. W. Rep. 839.

Because the Superior Court of the State of Washington for Spokane County held that the Tennessee administratrix might sue and recover in the courts of Washington upon the right of action given by the statutes of Idaho. While that court is not the highest court of the State, nevertheless its decision as to what is the law of the State must be accepted by this court as conclusive in the ab-

sence of a controlling statute or decision of a higher court. *Laing* v. *Rigney*, 160 U. S. 531, 542; *Fish* v. *Smith*, 47 Atl. Rep. 711.

There is no statute or decision of a higher court to the contrary.

Though the personal representative sues for the benefit of, and as trustee for, the heirs of the decedent, they are not entitled to be made parties to the action, or in any way control it. He is their representative for all the purposes of the action. *Yelton* v. *Railroad Co.*, 33 N. E. Rep. 629; *Pittsburg &c. Co.* v. *Moore*, 53 N. E. Rep. 290; *Cleveland &c. Co.* v. *Osgood*, 73 N. E. Rep. 285; *Major* v. *Railroad Co.*, 88 N. W. Rep. 815; *Harshman* v. *Railroad Co.*, 103 N. W. Rep. 412; *Louisville* v. *Hart*, 136 S. W. Rep. 212; *Slusher* v. *Weller*, 151 S. W. Rep. 684; *Harbin Co.* v. *McFarland*, 160 S. W. Rep. 798.

It follows that he may in good faith compromise the claim without the consent of the beneficiaries. *Foot* v. *Railroad Co.*, 84 N. W. Rep. 342; *Washington* v. *Louisville &c. Co.*, 26 N. E. Rep. 653.

The widow possesses the same right where she is authorized to sue in behalf of herself and children. *Shambach* v. *Electric Co.*, 81 Atl. Rep. 802; *Hamilton* v. *Railroad Co.*, 154 S. W. Rep. 86.

Where several judgments founded upon the same cause of action are recovered against the same defendant in several different States, a payment of one of them is a satisfaction of all. 2 Black on Judgments (2d ed.), § 1013; 23 Cyc., p. 1493; 17 Am. & Eng. Enc. (2d ed.), p. 863.

For a statement of the rule in actions to recover damages for death by wrongful act, see *Nelson* v. *Railroad Co.* 14 S. E. Rep. 838; *Harris* v. *Balk*, 198 U. S. 215, 226.

Mr. John P. Gray, with whom *Mr. Robert Elder* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

Mary Elizabeth Whitley, the defendant in error, recovered judgment in the District Court for the County of Kootenai, Idaho, for the sum of $5,500 as damages for the death of her son, A. P. Whitley, alleged to have been caused by the negligence of the Railroad Company, the plaintiff in error. The Supreme Court of the State affirmed the judgment (23 Idaho, 642), and this writ of error is prosecuted. It is assigned as error that the court failed to give due faith and credit, as required by the Federal Constitution, to a judgment recovered in the State of Washington by Josephine Whitley, as administratrix of the estate of the deceased A. P. Whitley, for the same cause of action.

The facts, upon which the question arises, are these: The Railroad Company operates an electric railway between the City of Spokane, in the State of Washington, and Cœur d'Alene, in the State of Idaho. On July 31, 1909, A. P. Whitley, a passenger, was killed in a collision at or near La Cross or Gibbs station, Idaho; and the court found that his death was caused by the defendant's negligence. The law of the State of Idaho provided: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." (Rev. Codes, § 4100.) The deceased at the time of his death was a resident of Shelby County, Tennessee. He was survived by his wife, Josephine Whitley, and his mother, Mary Elizabeth Whitley, the defendant in error. Under the Idaho law, they were his sole heirs. In September, 1909, the Railroad Company entered into an agreement with Josephine Whitley, promising to pay to her the sum of $11,000 on account of the death of her husband, of which $1,500 was paid at once and the remainder was to be paid

upon her appointment as administratrix in Tennessee. Thereupon, in October, 1909, Josephine Whitley obtained from the Probate Court of Shelby County, Tennessee, letters of administration upon her husband's estate and by that court was authorized to settle with the Railroad Company for the sum above stated. Shortly after—on October 25, 1909—the mother of the deceased brought the present action against the Railroad Company in the State of Idaho. Josephine Whitley, having refused to join as a party plaintiff, was made a defendant. She was not within the jurisdiction of the Idaho court and did not appear; under order of that court, a copy of the summons and complaint was served upon her without the State.

In view of the commencement of this suit, the Railroad Company refused to carry out the agreement with Josephine Whitley and she as administratrix (in November, 1909) brought an action against the company in the Superior Court of the State of Washington to recover the sum of $9,500 alleged still to be due. In her complaint she set forth her appointment as administratrix, the negligence of the defendant causing the death of the intestate, the statute of Idaho, the settlement for $11,000 authorized by the Probate Court of Tennessee, and the partial payment. It was not alleged that the mother, Mary Elizabeth Whitley, was an heir under the laws of Idaho, where the cause of action arose, or that any recovery was sought on her behalf. The Railroad Company in its answer denied the wrongful act and set forth as an affirmative defense that the mother had sued in Idaho, was one of the heirs, and was entitled to maintain her action; and that, if the plaintiff succeeded, the defendant would be exposed to a double recovery. The administratrix replied, alleging that she had full authority under the laws of Idaho to agree to a settlement of the claim and that the settlement would be a bar to a recovery in the Idaho action. Mary Elizabeth Whitley

was not a party to the Washington suit and no attempt was made to bring her in. It was swiftly determined, without contest. Service of the answer was acknowledged on November 16, 1909, and the reply was served on November 17, 1909. The cause was brought to trial on November 18, 1909; the pleadings were filed shortly after 9 o'clock on the morning of that day; at 9:45 o'clock findings were filed (with a conclusion of law overruling the defense of the Railroad Company), and at 10 o'clock on the same morning judgment was entered in favor of the plaintiff for the sum of $9,500.

The Railroad Company at once paid to Josephine Whitley the amount of the judgment and she removed this amount to the State of Tennessee. In the early part of the year 1910, the mother presented her petition to the Probate Court of Shelby County, Tennessee, alleging that the administratrix had recovered by compromise the sum of $11,000, and that the petitioner, as an heir under the Idaho law, was entitled to one-half. The demand was contested and the petition was dismissed. On appeal to the Supreme Court of Tennessee, the judgment was affirmed; it was held that the fund recovered by the administratrix was 'to be distributed in accordance with the laws of the State of Tennessee, and not the laws of the State of Idaho,' and that the mother had no interest in the proceeds of the recovery.

After these proceedings, the Railroad Company amended its answer in the present suit in Idaho, and pleaded in bar the Washington and Tennessee judgments. These defenses the Idaho court overruled and, as we have said, the mother recovered judgment for $5,500.

In determining the question now presented, it is apparent that the fundamental consideration is that the right to recover damages for the killing of the decedent was created by the Idaho statute. That right could be enforced in another State, if the enforcement was not

opposed to its policy (*Dennick* v. *Railroad Company*, 103 U. S. 11; *Texas & Pacific Rwy.* v. *Cox*, 145 U. S. 593), but, wherever enforced, the liability sprang from the Idaho law and was governed by it. Where suit is brought in another jurisdiction, it has been held that such provisions of the law of the place of the wrongful act as can be deemed to be merely procedural may be treated as non-essential (*Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445; *Atchison, Topeka & Santa Fe Rwy.* v. *Sowers*, 213 U. S. 55; *Tennessee Coal, Iron & R. R. Co.* v. *George*, 233 U. S. 354), but it is clear that the obligation itself has its source in that law. We must look to the Idaho statute to determine what the obligation is, to whom it runs, and the persons by whom or for whose benefit recovery may be had. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126, 127; *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542, 547.

The construction of that statute by the Supreme Court of Idaho, with respect to the nature of the right of action created, is in accord with the accepted view of statutes similar to Lord Campbell's Act. The recovery authorized is not for the benefit of the 'estate' of the decedent; the proceeds of the recovery are not assets of the estate. Where the personal representative is entitled to sue, it is only as trustee for described persons,—the 'heirs' of the decedent. The action, says the Supreme Court of Idaho, is allowed upon the theory that the wrongful killing of the ancestor 'works a personal injury to his heirs.' They are the sole beneficiaries. The 'heirs' are those who under the laws of Idaho take in cases of intestacy; here, it is conceded that these heirs were the widow and mother of the deceased, taking equally. 23 Idaho, pp. 659, 662. It may also be premised that when suit is duly brought by the trustee under such a statutory trust, it is a necessary and conclusive presumption that the trust will be executed and that the rights of the bene-

ficiaries as fixed by the statute which created the obligation will be recognized by all courts before whom the question of distribution may come. *Dennick* v. *Railroad Company*, 103 U. S. 11, 20. It follows necessarily that if Josephine Whitley as administratrix was authorized to sue on behalf of the mother, and she recovered as trustee by virtue of that authority, the Washington judgment constituted an adjudication of the mother's right and as such would be entitled to full faith and credit in other States, including Idaho; in that case, the fact that the Tennessee court subsequently denied the right of the mother to her share as one of the beneficiaries would present simply the case of an erroneous determination which could not operate to destroy the estoppel of the judgment. Judicial error on a trustee's accounting does not disturb the rights which have become fixed in suits prosecuted by the trustee against third persons.

The question, then, is one of jurisdiction, that is, whether the mother—Mary Elizabeth Whitley—was represented by the administratrix in the Washington suit. The mother was not a party to that suit, and if she was not represented by the administratrix, the Washington court was without jurisdiction as to her, and the Idaho court was not bound to treat the judgment as a bar to her recovery in the present suit. *Thompson* v. *Whitman*, 18 Wall. 457, 463, 469; *National Exchange Bank* v. *Wiley*, 195 U. S. 257, 270; *Haddock* v. *Haddock*, 201 U. S. 562, 573; *Fauntleroy* v. *Lum*, 210 U. S. 230, 237. The matter is not one of mere form or procedure, and it is manifest that the authority of the administratrix to represent the mother without her consent, if that authority existed, could be derived only from the Idaho statute. Not only did the Tennessee court deny that the Tennessee law conferred the right to represent the mother, but the State of Tennessee was powerless to confer it contrary to the statute which gave the cause of

action. The same is true with respect to the State of Washington, where the suit was brought; and there, it may be observed, it has been held under the local statute giving (as does that of Idaho) the right of action for the wrongful killing of the decedent to 'heirs or personal representatives' that the personal representative is not entitled to recover unless it be shown that the designated beneficiaries have sanctioned the bringing of the action. *Copeland* v. *Seattle*, 33 Washington, 415, 421; *Koloff* v. *Chicago, Milwaukee & Puget Sound Rwy. Co.*, 71 Washington, 543, 550, 551.

The Supreme Court of Idaho, having authority to construe the Idaho statute, has held that the administratrix did not represent the mother, and, consequently that the mother's right was not barred. The court thus expressed its conclusion:

"It clearly appears then, first, that the respondent in this case, Mary Elizabeth Whitley, had no right of action and no claim whatever under the laws of the State of Tennessee; second, that she was never made a party to the action prosecuted in the State of Washington, and that the action there prosecuted was not prosecuted for her or in her interest or on her behalf, and that she was neither accorded representation there in person nor by trustee, administrator or other representative. She has, therefore, clearly never been a party to the Washington judgment and is not bound by that judgment. (*Galveston H. & A. S. R. Co.* v. *Kutac*, 72 Texas, 643; *S. C.*, 11 S. W. Rep. 127.)" 23 Idaho, p. 658.

It is left to the plaintiff in error to contend, in substance, that the Idaho court sustained the right of a personal representative, that is, of a duly appointed administrator, to sue under the Idaho statute for the benefit of the 'heirs,' but denied credit to the judgment in question, recovered in virtue of that right, simply because of the subsequent decision of the Tennessee court in refusing to permit the

mother to participate in the proceeds of the recovery; and extracts from the opinion of the Idaho court are quoted in support of the argument. It seems to us that this is too narrow a view of the decision of the state court. We think that the decision taken in its full scope and with its necessary implications involves the construction of the statute to the effect that the 'heirs' are entitled to sue on their own behalf, and that the statute does not give to an administrator or personal representative an independent right of action, or authority to bind the heirs without their sanction, but an administrator is authorized by the statute to sue only on their behalf and with their consent. As has been said, similar words in the statute of the State of Washington, have been similarly construed. See *Copeland* v. *Seattle*, 33 Washington, 415 (cited in the opinion of the Idaho court); *Koloff* v. *Chicago, Milwaukee & Puget Sound Rwy.*, 71 Washington, 543, 550, 551. And under that construction there is no basis for the conclusion in the present case that the mother was represented in the Washington suit and that she was bound by the judgment there recovered. It is insisted that the mother ratified by endeavoring to obtain in Tennessee a share of the recovery. But this was a wholly barren proceeding. The administratrix resisted the petition, denying in effect that she had represented the mother in the Washington suit and asserting that the mother had no interest whatever in that action or the proceeds. The court upheld this contention of the administratrix and the mother took nothing. Neither the position of the widow nor that of the Railroad Company was changed in any respect, and it cannot be said that this unsuccessful attempt altered the mother's rights.

It is apparent that the Railroad Company coöperated with the administratrix in securing the judgment in her favor, without bringing the mother in as a party and without demanding that proof of authorization of the suit by

the mother should be furnished. Had the Railroad Company made such a demand, there is no reason to believe that it would not have been sustained. Relying upon what appears to be an erroneous construction of the Idaho statute, it preferred to facilitate the administratrix in obtaining the recovery in the absence of the mother and without its being shown that the suit was brought in her interest and with her authority, and the predicament in which it now finds itself is due solely to its own conduct.

Judgment affirmed.

SEABOARD AIR LINE RAILWAY *v.* TILGHMAN.

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

No. 713. Argued April 22, 23, 1915.—Decided May 17, 1915.

The Federal Employers' Liability Act rejects the common-law rule that contributory negligence is a complete defense and adopts the more reasonable rule that the damages shall be diminished in proportion to the amount of negligence attributable to the injured employé.

Where the causal negligence is attributable partly to the carrier and partly to the injured employé the latter is not to recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the total damages corresponding to the employé's contribution to the total negligence.

The trial court should not commit to the jury the duty of determining the amount in which the damages should be diminished by reason of the contributory negligence of the employé without advising them of the rule prescribed by the statute for determining the amount of the diminution. It should not be left to their conception of what is reasonable.

167 N. Car. 163, reversed.

THE facts, which involve the validity of a verdict in the state court in an action for personal injuries brought under the Employers' Liability Act, are stated in the opinion.

Mr. Murray Allen for plaintiff in error.

Mr. William C. Douglass, with whom *Mr. Clyde A. Douglass* and *Mr. Robert N. Simms* were on the brief, for defendant in error.

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

This was an action in the Superior Court of Wake County, North Carolina, under the Employers' Liability Act of Congress, c. 149, 35 Stat. 65, c. 143, 36 Stat. 291, to recover for personal injuries sustained by the plaintiff in a head-on collision of two passenger trains, of one of which he was the conductor in charge. A trial of the issues resulted in a verdict finding that the plaintiff's injuries were caused by the concurring negligence of the railway company and himself and assessing the damages recoverable by him at $7,000. A judgment in his favor was rendered on the verdict and the company appealed to the Supreme Court of the State where the judgment was affirmed, two judges dissenting. 167 N. Car. 163.

The Federal question which brings the case here is, whether proper effect was given to that part of the statute which deals with the measure of recovery where the employé contributes to his injuries by his own negligence.

At common law there could be no recovery in such a case, the contributory negligence being a complete bar or defense. But this statute rejects the common law rule and adopts another, deemed more reasonable, by declaring (§ 3), "the fact that the employé may have been guilty

of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." This is followed by a proviso to the effect that contributory negligence on the part of the employé shall not be considered for any purpose where the carrier's fault consisted in the violation of a statute—a Federal statute—enacted for the safety of employés (see *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503); but this is not such a case, and so the principal provision is the one to be applied. It means, and can only mean, as this court has held, that, where the causal negligence is attributable partly to the carrier and partly to the injured employé, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employé's contribution to the total negligence. *Norfolk & Western Ry.* v. *Earnest*, 229 U. S. 114, 122; *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42, 49.

At the trial the court instructed the jury that, if they found the plaintiff was injured through the concurring negligence of the railway company and himself, they should determine the full amount of damages sustained by him, "and then deduct from that whatever amount you think would be proper for the contributory negligence." This was reiterated in different ways and somewhat elaborated, but the fair meaning of all that was said was that a reasonable allowance or deduction should be made for the plaintiff's negligence and that it rested with the jury to determine what was reasonable. No reference was made to the rule of proportion specified in the statute or to the occasion for contrasting the negligence of the employé with the total causal negligence as a means of

ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made and the jury should have been advised of that rule and its controlling force.

It results that the objection to the instructions upon this subject was well taken and should have been sustained.

Judgment reversed.

COLLINS *v.* JOHNSTON, WARDEN OF THE CALIFORNIA STATE PRISON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 594. Argued February 25, 1915.—Decided May 17, 1915.

In *habeas corpus* proceedings this court is confined to the examination of fundamental and jurisdictional questions; the writ cannot be employed as a substitute for a writ of error.

Refusal of the trial court to permit a proffered defense, even if erroneous, does not ordinarily affect the jurisdiction or amount to more than error.

An averment of arbitrary action in judicial ruling merely states a conclusion of law and has no effect in the absence of facts alleged sufficient to show that the ruling was actually arbitrary.

Even though the question whether the judgment was rendered by a properly constituted court were open here, this court sees no reason to disagree with the meaning attributed by the state courts of Cal-

ifornia to Art. VI, §§ 6 and 8 of the constitution of that State in regard to a judge of the Superior Court of one county holding a court in another county on the request of the governor of the State.

An amendment of the constitution giving authority where it existed before may be adopted from abundant caution and not as recognizing and supplying a *casus omissus*.

A sentence of fourteen years imprisonment for one duly convicted of perjury does not amount to a deprivation of liberty without due process of law where it does not exceed the limit authorized by the statute.

Comparative gravity of criminal offenses is a matter for the State itself to determine, and the fact that some offenses are punished with less severity than others does not amount to a denial of equal protection of the law.

The prohibition in the Eighth Amendment of cruel and unusual punishments is a limitation upon the Federal Government and not on the States.

A person extradited from Great Britain is not protected by § 5275, Rev. Stat., from being tried and convicted for a crime committed in the State after extradition—and so *held* in this case as to perjury committed on the trial of the crime for which the party was extradited.

THE facts, which involve questions raised under the Eighth and Fourteenth Amendments, and under an extradition treaty, as to the validity of the conviction and sentence of appellant in a criminal court of California, are stated in the opinion.

Mr. George D. Collins pro se, submitted.

Mr. Raymond Benjamin, Chief Deputy Attorney General of the State of California, with whom *Mr. Robert W. Harrison*, Deputy Attorney General of the State of California, and *Mr. U. S. Webb*, Attorney General for the State of California, were on the brief for the appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal, taken under § 238, Jud. Code, to review a final order of the District Court of the United

States for the Northern District of California denying appellant's petition for a writ of *habeas corpus* to be addressed to appellee, as warden of the State Prison of the State of California, in whose custody appellant alleges he is held in violation of the Constitution, laws, and treaties of the United States. The petition was based upon § 753, Rev. Stat., and was denied under § 755 upon the ground that, on the face of it, the petitioner was not entitled to the writ.

Appellant is held under the authority of a judgment of the Superior Court in and for the City and County of San Francisco, in the State of California, imposing a sentence of imprisonment for the term of fourteen years, upon his conviction for perjury upon an indictment presented December 29, 1905. The allegations of fact upon which the Federal questions are raised are somewhat involved, and not easily understood without reference to previous proceedings set forth in *Collins* v. *O'Neil*, 214 U. S. 113, of which appellant asks us to take judicial notice. Reading the averments of the petition with this aid, the following facts appear: On July 13, 1905, appellant was indicted by the grand jury of the City and County of San Francisco for the crime of perjury, committed in the giving of testimony in an action pending in a court of that county wherein one Charlotta Collins was plaintiff and appellant was defendant, in which she sought to obtain maintenance, support, and alimony for herself and her child; the alleged false testimony being that the said Charlotta and appellant did not intermarry on May 15, 1889, or at any other time, and were never husband and wife. To answer this indictment appellant was extradited from Canada, and he was put upon trial in the month of December before the Superior Court of the City and County of San Francisco. The jury disagreed, and while appellant was in custody awaiting a further trial he was, on December 29, 1905, again indicted for perjury, the offense being alleged to

have been committed in the giving of evidence upon the trial of the first indictment, in that he falsely testified that on May 15, 1889, at a specified place in the City of San Francisco, a marriage ceremony was performed between him and one Agnes Newman, whereas in truth, at the time and place specified, a marriage ceremony was performed between him and one Charlotta Newman. Before being placed on trial upon the second indictment, appellant applied to the United States Circuit Court for the Northern District of California for a writ of *habeas corpus*, which was denied. 148 Fed. Rep. 573. He was then tried, found guilty, and sentenced; the judgment was affirmed by the District Court of Appeal, and a petition to have the cause heard in the Supreme Court was denied. 6 Cal. App. 492; 92 Pac. Rep. 513. Meanwhile, successive applications for *habeas corpus* were made to the United States District and Circuit Courts for the Northern District of California, and denied. 151 Fed. Rep. 358; 154 Fed. Rep. 980. And the Supreme Court of California, having entertained such an application, overruled his contentions and remanded him to the custody of the Sheriff. 151 California, 340, 351. This court reviewed the decision of the state Supreme Court, and the decision of the United States Circuit Court reported in 154 Fed. Rep. 980, with the result that both were affirmed. 214 U. S. 113.

It is unnecessary to enlarge upon the doctrine, thoroughly established and recently re-stated, that in *habeas corpus* proceedings we are confined to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error. *Frank* v. *Mangum*, decided April 19, 1915, *ante*, p. 309.

In his petition and in voluminous briefs appellant raises numerous questions, of which it is sufficient to mention the following:

(1) He contends that he was deprived of due process of law in violation of the Fourteenth Amendment, in that the trial court arbitrarily denied and refused to consider a valid and legally conclusive defense offered by him upon the trial of the second indictment, which resulted in the conviction upon which he is now held in custody. The alleged defense was: that testimony relating to the question of fact whether a ceremonial marriage took place on May 15, 1889, between him and Charlotta Newman could not be material to the issue upon the first indictment nor furnish valid or competent foundation for a charge of perjury, because the marriage, if performed, was a nullity; and this because at a previous time appellant and Agnes Newman intermarried by written and mutual contract of marriage *per verba de præsenti*, followed by a consummation and a public and mutual assumption of marital rights, duties, and obligations, which marriage continued to exist until dissolved by the death of Agnes in the month of May, 1901, and because of this previous marriage any marriage ceremony between appellant and Charlotta on May 15, A. D. 1889, was void by § 61 of the Civil Code of California. But, plainly, the question whether testimony respecting the alleged ceremony was material upon the trial of the first indictment was to be determined by considering the nature of the issue that was then being tried, and the state of the other evidence that had been introduced at the time the alleged false testimony was given; not by reëxamining the merits of that issue or the truth of the other evidence. The principal questions at issue upon the former trial, so far as appears, were: (a) Did appellant enter into a ceremonial marriage with Charlotta on the date named? (b) Was he, at that time, already married to Agnes, then still living? These were questions of fact; if both were answered in the affirmative, the marriage with Charlotta although made in fact was void in law. In order for the prosecution to succeed, the

first must be answered in the affirmative, the second in the negative; hence, testimony bearing upon either was material. The alleged false testimony of appellant tended to prove the negative of the first question. Manifestly, when he was afterwards tried upon an indictment for perjury based upon that testimony, no legitimate light could be thrown upon the question of its materiality or of its falsity by re-trying the second question of fact or the legal conclusions resulting therefrom. This matter was sufficiently disposed of by the state Court of Appeal in *People* v. *Collins*, 6 Cal. App. 492, 498, 500, 505; 92 Pac. Rep. 513, 515, 516, 518.

Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was "arbitrarily refused" merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged.

(2) A second contention is that the judgment under which appellant is held in custody is not the judgment of the Superior Court in and for the City and County of San Francisco, or of any legally constituted court of judicature, because Judge Burnett, who presided at the trial and rendered the judgment, was not a judge *de facto* or *de jure* of that court, but was a judge of the Superior Court for another county in said State, and presided at appellant's trial at the request of the Governor, and without the consent or stipulation of appellant or any request of the judges of the San Francisco Superior Court. This contention is to be tested by the state constitution, of which the pertinent provisions, as they stood at the time of appellant's conviction, are as follows:

"Art. VI, Sec. 6. There shall be in each of the organized

counties, or cities and counties, of the State, a superior court, for each of which at least one judge shall be elected by the qualified electors of the county, or city and county, at the general state election; *provided* . . . that in the city and county of San Francisco there shall be elected twelve judges of the superior court, any one or more of whom may hold court. There may be as many sessions of said court, at the same time, as there are judges thereof. . . . The judgments, orders, and proceedings of any session of the superior court held by any one or more of the judges of said courts, respectively, shall be equally effectual as if all the judges of said respective courts presided at such session. . . .

"Sec. 8. A judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof, and upon the request of the governor it shall be his duty so to do. . . . "

Of course, these sections are to be read together, and their natural meaning is that where a judge of a superior court of one county holds a superior court in another county upon the request of the Governor, the court so held by him constitutes a session of the superior court, with the same jurisdiction as if one of the elected judges were sitting. *Gardner* v. *Jones*, 126 California, 614, 620, is to this effect. And when we add that Judge Burnett presided at appellant's trial upon the request of the Governor, that the District Court of Appeal affirmed the judgment and the Supreme Court refused to review its decision (6 Cal. App. 492, 507), and that the latter court, in the *habeas corpus* proceeding, upheld the jurisdiction of the trial court (151 California, 340), no reasonable doubt remains that the state courts advisedly adopted such a construction of § 8 as to sustain Judge Burnett's authority, even though appellant's present contention was not raised and therefore not distinctly passed upon. Assuming the question to be open here, we see no reason

to disagree with the meaning thus attributed to the constitution by the courts of the State.

According to appellant's construction of § 8, *supra*, a superior court judge elected in one county, when holding a superior court in another county upon the request of the Governor, would be without jurisdiction, and incapable even of holding a "session" of the court, because of the absence of express provision in the constitution to that effect. This is so plainly unreasonable that it might be dismissed as absurd, except for the insistence that by a constitutional amendment adopted November 8, 1910 (several years after appellant's conviction), the people themselves recognized a *casus omissus* in § 8 of Article VI, and supplied it by adding these clauses: "There may be as many sessions of a superior court at the same time as there are judges thereof, including any judge or judges acting upon request, or any judge or judges *pro tempore*. The judgments, orders, acts and proceedings of any session of any superior court held by one or more judges acting upon request, or judge or judges *pro tempore* shall be equally effective as if the judge or all the judges of such court presided at such session." But in view of the settled construction of the section as it previously stood, we must regard the amendment as having been adopted, from abundant caution, to remove all question of doubt, rather than as recognizing and supplying a *casus omissus*.

(3) It is contended that a sentence of fourteen years' imprisonment for the crime of perjury is grossly excessive, and therefore illegal, and prohibited by the Fourteenth Amendment of the Constitution of the United States. The sentence was based upon § 126 of the California Penal Code, which reads: "Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years." This is not a case, therefore, of a sentence exceeding the limit authorized by law. *In re Snow*, 120 U. S. 274; *Hans Nielsen, Petitioner*, 131 U. S. 176.

To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the law-making power, are functions peculiarly belonging to the several States; and there is nothing to support the contention that the sentence imposed in this case violates the provisions of the Fourteenth Amendment either in depriving appellant of his liberty without due process of law or in denying to him the equal protection of the laws. *In re Kemmler*, 136 U. S. 436, 448; *Coffey* v. *Harlan County*, 204 U. S. 659, 662.

The argument under the equal protection clause is based principally upon the averment that the false testimony to the effect that a ceremonial marriage between appellant and Charlotta Newman did not take place on May 15, 1889, "could not by any possibility induce or influence any order, judgment, or decree of any court or judge, nor any verdict or judicial proceedings, and did not and could not by any possibility injure or tend to injure any one in his or her rights or status in law." Since the petition shows that the natural tendency, and, presumably, the intended result, of the perjury was to improperly procure appellant's acquittal upon the first indictment, the present contention is so manifestly frivolous as not to require further discussion. It is argued, also, that in the case of other felonies denounced by the laws of California, "many of them offenses of greater gravity and of more injurious consequences than perjury, the average maximum penalty is five years' imprisonment in the penitentiary, and no more." But it is hardly necessary to say that the comparative gravity of criminal offenses, and whether their consequences are more or less injurious, are matters for the State itself to determine.

The Eighth Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal

Government, not upon the States. *Barron* v. *Mayor of Baltimore*, 7 Pet. 243, 247; *Pervear* v. *Commonwealth*, 5 Wall. 475, 480; *McElvaine* v. *Brush*, 142 U. S. 155, 158; *O'Neil* v. *Vermont*, 144 U. S. 323, 332; *Ensign* v. *Pennsylvania*, 227 U. S. 592, 597.

(4) It is contended, upon the authority of *United States* v. *Rauscher*, 119 U. S. 407, 430; *Cosgrove* v. *Winney*, 174 U. S. 64, and other cases, that the conviction and imprisonment of appellant under the second indictment are in contravention of the treaty of extradition between the United States and Great Britain, in that he was extradited for the sole purpose of being brought to trial upon the first indictment, and that while that charge was awaiting trial and final disposition, he could not, without violence to the treaty and § 5275 of the Revised Statutes, be tried, convicted, sentenced, and imprisoned upon another charge. It is alleged that the first indictment was dismissed upon motion of the prosecution on July 12, 1909; and that under the treaty and law he was entitled to a reasonable time thereafter in which to return to the country from which he was extradited. In this form, and in others too numerous for mention, appellant reiterates the points that were decided against him by the Supreme Court of California (*In re Collins*, 151 California, 340), whose judgment was affirmed by this court in *Collins* v. *O'Neil*, 214 U. S. 113, where the court said (p. 122): "The contention of the plaintiff in error that the duty to afford opportunity to return after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed, is not even plausible"; and further (p. 123): "The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the State whose laws he has violated

since his extradition, and we cannot see that it is a matter of any interest to the surrendering government. There is nothing in § 5275, Rev. Stat., *supra*, which gives the least countenance to the claims of the plaintiff in error."

Appellant's other points and arguments are but variations of those that have been mentioned.

The final order of the District Court refusing the application for a writ of *habeas corpus* is

Affirmed.

LONGPRÉ *v.* DIAZ.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 51. Submitted March 15, 1915.—Decided June 1, 1915.

Under the law of Porto Rico as it was in 1892 a widow and guardian *ad litem* had no authority to give the property of the minor child in payment of a debt of the deceased father in private sale, and there was no authority in any judge to approve such a voluntary partition as was involved in this action.

A disposition of a minor's property by private sale in Porto Rico, unauthorized by the local law, even if approved by a judge, is void, and the minor, on coming of age, may sue in ejectment under the provisions of the Civil Code of Porto Rico, then in force and applicable in this case, without first seeking rescission of the partition.

An unsuccessful defendant in ejectment must, unless a purchaser in good faith, account for the fruits gathered during possession.

While under the Civil Code of Porto Rico good faith is presumed until bad faith is shown, one who purchases property belonging to a minor under a confessedly non-existent and void instrument cannot be a purchaser in good faith.

The rule that the burden of proof to show bad faith is on him who charges it, does not apply where bad faith is shown *ipso facto* by the acquisition being contrary to law.

Under Art. 442, of the Civil Code of Porto Rico, an heir who possessed

property in personal good faith is relieved from liability to account after ejectment, for the fruits during his possession, notwithstanding his ancestor from whom he derived the property may not have acquired it in good faith.

THE facts, which involve the construction and application of the laws of Porto Rico relating to the accountability for fruits and profits of real estate of one evicted therefrom, are stated in the opinion.

Mr. H. H. Scoville and *Mr. Jose R. F. Savage* for plaintiff in error.

Mr. Francis H. Dexter, Mr. Joseph Anderson, Jr., and *Mr. Damian Monserrat, Jr.,* for defendant in error.

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

Clemente Diaz y Gonzalez, residing in Viequez, Porto Rico, there died in April, 1890, leaving a widow and an infant son, the issue of their marriage. The deceased was the recorded owner of a piece of farming property known as Destino, as well as of other pieces of property of small area and value, all of which were his separate estate, having been acquired before marriage. By the provisions of the Code it is conceded that the minor was the sole legal heir of his father, taking all his property, subject however to a usufruct of one-third in favor of his mother, the widow. In April, 1892, in conciliatory proceedings before a municipal magistrate preparatory to a suit to be brought by Ramon Aboy Benitez to enforce a debt which he asserted against the estate, the widow admitted that Aboy was a creditor of the estate for a little over three thousand pesos, evidenced as to a considerable part by the notes of the deceased and the remainder embracing doctors' bills, taxes and money advanced for the support of the widow and infant child. The creditor,

presumably in consequence of this acknowledgment, agreed to await payment until March, 1893, when a lease would expire which existed on the property known as Destino in favor of an agricultural partnership styled Mourraille & Martineau. In the following August, 1892, on the petition of the widow the court of first instance of Humacao, within whose territorial jurisdiction Viequez was situated, recognized the minor as the sole heir of the father and as such entitled to his estate subject to the usufruct in favor of the widow as above stated. The court subsequently on the petition of the mother appointed a paternal uncle of the minor, Santos Diaz y Gonzalez, his guardian *ad litem* to act for and represent the infant in matters where from conflict of interest or otherwise his mother would be incapacitated from so doing. Thereafter Aboy by a notarial act transferred to the firm of Mourraille & Martineau the greater part of his acknowledged debt, the widow intervening in the act for the purpose of taking cognizance of the transfer and in addition to recognize certain small debts held by the firm against the estate.

Contemplating an extra-judicial partition, the widow and the guardian *ad litem* then united in the appointment of an accountant to accomplish that purpose, who drew an agreement of so-called partition which was executed by the parties on December 27, 1893. In the agreement the liabilities of the estate were enumerated and its assets were stated and valued and the property of the entire estate was conveyed. For the purposes of this case it suffices to say that as the debt due to the firm of Mourraille & Martineau was as stated precisely equal to the value affixed to the farm Destino, that property was transferred and delivered to the firm in extinguishment of its debts and a like course by transferring other property was pursued as to the comparatively small debt of Aboy. The small remainder of the estate was declared to be subject to the ownership of the minor and the one-third usufruct

of his mother. To make this private agreement for voluntary and extra-judicial partition authentic in form by placing it of record, the widow, on February 1, 1894, appeared before a notary and exhibiting the agreement deposited it among the archives of his office after making the necessary declarations to accomplish that purpose. This being done, a copy of the agreement as authenticated and deposited was presented to the judge of the court of first instance of Humacao for his approval, which was by him given with a direction to the officer of registration to place the agreement as authenticated upon the public records. In April, 1894, this was done, thus transferring on the public record the title of the farm Destino from the name of Diaz, the deceased, to the name of the firm of Mourraille & Martineau. It is conceded, however, that in the meanwhile, in February, 1894, as a result of the transfer made under the so-called partition agreement delivery of the possession of the farm Destino was made to the firm and they held the same asserting ownership thereof.

By the provisions of a notarial act executed in May, 1894, which was inscribed upon the public registry, for the purpose of dividing the assets of the firm of Mourraille & Martineau among the partners, the title to the farm Destino passed from the firm to the individual name of Victor Mourraille. By his death which, although the date is somewhat obscure in the record, occurred probably in January, 1895, the property passed to the plaintiffs in error, his widow and heirs. Whether they took as the result of intestacy or by will is not disclosed and is immaterial to consider, since it is conceded that the rights enjoyed by them were but a continuation of those possessed by Mourraille himself in virtue of the proceedings conveying the property Destino to the firm and of the attribution of the property to Mourraille in the division of the firm assets.

More than twenty years after the death of his father the minor, Clemente Diaz, having been duly emancipated, commenced in a local court in Porto Rico this suit against the present plaintiffs in error, the widow and heirs of Mourraille, in revendication of the property called Destino previously transferred to them under the circumstances above stated. They removed the case to the court below and successfully resisted a motion to remand. Thereupon the petition was amended. As amended in substance it asserted that the plaintiff was the duly registered owner of the property, and that his possession had been wrongfully disturbed in 1894 by the action of the defendants or their author in taking possession of the same. A brief outline of the facts which we have previously stated was made and the prayer was for a recovery of the farm called Destino and for a decree for fruits and revenues from the time of taking possession in 1894. An answer was filed which was demurred to for insufficiency. It would seem that before the demurrer was passed upon an amended and fuller answer was filed. By this answer the facts which we have previously stated were in substance admitted. The capacity of the plaintiff to sue was challenged, first, because as an heir of his father he had no right to do so, and second, because he was without authority to recover the property without previously suing to rescind the partition proceedings and the recorded title resulting therefrom and thus collaterally assail those proceedings. The want of right to recover as a question of merits was denied, first, because of a term of prescription which was pleaded, second, because of the validity of the partition proceedings and the conclusive effect of the judgment of approval given to them by the proper court, third, because a suit to rescind such proceedings was barred by a prescription which was also pleaded, fourth, because in any event the plaintiff was without authority to sue to recover the fruits and revenues of the property because

during his minority they were collectible, if due, by his mother as administrator of his estate and because even in case there was a right to evict, the fruits and revenues could not be recovered from Mourraille because of his good faith, nor from the defendants holding under him because of their good faith. This answer was again demurred to as stating no defense. The court sustained the demurrer in so far as it questioned the sufficiency of the technical defenses advanced by the answer on the ground that the proceedings of so-called partition were absolutely void and the approval affixed by the judge of the court of first instance of Humacao was equally null because of an absolute want of jurisdiction on his part to take the action in the premises which he had taken. The answer was again amended. The defenses to the merits concerning the want of right to recover the property or its fruits and revenues as well as prescription were all in the fullest way reasserted, and in addition a counterclaim was presented asserting that the defendants in the event of eviction were entitled to recover the amount of the debt owned by Mourraille & Martineau which had been used in the so-called partition proceedings to pay for the Destino property, with interest thereon at six per cent.

Upon the issues which were made by this answer and counterclaim the case came finally to trial before a jury. On the opening the plaintiff to make out his title after establishing his heirship, offered the documents establishing the facts concerning the partition which we have stated and the defendants expressing their purpose to offer no further evidence on those subjects, the court applying the conclusion which it had reached on the demurrer as to the absolute nullity of the partition sale, instructed the jury that on the question of title there must be a verdict for the plaintiff. Thereupon the trial proceeded solely as to the right to recover fruits and revenues and no evidence on any other subject was offered. It was

agreed between the parties that there should be deducted from any sum of fruits and revenues found to be due one-third thereof upon the theory that they belonged to the widow of Diaz, the mother of the plaintiff, in virtue of her usufruct and were not involved in the suit. And it was further admitted that the claim asserted in the counter-claim was valid and there should be a verdict for the recovery of the sum claimed with interest. Considerable evidence as to fruits and revenues was offered and some exceptions were taken by the defendants to rulings of the court admitting evidence concerning the subject on the ground that by its admission too great leeway was afforded for speculative damages. The defendants specifically requested that the jury be instructed that if they were in good faith they were not liable for fruits and revenues, which was refused and an exception taken. And an exception was also reserved concerning the right to award fruits and revenues to the plaintiff for the period covered by his minority because of the right of his mother to administer his property during such time. There was a verdict and judgment for the property and for the rents and revenues during the entire term of adverse possession, whether held by Mourraille & Martineau, by Mourraille himself, or by the defendants holding under him.

There are twenty-seven assignments of error, but we shall confine our attention to the questions pressed in argument. The validity and effect of the so-called partition proceedings on the title of the property sued for underlies every consideration urged and we therefore, as did the court below, first consider that subject. While it is obvious that the property left by the deceased and which passed to his heir, the minor, was bound for the debts of the deceased and subject to be disposed of under lawful proceedings to pay the same, we think it is indisputably apparent that there was an absolute want of authority on the part of the widow and guardian *ad litem* to give the property of the

minor in payment of an alleged debt of the estate of the father. We say this because the so-called partition and the sale of the property by a mere private agreement were directly in the teeth of the requirements of the law concerning the administration and sale of a minor's property and therefore such mere private sale created no rights whatever conflicting with the title vested in the minor in virtue of his heirship. And we are of opinion moreover that by the same token it conclusively results that the judge of the court of first instance of Humacao was absolutely without jurisdiction to approve the so-called voluntary partition proceedings and therefore that no rights whatever arose from such sanction. We do not stop to refer to the requirements of the local law which were absolutely disregarded in the private sale relied upon, since in substance it is not disputed that if the proceedings by which the property was sold had the character which we affix to them, they were wholly unauthorized by the local law and indeed were prohibited by its express or implied provisions. In the light of this conclusion we are of opinion that the lower court committed no error in overruling the challenge made by the answer to the capacity of the plaintiff to sue in revendication (ejectment) upon the assumption that he was bound first to seek the rescission of the partition proceedings and to obtain an annulment of the order of the judge approving the same, since it is impossible to conceive that the preliminary duty existed to obtain the annulment of that which was already null or to seek to rescind that which never in contemplation of law had any existence whatever. In passing we observe that the contention that the plaintiff as the sole heir of his father's estate and as such the owner of the entire property sued for was without capacity to sue is, we think, refuted by its mere statement.

Aside from the objections to which we have referred concerning the admissibility of evidence as to the quantum

of fruits and revenues which we shall hereafter notice, this reduces the case to a consideration of the right to recover fruits and revenues. The question arises in a two-fold aspect: First, as to the liability for fruits and revenues of Victor Mourraille, the author in title of the defendants, and second, of the defendants themselves. In both, questions of fact and law require to be considered, the first involving the existence of good faith, and the second, the legal responsibility for fruits and revenues resulting from the ultimate conclusion as to the existence of good faith drawn from the proof on the subject.

The provisions of the present Porto Rican Civil Code controlling the subject, which are in substance the same as those of the Spanish Civil Code previously governing in Porto Rico, are as follows, the numbers of the articles of the former Spanish Code being printed in brackets:

"SEC. 453. [451] A possessor in good faith becomes the owner of the fruits collected, so long as the possession is not legally interrupted.

"Natural and cultivated fruits are considered as collected from the time they are gathered or separated.

"Civil fruits are considered as daily proceeds, and belong, in that proportion, to the possessor in good faith.

"SEC. 436. [433] A *bona fide* possessor is deemed to be the person who is not aware that there exists in his title or in the manner of acquiring it, any flaw invalidating the same.

"A possessor in bad faith is deemed to be any person possessing in any case contrary to the above.

"SEC. 437. [434] Good faith is always presumed, and any person averring bad faith on the part of a possessor, is bound to prove the same.

"SEC. 444. [442] Any person who succeeds by hereditary title shall not suffer the consequences of a faulty possession of the testator, unless it be shown that he was aware of the defects affecting such possession; but the

effects of possession in good faith shall benefit him only from the date of the decease of the testator."

First, As to the good faith of Mourraille.

As there was no evidence from which the want of good faith of the firm of Mourraille & Martineau or of Mourraille himself was deducible except the proof concerning the giving in payment of the minor's property as the result of the voluntary partition, it follows that unless such evidence established the want of good faith there was error under the very terms of the Code in allowing the recovery of fruits and revenues against Mourraille for the period of his possession as distinguished from the possession of the defendants holding under him. As we have already, however, pointed out that the partition proceedings were absolutely void because in violation of the requirements of law concerning the sale of the minor's property, it follows that the absence of good faith clearly resulted from taking possession of the property and attempting to hold it under a confessedly nonexistent and void instrument. The conclusion so irresistibly arises from the premise upon which it is based that reference to authority on the subject might well be dispensed with. Authority, however, is not wanting, since in countries where the civil law prevails and the right to retain fruits and revenues in the event of eviction in case of good faith is recognized, with substantial unanimity it has always been considered that the existence of good faith was excluded and the conclusion of legal bad faith necessarily arose against one who was a party to an attempt to acquire property by a deed, conveyance or proceeding which was absolutely void because in violation of prohibitory laws. Such was the rule in France prior to the Code Napoleon. So also under that Code the doctrine has been expressly announced and applied by the Court of Cassation. See Hérit. Daudé C. Etienne, Cass. 19 Dec. 1864, Journal Du Palais for 1865, p. 27, and note 3 where a reference is made to other ad-

judged cases on the subject and to doctrinal writers sustaining the principle. So in Louisiana many years ago it was recognized that "The purchaser of minors' property by private agreement is a possessor in bad faith." *Fletcher* v. *Cavalier*, 4 Louisiana, 267, 277; *Morand* v. *New Orleans*, 5 Louisiana, 226, 242. And the same principle was applied to "one possessing by a judgment of a court without jurisdiction." *Lowry* v. *Erwin*, 6 Rob. 192. And that such was the law in Spain both before and after the Civil Code would seem to be undoubted since Scaevola so treats it. Thus that author in his Commentaries on the Spanish Civil Code, Volume 8, pages 308 *et seq.*, in commenting on Article 442 (identical with § 444 of the Porto Rican Civil Code,) says:

"This rule, which is but an expression of the principle that 'the burden of proof is upon the one who makes the charge,' . . . in our opinion had no application in the event the possession takes its origin in a faulty manner of acquiring, either by being contrary to provisions of law, or through lack of compliance with certain requisites. In this case, we said, that proof was not necessary, inasmuch as bad faith was shown *ipso facto* by the single circumstance of the acquisition being contrary to law. 'Thus,' we said, 'he who acquires a thing belonging to a minor, without authorization from the family council, he who purchases it, regardless of the prohibitions of Article 1459, cannot be considered a possessor in good faith, because he knew beforehand that he could not acquire it, that the acquisition was faulty, being contrary to law, and because no one is permitted to plead ignorance of the law.'"

And this brings us to consider under a second heading whether the burden of proof was sustained and the want of good faith of the plaintiffs in error, the heirs of Mourraille holding under him, was established as the result of the proof of Mourraille's own bad faith.

Second, As to the good faith of the heirs of Mourraille.

The contention of the plaintiffs in error pressed below and here urged is that even conceding the absence of good faith of Mourraille and their liability as his successors or heirs as the result of the eviction to refund fruits and revenues during his term of possession, the liability of the defendants beyond this to pay rents and revenues did not arise because the proof of the want of good faith in Mourraille did not establish the want of good faith of his heirs holding under him. And because of this proposition it is insisted the court below erred in refusing to charge that in the absence of proof of bad faith on their part they were not liable on eviction for fruits and revenues during their possession as distinguished from that of Mourraille. The contention is rested upon the provisions of § 444 of the Porto Rican Code (Article 442 of the Spanish Code), saying:

"Any person who succeeds by hereditary title shall not suffer the consequences of a faulty possession of the testator, unless it be shown that he was aware of the defects affecting such possession; but the effects of possession in good faith shall benefit him only from the date of the decease of the testator."

This provision, it is insisted, causes the liability of the heirs to pay fruits and revenues upon their eviction to depend upon their personal good faith disconnected from and uninfluenced by the bad faith found to exist in Mourraille, their author, under whom they held. On the other hand this is met by the contention that by the very nature of the possession of the heirs under and through Mourraille as his legal successors continuing, so to speak, his personality, the bad faith of their author was imputable to them and their liability as possessors in bad faith to restore fruits and revenues is consequently established. It is conceded by both parties that the text of the section relied upon was introduced into the Spanish Code as the

result of an original conception, since it was not found in the Code Napoleon and not expressed in the codes which have followed that Code, as for instance the Code of Louisiana. It is also to be conceded that as the text in the Spanish code had received no authoritative interpretation when it was adopted in so many words into the Porto Rican code, therefore the adoption carried with it no previous authoritative interpretation. The respective contentions turn upon a discussion of the text relied upon and the support which each side assumes is afforded their view of the subject derived from Spanish doctrinal writers on the Code. Thus in favor of the doctrine that the heirship to the property carries with it as an inseparable incident the heirship to the bad faith of the author or ancestor, especially where such bad faith of the author is the resultant of the void nature of the immediate title under which he held the property, great reliance is placed upon a passage in the work of Scaevola, the eminent legal writer already referred to. The passage in question is found in the comment of the author upon Article 442 of the Code immediately following the passage which we have already quoted concerning the proof of bad faith established as against one who has acquired through an absolutely void deed or proceeding, and is as follows:

"Now then: will the explanation be applicable to the successor? Our opinion inclines to the affirmative. The case presented by us deals with an error of law, and this no one should be ignorant of. The successor cannot maintain that he is ignorant of it: *first*, because it is not possible to claim ignorance of the law; *second*, because on accepting the inheritance, from the moment a person is converted into a successor, there is no other presumption but that he has examined the titles of possession of his author and predecessor. Acceptance of the inheritance implies previous examination of everything concerning it. How can it be lawful for a successor to allege that he believed, for

example, that an estate possessed by his predecessor was held in good faith if he had acquired it in a faulty manner, contrary to law? Such allegation would be inadmissible, because the successor, by the mere fact of being such successor, is presumed to know the titles of possession of the predecessor, and therefore the faults attached thereto. On the supposition of which we are speaking, we repeat, bad faith is inherent to transmittal to the successor, inasmuch as the successor continues the personality of the predecessor."

On the other hand reliance to the contrary is placed upon opinions expressed by other Spanish doctrinal writers on the Code or books dealing with that subject as follows: Manresa, Commentaries on the Spanish Civil Code, Vol. 4, p. 165 *et seq.;* Spanish Judicial Encyclopedia, Francisco Seix, Editor, Vol. 4, p. 665 *et seq.;* Diaz Guijarro y Martinez Ruiz on the Civil Code, Vol. 3, p. 311. Without admitting that the authorities thus relied upon are entirely reconcilable one with the other or afford what is deemed any safe rule for elucidating the significance of the section of the Code in question, we are of opinion that it must be conceded that these authorities do not coincide with the significance attributed to the article of the Code under consideration stated by Scaevola in the passage just quoted. Because of this situation we do not particularly refer to the authorities last relied upon since at best we can find nothing in them to relieve us of the duty of interpreting the section in question or which renders the performance of the duty of interpretation less difficult. In view of this situation we come to consider the subject with which the article deals primarily from the point of view of historical evolution in order if possible to throw light on the doctrinal conditions which led to the incorporation of the article into the Spanish Code and thus ascertain the intent and purpose which controlled its enactment

and then to interpret the provision from that vantage point.

Speaking in a general sense, before the Code Napoleon, certainly in the provinces more largely influenced by the Roman law, the doctrine of the right of a possessor in good faith to retain the fruits and revenues in case of eviction was firmly established. It was also equally clearly recognized that the bad faith of the author was attributable to one holding under him as an heir or universal successor. If complexities obtained in the application of the doctrine, they in a large measure resulted from questions concerning the burden of proof as to good or bad faith. Pothier De la Propriété, n. 332 et 336; Domat Lois civ., 1re part., liv. 3, tit. 5, n. 14. And see also a statement of Laurent on the subject, t. 6, n. 221. The general doctrine as to non-liability for fruits and revenues on eviction in case of good faith was embodied in the Code Napoleon in Articles 549 and 550. Two things came at an early day to be recognized under that Code: First, that it had come to pass that so far as the restitution of fruits and revenues was concerned, the burden of proof to establish the absence of good faith on the part of a possessor whose eviction was sought was upon the one seeking the eviction. The doctrine as it came to be crystallized is thus stated by Laurent, t. 6, n. 225, p. 298: "According to the principles generally prevailing the burden of proof would rest upon the possessor of property to prove his good faith. In effect under general principles the owner seeking to recover property would only be obliged to prove his right of property and when that right was established, by that fact alone the fruits of the property would belong to him as the result of the general rule established by Article 547. The possessor who claimed the fruits would then become an actor on his own account and if the correct principles were rigorously applied, he would be obliged to prove

the foundation of his demand, that is to say, his good faith. However, it is established that the possessor under these circumstances is not obliged to prove his good faith because by the text of Article 2268 good faith is always presumed and the burden is cast upon him who alleges bad faith to prove it."

Second. So also in some measure, it may be, because of this view concerning the burden of proof and from many other considerations, the preponderant opinion sustained by judicial decisions and supported by doctrinal authority came to be that under the Code the question of good faith was a personal one, depending so much upon considerations of that character that the good faith of the possession of the author was one thing, and the good faith of those holding under him, whether heir or other successor, was another. From this it came to be acknowledged that the right to retain fruits and revenues in case of eviction might exist in favor of an heir who was in good faith from the time of his possession, although it was conclusively established that the author or ancestor was in bad faith and the duty on the heir would exist to return so much of the fruits and revenues as accrued during the possession of the author. The principle was upheld by the Court of Cassation in Parent de Chassey C. La Commune de Monceaux-le-Comte, May, 1848, Journal Du Palais for 1849, Vol. I, p. 12. The doctrine was thus succinctly stated in one of the syllabi: "The heir of a possessor in bad faith may successfully avoid the restitution of the fruits in favor of the true proprietor by setting up his own personal good faith." See also a note to the case in which many authorities supporting the doctrine are collected. Demolombe (Vol. IX, n. 613, p. 558) thus states the strongly dominant opinion on the subject: "We ask simply if the fruits which the heir himself may have collected during his possession belong to him in virtue of his personal good faith. The affirma-

tive seems today to have triumphed both in jurisprudence and in doctrine where it counts among its supporters many authorities of the most imposing character." Among those cited are Marcadé, t. II, Art. 550, n. 2; Toulier, t. II, p. 263; Demante, t. II, n. 385 *bis*. VIII; and also a list of cases adjudged in numerous intermediary courts and courts of original jurisdiction.

The doctrinal writers in pointing out the personal character of the question of good faith for the purpose of ascertaining the duty to return fruits and revenues frequently directed attention to the fact that it was easy to conceive of a case where there might be bad faith on the part of one possessing in virtue of his heirship and good faith on the part of the author and *vice versa*. The argument that to distinguish because of personal good faith between an heir and his author who had been in bad faith would be purely academic, since the heir in virtue of his liability as heir for the obligation of his ancestor would be obliged to respond for all the fruits and revenues as heir if not as possessor, was met by pointing out that the effect of considering the question as one of personal liability, while it did not break the continuity of heirship, was to sever the continuity of possession and responsibility therefor and consequently to cause it to result that while the heir as heir would be responsible for the bad faith of the ancestor during his, the ancestor's, term of possession, he would not be responsible as heir for the term in which he, the heir, had possessed the property in good faith.

It is true, as pointed out by Demolombe, following the passage previously quoted, that the doctrine of the personal character of the good or bad faith so far as the obligation to restore fruits and revenues in case of eviction was concerned, was not universally accepted. It is true also that such doctrine has not been applied under all the codes which literally followed the Code Napoleon. Thus in

Louisiana, where in substance the provisions of the Code Napoleon were incorporated in the Civil Code in Articles 3450, 3451, 3452 and 3453, the rule recognized in the law of France before the Code Napoleon has been applied in many decisions. But this subject need not be entered into, since our purpose is not to discuss the relative merits of the doctrine prevailing in France under the Code Napoleon as compared with the contrary view, but only to make clear the fact of the prevalence of the doctrine in France under the Code as a means of elucidating the interpretation of the provisions of the Spanish Code not only so far as they adopt the Code Napoleon, but as they added new provisions on the subject in question.

Coming to so do and looking in a general way at the text of Article 442 and of the cognate articles immediately associated with it in the Spanish Code, we are of the opinion that Article 442 and those dealing with the same subject were adopted for the express purpose of causing the law under that Code to conform to the principle of the personal character of the question of good faith so far as the return of fruits and revenues was concerned in case of eviction, and thus enable an heir who possessed in personal good faith to relieve himself from liability despite the personal bad faith of his ancestor or author. In other words we think that the new provisions were inserted in order to adopt in the Spanish Code the dominant interpretation prevailing in France under the Code Napoleon and to exclude the possibility of taking a contrary view. The conviction in this regard which results from the general considerations of the text of the articles in the light of the statements made becomes irresistibly certain if the articles and their relation to each other are closely examined. Thus it is to be observed that while in France the duty to show the absence of good faith, which was one of the generating causes from which the doctrine of the personal character of the responsibility was deduced, was

expressed in a general provision of the Code Napoleon not associated with the question of responsibility to return fruits and revenues, in this instance that provision was grouped in direct and immediate association with the article under consideration as if to remove all possible question of its application to the subject. Moreover, the careful manner in which the article expresses the distinction between the liability of the heir as heir to return fruits and revenues during the possession by the ancestor in bad faith and the want of liability to return such revenues during the period of possession by the heir in good faith serves palpably to emphasize the dissociation between the continuity of heirship and the break in the continuity of possession for the purpose of the return of fruits and revenues lying at the basis of the doctrine of the personal character of the question of good faith which came to be established under the Code Napoleon.

And this view of the meaning of the text and of its purpose and intent makes clear that it would be impossible to adopt the interpretation stated in the Commentaries of Scaevola to which we have previously referred. We say this because that interpretation rests upon the existence of an assumed presumption of an examination by an heir of the title deeds of his ancestor or author which cannot be indulged in without disregarding the rule as to burden of proof which Article 434 (§ 437 of the Porto Rican Code) directly ordains. Besides when it is considered that the interpretation referred to makes the heir in good faith liable to return fruits and revenues because of the bad faith of the ancestor only in cases where an assumed presumption of an examination of the title papers of an ancestor by an heir would apply, it would follow not only that the burden of proof fixed by the statute would be disregarded, but that the interpretation relied upon would be inapplicable where the bad faith of the ancestor arose from conditions dehors his title papers and which

were not susceptible of being disclosed by an examination.

As under the provisions of § 444 of the Porto Rican Code when rightly interpreted, in the absence of proof of the bad faith of the defendants they were not liable for the return of the fruits and revenues during the period of their possession even although the bad faith of Mourraille, their author, had been established during the period of his possession, it follows that there was error in the refusal of the court below to so instruct the jury and hence a reversal must result and a new trial follow. Before, however, so directing, we observe that we are of opinion that the contention concerning the want of right of the plaintiff to recover rents and revenues of the property sued for for the period of his minority because of the administrative authority vested by law in his mother, under the circumstances here disclosed was without merit, and that such also is the case concerning the objection made to the admissibility of testimony concerning the quantum of fruits and revenues because of its speculative character. The judgment therefore will be reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

SUPREME COUNCIL OF THE ROYAL ARCANUM *v.* GREEN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 106. Argued December 8, 9, 1914.—Decided June 1, 1915.

Where the trial court refuses to hold that the rights of the parties were to be determined by the law of another State in which a decree had been rendered establishing them and to apply such law, it refuses to give due effect to such decree, and a question arises under the full

faith and credit clause of the Federal Constitution and this court has jurisdiction under § 237, Judicial Code.

The rights of members of a corporation of a fraternal and beneficiary character have their source in the constitution and by-laws of the corporation, and can only be determined by resort thereto, and such constitution and by-laws must necessarily be construed by the law of the State of its incorporation.

The law of the State by which a corporation is created governs in enforcing liability of a stockholder to pay his stock subscription and in establishing the relative rights and duties of stockholders and the corporation.

A failure by the court to give effect to and apply the law of the State of incorporation in consideration of a judgment rendered in that State amounts to denying full faith and credit to such judgment.

In this case *held* that a judgment rendered by a court of the State of incorporation holding an amendment to the constitution and by-laws of a fraternal and beneficiary corporation to be legal, amounted to a construction of the charter by the courts of the State which the courts of another State were bound to recognize under the full faith and credit clause of the Federal Constitution.

A fraternal and beneficiary society is, for the purpose of controversies as to assessments, the representative of all of its members; and a judgment of the State of incorporation as to the validity of an amendment to the Constitution and by-laws must be given effect by the courts of another State even though not between the corporation and the same member.

Green v. *Elbert*, 137 U. S. 615, followed in striking from the files of this court the brief of counsel of one of the parties on account of its being so full of vituperative, unwarranted and impertinent expressions in regard to opposing counsel.

206 N. Y. 591, reversed.

THE facts, which involve the effect and application of the full faith and credit clause of the Federal Constitution and other matters, are stated in the opinion.

Mr. Howard C. Wiggins, with whom *Mr. Curtis Waterman*, *Mr. John Haskell Butler*, *Mr. W. Holt Apgar* and *Mr. Joesph A. Langfitt* were on the brief, for plaintiff in error.

Mr. F. J. Moissen for defendant in error:

Plaintiff in error is a corporation organized under the laws of Massachusetts; and, beyond such comity as any other State is willing to confer upon it, it has no corporate status in any other State, and is subject in such other State to any and all the laws, regulations and limitations prescribed therein upon foreign corporations.

The contract, the subject of the transaction herein, was made in and was to be performed in the State of New York, and therefore the rules of law as to its construction and performance must be under the laws of New York, and the laws of Massachusetts have no application.

Amendments to by-laws such as have been made to the by-laws of the plaintiffs in error as affecting contracts previously entered into by corporations like the plaintiffs in error have been held invalid by the courts of the State of New York as affecting such prior contracts and that rule of law is the policy of that State.

The Massachusetts judgment offered in evidence on the trial in the court below was properly excluded; it did not bind the defendant in error in any manner whatsoever, and the claim on the part of the plaintiff in error that the defendant in error is concluded by it, is absolutely untenable.

No Federal question was raised by the pleadings nor upon the trial in the court below, where, under the law of New York, it must be raised for the first time to be considered by the court either upon trial or upon appeal. That cannot be raised for the first time on appeal in this court.

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

Conformably to the authority conferred by the general laws of Massachusetts to organize fraternal beneficiary

corporations, in 1877 there was issued to designated persons a certificate of incorporation under the name of the Supreme Council of the Royal Arcanum. By the constitution and by-laws, referred to in the certificate, the corporation became what is known as a fraternal association under the lodge system. Its principal objects as stated were:

"1st. To unite fraternally all white men of sound bodily health and good moral character, who are socially acceptable and between twenty-one and fifty-five years of age.

"2nd. To give all moral and material aid in its power to its members and those dependent upon them.

"3rd. To educate its members socially, morally and intellectually; also to assist the widows and orphans of deceased members.

"4th. To establish a fund for the relief of sick and distressed members.

"5th. To establish a widows' and orphans' benefit fund, from which, on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding three thousand dollars shall be paid to his family, or those dependent on him, as he may direct. . . ."

There was power conferred by the constitution and by-laws to subsequently amend such constitution and by-laws in the manner therein provided. The general governing power of the Order was vested in the Supreme Council and the administration of its affairs under the supervision of such Council was entrusted to the officers named in the constitution. Authority was given to the Supreme Council to sanction the organization of local lodges or councils upon whom were conferred certain powers not in any way conflicting with the constitution and by-laws of the Order, and the members of such local lodges or councils were required to be members of the Order and

were subject to the duties and responsibilities which resulted from that relation and enjoyed also the resulting benefits.

Pursuant to the constitution under due authority there was organized in the State of New York a local lodge or council known as the De Witt Clinton Council No. 419 of the Royal Arcanum. In May, 1883, Samuel Green, the defendant in error, made application to become, and was admitted as, a member of this council. In his application it was directed that in case of his death, "all benefit to which I may be entitled from the Royal Arcanum, be paid to Louisa Green related to me as my wife, subject to such future disposal of the benefit, among my dependents, as I may hereafter direct, in compliance with the Laws of the Order. . . . I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the Laws, Rules, and Usages of the Order now in force, or which may hereafter be adopted by the same."

Upon the admission of the applicant a certificate was issued to him as a member of the De Witt Clinton Council No. 419, of the Royal Arcanum upon the condition, among others, "that the said member complies, in the future, with the laws, rules and regulations now governing the said Council and Fund, or that may hereafter be enacted by the Supreme Council to govern said Council and Fund." The certificate then stated that upon compliance with these conditions, "The Supreme Council of the Royal Arcanum hereby promises and binds itself to pay out of its Widows' and Orphans' Benefit Fund, to Louisa Green (wife) a sum not exceeding Three Thousand Dollars, in accordance with and under the provisions of the laws governing said Fund, upon satisfactory evidence of the death of said member. . . ."

At the time this certificate was issued, under the by-

laws the amount of the assessment required to be paid to the corporation to enable it to meet claims coming due under the Widows' and Orphans' Benefit Fund was graded according to the age of the member, and the contribution required of Green for this purpose was stated in his certificate to be $1.80 per assessment, and he paid up to 1898 at that rate various assessments called for under the rules of the Order. In 1898 by a three-fourths vote of the Supreme Council, the system theretofore prevailing, exacting the payment of assessments as called for was changed and the duty was imposed to make payment monthly of a sum the amount of which, although still dependent upon the age of the member, was higher than had previously prevailed. Under these new rates the sum due from Green was $3.16 per month, and he met regularly the payments thus exacted until the year 1905. In that year by the action of the Supreme Council taken in virtue of the requisite three-fourths vote, while the standard of age was continued, the sum to be paid was again increased so that the monthly assessment of Green became $6.87, and from October, 1905, when these new rates became effective, down to February, 1910, it is not disputed that Green paid the amount of the increased assessments monthly, although it was found by the trial court that he did so under protest because of a denial on his part of the right of the Supreme Council even under the sanction of the requisite vote and in compliance with the forms of the constitution and laws of the Order to increase the rates.

In the meanwhile shortly after the going into effect of the increased rates, that is, in November, 1905, sixteen members of the Order, holders of certificates under the Widows' and Orphans' Benefit Fund, filed a bill in the Supreme Judicial Court of Massachusetts against the corporation in their own behalf and in behalf of all other certificate holders to vacate and set aside the by-

laws by which the rates had been increased on the ground that the increase was *ultra vires* of the corporation and violative of contract rights. The case was submitted by agreement of counsel to the whole court upon an agreed statement of facts and was on May 17, 1906, decided. The court after a careful review of the general nature of the corporation, of the character of the fund, of the rights of its members as evidenced by the certificates, of the constitution and by-laws of the corporation and the laws of the State applicable thereto, decided that the increase complained of was valid, impaired no contract right of the certificate holders and was entitled to be enforced. *Reynolds* v. *Supreme Council, Royal Arcanum,* 192 Massachusetts, 150.

Four years after this decision Green ceased to make the payments required by the by-laws of the corporation and in virtue of his membership and ownership of the certificate issued to him commenced in a state court in New York this suit against the Supreme Council and the Regent of De Witt Clinton Council No. 419, assailing the validity of the increase in the rate of assessment made in 1905 on the ground that it was void as exceeding the powers of the corporation and because conflicting with his contract rights as a member of the corporation and a certificate holder. The prayer of the bill was not that the corporation be restricted to the method and rate of assessment which prevailed in 1883 when the complainant became a member, but that the corporation be confined to the rate of assessment established by the amendment adopted in 1898 and that the complainant be decreed to have a contract right to pay only that sum monthly in discharge of his duty to pay assessments and that the corporation and its officers be enjoined during his life from exacting any greater sum or in any way suspending him for refusing to pay the amount fixed by the amendment of 1905.

The answer in twenty-seven distinct paragraphs asserted the validity of the assessment and the action of the corporation by which it was established. It asserted that the complainant as a member in a mere beneficiary association was bound thereby and that no contract rights of his were affected. In many reiterated forms of statement it was asserted that the corporation was created under the laws of Massachusetts and was subject thereto and that under those laws, by which the power to make the change was to be determined, the validity of the change was beyond question. It was then alleged that the *Reynolds* suit in the courts of Massachusetts was brought by certain members and certificate holders against the corporation not only in their own behalf but as a class suit in favor of all others similarly situated and that the facts in that case were substantially identical with those presented in this. The judgment of the Supreme Judicial Court of Massachusetts maintaining the by-law and holding that the assessment was valid and binding and that no contract rights existing in favor of certificate holders were impaired by the increase of rate was explicitly referred to and in addition the twenty-seventh paragraph of the answer expressly counted on the judgment as follows:

"That the defendant Supreme Council says that the rights of the plaintiff in respect to his contract with the said defendant and his membership in the defendant order, and the changes adopted by it were and are concluded and determined by the aforesaid judgment of the Supreme Judicial Court of Massachusetts; that under the Constitution of the United States the same is entitled to full faith and credit in the State of New York, and that the complaint should be dismissed."

On the trial the proceedings and judgment in the Massachusetts court duly exemplified as required by the Act of Congress were offered in evidence and excluded

and an exception reserved. The court made what in the record are styled findings of fact but which embrace every question of law which it was conceived the controversy could possibly involve. The court held that the complainant was not barred by laches in consequence of his having accepted the amendment to the rates made in 1898, and that as he had protested in making the payments during the four years as to the rates fixed under the amendment of 1905, he was not estopped from questioning the validity of that amendment. It was decided that under the law of New York as a certificate holder the complainant had a contract which entitled him to prevent any increase of rate over that established in 1898. So far as the law of Massachusetts was concerned it was declared that although it was governed by that law, the assessment would be valid, as the complainant was a member of a subordinate council existing in New York and doing business there, the rights of its members were controlled by the New York law wholly irrespective of the law of Massachusetts. The rights asserted by the complainant were adjudged to exist and the relief prayed for was granted.

The case then went to the Appellate Division of the Second Department. The court considering the character of the corporation, the provisions of its constitution and by-laws and the powers which they conferred on the corporation, as well as the application for membership and the certificate issued pursuant thereto, decided that the amendment as to rates was not *ultra vires* of the corporation but on the contrary was within its powers and violated no contract rights of the complainant. Without deciding whether the case was controlled by the law of Massachusetts, and without passing upon the action of the trial court in seemingly rejecting the offer of the Massachusetts judgment, the court, treating that judgment as before it and considering besides the Massachusetts law as open

for its consideration, held that the law of that State and the judgment there rendered served additionally to sustain the view taken as to the significance of the constitution and by-laws of the order and thus served additionally to demonstrate that error had been committed by the trial court in holding that under the law of New York there was a right to relief. 144 App. Div. (N. Y.) 761. The case then went to the Court of Appeals where the judgment of the Appellate Division was reversed and that of the trial court affirmed on the ground that the law of New York governed and established under the circumstances disclosed the right of the complainant to the relief which had been awarded him. 206 N. Y. 591.

It is not disputable that, disregarding details, all the rights asserted under the assignments of error come to one contention, that a violation of the full faith and credit clause of the Constitution of the United States resulted from refusing to hold that the rights of the parties were to be determined by the Massachusetts law and to apply that law, and in further refusing to give due effect to the decree rendered in Massachusetts concerning the subject of the controversy.

By a motion to dismiss it is urged that this question is not open for consideration because it was not raised below. But, as we have seen, the fact that the charter was a Massachusetts charter and the controlling character of the laws of that State on its operation and effect were asserted by way of defense over and over again in the pleadings. It is, indeed, true that in none of the averments concerning the duty to apply the Massachusetts law and the validity under that law of the provision of the constitutions and by-laws which was assailed was any express reference made to the full faith and credit clause of the Constitution of the United States, but this was not the case as to the Massachusetts judgment which was expressly pleaded, accompanied with an explicit averment that not

to give it due effect would be a violation of the full faith and credit clause of the Constitution of the United States. And as what was the due effect to be given to the judgment depended, as we shall hereafter more particularly point out, upon whether the Massachusetts law controlled the parties, since if it did, the judgment would be entitled to one effect, and if it did not, to another effect, it follows that the claim as to constitutional right concerning the judgment also involved deciding whether the Massachusetts law controlled. It follows that in both aspects the claim of full faith and credit under the Constitution of the United States was asserted, and whether the court below erred in holding that that clause was inapplicable because the contract was a New York contract governed by New York law is the question for decision. And the solution of that question involves two considerations: first, was the controversy to be determined with reference to the Massachusetts charter and laws and judgment; and second, if yes, did they sustain the right of the corporation to make the increased assessment complained of?

Before coming to consider the subject in its first aspect as controlled by authority, we briefly contemplate it from the light of principle in order that the appositeness of the authorities which are controlling may be more readily appreciated.

It is not disputable that the corporation was exclusively of a fraternal and beneficiary character and that all the rights of the complainant concerning the assessment to be paid to provide for the Widows' and Orphans' Benefit Fund had their source in the constitution and by-laws and therefore their validity could be alone ascertained by a consideration of the constitution and by-laws. This being true, it necessarily follows that resort to the constitution and by-laws was essential unless it can be said that the rights in controversy were to be fixed by disregarding the source from which they arose and by putting out of view

the only considerations by which their scope could be ascertained. Moreover, as the charter was a Massachusetts charter and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that State, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long since been recognized. *Gaines* v. *Supreme Council of the Royal Arcanum*, 140 Fed. Rep. 978; *Royal Arcanum* v. *Brashears*, 89 Maryland, 624. And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many States in passing on questions involving the general authority of

fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the State under which it was granted as the test and measure to be applied. *Supreme Lodge* v. *Hines*, 82 Connecticut, 315; *Supreme Colony* v. *Towne*, 87 Connecticut, 644; *Palmer* v. *Welch*, 132 Illinois, 141; *Grimme* v. *Grimme*, 198 Illinois, 265; *American Legion of Honor* v. *Green*, 71 Maryland, 263; *Royal Arcanum* v. *Brashears*, 89 Maryland, 624; *Golden Cross* v. *Merrick*, 165 Massachusetts, 421; *Gibson* v. *United Friends*, 168 Massachusetts, 391; *Larkin* v. *Knights of Columbus*, 188 Massachusetts, 22; *Supreme Lodge* v. *Nairn*, 60 Michigan, 44; *Tepper* v. *Royal Arcanum*, 59 N. J. Eq. 321; *S. C.*, 61 N. J. Eq. 638; *Bockover* v. *Life Association*, 77 Virginia, 85. In fact, while dealing with various forms of controversy, in substance all these cases come at last to the principle so admirably stated by Chief Justice Marshall more than a hundred years ago (*Head* v. *Providence Insurance Co.*, 2 Cranch, 127, 167) as follows:

"Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers. . . ."

In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, that the law of the State by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, that the state law and proceedings are binding as to the ascertaining of

the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected; and third, that putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. *Selig* v. *Hamilton*, 234 U. S. 652; *Converse* v. *Hamilton*, 224 U. S. 243; *Bernheimer* v. *Converse*, 206 U. S. 516; *Whitman* v. *National Bank*, 176 U. S. 559; *Hawkins* v. *Glenn*, 131 U. S. 319.

That the doctrines thus established if applicable here are conclusive is beyond dispute. That they are applicable clearly results from the fact that although the issues here presented as to things which are accidental are different from those which were presented in the cases referred to, as to every essential consideration involved the cases are the same and the controversy here presented is and has been therefore long since foreclosed.

The controlling effect of the law of Massachusetts being thus established and the error committed by the court below in declining to give effect to that law and in thereby disregarding the demands of the full faith and credit clause being determined, we come to consider whether the increase of assessment which was complained of was within

the powers granted by the Massachusetts charter or conflicted with the laws of that State. Before doing so, however, we observe that the settled principles which we have applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that State and therefore, as we have previously stated, how necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment was the exact equivalent of the assertion of a claim of right under the Constitution of the United States to the application of the laws of the State of Massachusetts. We say this because if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment.

Additionally, before coming to dispose of the final question it is necessary to say that in considering it in view of the fact that the Appellate Division treated the Massachusetts judgment as in the record and considered it, and that the court below made no reference to its technical inadmissibility, but on the contrary treated the question as being one not of admissibility but of merits, we shall pursue the same course and treat the judgment as in the record upon the hypothesis that the action of the trial

court did not amount to its technical exclusion but only to a ruling that as it deemed the law of Massachusetts inapplicable it so considered the judgment, and therefore held it merely irrelevant to the merits.

Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that State to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial Court of Massachusetts in the *Reynolds Case*. And this conclusion does not require us to consider whether the judgment *per se* as between the parties, was not conclusive in view of the fact that the corporation for the purposes of the controversy as to assessments was the representative of the members. (See *Hartford Life Ins. Co.* v. *Ibs*, this day decided, *post*, 662.) Into that subject therefore we do not enter.

Before making the order of reversal we regret that we must say something more. The printed argument for the defendant in error is so full of vituperative, unwarranted and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once when it came to our attention after the argument of the case had we not feared that by doing so delay in the examination of the case and possible detriment to the parties would result. Following the precedent established in *Green* v. *Elbert*, 137 U. S. 615, which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files and the decree below in accordance with the

views which we have expressed will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

DANIELS *v.* WAGNER.

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

No. 239. Argued April 21, 1915.—Decided June 1, 1915.

Under the Forest Act of June 4, 1897, c. 2, 30 Stat. 36, one whose land was included in a forest reserve had the right to apply to the Land Office, and, on surrendering his land, to obtain the right to enter an equal amount of public lands on offering to do all that the law and lawful regulations of the Land Department required.

The fact that an officer of the Land Department commits a wrong by denying to an individual a right expressly conferred by law cannot become the generating source of a discretionary power to make such wrongful act legal. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, distinguished.

One who has done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right from the Land Office conferred upon him by Congress, cannot be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Officers.

Error of law having been committed by the Land Department in assuming that it had a discretionary power to reject a lieu entry made under the Forest Act of June 4, 1897, by one who had offered to comply with the statute and lawful regulations of the Department, its action is not sustainable, upon general equitable considerations, such as were made the basis for refusing to issue certificates in this case.

Because a patent of the United States is involved, does not necessarily require the United States to be a party to an action to determine to whom it should have been issued.

205 Fed. Rep. 235, reversed.

THE facts, which involve the construction of certain provisions of the laws of the United States relating to the public lands, are stated in the opinion.

Mr. Harrison G. Platt, with whom *Mr. Robert Treat Platt* and *Mr. Hugh Montgomery* were on the brief, for appellant.

Mr. J. H. Carnahan, with whom *Mr. F. H. Mills* was on the brief, for appellee:

No vested right is acquired by the mere offer to file a forest lieu selection which is rejected. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301; *Pacific Land Co.* v. *Elwood Co.*, 190 U. S. 314; *Roughton* v. *Knight*, 219 U. S. 536; *United States* v. *McClure*, 174 Fed. Rep. 510; *Clearwater Timber Co.* v. *Shoshone Co.*, 155 Fed. Rep. 612; *Osborn* v. *Forsyth*, 216 U. S. 570; *Pacific Stock Co.* v. *Isaacs*, 96 Pac. Rep. (Ore.) 464; *Robinson* v. *Lundrigan*, 178 Fed. Rep. 230; *S. C.*, 227 U. S. 173; *Miller* v. *Thomas*, 36 L. D. 492; *Ehlainen* v. *Santa Fe Pac. R. R.*, 42 L. D. 578; *Re Walker*, 36 L. D. 495; *Sherar* v. *Frazer*, 40 L. D. 549; *La Fayette Lewis*, 33 L. D. 43; *William E. Moses*, 33 L. D. 333; *Smith* v. *State*, 40 L. D. 554; Instructions, 24 L. D. 589, 592; Instructions, 30 L. D. 28; *Kern Oil Co.* v. *Clarke*, 30 L. D. 550, 569; *S. C.*, 31 L. D. 288; *Gray Eagle Co.* v. *Clarke*, 30 L. D. 570; *Re Cobb*, 31 L. D. 220; *Santa Fe Pac. R. R.* v. *State*, 34 L. D. 12; *Re Walker*, 36 L. D. 495; *Sherar* v. *Veazie*, 40 L. D. 549.

The administration of the Forest Reserve Lieu Land Act of June 4, 1897, as amended by subsequent acts of Congress, is vested in the Land Department of the United States. Cases *supra* and *Wisconsin Cent. R. R. Co.* v. *Price Co.*, 133 U. S. 460; Regulations of Int. Dep't under act June 4, 1897, 24 L. D. 589; *Nasqually* v. *Gibbon*, 158 U. S. 155; *Knight* v. *Land Association*, 142 U. S. 161, 177; *In re Clarke*, 32 L. D. 233, 235; *Miller* v. *Thompson*, 36 L. D. 492.

The decisions of the Land Department upon questions of fact are conclusive. *De Cambra* v. *Rogers*, 189 U. S. 119; *Gertgens* v. *O'Connor*, 191 U. S. 237; *Johnson* v. *Drew*, 171 U. S. 93; *Love* v. *Flahive*, 205 U. S. 105; *Johnson* v. *Towsley*, 13 Wall. 72; *Marquez* v. *Frisbie*, 101 U. S. 473; *Quimby* v. *Conlan*, 104 U. S. 420; *Burfenning* v. *Chicago*, 163 U. S. 321; *Whitcomb* v. *White*, 214 U. S. 15.

Likewise its decisions upon mixed questions of law and fact. *Quimby* v. *Conlan*, 104 U. S. 420; *Whitcomb* v. *White*, 214 U. S. 15; *Ross* v. *Day*, 232 U. S. 114; *Moore* v. *Robbins*, 96 U. S. 530; *Gonzales* v. *French*, 164 U. S. 338.

The acts of the Executive Departments of the Government, when acquiesced in, and especially their interpretation of statutes which they are called upon almost daily to construe, if acquiesced in for a long time, are almost conclusive upon the courts. *Roughton* v. *Knight*, 219 U. S. 536; *Osborn* v. *Forsyth*, 216 U. S. 570; *Orchard* v. *Alexander*, 157 U. S. 373; *Knight* v. *Land Association*, 142 U. S. 161; *Parsons* v. *Venzke*, 164 U. S. 89; *Williams* v. *United States*, 138 U. S. 514, 524; *Kern Oil Co.* v. *Clarke*, 31 L. D. 288, 300; *Pacific Stock Co.* v. *Isaacs*, 96 Pac. Rep. (Ore.) 464.

The Secretary of the Interior is vested with large discretionary powers in the administration of the public land system. *Williams* v. *United States*, 138 U. S. 514, 524; *Knight* v. *Land Ass'n*, 142 U. S. 161, 177; *Fowler* v. *Dennis*, 41 L. D. 173.

The act of June 4, 1897, contemplates a common-law exchange of equal estates, which requires the assent of both parties thereto before the exchange is consummated. See Co. Litt., 50a *et seq.;* Butler & Hargrave's Notes; Shep. Touch. 294; 3 Words & Phrases, 2547; *United States* v. *McClure*, 174 Fed. Rep. 510; *Clearwater Timber Co.* v. *Shoshone Co.*, 155 Fed. Rep. 612; *Lessieur* v. *Price*, 12 How. 59, 74; *Roughton* v. *Knight*, 156 California, 123; *S. C.*, 219 U. S. 536; *Re Lewis*, 33 L. D. 43; *Re Moses*, 33 L. D. 333; *Re Hyde*, 28 L. D. 286, 290; *Opinions Asst.*

Atty.-Gen. Van Devanter, 28 L. D. 312, 472; 30 L. D. 105; *Kern Oil Co.* v. *Clarke*, 30 L. D. 550; *S. C.*, 31 L. D. 288, 294; *Gray Eagle Co.* v. *Clarke*, 30 L. D. 570; Instructions, 31 L. D. 225; *Re C. W. Clarke*, 32 L. D. 233, 235; *Miller* v. *Thompson*, 36 L. D. 492; *Smith* v. *Idaho*, 40 L. D. 554.

In case of rejection of lieu land applications the base lands are not lost. Cases *supra* and *Re Austin*, 33 L. D. 589; *Re Krebs*, 37 L. D. 143.

The selector of land under the exchange provisions of the act of June 4, 1897, is the owner of the base land and must pay taxes thereon until the selection is approved by the Commissioner of the General Land Office and the exchange consummated. *Weyerhauser* v. *Hoyt*, 219 U. S. 380, distinguished. Under the act of June 4, 1897, if the selection fails, the selector still retains the land he attempted to relinquish to the United States, and loses nothing. Cases *supra* and *Sjorli* v. *Dreschel*, 199 U. S. 564; *Grant* v. *Railway Co.*, 54 Iowa, 673; *Musser* v. *McRae*, 38 Minnesota, 409; *Page* v. *Price Co.*, 25 Washington, 6.

If dissatisfied, plaintiff should have brought mandamus against the Secretary of the Interior when the selections were finally rejected. *Osborn* v. *Forsyth*, 216 U. S. 570.

The decisions of the Interior Department construing the laws specially intrusted to it for execution, and the rules and regulations promulgated by it in the discharge of its duties, should not be disturbed or reversed except for the most cogent reasons. Rev. Stat., §§ 441, 453, 2478; *Knight* v. *Land Assn.*, 142 U. S. 161, 167; *Orchard* v. *Alexander*, 157 U. S. 372, 375; *Bishop of Nasqually* v. *Gibbon*, 158 U. S. 155, 166; *Parsons* v. *Venzke*, 164 U. S. 89, 91; *Gray Eagle Co.* v. *Clarke*, 31 L. D. 303, 306; *McMichael* v. *Murphy*, 197 U. S. 304; *Williamson* v. *United States*, 207 U. S. 425, 462; *Logan* v. *Davis*, 233 U. S. 613; *Small* v. *Rakestraw*, 196 U. S. 401.

Lands suspended from entry, or reserved by competent authority, and lands occupied or covered by an entry,

selection or filing, and mineral lands, are not subject to selection under the exchange provisions of the act of June 4, 1897. *Leaming* v. *McKenna*, 31 L. D. 318; *Kern Oil Co.* v. *Clarke*, 31 L. D. 288; *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Walcott* v. *Des Moines Co.*, 5 Wall. 681, 688; *Grisar* v. *McDowell*, 6 Wall. 363, 381; *Re Cal. Land Co.*, 33 L. D. 595; *Sante Fe Pac. R. R.* v. *California*, 34 L. D. 12; *Re Santa Fe Pac. R. R.*, 34 L. D. 119.

The decision of the Secretary of the Interior in the cases at bar followed a long line of decisions rendered by his predecessors. *Kern Oil Co.* v. *Clarke*, 30 L. D. 550; Instructions, 24 L. D. 589, 592; *Gray Eagle Oil Co.* v. *Clarke*, 30 L. D. 570; *Re Pavey*, 31 L. D. 186; *Re Cobb*, 31 L. D. 220; *Porter* v. *Landrum*, 31 L. D. 352.

The regulations promulgated by the Secretary of the Interior in pursuance of statute, have all the force and effect of law. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301; *Knight* v. *Land Assn.*, 142 U. S. 161, 177; and see 2 L. D. 709; 5 L. D. 169; 6 L. D. 111; 9 L. D. 86, 189, 284, 353.

The law deals tenderly with the settler upon public lands. *Ard* v. *Brandon*, 156 U. S. 537, 543; *Shepley* v. *Cowan*, 91 U. S. 330, 338.

The courts of the United States take judicial notice of the regulations of the Land Department. *Caha* v. *United States*, 152 U. S. 211; *Leonard* v. *Lennox*, 181 Fed. Rep. 764; *Jones* v. *United States*, 137 U. S. 202, 216; *Jenkins* v. *Collord*, 145 U. S. 546, 560.

The final decision of the Interior Department of February 17, 1910, shows that the selections were never accepted by the Land Department, notwithstanding allegations in other parts of the amended bills of complaint to the contrary.

That plaintiff was awarded a decision by the Interior Department, prior to the final decision of February 17, 1910, in favor of defendants, gives him no standing, since the final decision alone determines the rights of the parties.

Potter v. *Hall*, 189 U. S. 292; *Greenameyer* v. *Coate*, 212 U. S. 434.

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

Daniels, the appellant here, was plaintiff in the trial court and appellant in the court below. In stating this case in its opinion the court below mentioned that there were fifteen other cases under submission in which Daniels also was the plaintiff in the trial court and the appellant before it and that all the cases involved substantially the same legal questions. The court, evidently considering that its conclusions in this disposed of the other cases, directed a judgment of affirmance not only in this but in the other fifteen cases. It would seem, since only fourteen of the cases besides this one are here, that in one of the cases no appeal was taken, but otherwise the situation which existed below obtains here, since this and fourteen other cases are before us for decision. For the appellant this case and the fourteen others were argued in one brief, but for the appellees the cases in the briefs are divided into groups presumably in consequence of what was assumed to be some material difference of fact between them. In passing upon the cases the court below substantially rested its conclusion upon what it decided was the power of the officers of the Land Department over the land entries which are the subject of the controversy, although in concluding its opinion the court intimated rather than decided that even if its views on the question of power were mistaken, there was a state of fact in this (and presumably in the other cases) which required a decision against Daniels, the appellant. 205 Fed. Rep. 235.

In the argument before us for the appellant it is not disputed that if the court below was right in its ruling as to the power of the Land Department, its conclusion in

this and all the other fifteen cases was correct and its decrees must be affirmed, since under the hypothesis stated there is no contention that there is any fact in this or any of the other cases which would justify a different conclusion. On the other hand, in the arguments for the appellees, although it is not disputed that if the court below erred in the proposition which it maintained concerning the power of the Land Department its decrees were wrong, it is nevertheless insisted that putting the proposition of power out of view, in some if not in all the cases particular facts were established which when properly considered would require an affirmance of the decrees.

Under these conditions to avoid repetition in the statement of the other cases, we proceed first in this case to dispose of the proposition as to the power of the officers of the Land Department in order, if it be found that such proposition was well founded, to decide this and all the other cases without going any further. In following this method we shall state the case on broad lines so as to present in bold relief the legal question for decision, paying no heed to facts not in any way involved in that question. If, after doing so, the power upheld by the court below be found not to exist we shall then examine the facts to determine how far they may control or influence the decision of the case.

In June, 1902, the State of Oregon prepared lists selecting lands in place of certain designated school lands for which it claimed to be entitled to be indemnified and these lists were filed in the local land office and were transmitted for approval to the Commissioner of the General Land Office. The State before such approval sold to Daniels the land covered by the lists including that with which this controversy is concerned. The Land Department subsequently refused to approve the state lists because of error concerning the school lands for which the right of indemnity was asserted. Daniels, the purchaser from the

State, was therefore without right in and to the land. Through the Governor of the State an arrangement was made with the Land Department by which the State might point out and substitute other school sections, the right to which had been lost, for those previously stated, and if it could not do so, on notice from the Department that its lists would be cancelled the State might relinquish its claim, if any, arising from the filing of the lists in favor of its vendees who on presentation of the relinquishment might enter the land which they had already bought from the State. The Department directed attention to the fact that in the meanwhile the right of the vendees to make the proposed entry would be indubitably preserved as the filing of the previous lists by the State had segregated the land and until the relinquishment was presented that segregation would continue, and further that if the relinquishment and the application to enter the lands were filed together, no danger of loss of right would exist. Daniels, to avail of this advantage, procured the Aztec Land and Cattle Company and one Perrin who owned land which had been included in the San Francisco Mountains Forest Reserve, in his interest and for his account to surrender said land to the United States under the provisions of the act of Congress of June 4, 1897 (c. 2, 30 Stat. 36), and to apply for the benefit of Daniels to enter as lieu land the land which he had bought from the State of Oregon. To accomplish this purpose it was understood that the relinquishments which the State had made of its rights, if any, to such land resulting from its filed lists should be delivered to the Land Office in connection with the application to enter the lieu lands, thus following the method suggested previously by the Land Department. Carrying out this purpose after compliance in every respect with the statute and with the regulations of the Land Department the application for the lieu lands was filed and the certificate of relinquish-

ment from the State was simultaneously handed to the proper Land Office.

When the applications were made it is not disputed that it was the duty of the local land officers on receipt of the application to file and transmit it to the Commissioner of the General Land Office for his approval, but for some reason best known to themselves they rejected the application and allowed subsequent entries in favor of other persons to be made under the homestead, timber and stone and other laws. From this there resulted a controversy which led to repeated directions by the Land Department to the local Land Office to allow the lieu entry, but which for one reason or another were not carried out, until finally in February, 1910, the whole subject came before the Secretary of the Interior on appeal from a ruling of the Commissioner of the General Land Office that the lieu entry was valid and again directing that it be allowed and consummated. In great detail reviewing the facts concerning the Daniels purchase from the State of Oregon and his obtaining the relinquishment conformably to the instructions of the Department, after holding that his perfect good faith was established and after finding as a matter of fact that the application for the entry of the lieu lands and the relinquishment from the State had been filed simultaneously in the local Land Office although the relinquishment had not been marked by the local officers as filed until afterwards, the Secretary came to review the controversy which had followed and to state his general conclusions as to the entry of the lieu lands as follows:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries

for most of these lands. It is thought however, that in instances where the Land Department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition. See *Hoyt* v. *Weyerhauser et al.* (161 Fed. Rep. 324)."

Giving effect to these opinions the Secretary of the Interior decided that the entries subsequent in date to the Daniels or lieu land entries should be maintained except as to certain of said subsequent claims which were held to be subordinate to the Daniels or lieu land claims for reasons which we need not notice. When this action of the Secretary was carried into effect by the Land Department this suit was brought charging that by error of law of the Department of the Interior Daniels had been deprived of his right to enter the land and seeking to charge the defendants to whom the right to enter the land had been awarded or those holding under them with a trust in favor of Daniels. The averments of the bill were full and embraced the facts above recited and the opinion of the Secretary rendered in 1910 was made a part of the bill. The bill was demurred to as stating no case for relief. It was amended and again demurred to for the same reason. The trial court sustained the demurrer and in substance held that the Land Department had the discretionary power to award the lands, without reference to the priority of the applications, to the persons selected as a result of taking into account the general equitable considerations stated in the opinion of the Secretary of the Interior which

we have already quoted. On appeal the decree of the trial court was affirmed. It was held that the Land Department as to the character of the entries in question possessed the discretionary power which was relied upon by the Secretary of the Interior as the basis for his action although it was held or intimated in considering a decision of this court that the discretionary power asserted could not be applied to indemnity selections made by a railroad company under a railroad grant. In concluding the court said:

"But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local Land Office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the State until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. *Greenameyer* v. *Coate*, 212 U. S. 434, 443."

This brings us to determine whether the Land Department had a right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so, an authority the possession of which was sustained by both the courts below.

In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded, *a*, that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the Land Office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation and upon the doing and offering to do everything required

by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; *b*, that in the particular case the application to enter the lieu land came within the grant of the statute and all that was required by law or lawful regulation was done by the applicant in order to obtain entry, and *c*, that it was the plain duty of the proper authorities of the Department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an Act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done and thus deprive the individual of the right which the law gives him. And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation. And the inherent vice which thus clearly appears from the mere statement of the proposition when reduced to the ultimate conceptions which it involves is not relieved by the suggestion that the action taken in this case by the Department rested not upon the assumption that there was a general discretion, but upon the assumption that such discretion arose because of the pri-

mary mistake made by the local land officers concerning the lieu entry and the allowance of the filing of claims which were subsequent in date. We say this because thus seemingly to limit the discretionary power exerted would in our opinion aggravate its manifest unsoundness for the power as thus qualified would come to this: That the commission of a wrong by the officers of the Department in disobeying the Act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of law lawful and the taking away of the right of an individual legal. But this in another form of statement brings the proposition back to its real and essential basis.

Let us consider the subject from the point of view of the authorities relied on as sustaining the possession of the discretionary power by the Land Department, first, from the point of view of the opinion expressed by the Secretary of the Interior and second, from that of the court below in affirming the action of that officer. As to the first, it is to be observed that the only authority referred to was the case of *Hoyt* v. *Weyerhaeuser*, decided April 17, 1908, in the Circuit Court of Appeals for the Eighth Circuit, 161 Fed. Rep. 324, and that therefore the ruling was not the result of any prior administrative rule or practice of the Department asserting the existence of the administrative authority which the proposition involves. We do not stop to point out that in our opinion the ruling in *Hoyt* v. *Weyerhaeuser* did not sustain the right to exert the discretionary authority which it exercised, since that case after the action of the Land Department was reviewed in this court and reversed upon reasoning which negatives the assumption that the Department possessed the discretionary authority which it assumed it had. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380.

As to the second, while the court below likewise re-

ferred to no practice or ruling of the Land Department asserting the possession by the Department of the latitude of discretion which it exercised, that power was sustained and the lawfulness of its exertion in the present case established by the ruling in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301. While thus understanding the *Cosmos Case* the court recognized that the decision in *Weyerhaeuser* v. *Hoyt* was in conflict with such view if that decision was applicable to the case before it, which the court concluded was not the case because it must be restricted to applications for indemnity selections made by a railroad company under a railroad grant and therefore did not relate to lieu land selections applied for under the Act of 1897. But we are of opinion that this interpretation of the *Cosmos Case* cannot be justified. In the first place we can discover no reason for holding that the *Cosmos Case* either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case of lieu land entries or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the *Cosmos Case* it was decided that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a prerequisite to allowing a lieu entry under the Act of 1897, but that ruling has no relation to the question of the right of the Department after it had passed on the prerequisites required for the entry under the Act of 1897 and after it had decided that they had all been complied with, to deny the right of the applicant to enter and under the theory of a discretion possessed to permit a later applicant to take the land, thus depriving the first applicant of the right conferred upon him by the Act of Congress. The difference between the two is that which must obtain between the power to decide on the one hand whether the prerequisites

to an entry exist and the right on the other of the Land Department after finding that an applicant has fully complied with the law and is entitled to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done.

It is true again that in the *Cosmos Case* the court declined to hold that the Department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its final allowance, a ruling which but in a different form illustrates the broad distinction which we have just pointed out. It is also true that *Weyerhaeuser* v. *Hoyt* concerned a question of the selection of indemnity lands by a railroad company under a railroad grant, but the reasoning in that case, we are of opinion, in the very nature of things is repugnant to the possibility of the possession of the discretionary power in the Department here asserted.

There being then no basis for the assumption of a discretionary power on the part of the Land Department upon which the lieu land entry or entries were finally rejected and the land awarded to other entrymen who were later in time, the bill stated a cause of action sustaining the relief prayed unless the demurrer was rightly maintained for some other reason. And for the purpose of considering that subject we state under one heading the questions involved in its solution.

From the point of view that it is established that error of law was committed by the Land Department in assuming that it had a discretion to reject the lieu entry, is its action nevertheless sustainable because of the suggestion made by the court below in closing its opinion, or for any other fact or reason pressed in argument?

These considerations are, of course, as the matter went off on a demurrer, to be determined by the bill

and the opinion of the Secretary of the Interior of 1910, which was annexed to the bill. Although in considering and disposing of the question of law we have given a summary of the proceedings in the Land Department, we refer more fully to the subject. The application to make the lieu entry was presented to the local land office February 8, 1904. After its rejection the applicant for the entry appealed, the date not being given. On this appeal the decision of the local land officers was affirmed by the Commissioner of the General Land Office, the date not being given, and on appeal to the Secretary of the Interior, the local land officers and the Commissioner of the General Land Office were reversed, October 25, 1905, and the local officers were directed to allow the lieu entry. This order was not carried out because the local land officers declined to do so upon the ground that the land covered by the lieu entry was included in a named reservation, and on appeal taken by the lieu entrymen the Commissioner of the General Land Office reversed the action of the local officers, January 23, 1906, and sent the matter back with directions to the local land officers to allow the lieu entry or entries "as of date February 8, 1904, the day on which they were originally presented, if no other objection appeared." What then ensued is thus stated by the Secretary in his opinion:

"Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office [General Land Office] upon the said applications, and stated there were objections to the allowance of the same, in that there were various homestead and timber and stone applications which had been allowed subsequently to the cancellation of the State's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

"Separate appeals were taken by the Aztec Land and

Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

"Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels was entitled to protection as a bona fide purchaser from the State; that the State's selections were filed January 28, 1902, while the lands were sold on January 21st, preceding, at which time they were public lands of the United States, and no one purchasing them could claim to be a bona fide purchaser from the State; that as late as October 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a bona fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed; and if he had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a bona fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the general land laws; that to concede to him this privilege under letters October 17 and 13, 1903, mentioned above, would in effect, be to make such persons, as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's lists invalid for want of sufficient base, the filing of the State's relinquishment, and the protection of

the purchaser from the State by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

"A motion for review of said decision of June 26th, 1906, having been filed by Daniels, the Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels was not, strictly speaking, a bona fide purchaser from the State, because the certificates of sale issued by the State antedated the filing of the school indemnity selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a bona fide purchase.

"The decision of June 26th, 1906, was therefore recalled, and it was ordered that the lieu selection should be reinstated."

As additionally stated by the Secretary in his opinion, the Commissioner of the General Land Office transmitted the decision just stated to the local land officers along with the lieu entry or entries for allowance and instructed those officers to notify the parties who had been allowed to make entries subsequent to the filing of the lieu applications to show cause why their entries should not be cancelled.

Thereupon as further stated by the Secretary, "a petition termed a motion for re-review of Departmental Decisions of May 15 and 18, 1907, was filed on behalf of Archie Johnson who claimed a part of the lands under a sale made thereof under the Public Land Laws. This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved; that the entire

proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the Public Land Laws."

And it was the controversy which arose from this petition which took the subject again before the Commissioner of the General Land Office and to the Secretary of the Interior and which led to the final decision of the Department of 1910 with which we are dealing maintaining the right of the lieu entrymen, and in which as we have previously seen in discussing the question of discretion the Department explicitly and finally found (1) that Daniels as a matter of fact was in good faith in his dealings concerning the purchase of the land from the State of Oregon and the receipt from the State of its relinquishment, and (2) that the application for the lieu entry or entries and the relinquishment by the State were presented to the Land Office for filing at one and the same time. Because of its conclusive effect upon that aspect of the question we append in the margin the finding made by the Secretary of the Interior on this subject.[1]

[1] "It is true the record shows that the relinquishments were not marked, filed, in the local office until February 10, 1904, which was two days after the presentation of the scrip applications.

"It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been received on February 8, instead of February 10, the filing would have been noted on the day they were received.

"But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

"The filing was by mail, and the letter of transmittal was written by Daniels' attorney, the said L. T. Barin.

"The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the

Under these conditions it is apparent that the suggestion made in the opinion of the court below was either inadvertent or, if not, was clearly without foundation, a result as to which there is no room for controversy in view of the express finding by the Department of the simultaneous presentation of the relinquishment and the application for the lieu entry or entries, since it constitutes a finding of fact by the Department which it was within its province and its duty to make and which the courts have no power to review. And from this it follows that any attempt to base a right in favor of persons entering subsequently because of the failure of the local land officers to file, would reduce the case at once to the contention that one who had done everything essential, exacted either by law or the regulations of the Department, to obtain a right from the Land Office conferred upon him by Congress, could be deprived of the same either by the exercise of discretion or by a wrong committed by the land officers.

In addition in the brief for the appellee in this case

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action of the local officers at the time in rejecting the proffered scrip applications is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

"It is worthy of [notice] too, that there has not been found any correspondence of record which would indicate that if the said Barin had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

"I conclude, therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be in your office report of September 28th, 1903, above quoted."

various mixed contentions of law and fact are stated under six propositions which it is deemed establish that the demurrer was rightly sustained even although the Land Department did not possess the discretion which it assumed it had. Some of them we think too obviously devoid of merit to require anything but statement. For instance, the contention that because a patent of the United States is involved, therefore the United States is a necessary party. As to the others we think whatever be their merit, as to which we intimate no opinion, they plainly concern themselves with the merits of the case and have no tendency to establish the proposition that the demurrer was rightly sustained. Thus, so far as the final action of the Secretary was concerned we think under the averments of the bill and on the face of the Secretary's opinion it is to be assumed that the necessary parties to enable the Secretary to act were before him and that this carries with it, at least for the purposes of the hearing on the merits, the question whether there was an insufficiency of parties in the previous hearings.

Our conclusion therefore is that the judgment sustaining the demurrer was wrong and it must be and is reversed and the case is remanded for further proceedings in accordance with this opinion.

Reversed.

DANIELS *v.* JOHNSTON.

SAME *v.* BUTLER.

SAME *v.* CONNOR.

SAME *v.* DINEEN.

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

Nos. 234, 235, 236, 240. Argued April 21, 1915.—Decided June 1, 1915.

Decided on the authority of *Daniels* v. *Wagner*, *ante*, p. 547. 205 Fed. Rep. 235, reversed.

THE facts are stated in the opinion.

Mr. Harrison G. Platt, with whom *Mr. Robert Treat Platt* and *Mr. Hugh Montgomery* were on the brief, for appellant.

Mr. Homer D. Angell, with whom *Mr. William D. Fenton* and *Mr. Forrest S. Fisher* were on the brief, for appellees.

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

These four cases were embraced among the fifteen which were argued by the appellant in one brief. For the appellees, however, they were argued in an elaborate brief which presses upon our attention fifteen different propositions. Without going into detail, however, after giving them all careful examination we think none of them af-

fords ground for sustaining the action of the court below in maintaining the demurrers, first, because many of them rest upon contentions concerning the good faith of Daniels in purchasing from the State of Oregon the right to lands under the school indemnity lists which even if that subject were relevant to the issues here arising are without merit, since they but contradict and conflict with the finding by the Secretary of the Interior as to good faith, which finding we have pointed out in No. 239. Second, because other of the propositions but dispute in various forms of statement the finding of the Secretary that the applicant or applicants for the lieu entry or entries had complied with every requirement of the statute and regulations which were prerequisite to the allowance of the right which they claimed. And finally because the remainder perhaps not directly but certainly by indirection seek to establish as a matter of construction under the act of 1897 that the Department possessed the discretionary power which it asserted.

We have not included in this classification of the propositions the first three which advance the theory that because patents had been issued to the subordinate entrymen in Nos. 234 and 235, therefore there was no right on the part of the lieu entrymen to assail the patent by indirection by seeking to impose a trust upon the title which the patents represent. But this view is so directly in conflict with the well-settled principle on that subject that we deem it unnecessary to say more. *Lee* v. *Johnson*, 116 U. S. 48; *Duluth & Iron Range R. R.* v. *Roy*, 173 U. S. 587; *Burke* v. *Southern Pacific Co.*, 234 U. S. 669, 692.

For these reasons and those stated in *Daniels* v. *Wagner*, *ante*, p. 547, No. 239, the decrees sustaining the demurrers in these cases must be reversed and the cases remanded for further proceedings in accordance with the opinion in this and in *Daniels* v. *Wagner*, *ante*, p. 547.

Reversed.

DANIELS *v.* MERRITHEW.

SAME *v.* SACKVILLE.

SAME *v.* MESERVEY.

SAME *v.* JOHNSON.

SAME *v.* MANNING.

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

Nos. 237, 238, 245, 246, 247. Argued April 21, 22, 1915.—Decided June 1, 1915.

Decided on authority of *Daniels* v. *Wagner, ante*, p. 547.

An assertion that one seeking to exchange lands under the Forest Reserve Act of June 4, 1897 is not entitled to make the exchange is devoid of merit where the bill shows that the Secretary expressly found that the applicant had acted in good faith.

205 Fed. Rep. 235, reversed.

THE facts are stated in the opinion.

Mr. Harrison G. Platt, with whom *Mr. Robert Treat Platt* and *Mr. Hugh Montgomery* were on the brief, for appellant.

Mr. A. W. Lafferty, with whom *Mr. P. A. Lafferty*, *Mr. H. M. Manning* and *Mr. Arthur I. Moulton* were on the brief, for appellees.

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

These five cases were among the fourteen referred to in the opinion in *Daniels* v. *Wagner*, No. 239, just de-

cided, *ante*, p. 547. For the appellant they were argued in the brief which was filed in No. 239 and which was stated to be applicable to the other fourteen cases. But for the appellees a brief was filed applicable to these five cases. In this brief nothing is said to maintain the existence of the discretionary power under which the Land Department acted and which we have decided in No 239 was not possessed, the brief stating that the subject is irrelevant because the correctness of the action of the Land Department and the court below in sustaining the demurrers is maintainable on other grounds, as follows:

1. Because of the failure of the lieu entrymen to file in time the relinquishment made by the State of Oregon and the assumed resulting priority of the rights of the other entrymen over those of the lieu entrymen. But this contention is governed by the ruling made in No. 239 on the same subject, since we directed attention to the specific finding of the Secretary of the Interior to the contrary and pointed out its binding force.

2. In addition various propositions are urged concerning the bad faith of Daniels in buying the right to the land from the State and the assumption, based upon this premise, of his want of right to the relinquishment or to use it in order to clear away the supposed impediment on the land record to the allowance of the lieu entries. But even assuming for the sake of argument that the premise of fact upon which this contention proceeded had any real relevancy to the right of the lieu entrymen to acquire the land and to use the relinquishment to enable them to do so, such premise is devoid of merit because of the express finding of the Secretary of the Interior which we have stated in the opinion in No. 239 that Daniels' good faith in the Oregon transaction was established. It is true that the argument in these cases in an indirect way seemingly assails the cor-

rectness of this finding, but as it is conclusive here nothing more need be said on that subject.

It results that these cases both as to law and the facts are disposed of by the opinion expressed in No. 239. The decrees sustaining the demurrers in these cases are therefore reversed and they are remanded for further proceedings in accordance with the opinion in this and in *Daniels* v. *Wagner*, *ante*, p. 547.

Reversed.

DANIELS *v.* BERNHARD.

SAME *v.* HOWARD.

SAME *v.* LEONARD.

SAME *v.* WAKEFIELD.

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

Nos. 241, 242, 243, 244. Argued April 21, 1915.—Decided June 1, 1915.

Decided on authority of *Daniels* v. *Wagner*, *ante*, p. 547.

One who has complied with all necessary steps to obtain lieu lands under the Forest Reserve Act of June 4, 1897, is not confined to the remedy of mandamus against the Secretary of the Interior. He may proceed by action against the party to whom the patent was issued. *Osborn* v. *Froyseth*, 216 U. S. 571, distinguished.

205 Fed. Rep. 235, reversed.

THE facts are stated in the opinion.

Mr. Harrison G. Platt, with whom *Mr. Robert Treat*

Platt and *Mr. Hugh Montgomery* were on the brief, for appellant.

Mr. J. H. Carnahan for appellee.

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

The printed argument for the appellant in these four cases was presented in the one brief embracing No. 239 and the other fourteen cases referred to in that case, but they were separately briefed for the appellees. The separate brief covers fifteen propositions of law, or it may be in some aspects of intermingled law and fact, each supported by a copious citation of authority. All but one or two of the propositions are directly or indirectly urged as a means of support for the possession by the Land Department of the discretionary power which the Department assumed it possessed, and the possession of which was sustained by the court below. As in No. 239 we have held that proposition to be without merit, it follows that there is no necessity for reviewing the propositions relied upon, as they present the subject in no new aspect. We say, however, without stopping to state and review them, that many of the propositions but enunciate elementary rules of construction about which there could be no dispute but which are inapplicable to the question here arising for decision.

Moreover, in concluding we observe that the proposition that *Osborn* v. *Froyseth,* 216 U. S. 571, established the doctrine that the sole remedy of the complainant under the circumstances here disclosed was to have proceeded by mandamus against the Secretary of the Interior when his final decision was rendered, finds no support on the face of the case relied upon and is absolutely in conflict with the elementary and settled doctrine to the contrary.

As these reasons, as well as those stated in No. 239, are conclusive that the demurrers in these cases should not have been sustained, it follows that the decrees sustaining the demurrers in these cases must be and they are reversed and remanded for further proceedings in accordance with this and the opinion in *Daniels* v. *Wagner*, *ante*, p. 547.

Reversed.

DANIELS *v.* CRADDOCK.

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

No. 248. Argued April 21, 22, 1915.—Decided June 1, 1915.

Decided on authority of *Daniels* v. *Wagner*, *ante*, p. 547.
205 Fed. Rep. 235, reversed.

THE facts are stated in the opinion.

Mr. Harrison G. Platt, with whom *Mr. Robert Treat Platt* and *Mr. Hugh Montgomery* were on the brief, for appellant.

Mr. Will R. King, *Mr. F. M. Saxton* and *Mr. L. F. Conn* for appellees, submitted.

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

Included among the fifteen cases which were argued by the appellant in a single brief, this case was separately argued by the appellees. The brief pressed upon our attention seven propositions, all of which we are of opinion

are disposed of by the views announced in *Daniels* v. *Wagner, ante,* p. 547 (No. 239), since the propositions all in substance either conflict with the finding of the Secretary of the Interior as to the performance by the lieu applicants of every essential requirement to entitle them to make the entry, or directly or indirectly assert the possession by the Land Department, at least as to the lieu entries, of the discretionary power which was asserted and recognized by the court below. It follows therefore that for the reasons here stated and those expressed in No. 239 the judgment must be and it is reversed and the case is remanded for further proceedings in accordance with this and the opinion in *Daniels* v. *Wagner, ante,* p. 547.

Reversed.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY CITY, *v.* THE PENNSYLVANIA RAILROAD COMPANY.

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

No. 269. Argued May 7, 1915.—Decided June 1, 1915.

This court cannot review the judgment of the Circuit Court of Appeals when the complaint alleged diversity of citizenship unless there remain in the complaint, if the averments of such diversity were disregarded, such averments as to existence of rights under the Constitution and laws of the United States as are adequate to sustain jurisdiction.

Inadequacy of averments in the bill to sustain jurisdiction under the Constitution and laws of the United States cannot be cured by showing that the nature and character of the acts relied upon are sufficient to justify the implication that such Constitution and laws were relied upon.

In this case the facts alleged in regard to damages caused by negligent

operation of its railroad by the carrier defendant exclude affixing to such acts the character of state action so as to bring them within the Fourteenth Amendment.

Quære whether the operation of a railroad, not on a public highway but on private property, can be treated as state action within the meaning of the Fourteenth Amendment.

Appeal from 207 Fed. Rep. 897, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Courts of Appeal, are stated in the opinion.

Mr. Frank M. Hardenbrook, with whom *Mr. Marshall Van Winkle* was on the brief, for appellant.

Mr. Albert C. Wall, with whom *Mr. James B. Vredenburgh* was on the brief, for appellee.

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

Brought in the Circuit Court of the United States for the District of New Jersey and there decided, this case was taken by appeal to the Circuit Court of Appeals for the Third Circuit where the decree of the Circuit Court was affirmed. 207 Fed. Rep. 897. It is here on appeal upon the assumption that the decree of affirmance is susceptible of being here reviewed, and at the threshold because of a motion to dismiss we come to consider whether the assumption of jurisdiction to review has any foundation.

There is no question concerning the jurisdiction of the Circuit Court and of the Circuit Court of Appeals to review the action of that court, since the complaint expressly alleged diversity of citizenship. But as this court has no power under the statute to review the decision of the Circuit Court of Appeals in a case where the jurisdiction of the Circuit Court was invoked alone upon diversity

of citizenship, it follows that whether we have jurisdiction depends upon whether the jurisdiction of the Circuit Court was by the pleadings invoked not alone because of diverse citizenship, but also because rights under the Constitution and laws of the United States were expressly asserted in the pleadings as a basis for jurisdiction. In other words, the inquiry is whether if the averments in the complaint of diversity of citizenship were disregarded, there would yet remain in the complaint such averments as to the existence of rights under the Constitution and laws of the United States as would be adequate to sustain jurisdiction. *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Weir* v. *Rountree*, 216 U. S. 607; *Shulthis* v. *McDougal*, 225 U. S. 561; *Hull* v. *Burr*, 234 U. S. 712, 720.

The cause of action relied upon was injury inflicted on the property of the complainant and wrong suffered by its officers and agents in their persons occasioned by a nuisance produced by the operation of the trains of the Railroad Company along its tracks alleged to be situated on Sixth Street in Jersey City. The ownership by the complainant of a church, a schoolhouse and other property in the immediate vicinity of Sixth Street, the damage by interruption of light and view and the injury by smoke and dust and cinders were in the bill fully and graphically described. But the only passage in the bill which in any degree whatever gives basis for the assumption that jurisdiction was invoked because of a reliance on rights claimed under the Constitution and laws of the United States is Paragraph XI, which is as follows:

"XI. That the said acts of the defendant have taken from your orator property consisting of the easement of light and air to which your orator is legally entitled, and deprives it of the same without due process of the law, and without just compensation, or any compensation whatever, and that such acts of the defendant in such interference with and appropriation of said property of

your orator has been, and now is, a violation of the provisions of the Constitution of the United States."

As from any point of view it is impossible because of the vagueness of these averments to escape, to say the least, doubt as to whether the bill asserted rights under the Constitution and laws of the United States which would be adequate to sustain the jurisdiction of the Circuit Court if the allegations of diversity of citizenship were stricken out, it follows that they are insufficient to sustain the claim of jurisdiction, since the rule is that averments to accomplish that result must be expressly and clearly made. *Hull* v. *Burr*, 234 U. S. 712, 720. Indeed, it is apparent on the face of the paragraph of the bill which we have quoted that it entirely fails even vaguely to manifest the purpose to base the jurisdiction of the court upon the fact that constitutional rights were relied upon. So completely is this the case that the argument made by the appellant to sustain jurisdiction frankly admits that the averments of the bill are inadequate for that purpose, but suggests that the nature and character of the acts relied upon are sufficient to justify the implication that the Constitution of the United States was relied upon as a basis for jurisdiction and thus to cure the insufficiency. Thus in the argument it is said: "While reference to the Constitution in the complaint is not sufficient to invoke jurisdiction, the facts as alleged in the complaint of the acts of nuisance committed by the defendant, the evidence of which is entirely undisputed in the record, show conclusively that the acts of the defendant in permitting black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives to fall upon or enter into the premises and structures of the complainant in such appreciable quantities as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the

same by the complainant and the priests connected therewith, the teachers and children connected with the school and persons using the said respective structures of the complainant" amounted to a violation of the Constitution of the United States.

But even if this impossible assumption were yielded to there would yet be no ground upon which to rest jurisdiction, since the bill contains allegations which would exclude the possibility of implying from the facts alleged that there was an intention to base jurisdiction on rights asserted under the Constitution of the United States. We say this because paragraph XII of the bill unmistakably charges that the acts complained of were the result of the negligence of the carrier in operating its trains, thus excluding the possibility of affixing to them the character of state action so as to bring them within the Fourteenth Amendment. The paragraph in question is as follows:

"XII. That the aforesaid acts, use, occupation of and appropriation by the defendant as aforesaid constitute and are a nuisance to and one of special injury to your orator, and are unnecessary, avoidable and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad, and which acts are continuous, and which will cause great and irreparable loss to your orator and subject your orator to the prosecution of a multiplicity of suits for damages unless the defendant be restrained by injunction from the commission thereof."

It is true that in the opinion of the court below it is said that the case of the complainant was pressed upon it in the argument upon two grounds: wrong resulting from acts of mere negligent operation on the part of the railroad and wrongs necessarily arising from even a careful operation by the railroad of its trains over its tracks situated in the street as alleged in the complaint. But here again

if we disregarded the pleadings and tested the jurisdiction by the statements in the opinion of the court below as to the arguments urged upon it, the situation as to the absence of a Federal question adequate to confer jurisdiction would be manifested. We say this because the opinion also states that it was established by the proof and not controverted in the argument below that the tracks of the railroad were not on Sixth street as alleged in the bill, but were on a right of way not part of a street, a situation which at once gives rise to the inquiry whether the operation of the road complained of could under this condition be treated as state action within the meaning of the Fourteenth Amendment.

Dismissed for want of jurisdiction.

TOOP *v.* ULYSSES LAND COMPANY.

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

No. 284. Submitted May 13, 1914.—Decided June 1, 1915.

This court cannot entertain jurisdiction of a direct writ of error to review a judgment of the District Court under § 238, Judicial Code, on frivolous grounds.

The contention that rights were denied under a treaty that did not go into effect until two years after title had vested in defendants in error or in their grantors under the state law, is too frivolous to sustain jurisdiction of this court under § 238, Judicial Code.

Even though the widow had some use of the intestate's property after his death which continued until after the treaty became operative, if the title was not suspended, the treaty could have had no effect thereon.

The contention that a state statute forbidding the ownership of real estate by non-resident aliens is repugnant to the Fourteenth Amendment simply because it does forbid such ownership is also frivolous.

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

Mr. Clair E. More, Mr. J. J. Boucher, Mr. Almon W. Bulkley and *Mr. Thomas D. Crane* for plaintiffs in error.

No appearance for defendants in error.

Mr. R. C. Roper and *Mr. C. M. Skiles* filed a brief as *amici curiæ.*

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

The plaintiffs in error, who were plaintiffs below, alleging themselves to be residents of England and subjects of the Kingdom of Great Britain and Ireland, in 1912 sued the defendants in error to recover a two-thirds interest in a piece of real estate situated in Nebraska. They alleged that John Toop, a resident of Nebraska, who had owned the real estate in question, died in 1898 intestate and without issue, his widow surviving him, and that as children and grand-children of a deceased brother and sister of Toop they as his heirs became the owners of the two-thirds of the property sued for. It was charged that the right to inherit the property notwithstanding the alleged alienage was secured by a treaty between the United States and Great Britain which took effect in 1900. In their answer the defendants deraigned their title from the children and grand-children of a deceased sister of Toop who, it was alleged, were American citizens at the time of Toop's death. Without denying the kinship of the plaintiffs to Toop as they alleged, it was asserted that as aliens they were incapacitated from taking by inheritance or holding real estate in the State of Nebraska in virtue of a law of

that State which was in force at the time of Toop's death. The case was submitted to the court on an agreed statement of facts and was decided against the plaintiffs on the ground that applying the state law prohibiting non-resident aliens "from acquiring title to or taking or holding any lands or real estate in this State by descent, devise, purchase, or otherwise," etc. (act of March 16, 1889, § 4825, Comp. Stat. of 1907), the plaintiffs had no interest in the property for which they sued. The court concluded that the treaty referred to in the pleadings was not necessary to be considered as it only became operative two years after the death of Toop and had no retroactive effect.

On the face of the pleadings the only ground upon which there is any semblance of jurisdiction to entertain this direct writ of error is the averment of the treaty between the United States and Great Britain. But the absolutely frivolous character of that ground is apparent when it is considered that the treaty only went into effect two years after the death of Toop and the vesting of the property in those entitled legally to take it. It is true that it is now argued—a contention which seems not to have been pressed below—that the treaty is involved because Toop's widow who survived him and died in 1907 after the treaty was adopted had a use of the property during her life and therefore title to it did not pass to the heirs until her death. This, however, does not add substance to the proposition, but only asserts another unsubstantial contention, for it is apparent that the fee of the property was not in suspension until the death of the wife, but passed to the heirs entitled to take, subject, it is true, to the use of the widow, but nevertheless so far as the passage of the title was concerned uncontrolled and uninfluenced by the treaty.

As except for a contention that the state statute forbidding the ownership of real property by aliens was repugnant to the Fourteenth Amendment, which seems also

not to have been raised below and which we think also is too frivolous to afford a basis for jurisdiction, what we have said disposes of all the considerations relied upon as the basis for the right to prosecute this direct writ of error, it follows that we are without jurisdiction and the writ is therefore

Dismissed for want of jurisdiction.

BROWN AND SCHERMERHORN, TRUSTEES, *v.* FLETCHER, AS TRUSTEE OF BRAKER.

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

No. 286. Argued May 13, 14, 1915.—Decided June 1, 1915.

Brown v. *Fletcher*, 235 U. S. 589, followed to the effect that § 24, Judicial Code, does not apply to the assignment of an interest of the *cestui que trust* of a testamentary trust fund.

Even though jurisdiction to do so exists, this court will not dispose of a case on the merits where such action would be out of harmony with the provisions of the Judicial Code giving a direct right of review on questions of jurisdiction, or where it would be incompatible with the provisions of that Code giving finality to judgments of the Circuit Court of Appeals.

The refusal of the Circuit Court of Appeals to decide a case on its merits because it erroneously held that the diversity of citizenship necessary to give jurisdiction to the Federal courts did not exist, should not, under the circumstances of this case, be made the basis of this court for deciding a case which, if jurisdiction does exist, should be finally decided by the Circuit Court of Appeals.

The District Court having taken jurisdiction of a case on the ground that diversity of citizenship existed, and decided the case on the merits, and the Circuit Court of Appeals having held that jurisdiction did not exist and reversed, with instructions to dismiss the bill, but not on the merits, this court, having found that diversity of citizen-

ship does exist, and that there is jurisdiction, does not decide the case on the merits, although it has jurisdiction so to do, but remands it to the Circuit Court of Appeals to the end that it proceed to discharge its duty of hearing and deciding the case.

206 Fed. Rep. 461, reversed.

CONRAD BRAKER, JR., of New York who there died July 21, 1891, by his will created several trusts in favor of his son, Conrad Morris Braker. The beneficiary of these trusts, the son, assigned a portion of his interest in them to one Rabe and nearly the whole of the remainder to the New York Finance Company. Rabe subsequently assigned to the Finance Company the interest which he had acquired and the Finance Company which thus claimed to be the successor or assignee to all, or nearly all, the interest of Braker, the son, under the trusts, assigned certain parts of its interest to one Cunningham and the remainder to one Wood. Cunningham having died, this suit was commenced in 1911 in the Circuit Court of the United States for the Southern District of New York by the trustees under his will to enforce one of the trusts under the assumption that it had matured and was owned by the estate of Cunningham in virtue of the assignment made to him. The jurisdiction of the court was based solely on diversity of citizenship. The bill was demurred to for various causes, one of which challenged the jurisdiction of the court on the ground that as there was no diversity of citizenship as between the original parties and hence no jurisdiction, none did or could result under the law from the assignments. The demurrer was overruled and the case on the merits was decided against the complainants who appealed to the Circuit Court of Appeals for the Second Circuit.

While the case was there, on February 5, 1913, the trustees under the will of Cunningham commenced another suit in the District Court of the United States for the Southern District of New York against the trustee

under the will, to enforce another trust which they asserted had matured and which they claimed to have a right to enforce in consequence of the assignment from the New York Finance Company. In the meanwhile Wood, to whom as we have previously said an assignment had been made, having died, his testamentary executors also on the same day commenced in the District Court a suit against the trustee of the will of Braker, to enforce the trust. The jurisdiction in both these cases also depended on diverse citizenship. The cases were put at issue by answer and while they were on the docket awaiting trial this case, which was pending in the Circuit Court of Appeals, was by that court decided June 27, 1913. The court primarily intimated opinions concerning the controlling influence of a prior ruling made in the state Surrogates Court and further intimated views on the merits which came ultimately, however, to be mere obiter since the court placed its final ruling on a question of Federal jurisdiction and held that as Braker, the son, was not a party and as diversity of citizenship did not exist if the prior parties were considered and as the assignee had no greater right than had his assignor to invoke the Federal jurisdiction, there was no jurisdiction and the decree below was therefore reversed with directions "to dismiss the bill, but not upon the merits." (206 Fed. Rep. 461.) Before, however, such decree became final a writ of certiorari was granted and in consequence of that fact the case is now before us.

After the decision of the Circuit Court of Appeals and after the granting of the writ of certiorari by this court demurrers to the jurisdiction were filed in the two cases pending in the District Court on the ground covered by the decision of the Circuit Court of Appeals in this case, and the District Court evidently following that decision changed its previous ruling and dismissed both of the cases for want of jurisdiction. Under the provisions of

§ 238 of the Judicial Code direct appeals were then prosecuted in both the cases from the District Court to this court. On these appeals as the result of the allowance of a motion to advance the cases were heard in December last and the judgments below were reversed, it being decided that the assignee under the circumstances was not within the provisions of § 24 of the Judicial Code and therefore the existence of diversity of citizenship between the parties gave authority to hear and decide the cases. *Brown* v. *Fletcher*, 235 U. S. 589.

Mr. Charles H. Burr for petitioners.

Mr. William P. S. Melvin for respondent.

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

It is apparent from the statement which we have made that the ruling as to the question of jurisdiction made in the two previous cases involving the same subject-matter which is here in controversy so far as it concerned the jurisdiction of the court as a Federal court, conclusively demonstrates that the court below erred in declining to take cognizance of the cause upon the theory that it was without its jurisdiction as a Federal court to do so. While it is clear, the question of jurisdiction being thus determined, that we have power to consider and dispose of the merits, we think it is equally clear that we ought not to exert the authority, (*a*), because to do so would be out of harmony with the provisions of the Judicial Code, giving a right to direct review on questions of jurisdiction; and (*b*), because it would be in a broad sense incompatible with the provisions giving finality to the judgments and decrees of the Circuit Court of Appeals in cases, of which this is one, within the final competency of those courts. We say

the first, because it is apparent that if we now determine the merits of this case, we shall in a large sense virtually decide the merits of the two other cases concerning in a sense the same subject-matter involved in the cases which came here on direct appeals as to jurisdiction and jurisdiction alone and which now, the question of jurisdiction alone having been determined, doubtless await the action of the District Court and the review of that action by the court below if after the cases have been decided by the District Court they are carried to the Circuit Court of Appeals for review and final decision. We say the second, because as this case is one over which the action of the court below is made final by the statute, we are of opinion that its refusal to decide the case on the merits because of an erroneous conclusion as to want of power as a Federal court to do so ought not under the circumstances here disclosed to be made the basis by which this court would perform a duty which the statute contemplates should be discharged by the court below.

Indeed, the views just stated have been applied by previous rulings. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257; *United States* v. *Rimer*, 220 U. S. 547; *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U. S. 645. In the *Lutcher Case* which was brought here by the allowance of a writ of certiorari, it was found that the court below, the Circuit Court of Appeals of the Fifth Circuit, had from a mistake of law refused to consider the merits of the case and although it was recognized that as the result of the certiorari the whole case was open to our review, it was yet pointed out that as by the provisions of the act of 1891 the cause was one which apart from certiorari was within the competency of the Circuit Court of Appeals and its judgment when rendered would be final, the duty of this court was not to determine the case on the merits but after correcting the error which had stood in the way of the court below performing its duty, to remand the case

to that court so that such duty might be discharged. So in the *Rimer Case* which was brought here by certiorari, when it was discovered that the writ had obviously been allowed upon a mistaken conception as to the existence in the case of a far-reaching question of public importance justifying the issue of the writ, it was pointed out that, the mistake becoming apparent, it was our duty not to decide the case but to remand it to the Circuit Court of Appeals to which the certiorari had been directed to enable that court to discharge its duty. And the same principle was involved in the *Cramp Case* where, after the case had been brought to this court by certiorari and it was held that the decision of the court below was void because the court which decided it was not legally organized, while it was recognized that there was power under the certiorari to dispose of the whole case, it was held that the duty arose in order to give effect to the statute not to decide, but to remand the case so that when the court below was organized conformably to the statute the case might be considered and disposed of as the statute contemplated it should be.

While it follows from these considerations that the decree below must be reversed, it also results that it is our duty to remand the case to the court below, that is, the Circuit Court of Appeals, to the end that, all questions concerning its jurisdiction as a Federal court having been determined by the prior decision of this court, it proceed to discharge its duty of hearing and deciding the case conformably to law.

Reversed and remanded for further proceedings consistent with this opinion.

WAUGH *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 255. Argued May 4, 1915.—Decided June 1, 1915.

The equal protection provision of the Fourteenth Amendment does not forbid classification based on obvious and rational distinctions.

If a state police statute is not invalid under the Fourteenth Amendment, regulations of the proper officials making it effective are not invalid under that amendment.

A State may base a classification of the students in its educational institutions by putting those already connected with organizations, the joining of which is to be prohibited by a police statute, into an excepted class by themselves; the classification is reasonable as legislation should not, on principles of construction and justice, be construed retrospectively.

What regulations a State may establish as to the discipline of its educational institutions, and how such regulations shall be enforced, are matters for the state courts to determine, and unless they deny due process of law under the Fourteenth Amendment, the decision of the state court is conclusive.

A State may establish the rule that students in its educational institutions shall not affiliate with fraternities, and even though such fraternities may be moral and beneficial in themselves, the prohibition is a matter within the wisdom of the state legislature and does not offend the due process provision of the Fourteenth Amendment.

The statute of Mississippi of 1912 prohibiting Greek-letter fraternities and other societies in the educational institutions of the State is not unconstitutional under the Fourteenth Amendment, either as denying students due process of law or as denying some of them the equal protection of the law by reason of its permitting those students already members of such societies to continue their membership under specified conditions.

THE facts, which involve the constitutionality under the due process and equal protection provisions of the Fourteenth Amendment of a statute of the State of Mississippi prohibiting Greek Letter fraternities and other societies in

the educational institutions of the State, are stated in the opinion.

Mr. A. F. Fox, with whom *Mr. Hamilton Douglas* and *Mr. William G. Cavett* were on the brief, for plaintiff in error:

The second section of said act and said order of the Board of Trustees is unreasonable and *ultra vires*. 22 Am. & Eng. Enc. 936; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Cotting* v. *Goddard*, 183 U. S. 79; *Gulf, Col. & Santa Fe R. R.* v. *Ellis*, 165 U. S. 666; *Lawton* v. *Steele*, 150 U. S. 133; *Miller* v. *Pittsburg*, 180 Massachusetts, 32; *Tol., Wab. & West. R. R.* v. *Jacksonville*, 67 Illinois, 37; *Lakeview* v. *Rosehill Cemetery*, 70 Illinois, 191; *Viemeister* v. *White*, 179 N. Y. 235; Words & Phrases, pp. 5427, 5431, 5432; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

See cases in regard to schools. *Bissell* v. *Davidson*, 65 Connecticut, 183; *Burdick* v. *Babcock*, 31 Iowa, 562; *Deskins* v. *Gose*, 85 Missouri, 485; *Dritt* v. *Snodgrass*, 66 Missouri, 286; *Hobbs* v. *Germany*, 94 Mississippi, 469; *Kinzer* v. *Toms*, 3 L. R. A. (N. S.) 496; *Viemeister* v. *White*, 179 N. Y. 234; *Ward* v. *Flood*, 48 California, 36.

For fraternity cases see *Bradford* v. *Board of Education*, 121 Pac. Rep. 929; *Stallard* v. *White*, 92 Indiana, 278; *Wayland* v. *School Directors*, 7 L. R. A. (N. S.) 352; *Wilson* v. *Chicago Board of Education*, 233 Illinois, 464.

Plaintiff in error is denied equal protection of law. *Boyd* v. *United States*, 116 U. S. 616; *Cotting* v. *Goddard*, 183 U. S. 79; *Gulf, Col. & S. F. R. R. Co.* v. *Ellis*, 165 U. S. 66; *McFarland* v. *Goins*, 50 So. Rep. 493; *Southern Ry.* v. *Green*, 216 U. S. 400; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The classification must be reasonable and in this case it is unreasonable. *Gulf, C. & S. F. R. R. Co.* v. *Ellis*, 165 U. S. 66; *Southern Railway* v. *Green*, 216 U. S. 400.

Mr. Jackson H. Ralston, with whom *Mr. William C. McLean* and *Wm. E. Richardson* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error, herein called complainant, by a bill in the chancery court of Lafayette County, State of Mississippi, attacked the validity and sought to restrain the execution of an act of the State [act of Feb. 27, 1912, c. 177, Miss. L. (1912), p. 192], prohibiting Greek letter fraternities and societies in the State's educational institutions.

Section 1 of the act designates by name certain societies and declares that they "and other secret orders, chapters, fraternities, sororities, societies and organizations of whatever name, or without a name, of similar name and purpose, among students are hereby abolished and further prohibited to exist in the University of Mississippi and in all other educational institutions supported, in whole or in part, by the State."

By § 2 of the act any student in the University belonging to any of the prohibited societies is not permitted to receive or compete for class honors, diplomas or distinctions nor contend for any prize or medal. But it is provided that any student who is a member of any of the prohibited orders or societies may, upon entrance to any of the schools, "file with the Chancellor, President or Superintendent, as the case may be, an agreement in writing that he will not, during his attendance at said school, affiliate with same, nor attend their meetings, nor in any wise contribute any dues or donations to them, and, thereafter so long as such agreement is complied with in good faith, such student shall not be subjected to the restrictions created by this act."

Subsequent sections provide for the enforcement of the

statute by the trustees and faculties of the institutions by rules and punishments and for the removal of any trustee or member of faculty if he fail or refuse to enforce the act.

Complainant in his bill set out the act and alleged that he was a resident, citizen and taxpayer in Goodman, Holmes County, in the State of Mississippi. That he was a member, and had been for several years, of what is known as the Kappa Sigma Fraternity and was affiliated and identified with the chapter of that fraternity at Millsaps College, and that such fraternity is one of those mentioned in the statute.

He also alleged that subsequent to the enactment of the statute the board of trustees of the University adopted an order which recited that the board desired it to be understood that the statute was "not to be construed to apply to students already entered and who conducted themselves with that decorum always expected of Southern Gentlemen."

Subsequently the board ordered that certain pledges should be incorporated in the application of a student for admission into the University. These were: that he was not pledged to become a member of any of the prohibited fraternities, nor a member of any such; and that he would pledge and promise not to join any such while he was a student, or aid, abet or encourage the organization or perpetuation of any of the orders. And, further, that he would not apply for nor accept any scholarship or medal or in any way be a beneficiary of any students' self-help fund. That it would be his purpose and constant endeavor so to act that no word or deed of his could be even remotely construed as being violative of the letter and spirit of the statute. The obligation was to be binding between the sessions of 1912–13 and 1913–14. The pledges required were embodied in the application of students.

Complainant applied for admission into the law de-

partment of the University but was refused admission because he declined to sign the pledges required, though he alleged that he was otherwise eligible for admission under the laws of the State and of the United States; that he has never been a member of any of the prohibited fraternities organized among the students of the University or located at the University, and, though he is affiliated with and pays dues to the chapter of the Kappa Sigma Fraternity at Millsaps College, if admitted as a student to the University of Mississippi, he has no intention or purpose of encouraging the organization or continuance of any of the prohibited fraternities or of affiliating with or paying dues to any at the University.

The statute is charged to be in certain particulars in violation of the constitution of Mississippi. It is also charged to be in violation of the Fourteenth Amendment of the Constitution of the United States because it "without reason, deprives the complainant of his property and property right, liberty and his harmless pursuit of happiness and denies to the complainant the equal protection of the law of the State of Mississippi."

The charge is accentuated by the allegation that the society of which complainant is a member "has for its paramount purpose the promotion and enforcement of good morals, the highest possible attainment and standing [in the classes], and good order and discipline in the student bodies of the different colleges with which it is connected."

A demurrer was filed to the bill on grounds which asserted the validity of the statute and the insufficiency of the bill, and subsequently a motion was made to strike out the praise of the purposes of the Kappa Sigma Fraternity. The demurrer was overruled and the motion denied.

Defendants declined to plead further, and it was decreed, with recitation of details, that the statute was in violation of the constitution of Mississippi "and in violation of that paragraph of Section 1 of Article Fourteen of

the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws." The statute was declared to be "unconstitutional, null and void" and the orders of the trustees of the University "*ultra vires*, unreasonable and void." It was ordered that the injunction theretofore granted be made perpetual.

The decree was reversed by the Supreme Court of the State, the demurrer sustained and the bill dismissed.

The Supreme Court specifically rejected the contention that the statute was not in accordance with the constitution of the State, and as specifically sustained the orders of the trustees as being authorized by the statute.

The rulings cannot be questioned here; indeed, are not questioned, for counsel say that the assignments of error are all based on the contention that the statute is unconstitutional and void for the reason that it violates the Fourteenth Amendment in denying to complainant "the equal protection of law and the harmless pursuit of happiness, and that the various rules and regulations adopted by the Board of Trustees are *ultra vires* and void, because they are unreasonable, unnecessary, and deny plaintiff in error the equal protection of the law and the harmless pursuit of happiness;" and deprive him of property and property rights without due process of law and of the privileges and immunities of citizens of the United States.

If the statute is valid, the orders of the board of trustees are, and to keep up a distinction between them can only lead to confusion. Counsel, however, seem to urge that the statute may be adjudged valid and the orders of the trustees declared "*ultra vires* and unwarranted even by the said act, and that the action of the Board of Trustees in enforcing said regulation is arbitrary and unreasonable in depriving complainant of his constitutional rights."

However, we need not dispute about the distinction, but pass to the grounds of attack on the statute and orders

and ask, Wherein does either offend against the Fourteenth Amendment?—to be specific, Wherein do they deprive plaintiff of the equal protection of the laws or obstruct his pursuit of happiness?

The statute is universal in its prohibitions. None of the named societies or others "of whatever name, or without name," are permitted to exist in the University; and no student who is a member of any of them is permitted to receive or compete for class honors nor contend for prizes or medals. To secure this result one of the orders of the trustees was directed.

But by another order of the trustees a distinction is made. By it it is provided that the statute is not to be construed "to apply to students already entered and who conduct themselves with that decorum always expected of Southern Gentlemen." This order is assailed by plaintiff as "a clear discrimination between the 'ins' and 'outs,' between those who were, at the time the statute was enacted, students in the University and those who were not on that date members of the student body and who might desire to be admitted as such." The contention is made much of by counsel and the order is denounced, as irrational and arbitrary. But counsel overlook that it is an obvious principle of construction, and sometimes of justice, that laws are not to be construed retrospectively. The trustees regarded and followed the principle and left undisturbed the students already in the University, admonishing them, however, that their honor would be regarded as pledged not to abuse the right or the indulgence. And whether it was a right or an indulgence—whether required by the statute or accorded by the trustees,—it was based on an obvious and rational distinction, and the Supreme Court sustained its competence.

The next contention of complainant has various elements. It assails the statute as an obstruction to his pursuit of happiness, a deprivation of his property and

property rights and of the privileges and immunities guaranteed by the Constitution of the United States. Counsel have considered these elements separately and built upon them elaborate and somewhat fervid arguments, but, after all, they depend upon one proposition: whether the right to attend the University of Mississippi is an absolute or conditional right. It may be put more narrowly—whether under the constitution and laws of Mississippi the public educational institutions of the State are so far under the control of the legislature that it may impose what the Supreme Court of the State calls "disciplinary regulations."

To this proposition we are confined and we are not concerned in its consideration with what the laws of other States permit or prohibit. Its solution might be rested upon the decision of the Supreme Court of the State. That court said: "The legislature is in control of the colleges and universities of the State, and has a right to legislate for their welfare, and to enact measures for their discipline and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts."

This being the power of the legislature under the constitution and laws of the State over its institutions maintained by public funds, what is urged against its exercise to which the Constitution of the United States gives its sanction and supports by its prohibition?

It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited

societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity. Nor can we accommodate the regulations to the assertion of a special purpose by the applying student, varying perhaps with each one and dependent alone upon his promise.

This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the State considers inimical to discipline, finds no prohibition in the Fourteenth Amendment.

Judgment affirmed.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY *v.* VARNVILLE FURNITURE COMPANY.

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

No. 273. Argued May 12, 1915.—Decided June 1, 1915.

A state law not contrived in aid of the policies of Congress, but to enforce a policy of the State differently conceived, cannot be said to be in aid of interstate commerce.

When Congress has taken the particular subject-matter in hand, coincidence of a state statute is as ineffective as opposition, and a

state law on the same subject cannot be sustained as a help to the Federal statute because it goes farther than Congress has seen fit to go.

A state statute which is a burden on interstate commerce is not saved by calling it an exercise of police power.

Section 2573, Code of 1912, of South Carolina, imposing a penalty on carriers for failure to settle, or adjust, claims within forty days is an unconstitutional burden on interstate commerce and is also in conflict with the provisions of the Act to Regulate Commerce, as amended by the act of June 29, 1906. (Carmack Amendment.)

Atlantic Coast Line v. *Mazursky*, 216 U. S. 122, distinguished, as that case was decided prior to the enactment of the Carmack Amendment.

98 S. Car. 63, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of certain provisions of the South Carolina Civil Code of 1912 imposing penalties on carriers for failure to pay claims within a specified period, are stated in the opinion.

Mr. F. B. Grier for plaintiff in error:

The South Carolina Penalty Act, as construed by the Supreme Court of the State, makes the delivering carrier responsible for the delicts of the connecting carrier, resulting in loss or damage, to the lawful holder of the bill of lading, in a through shipment, although it may not as a matter of fact be the carrier at fault. *Varnville Fur. Co.* v. *C. & W. C. Ry. Co.*, 98 S. Car. 63; *Willet* v. *Railway Co.*, 66 S. Car. 477; *Dupree* v. *C. N. & L. Ry. Co.*, 98 S. Car. 468; *Eastover Mule Co.* v. *Atl. Coast Line*, 99 S. Car. 457.

The subject of the Carmack Amendment is carrier liability for loss, damage or injury to property, caused by it, or by any connecting carrier to whom the property is delivered, or over whose line it may pass. It embraces the entire subject and covers every detail of carrier liability to the lawful holder of the bill of lading, which the receiving or initial carrier is required to issue. *River-*

side Mills v. *Atl. Coast Line,* 219 U. S. 186; *Express Co.* v. *Croniger,* 226 U. S. 491.

The subject of the statute is carrier liability for freight overcharge, or for loss or damage to property and baggage while in possession of such common carrier. The penalty is automatic and is imposed by the terms of the statute for a failure to pay the claim for loss or damage within the time specified by the act. It grows out of and is founded on carrier liability for loss or damage sustained by the lawful holder of the bill of lading which the act of Congress requires the carrier to issue. The subject-matter of the act as to the fundamental and only real question involved is identical with the subject-matter of the act of Congress. Civil Code 1912, §§ 2572, 2573.

The State has no inherent power to deal with this subject. Its power is permissive only and dependent upon non-action by Congress, and ceases to exist the moment that Congress asserts its paramount authority over the subject, which is of national scope and importance, and permitting of but one uniform system of regulations. *Mo., Kan. & Tex. Ry.* v. *Harris,* 234 U. S. 412; *Southern Ry.* v. *Reid,* 222 U. S. 424; *Chicago, R. I. & P. Ry.* v. *Hardwick Elevator Co.,* 226 U. S. 426; *Express Co.* v. *Croniger,* 226 U. S. 491; *Chicago, R. I. & P. Ry.* v. *Cramer,* 232 U. S. 490; *Atchison, T. & S. F. Ry.* v. *Robinson,* 233 U. S. 173.

The statute was upheld on the theory that there was no Federal legislation on the subject involved. The decisions held that the penalty imposed was for a delict of duty pertaining to the business of a common carrier, and in so far as it affected interstate commerce was an aid thereto by its tendency to promote safe and prompt delivery of the goods, or, its legal equivalent, prompt settlement of proper claim for damages.

The cause of action in *Charles* v. *Atlantic Coast Line,* 78 S. Car. 36; *Atlantic Coast Line* v. *Mazursky,* 216 U. S. 122, arose in 1905, and since then Congress has

legislated on the subject. Hepburn Act, June 26, 1906, and the Mann-Elkins Act, June 18, 1910.

The Hepburn Act has been construed by this court to deny to the State the power of enforcing by statutory penalties the duty of receiving and prompt delivery of property in consummation of interstate transportation. *St. Louis, I. M. & S. Ry.* v. *Edwards*, 227 U. S. 265; *Chicago, R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Southern Ry.* v. *Reid*, 222 U. S. 424.

The Interstate Commerce Commission, pursuant to the powers conferred on it by the Commerce Act, has assumed the regulation of the payment of claims for loss or damage and for overcharge of freight by carriers. Action by Congress or the Commission supersedes and annuls state regulation. *Northern Pac. Ry.* v. *Washington*, 222 U. S. 370; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Southern Ry.* v. *Reid & Beam*, 222 U. S. 444; Conference Ruling No. 462, April 25, 1914; No. 464, May 28, 1914; Conference Ruling No. 236.

Congress has legislated specifically with reference to freight overcharge, and the Interstate Commerce Commission under its delegated powers has assumd control of the subject. Sections 2, 8 and 9 of the act to regulate commerce. See Barnes Int. Transp., 600, § 405–D and p. 600, § 405–J; *Lanning-Harris Co.* v. *St. L. & S. F. Ry.*, 15 I. C. C. 37; *Leonard* v. *N. K. T. R.*, 12 I. C. C. 538.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for $14.75, damage to furniture in transit from High Point, North Carolina, to Varnville, South Carolina, $4.60 overcharge, and $50 penalty under

a South Carolina statute, Civil Code, 1912, § 2573, for a failure to pay the claims within forty days. The defendant contended that the law imposing the penalty was invalid under the Act to Regulate Commerce, especially § 20, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, 593, known as the Carmack Amendment. The lower courts gave judgment for the plaintiff and the judgment was affirmed by the Supreme Court of the State. *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122, was relied upon as still sustaining the law notwithstanding the amendments of the Federal act. 98 S. Car. 63.

The defendant (plaintiff in error), received the goods from the Southern Railway Company and delivered them in damaged condition. Where the damage was done does not appear. But by § 2572, in such cases the initial, intermediate, or terminal carrier who fails within forty days from notice to inform the notifying party when, where and by which carrier the property was damaged is made liable for the amount of the claim and a penalty of $50, although it may escape by proof that it used due diligence and was unable to trace the property, etc. By § 2573 a similar liability is imposed on carriers for failure to pay claims for freight overcharge or damage to property while in the possession of such carriers, 'within forty days in case of shipments from without the State, after the filing of such claim' &c. If the property never came into their possession they are remitted to § 2572. It seems to follow from the decision in this case, that the terminal carrier is held for a loss anywhere along the line and for the penalty, unless it proves that the property never came into its possession, &c., or succeeds in shifting the loss within the forty days allowed. Therefore the assumption of this court in *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122, 129, that the statute only concerned property lost or damaged while in the possession of a

carrier in South Carolina no longer is correct—perhaps because of amendments in what now is § 2572.

It is true that in the opinion of the Supreme Court the judgment is spoken of as being for damage done to a shipment 'while in defendant's possession in this State,' and it is said that the statute limits the liability to such damage. But in view of the record this can mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible is itself in fault. The defendant happened to be the last carrier of the line, and in many States, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remained so until the latest moment when it could have been harmed. But while this seems to have made its first appearance in the guise of a true presumption of fact, it became, if it was not always, a rule of substantive law, a rule of convenience, calling on the last carrier to explain. *Willett* v. *Southern Ry.*, 66 S. Car. 477, 479. *Moore* v. *N. Y., New Haven & Hartford R. R.*, 173 Massachusetts, 335, 337. The rule is stated as a rule of policy in South Carolina, and the statute makes it still more clearly so, since with the limits that we have stated, it applies indifferently to any carrier in the line, if within the State, according to the accident of the plaintiff's demand. The case then, we repeat, is that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the State, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law.

The claims dealt with in *Atlantic Coast Line Co.* v. *Mazursky*, 216 U. S. 122, all arose before June 29, 1906, the date of the Carmack Amendment. The South Carolina law has been amended and enlarged in scope since that decision but it is less necessary to scrutinize those changes

than to consider the modifications of the United States law. As it now stands that law requires the initial carrier to issue a through bill of lading and makes it liable for all damage anywhere on the route. § 20. By § 1 as amended by the act of June 18, 1910, § 7, c. 309, 36 Stat. 539, 546, it is made the duty of carriers to secure the safe transportation and delivery of property subject to the act, upon reasonable terms. As was said in *Missouri, Kans. & Tex. Ry. Co.* v. *Harris*, 234 U. S. 412, 420, the result of many recent cases, there cited, beginning with *Adams Express Co.* v. *Croninger*, 226 U. S. 491 and coming down through *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, is that 'the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto, have been superseded.' It is true that in that case the inclusion of the attorney's fee not exceeding $20 in the costs upon judgments for certain small claims was upheld although incidentally including some claims arising out of interstate commerce. But apart from the effect being only incidental the ground relied upon was that the statute did not 'in anywise enlarge . . . the responsibility of the carrier' for loss or 'at all affect the ground of recovery, or the measure of recovery,' pp. 420, 422. The South Carolina Act, on the other hand extends the liability to losses on other roads in other jurisdictions and increases it by a fine difficult to escape. It overlaps the Federal act in respect of the subjects, the grounds, and the extent of liability for loss. We leave on one side the remote analogies put forward in the decision of the state Court as in our opinion the cases and principle to which we have referred are sufficient and direct. We should add that the item for overcharges also falls under the act of Congress, § 2, as it now stands, since that section makes the receiving of greater compensation than is received from others for similar services an unjust and unlawful dis-

crimination. The penalty, the only matter that we are considering, was exacted for a failure to pay both claims, within forty days, irrespective of the question whether adequate investigation had been possible, as required by the Interstate Commerce Commission's rulings, Nos. 462, 236 and 68.

It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. *Southern Ry.* v. *Reid*, 222 U. S. 424, 443. But that is immaterial. When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 435. *Southern Railway* v. *Indiana Railroad Commission*, 236 U. S. 439, 446, 447. The legislation is not saved by calling it an exercise of the police power, or by the proviso in the Carmack Amendment saving the rights of holders of bills of lading under existing law. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 506, 507.

Judgment reversed.

LUMBER UNDERWRITERS OF NEW YORK *v.* RIFE.

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

No. 279. Argued May 13, 1915.—Decided June 1, 1915.

If the insured can prove that he made a different contract from that expressed in the policy, he may have it reformed in equity, but he may not take the policy without reading it, and then in a suit at law upon it, ask to have it enforced otherwise than according to its terms.

A policy of insurance is a document complete in itself, and the fact that there is an endorsement stating that it is a renewal of a prior existing policy which had a provision for renewal therein has no bearing on the express terms of the instrument.

A provision in a policy of insurance prescribing an express condition cannot be varied by parol evidence to the effect that the insurer knew that the condition was being violated and had been violated during the existence of a prior policy of which the existing policy purported to be a renewal.

204 Fed. Rep. 32, reversed.

THE facts, which involve the construction of a policy of insurance and the right to vary the terms thereof by parol evidence, are stated in the opinion.

Mr. R. Lee Bartels for petitioner.

Mr. Caruthers Ewing for respondent:

The policy in force when the fire occurred being a renewal of a previous policy, is but a continuation of the original contract of insurance. *Mallette* v. *Assur. Co.*, 91 Maryland, 471; *Hay* v. *Star Fire Ins. Co.*, 77 N. Y. 235; *Martin* v. *Jersey City Ins. Co.*, 44 N. J. L. 273; 1 Cooley's Briefs on Ins., p. 849; *Ky. Vermillion Co.* v. *Norwich Co.*, 146 Fed. Rep. 695, distinguished.

The renewal premium was accepted by the insurer with full and complete knowledge of every fact now set up as invalidating the contract.

No waiver of a condition or provision of the policy could result from any fact known to the insurer's agent issuing the policy at the time the policy was issued—the agent being without express authority from the insurer to make the waiver and the written contract providing in substance against this result. *Northern Assur. Co.* v. *Bldg. & Loan Asso.*, 183 U. S. 308; *Penman* v. *St. P. F. & M. Ins. Co.*, 216 U. S. 311; *Ætna Ins. Co.* v. *Moore*, 231 U. S. 543; *Gish* v. *Ins. Co. of Nor. Am.* (1905), 16 Oklahoma, 59; *Ind. Mut. Indemnity Co.* v. *Thompson*, 10 L. R. A. (N. S.) 1064; *Sharman* v. *Con. Ins. Co.*, 167 California, 117.

The written contract whereby the assured agreed that a continuous clear space of 100 feet shall at all times be maintained between the property insured and any woodworking or manufacturing establishment cannot be varied by parol evidence that the assured was not to maintain such continuous clear space. See authorities *supra* and *Franklin Fire Ins. Co.* v. *Martin*, 40 N. J. L. 568; *Kupferschmidt* v. *Agri. Ins. Co.*, 80 N. J. L. 441; *Ellison* v. *Gray*, 55 N. J. Eq. 581; *Keller* v. *L. & G. Ins. Co.*, 27 Tex. Civ. App. 102; *England* v. *Ins. Co.*, 81 Wisconsin, 583; *Shingle Co.* v. *Ins. Co.*, 91 Michigan, 443; *Ky. Vermillion &c. Co.* v. *Norwich &c. Co.*, 146 Fed. Rep. 695, but the effect of assured's failure to make this warranty good was to give the insurer the right to abrogate.

The insurer elected not to avoid the policy, but treated it as in full force and received new benefits therefrom, and became, as a matter of law, charged with its burdens. *Ins. Co.* v. *Wilkinson*, 13 Wall. 232; *Globe Mut. Ins. Co.* v. *Wolff*, 95 U. S. 326; *Insurance Co.* v. *Norton*, 96 U. S. 234; *Phœnix Ins. Co.* v. *Raddin*, 120 U. S. 183; *Iowa Ins. Co.* v. *Lewis*, 187 U. S. 335; *State Ins. Co.* v. *Murray*, 159

Fed. Rep. 408; *Murray* v. *State Ins. Co.*, 151 Fed. Rep. 539; *Ætna Ins. Co.* v. *Frierson*, 114 Fed. Rep. 56.

The waiver relied on was a waiver resulting from the mere knowledge of the agent. *Mill. Mut. Co.* v. *Mec. &c. Asso.*, 43 N. J. L. 652; *Martin* v. *Jersey City Ins. Co.*, 44 N. J. L. 273; *Redstrake* v. *Cum. Ins. Co.*, 44 N. J. L. 294; *Agri. Ins. Co.* v. *Potts*, 55 N. J. L. 158; *Ætna Ins. Co.* v. *Holcomb*, 89 Texas, 404; *Wagner* v. *Westchester Co.*, 92 Texas, 549; *Conn. Ins. Co.* v. *Cummings*, 98 Texas, 115; *Security &c. Co.* v. *Calvert*, 101 Texas, 128; *Eq. L. Assur. So.* v. *Ellis*, 105 Texas, 526; *Knoebel* v. *North American Co.*, 135 Wisconsin, 424; *Ramsey* v. *Travelers Ass'n*, 147 Wisconsin, 405; *O'Neill* v. *Northern Ins. Co.*, 155 Michigan, 564; *Laxton* v. *Patron Co.*, 168 Michigan, 448; *Hause* v. *Standard Ins. Co.*, 172 Michigan, 59; *Dahrooge* v. *Fire Assur. Co.*, 175 Michigan, 248.

The proposition advanced is that parol evidence, while not admissible to vary the terms of a written contract, is permissible and is usually the only evidence to be adduced to establish facts which show that the contract as originally written was subsequently altered, expressly or by necessary implication. *L. & L. Ins. Co.* v. *Fischer*, 92 Fed. Rep. 500; *Rochester German Ins. Co.* v. *Schmidt*, 151 Fed. Rep. 681; *State Life Ins. Co.* v. *Murray*, 159 Fed. Rep. 408; *Farmers' Feed Co.* v. *Ins. Co.*, 166 Fed. Rep. 111; *Met. Life Ins. Co.* v. *Williamson*, 147 Fed. Rep. 116; *Bennett* v. *Ins. Co.*, 70 Iowa, 600; *Hagan* v. *Ins. Co.*, 81 Iowa, 321; *Hamilton* v. *Insurance Co.*, 94 Missouri, 353; *Insurance Co.* v. *Covey*, 41 Nebraska, 724; *Insurance Co.* v. *Hammang*, 44 Nebraska, 566; *Allen* v. *Insurance Co.*, 123 N. Y. 6; *Morrison* v. *Insurance Co.*, 69 Texas, 353; *Kahn* v. *Insurance Co.* (Wyo.), 34 Pac. Rep. 1059; *Ala. Ins. Co.* v. *Long Clothing Co.*, 123 Alabama, 667; *Phœnix Ins. Co.* v. *Johnston*, 143 Illinois, 106; *Leisen* v. *St. P. F. & M. Ins. Co.* (N. D.), 127 N. W. Rep. 837; *Home Ins. Co.* v. *Marple*, 1 Ind. App. 411; *Glen Falls Ins. Co.* v. *Michael*,

167 Indiana, 659; *Gray* v. *Natl. Ben. Asso.*, 111 Indiana, 531; *Traders' Ins. Co.* v. *Letcher*, 143 Alabama, 400; *Phœnix Ins. Co.* v. *Hart*, 149 Illinois, 513; *N. Y. Life Ins. Co.* v. *Evans* (Ky.), 124 S. W. Rep. 376; *Glasscock* v. *Des Moines Ins. Co.*, 125 Iowa, 170; *Polk* v. *Western Assur. Co.*, 114 Mo. App. 514; *Horton* v. *Home Ins. Co.*, 122 N. Car. 498; *Mut. Life Ins. Co.* v. *French*, 30 Oh. St. 240; *German-American Ins. Co.* v. *Harper*, 75 Arkansas, 98; *Clay* v. *Phœnix Ins. Co.*, 97 Georgia, 44; *Union Nat. Bank* v. *Manhattan Ins. Co.*, 52 La. Ann. 36; *Schmurr* v. *State Ins. Co.*, 30 Oregon, 29; *Arnold* v. *Am. Ins. Co.*, 148 California, 660; *Insurance Co.* v. *Pankey*, 91 Virginia, 259.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit upon a policy insuring lumber for one year from May 22, 1909. The policy contained a warranty by the assured that a continuous clear space of one hundred feet should be maintained between the lumber and the mill of the assured and also a provision requiring any waivers to be written upon or attached to the instrument. The lumber was burned during the year, but it appeared by the undisputed evidence that the warranty had been broken and the judge directed a verdict for the defendants. It appeared, however, that the policy was endorsed 'No. 27868 Renewing No. 27566,' and the plaintiffs offered to prove that pending the earlier policy the defendants had the report of an inspection that informed them of the actual conditions, showing permanent structures between where some of the lumber was piled and the mill, that made the clear space in this direction less than one hundred feet, and that with that knowledge they issued the present policy and accepted the premium. This evidence was excluded subject to exception. But it was held by the Circuit Court of Appeals that the jury should have been allowed to find whether the defendants had knowledge of the conditions and reasonable expectation that they would

continue and so had waived the warranty. For this reason the judgment was reversed. 204 Fed. Rep. 32; 122 C. C. A. 346.

When a policy of insurance is issued, the import of the transaction, as every one understands, is that the document embodies the contract. It is the dominant, as it purports to be the only and entire expression of the parties' intent. In the present case this fact was put in words by the proviso for the endorsement of any change of terms. Therefore when by its written stipulation the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received. *Northern Assurance Co.* v. *Grand View Building Association*, 183 U. S. 308. *Northern Assurance Co.* v. *Grand View Building Association*, 203 U. S. 106, 107. *Connecticut Fire Ins. Co.* v. *Buchanan*, 141 Fed. Rep. 877, 883. See *Penman* v. *St. Paul Fire & Marine Ins. Co.*, 216 U. S. 311. *Ætna Life Ins. Co.* v. *Moore*, 231 U. S. 543, 559. There is no hardship in this rule. No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. The assured also knows better than the insurers the condition of his premises, even if the insurers have been notified of the facts. If he brings to the making of his contract the modest intelligence of the prudent man he will perceive the incompatibility between the requirement of one hundred feet clear space and the possibilities of his yard, in a case like this, and will make a different contract, either by striking out the clause or shortening the distance, or otherwise as may be agreed. The distance of one hundred feet that was written into this policy was not a fixed conventional formula that there would be trouble in changing, if

the insured would pay what more, if anything, it might cost. Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.

The plaintiffs try to meet these recognized rules by the suggestion that after a contract is made a breach of conditions may be waived, void only meaning voidable at the option of the insurers; *Grigsby* v. *Russell*, 222 U. S. 149, 155; that this policy was a renewal of a former one, and that the case stands as if, after the breach of warranty had been brought to the notice of the insurers, a premium had been paid and accepted without a new instrument. But what would be the law in the case supposed we need not consider as in our opinion it is not the one before us. The policy in suit is a document complete in itself. The endorsement that we have quoted is probably only for history and convenient reference. We see no ground for attributing to it any effect upon the contract made. The fact that the policy has a provision for renewal has no bearing, and we do not perceive how it would matter if the previous one had the same. No use was made of the clause. Therefore in our opinion the principles that we have laid down apply to the present case, *Kentucky Vermilion Mining & Concentrating Co.* v. *Norwich Union Fire Ins. Soc.*, 146 Fed. Rep. 695, 700, and the action of the District Court was right.

Judgment reversed.

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE DAY are of opinion that the Circuit Court of Appeals properly disposed of the case, and dissent.

HOOD *v.* McGEHEE.

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

No. 281. Submitted May 13, 1915.—Decided June 1, 1915.

A State may in its statute of descent exclude children adopted by proceedings in other States, as Alabama has done, without violating any Federal right.

The construction of a contract of adoption as complying with the law of the State where made, but as not giving any rights in the State where the property is situated because the law of descent of the latter State excludes children adopted in any other State, does not deny the adoption full faith and credit.

An adoption, although good in the State where made, cannot acquire a greater scope in other States than their laws give to it by reason of the adoptors' expectation that it will be effective in other States.

199 Fed. Rep. 989, affirmed.

THE facts, which involve the construction of an instrument of adoption and the question of whether full faith and credit was given thereto in an action in another State, are stated in the opinion.

Mr. E. Howard McCaleb for appellants:

In the absence of any settled decision construing state statutes by the highest state court, Federal courts exercise an independent judgment as to what is the law of the State applicable to the case, even where a different view has been expressed by the state court after the rights of the parties accrued.

The status of an adopted child fixed as such by a state court having jurisdiction, is compelled by the full faith and credit clause of the Constitution and rights of inheritance accorded in another State, when the latter State

has, by statute, recognized such rights of inheritance to adopted children, and where before such adoption, the heritable rights of such child has accrued, there was no settled decision of the highest state court construing its adoption statute adversely. Wharton Confl. Laws, § 25 a; *Ross* v. *Ross*, 129 Massachusetts, 243.

Executory agreements and mutual promises will be specifically enforced in equity.

In order to effectuate the intention of the parties to a contract, the state of things, the relation of the parties, their connection with the subject-matter, and the surrounding circumstances, should govern, and such interpretation accorded strongly against the grantor.

Statutory implications are operative only when the deed or instrument fails to contain statutory covenants.

Equity will not limit the meaning and intention of the contracting parties to the statutory implication.

In deeds, the words are to be strongly against the party using them, while in respect to statutes in derogation of the common law, they should be construed strictly.

The word "estate" as used in the contract under consideration is one of large signification and means all the property which the grantor would have at his death.

Ineffective adoption proceedings and contract accompanied by a promise of the adopting parent to leave his estate to the adopted child will amount to a contract when fully performed by the child and specifically enforced in equity against the collateral heirs of the adopting parent or his legal representative.

Practical construction of instruments by the parties to them should, in case of doubt as to the meaning of the words used, control the intention of the parties and the meaning of their language.

In support of these contentions see *Abney* v. *Deloach*, 84 Alabama, 393; *Brown* v. *Finlay*, 157 Alabama, 424;

Bradley v. *Washington Packet Co.*, 13 Pet. 89; *Brown* v. *Slater*, 116 Connecticut, 192; *Bolman* v. *Bolman*, 80 Alabama, 451; *Bush* v. *Whitaker*, 45 Wisconsin, 74; *Brown* v. *Sutton*, 129 U. S. 239; *Burns* v. *Smith*, 21 Montana, 251; *Canal Co.* v. *Hill*, 82 U. S. 94; *Cross* v. *Scruggs*, 115 Alabama, 264; *Cranons* v. *Eagle Cotton Mills*, 120 Indiana, 9; *Chicago* v. *Sheldon*, 76 U. S. 50; *Douglas* v. *Lewis*, 131 U. S. 75; *Fusileer* v. *Masse*, 4 Louisiana, 424; *Field* v. *Lighter*, 118 Illinois, 30; *Godine* v. *Kidd*, 19 N. Y. Supp. 335; *Gall* v. *Gall*, 19 N. Y. Supp. 332; *Homer* v. *Shonfield*, 84 Alabama, 315; *Hunter* v. *McGraw*, 32 Alabama, 519; *Healy* v. *Simpson*, 66 N. Y. Supp. 927; aff'd 167 N. Y. 572; *Healy* v. *Simpson*, 113 Missouri, 340; *Jaffe* v. *Jacobson*, 48 Fed. Rep. 21, 24; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Kenyon* v. *Ulan*, 53 Hun, 592; *Leatherwood* v. *Sullivan*, 81 Alabama, 858; *Livingston* v. *Arrington*, 28 Alabama, 424; *Moran* v. *Prather*, 13 Wall. 501; *Merrian* v. *United States*, 107 U. S. 441; *Moran* v. *Bradley*, 9 Wall. 407; *Mathews* v. *Mathews*, 62 Hun, 61; *Parcell* v. *Striker*, 41 N. Y. 480; 3 Parsons on Contracts, §§ 405, 406; *Rock Island R. R.* v. *Rio Grande R. R.*, 143 U. S. 609; *Sullivan* v. *Rabb*, 86 Alabama, 433; *Sanders* v. *Clark*, 29 California, 300; *Strong* v. *Gregory*, 19 Alabama, 149; *Sea* v. *McCormick*, 68 Alabama, 549; *Sharkey* v. *McDermott*, 91 Missouri, 647; *Shehak* v. *Battles*, 110 N. W. Rep. 330; Schouler on Wills, §§ 452, 454; *Thomas* v. *Blair*, 111 Louisiana, 678; *Tierman* v. *Craine*, 121 Pac. Rep. 1007; *Taylor* v. *Kelly*, 31 Alabama, 59; *Teets* v. *Flaners*, 118 Missouri, 660; *Topliff* v. *Topliff*, 122 U. S. 121; *United States* v. *Peck*, 102 U. S. 65; *United States* v. *Gibbon*, 109 U. S. 200; *Van Tine* v. *Van Tine*, 15 Atl. Rep. 249; *Van Dyne* v. *Vreeland*, 11 N. J. Eq. 370; *Winne* v. *Winne*, 166 N. Y. 263; *Wright* v. *Wright*, 99 Michigan, 170; Waterman on Specific Performance, § 41.

Mr. John P. Tillman for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to quiet title to land in Alabama. It was dismissed by the Circuit Court on demurrer and the decree was affirmed without further discussion by the Circuit Court of Appeals. 189 Fed. Rep. 205. 199 Fed. Rep. 989. The plaintiffs and appellants are children of the late General Hood and were adopted in Louisiana in 1880 by George T. McGehee, who bought the property in question in 1886. The defendants are McGehee's heirs if the Louisiana adoption does not entitle the plaintiffs to the Alabama land. The bill sets up that the adoption did entitle them to it by virtue of Article IV, § 1, of the Constitution and the Act of Congress in pursuance of the same, entitling the Louisiana record to full faith and credit. By the instrument of adoption the McGehee's 'bind and obligate themselves to support, maintain and educate them [the plaintiffs] as if they were their own children; and hereby invest them with all the rights and benefits of legitimate children in their estate'; and the bill further sets up that the latter clause constituted a contract with the plaintiffs so to invest them. It alleges services as children to McGehee and also in advance to him of $8,600, being the plaintiffs' share of the Hood Relief Fund collected in the Southern States. Finally a familiar letter of McGehee to the plaintiffs, which has been probated as a will in Mississippi where McGehee lived, but is not alleged to have been admitted to probate in Alabama, is set forth, *valeat quantum*. It states that, with immaterial exceptions, 'everything else of mine is to be yours equally divided' and that the letter will be valid as a will.

The alleged will is relied upon only as confirming the intent supposed to be expressed by the instrument of adoption and as showing that if the bill is dismissed it should be dismissed without prejudice. As there seems to be no ground for supposing that it could take effect on real estate

in Alabama it may be laid on one side. The other contentions were correctly disposed of by Judge Grubb in an accurately reasoned opinion. The Alabama statute of descents as construed by the Supreme Court of the State excludes children adopted by proceedings in other States. *Brown* v. *Finley*, 157 Alabama, 424. *Lingen* v. *Lingen*, 45 Alabama, 410. There is no ground upon which we can go behind these decisions, and the law so construed is valid. The construction does not deny the effective operation of the Louisiana proceedings but simply reads the Alabama statute as saying that whatever may be the status of the plaintiffs, whatever their relation to the deceased by virtue of what has been done, the law does not devolve his estate upon them. There is no failure to give full credit to the adoption of the plaintiffs, in a provision denying them the right to inherit land in another State. Alabama is sole mistress of the devolution of Alabama land by descent. *Olmsted* v. *Olmsted*, 216 U. S. 386.

The language relied upon as a contract was simply the language of adoption used in the duly authorized notarial act. It had its full effect by constituting the plaintiffs adopted children under the Louisiana law. It gave them whatever rights the Louisiana law attempted and was competent to give them as such children, and it did not purport to do more. As matter of supererogation we may repeat the remark of Judge Grubb that the proceeding gave the children all that was expected at the time, as it was effective in Louisiana and recognized in Mississippi, and that it cannot acquire a greater scope on the strength of a subsequent purchase in Alabama, or from McGehee's mistaken expectation that the land would descend to them.

Decree affirmed.

PARK, TRUSTEE OF SLAYDEN-KIRKSEY WOOLEN MILL, BANKRUPT, *v.* CAMERON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 293. Submitted May 14, 1915.—Decided June 1, 1915.

This action by the trustee to recover funds formerly belonging to the bankrupt corporation, not being a suit to avoid a transfer by the bankrupt of its property, but a suit against wrongdoers who had appropriated the bankrupt's property without its assent, is not one within §§ 23b and 70e of the Bankruptcy Act, and the District Court properly dismissed the bill for want of jurisdiction.

THE facts, which involve the right of a trustee in bankruptcy to recover funds formerly belonging to the bankrupt, are stated in the opinion.

Mr. John Neethe, *Mr. J. D. Williamson* and *Mr. Rhodes S. Baker* for plaintiff in error.

Mr. Charles A. Boynton, *Mr. W. M. Sleeper* and *Mr. Ben G. Kendall* for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by a trustee in bankruptcy to recover funds formerly belonging to the bankrupt. The District Court dismissed the bill for want of jurisdiction. The defendants in error admit that the court had jurisdiction of a suit by the trustee to recover property fraudulently transferred by the bankrupt, §§ 23b, 70e, but deny that this is such a suit. The plaintiff says that it is—so that our decision must rest upon an analysis of the bill. The trouble with it is that the cause of action is not very steadily conceived;

but in view of what seem to us the dominant allegations we are of opinion that the decree was right.

If we stopped with the opening averment it is uncompromising: that the bankrupt transferred to the defendants, for the purpose of defrauding its creditors, $8,250 in cash. The declaration goes on to tell that the defendants, being largely interested in the bankrupt Corporation, bought 275 shares of one Altgeld to prevent the depreciation of the stock on the market; that they sold them to Harris, but had trouble about collecting the price (two notes for $4,125 each, secured by the stock), Harris discovering that he had been overreached; that thereafter the defendants, being directors, conspired with one Kirksey, the general manager, and induced him to make a pretended purchase of the stock, but really for the Corporation, and to use in payment for the same $8,250 of the Corporation's funds; that the Corporation had no funds with which to purchase its own stock but was heavily involved and that the sale was void; that the purchase was a pretense to purchase the stock from the defendants and that $4,125 of the Corporation's funds were received by each of them. Then it is alleged that the defendants knew or ought to have known that the Corporation was not indebted to Kirksey, that it was insolvent, and 'that the stock so pretended to be sold by them, either to the said Kirksey, or to the said Corporation, was of no value' and that the money received was the property of the bankrupt. So far it might seem that the declaration sustained the plaintiff's contention. But it continues that the Corporation did not authorize the foregoing transactions or ratify them, and that the defendants knew it; and 'that to conceal said misapplication of funds' the defendants caused entries to be made on the Corporation's books making the transaction appear to be a purchase of the stock by Kirksey, contrary to the facts, 'and the defendants knew said S. F. Kirksey, Jr., was not to repay said funds to said Corpora-

tion' and the liability was not intended to be a *bona fide* one and afterwards pursuant to the conspiracy was cancelled and retired. The other allegations are not material to the question before us. Those that we have recited seem to us in their conclusion to import not that the corporation has done anything, but that certain of its officers by false pretenses have withdrawn its funds. If so the suit is not to avoid a transfer by the bankrupt of its property, but a suit against wrongdoers who have appropriated it without the bankrupt's assent, and therefore not within §§ 23b and 70e of the Act.

Judgment affirmed.

G. & C. MERRIAM COMPANY *v.* SYNDICATE PUBLISHING COMPANY.

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

No. 217. Argued April 14, 1915.—Decided June 1, 1915.

In a case where diverse citizenship exists, the decree of the Circuit Court of Appeals is final unless in addition to the allegations of diverse citizenship, the bill contains averments of a cause of action, and consequent basis of jurisdiction, arising under the Constitution or laws of the United States.

If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and averments as to a Federal right are unsustainable and frivolous, or foreclosed by former adjudication of this court, the appeal from the judgment of the Circuit Court of Appeals must be dismissed.

Where the jurisdiction below rests on diverse citizenship, averments of unfair trade, which do not contain any elements of a cause of action under the Federal Constitution or statutory law, afford no basis for jurisdiction of this court of an appeal from the decree of the Circuit Court of Appeals.

The Trade-mark Act of 1881 expressly denied the right of an applicant to obtain a trade-mark on his own name, or to acquire in a proper name trade-mark rights not recognized at common law.

The Trade-mark Act of 1905 does recognize the right to obtain trade-marks in a proper name when the same has been in use under specified conditions for ten years, but makes the judgment of the Circuit Court of Appeals final in cases arising under the Act. *Street & Smith* v. *Atlas Co.*, 231 U. S. 348.

As is the case with patents, so after the expiration of copyright securing the exclusive right of publication, the further use of the name by which the publication was known and sold cannot be acquired by registration as a trade-mark. *Merriam* v. *Hollaway Co.*, 43 Fed. Rep. 450, approved; and see *Jane* v. *Singer Manufacturing Co.*, 163 U. S. 169.

The word "Webster" was not subject to registration as a trade-mark under the act of 1881, and a contention based on an attempted registration affords no jurisdiction for this court to review a judgment of the Circuit Court of Appeals, having been precluded by prior decisions of this court.

Appeal from 207 Fed. Rep. 515, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals, in cases involving rights under the Trade-mark Acts of 1881 and 1905, are stated in the opinion.

Mr. William B. Hale for appellant.

Mr. Hugh A. Bayne, with whom *Mr. Wade H. Ellis*, *Mr. R. Golden Donaldson* and *Mr. Challen B. Ellis* were on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by complainant to enjoin the defendant from the use of the name "Webster" as a trade-mark and trade-name, when applied to the sale of dictionaries of the English language. A decree was entered dismissing the bill in the United States District Court (207 Fed. Rep. 515). This decree was affirmed upon ap-

peal to the Circuit Court of Appeals for the Second Circuit (207 Fed. Rep. 515), and from the latter decree an appeal was taken to this court.

The original bill set up at great length the origin and history of the Webster dictionary publications, the succession of the complainant to the ownership of the rights of publication, and the various copyrights which had been taken out from time to time to protect the use of the name "Webster," as applied to dictionaries of the English language, and facts were set out in detail concerning the various publications which the complainant and its predecessors had made from time to time. The bill, in its original form, relied upon the secondary meaning which, it was alleged, the history of the publications had established in the name "Webster," as applied to English dictionaries, and it was alleged that the exclusive right to use that name in such connection had become the property of the complainant, and entitled it to protection against those who used the word in such manner as to cause their publications to be purchased as and for the publications of the complainant. It was charged that the respondent belonged to the class of persons wrongfully using the name thus acquired, and facts in detail were set forth to support this contention of unfair competition in trade. After the bill was filed an amendment was added setting up the ownership in complainant of certain trade-marks, duly registered in the Patent Office of the United States, in accordance with the statutes in such case made and provided. The amendment alleges the registration of two trade-marks under the Act of Mar. 3, 1881 (c. 138, 21 Stat. 502), and of eight trade-marks under the Act of Feb. 20, 1905 (c. 592, 33 Stat. 724), and it was charged that the defendant used and imitated the complainant's trade-marks upon Webster's dictionaries, by affixing the word "Webster" to dictionaries in a manner closely imitating complainant's registered trade-marks or one of

them, the natural tendency of such acts being to deceive the public and to pass off defendant's dictionaries as and for the dictionaries of the complainant. The prayer of the bill was amended so as to ask relief by injunction against the defendant from in any manner copying, imitating, or infringing any of complainant's registered trade-marks. The bill as amended therefore rested upon (1) allegations tending to establish unfair competition in trade, (2) trade-marks registered under the Act of 1881, and (3) trade-marks registered under the Act of 1905.

A motion to dismiss the appeal was made and passed for consideration to the argument upon the merits, which has now been had.

The Circuit Court of Appeals' decree, affirming the decree of the District Court, was final unless, in addition to the allegations of diverse citizenship which were contained in the bill, there was an averment of a cause of action and consequent basis of jurisdiction arising under the Constitution or statutes of the United States. *Macfadden* v. *United States*, 213 U. S. 288; *Shulthis* v. *McDougal*, 225 U. S. 561. If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and the averment as to a right arising under the Federal Constitution or statutes was unsubstantial and without real merit, either because of its frivolous character upon its face, or from the fact that reliance was based upon a claim of Federal or statutory right denied by former adjudications of this court, then the appeal to this court must be dismissed. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311.

So far as concerns the allegations of unfair competition in trade, upon which the bill mainly rests, such averments contain no element of a cause of action arising under the Federal Constitution or statutory law. The registered trade-marks, an essential part of which covers the use of

the word "Webster" as applied to dictionaries of the English language, were registered some under the Act of 1881 and some under the Act of 1905. In the latter act there is a recognition of the right to obtain a trade-mark upon a proper name, when the same has been in use for ten years under conditions named in the statute. That act was before this court in *Thaddeus Davids Co.* v. *Davids*, 233 U. S. 461, and the distinction between it and former acts was pointed out, particularly in that the Act of 1905 gave the right to the use of ordinary surnames as a trade-mark, which right did not exist under the prior legislation. The Act of 1905 contains provisions making the jurisdiction of the Circuit Court of Appeals final. *Street & Smith* v. *Atlas Co.*, 231 U. S. 348.

The Act of 1881 expressly denied the right of an applicant to obtain a trade-mark upon his own name, and gave no recognition to the right to a trade-mark in a proper name, nor did it confer authority to register such name and thereby acquire a right not recognized at common law. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 542; *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665; *Howe Scale Co.* v. *Wyckoff*, 198 U. S. 118, 134, 135.

Moreover, it appears upon the face of the bill that the registration of the trade-marks relied upon, having the name "Webster" as applied to dictionaries of the English language as their chief characteristic, was made long after the expiration of the copyright securing to the publishers the exclusive right to publish the Webster dictionaries. After the expiration of a copyright of that character, it is well-settled that the further use of the name, by which the publication was known and sold under the copyright, cannot be acquired by registration as a trade-mark; for the name has become public property, and is not subject to such appropriation. Such was the decision of Mr. Justice Miller, sitting at circuit, in the first of what may be called the Webster Dictionary Cases,—*Merriam* v.

Holloway Pub. Co., 43 Fed. Rep. 450. In that case, the learned justice in vigorous terms denied the right to appropriate as a trade-mark the designation "Webster's Dictionary" after the expiration of the copyright. To the same effect is *Merriam* v. *Famous Shoe & Clothing Co.*, 47 Fed. Rep. 411. These cases were cited with approval in the opinion in *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169, in which case the subject was fully considered, and the cases, American and foreign, were reviewed; the conclusion being reached that on the expiration of a patent there passed to the public not only the right to make the machine in the form covered by the letters patent, but along with the public ownership of the device described there necessarily passed to the public the generic designation of the thing which had arisen during the life of the monopoly. As the cases cited in the opinion in that case show, this doctrine is no less applicable to the expiration of a copyright, upon the termination of which there passes to the public the right to use the generic name by which the publication has been known during the existence of the exclusive right conferred by the copyright. In the *Singer Case*, at page 202, the same doctrine was applied to a trade-mark containing the word "Singer" and attempted to be used as one of the constituent elements of a trade-mark.

In that case while the right of another, after the expiration of the monopoly, to use the generic designation was recognized, it was also stated that its use must be such as not to deprive the original proprietor of his rights, or to deceive the public, and that such use of the name must be accompanied with indications sufficient to show that the thing manufactured or sold is the work of the one making it, so that the public may be informed of that fact,—this latter consideration arising from the use of the name as designating the production of the original owner, and in order to prevent confusion and unfair trade, and

the wrongful appropriation of another's rights. As we have already said, the feature of the case involving unfair competition in trade came within the jurisdiction of the District Court because of diverse citizenship, and the right of appeal was limited to the Circuit Court of Appeals.

From what has been said, it follows that the name "Webster" was not subject to appropriation or registration as a trade-mark, under the Act of 1881, and the contention to the contrary as a basis for jurisdiction in the District Court was devoid of substantial merit and was foreclosed by previous decisions of this court. In reaching this conclusion, we have not overlooked the cases relied upon by the complainant, cited in opposition to the motion to dismiss for want of jurisdiction, in which this court has held that where jurisdiction was invoked upon diverse citizenship and also because of alleged rights arising from the Federal Trade-Mark Statute (c. 138, 21 Stat. 502) of 1881, this court has jurisdiction upon appeal from the Circuit Court of Appeals—*Warner* v. *Searle & H. Co.*, 191 U. S. 195; *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446; *Baglin* v. *Cusenier Co.*, 221 U. S. 580; *Jacobs* v. *Beecham*, 221 U. S. 263. These cases are readily distinguishable from the one at bar, in which there was an attempt to register and obtain a statutory trade-mark upon a proper name, which registration was also long after the expiration of the copyright embodying the same designation as its distinguishing feature.

It follows that this appeal must be dismissed for want of jurisdiction.

Dismissed.

EBELING *v.* MORGAN, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS.

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

No. 736. Argued April 7, 1915.—Decided June 1, 1915.

Section 189, Criminal Code, makes an offender of anyone, cutting, tearing, or otherwise injuring any mail bag with felonious intent; and, as the wording plainly indicates that it was the intent of Congress to protect every bag from felonious injury each time any one mail bag is torn or injured, the offense is complete irrespective of any attack upon, or mutilation of, any other bag.

Under § 189, Criminal Code, successive cuttings of different mail bags, with criminal intent, constitute separate offenses.

The same course of conduct, and upon the same occasion, may amount to separate offenses and be separately punished. *Gavieres* v. *United States*, 220 U. S. 338.

Where, as in this case, proof of cutting and opening one sack completed the offense, and although the defendant continued the operation of cutting into other sacks, proof of cutting one would not have supported the counts as to the other sacks, there was not one continuous offense punishable by a single penalty, but the cutting into each of the several sacks constituted a separate crime for which the defendant could be separately punished.

THE facts, which involve the construction of § 189, Penal Code, and the validity of separate convictions thereunder for separate offenses of cutting open more than one mail bag, are stated in the opinion.

Mr. Frank E. Linquist, Mr. William P. Borland, Mr. Martin J. Ostergard, Mr. Charles S. McClean, Mr. Edwin J. Shannahan, Mr. Oscar F. Wimmer, Mr. Herman D. Kissenger, Mr. Leonard Waddell, Mr. Luther

N. Dempsey and *Mr. Ira S. Gardner* for the appellant, submitted:

The court had no jurisdiction to impose more than one sentence. § 189, Crim. Code; *Crepps* v. *Durden*, Cowper, 640; *In re Snow*, 120 U. S. 283; *In re Nielsen*, 131 U. S. 176; *Halligan* v. *Wayne*, 179 Fed. Rep. 112; *Munson* v. *McClaughry*, 198 Fed. Rep. 72; *Stevens* v. *McClaughry*, 207 Fed. Rep. 18; O'*Brien* v. *McClaughry*, 209 Fed. Rep. 816.

The six counts charge but one offense. *Commonwealth* v. *Prescott*, 153 Massachusetts, 396; *Hurst* v. *State*, 86 Alabama, 640; *People* v. *Stephens*, 79 California, 428; *State* v. *Larson*, 85 Iowa, 659; *Storrs* v. *State*, 3 Missouri, 9; *Lorton* v. *State*, 7 Missouri, 55; *State* v. *Daniels*, 32 Missouri, 558; *State* v. *Wagner*, 118 Missouri, 626; *State* v. *O'Connell*, 144 Missouri, 393; *State* v. *Maggard*, 160 Missouri, 469; *State* v. *Soper*, 207 Missouri, 502; *State* v. *Egglesht*, 41 Iowa, 574; *People* v. *Van Kuren*, 5 Parker, C. R. 66; *State* v. *Benham*, 7 Connecticut, 414; *Furnace* v. *State*, 153 Indiana, 93; *State* v. *Colgate*, 31 Kansas, 511; *Nichols* v. *Commonwealth*, 78 Massachusetts, 180; *Wilson* v. *State*, 45 Texas, 76; *State* v. *Williams*, 10 Hump. 101; *State* v. *Moore*, 86 Minnesota, 422; *Tweed* v. *Liscomb*, 60 N. Y. 559; *People* v. *Stephens*, 79 California, 428; *Fischer* v. *Commonwealth*, 1 Bush, 211; *State* v. *Larson*, 85 Iowa, 659; *Vining* v. *State*, 146 S. W. Rep. 909; *State* v. *Sampson*, 138 N. W. Rep. 473; *Commonwealth* v. *Prescott*, 153 Massachusetts, 396; *Hurst* v. *State*, 86 Alabama, 604.

Sentences on five counts are void. *United States* v. *Pridgeon*, 153 U. S. p. 62.

Fines and costs are civil liability only. Section 1041, U. S. Comp. Stat. 1901; *Ex parte Jackson*, 96 U. S. 727.

Involuntary servitude is prohibited. Section 1 Amendment XIII; *Ex parte Peters*, 12 Fed. Rep. 461; *Munson* v. *McClaughry*, 198 Fed. Rep. 72; *United States* v. *Petit*, 114 U. S. 429.

Petitioner has been six times in jeopardy; this is not due process of law.

The district judge erred in denying the application. Section 189, Code Crim. Proc.; cases *supra* and *Halligan* v. *Wayne*, 179 Fed. Rep. 112; *State* v. *Damon*, 2 Tyler, 387; *Clem* v. *State*, 42 Indiana, 420; *Ben* v. *State*, 22 Alabama, 9; *Wilson* v. *State*, 45 Texas, 76; *State* v. *Morphin*, 37 Missouri, 373; *United States* v. *Randenbush*, 8 Pet. 288; Bishop's Crim. Law, 7th ed., § 1051; *In re Henry*, 123 U. S. 372; § 5480, Rev. Stat.

The judge's contention is erroneous and the motion for judgment should have been sustained.

Petitioner having served valid portion of sentence should be released. *Craemer* v. *Washington*, 168 U. S. 124; *Dimmick* v. *Tompkins*, 194 U. S. 546; see also cases *supra* and § 4548, Rev. Stats. Missouri, 1909; *O'Brien* v. *McClaughry*, 209 Fed. Rep. 816; *Hurst* v. *State*, 86 Alabama, 640; *United States* v. *Pridgeon*, 153 U. S. p. 62; *Ex parte Lange*, 18 Wall. 163; *Ex parte Creasy*, 243 Missouri, 707.

Mr. Assistant Attorney General Wallace for appellee.

Mr. Justice Day delivered the opinion of the court.

The appellant, Ebeling, was convicted in the United States District Court for the Eastern District of Missouri of violations of § 189 of the Criminal Code. The indictment contains seven counts. The second, third, fourth, fifth, sixth and seventh charge that, on the twenty-first day of January, 1910, said Ebeling did wilfully, knowingly and feloniously tear, cut, and injure a certain bag then and there used for the conveyance of mails of the United States, each count describing the mail pouch so torn, cut, and injured by its lock and rotary number, and in each count it was alleged that the pouch in such count

named was in a certain railway postal car, then and there in transit on a certain railroad, and that the act was done with intent to forcibly, knowingly and feloniously rob, steal, and carry away the contents of the pouch. Ebeling entered a plea of guilty, and was sentenced to pay a fine of $500 and be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a period of three years on the second count; and a like fine and imprisonment were imposed because of each the third, fourth, fifth, sixth and seventh counts, to run consecutively with the sentence under the second count; but it was provided that the imprisonment as to the seventh count should begin, run and terminate concurrently with the sentences imposed under the other counts, making in all a period of fifteen years' imprisonment. Ebeling, having served the sentence of three years imposed under the second count, applied to the District Court of the United States for the District of Kansas for a writ of *habeas corpus* to procure his release from further imprisonment, upon the ground that he had endured all the punishment that could be legally imposed upon him by imprisonment under said indictment. The District Court denied the application, and refused to issue the writ, and appeal was then prosecuted to this court.

This case raises the question whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a single offense or of additional offenses because of each successive cutting with the criminal intent charged. If the successive cuttings into the different bags constitute different offenses, then the court below was right in refusing the writ of *habeas corpus*. If but a single offense was committed, notwithstanding separate mail bags were successively cut with the felonious intent named in the statute, then the appellant was entitled to the writ, and should have been discharged by order of the court upon the proceedings below.

Section 189, under which this indictment was prosecuted, provides:

"Whoever shall tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break any staple or loosen any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both."

Reading the statute with a view to ascertaining its meaning, it is apparent that it undertakes to make an offender of anyone who shall cut, tear, or otherwise injure any mail bag, or who shall draw or break any staple or loosen any part of any lock, chain or strap attached thereto, with the felonious intent denounced by the statute. These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. Although the transaction of cutting the mail bags was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged. The offense as to each separate bag was complete when that bag was cut, irrespective of any attack upon, or mutilation of, any other bag. The words are so plain as to require little discussion or further amplification to ascertain their meaning. The separate counts each charged by its distinctive number the separate bag and each time one of them was cut there was, as we have said, a separate offense committed against the statute. Congress evidently intended to protect the mail in each sack, and to make an attack thereon in the manner described a distinct and separate offense.

The case is not like those charges of continuous offenses

where the crime is necessarily, and because of its nature, a single one, though committed over a period of time. Such is the English case of *Crepps* v. *Durden*, 2 Cowper, 640, wherein Lord Mansfield held that one who was charged with exercising his ordinary trade on the Lord's Day could not be convicted of separate offenses because of a number of acts performed on that day which made up the offense of exercising his trade. It was there said that every stitch that a tailor takes and everything that a shoemaker or carpenter may do for different customers at different times on the same Sunday, did not constitute separate offenses, for the offense was one and entire of exercising the trade and calling upon the Lord's Day, and the object of the legislation was to punish a man for exercising his trade on Sunday, and not to make a separate offense of each thing he did in the exercise of that trade. So, in *In re Snow*, 120 U. S. 274, where an attempt was made to divide into separate periods of time the offense of continuous cohabitation with more than one woman, when the facts showed that there was but one offense committed between the earliest day charged and the end of the continuing time attempted to be charged in separate indictments. These and similar cases are but attempts to cut up a continuous offense into separate crimes in a manner unwarranted by the statute making the offense punishable.

As we interpret the statute, the principle applied in *Gavieres* v. *United States*, 220 U. S. 338, is applicable, where this court held that, when in the same course of conduct, and upon the same occasion, certain rude and boisterous language was used, and an officer insulted, two offenses were committed, separate in their character, and this, notwithstanding the transaction was one and the same. The principle stated by the Supreme Judicial Court of Massachusetts, in *Morey* v. *Commonwealth*, 108 Massachusetts, 433, was applied, where it was held that a conviction upon one indictment would not bar a conviction and sen-

tence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact, and it was there declared that a single act might be an offense against each statute, if each required proof of an additional fact which the other did not, and that conviction and punishment under one does not exempt the defendant from conviction and punishment under the other statute.

So here, proof of cutting and opening one sack completed the offense, and although defendant continued the operation by cutting into other sacks, proof of cutting one sack would not have supported the counts of the indictment as to cutting the others; nor was there that continuity of offense which made the several acts charged against the defendant only one crime.

We find no error in the judgment of the District Court, and the same is

Affirmed.

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

MORGAN, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, *v.* DEVINE.

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

No. 685. Submitted April 7, 1915.—Decided June 1, 1915.

Under §§ 190 and 192 of the Penal Code, two offenses, the one of breaking into a post office and the other of stealing property belonging to the Post Office Department, may be committed and separately charged and punished.

It is within the competency of Congress to say what shall be offenses against the law, and its purpose was manifest in enacting §§ 190 and 192, of the Penal Code, to create separate offenses under each section.

The test of whether the breaking in and the larceny constitute two separate offenses is not whether the same criminal intent inspires the whole transaction, but whether separate acts have been committed with requisite criminal intent and such as are punishable by the statute. *Burton* v. *United States*, 202 U. S. 344.

The test of identity of offenses when double jeopardy is pleaded is whether the same evidence is required to sustain them; and if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where more than one are defined by the statute. *Gavieres* v. *United States*, 220 U. S. 338.

In this case *held* that one who broke into a post office and also committed larceny therein, and who was convicted under separate counts of the same indictment for violation of §§ 190 and 192, of the Penal Code, and sentenced separately under each, was not, after having served the sentence under one count, entitled to be released on the ground of double jeopardy, because the several things charged were done at the same time and as a part of one transaction.

THE facts, which involve the construction of §§ 190 and 192, Penal Code, and questions of separate offenses and punishment for breaking into a post office and committing larceny of property of the Post Office Department under

the double jeopardy provision of the Fifth Amendment, are stated in the opinion.

Mr. Assistant Attorney General Wallace for appellant:

Sections 190 and 192 define and punish two offenses. The same evidence test should be applied.

For the declared law, see 1 Bishop, New Crim. Law, § 1062 and p. 630.

Halligan v. *Wayne*, 179 Fed. Rep. 112, is responsible for erroneous decisions and this court has repeatedly applied a rule contrary to that case; see *Burton* v. *United States*, 202 U. S. 344; *Carter* v. *McClaughry*, 183 U. S. 365, and *Gavieres* v. *United States*, 220 U. S. 338, to which this case is parallel.

In support of the Government's contention, see cases *supra*, and *Anderson* v. *Moyer*, 193 Fed. Rep. 499; *Ex parte Peters*, 12 Fed. Rep. 461; *Morey* v. *Commonwealth*, 108 Massachusetts, 433; *Moyer* v. *Anderson*, 203 Fed. Rep. 882; *Munson* v. *McClaughry*, 198 Fed. Rep. 72; *Wilson* v. *State*, 24 Connecticut, 57.

Mr. A. E. Dempsey, *Mr. Turner W. Bell* and *Mr. Robert B. Troutman* for appellees:

If the second count of this indictment, as to the stealing and purloining of the property, places the defendant twice in jeopardy for the same offense, any punishment or sentence on this charge is contrary to the express provision of the Constitution, and is, therefore, beyond the jurisdiction of the court. Such a sentence or punishment is void. The writ of *habeas corpus* is always to release one held in custody under a judgment which is void, because it is beyond the jurisdiction of the court. 1 Bailey, Hab. Corp., § 2; *Ex parte Lange*, 18 Wall. 163; *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Snow*, 120 U. S. 274; *Hans Nielsen, Petitioner*, 131 U. S. 176; *Henry* v. *Henkel*, 235 U. S. 219; *In re Bonner*, 151 U. S. 242; *Ex parte Mayfield*, 141 U. S. 207.

By *habeas corpus* the jurisdiction of the court, *i. e.*, (1) of the person, (2) of the offense or subject-matter, or (3) its power to pass the particular judgment, may be examined. 1 Bailey, Hab. Corp., p. 179, and cases *supra*.

If the court has not jurisdiction to render the particular sentence,—if the sentence is different from that prescribed by the law, or is below the minimum or above the maximum,—that is good ground for releasing the prisoner on *habeas corpus*. *Ex parte Cox*, 3 Idaho, 530; *Ex parte Bulger*, 60 Colorado, 438.

If a court having jurisdiction of the person of the accused and of the offense with which he is charged, may impose any sentence other than the legal statutory judgment, and deny the aggrieved party all relief except upon writ of error, it is but a judicial suspension of the writ of *habeas corpus*. See cases *supra* and *Stevens* v. *McClaughry*, 207 Fed. Rep. 18; *Munson* v. *McClaughry*, 198 Fed. Rep. 72; *Halligan* v. *Wayne*, 179 Fed. Rep. 112.

In *Moyer* v. *Anderson*, 203 Fed. Rep. 881, to the contrary, the court relied upon decisions of this court which were neither controlling or in point, such as *Matter of Spencer*, 228 U. S. 709; *Glasgow* v. *Moyer*, 225 U. S. 420; *Johnson* v. *Hay*, 227 U. S. 245, none of which contravenes the contention of appellee; in fact, the doctrine of the *Anderson Case* was expressly repudiated in *Stevens* v. *McClaughry*, 207 Fed. Rep. 18.

The offenses charged in the first and second counts were parts of the same transaction, *i. e.*, were parts of the same continuing criminal act. *Carter* v. *McClaughry*, 183 U. S. 365; *Burton* v. *United States*, 202 U. S. 344, do not apply.

The intent to take the Government's property was identical in, and indispensable to, each count. The offenses were committed in the same transaction. The intent, in each case, was in fact the same. *Munson* v. *McClaughry*, 198 Fed. Rep. 72; *Stevens* v. *McClaughry*, 207 Fed. Rep.

18; *O'Brien* v. *McClaughry*, 209 Fed. Rep. 816; *Halligan* v. *Wayne*, 179 Fed. Rep. 112; *Ex parte Peters*, 12 Fed. Rep. 461; *Anderson* v. *Moyer*, 193 Fed. Rep. 499, distinguished.

A conviction for robbery is a bar to a subsequent trial for larceny committed at the same time. And the converse is true. That is, a man may be tried but once for robbery or larceny done at the same time. *State* v. *Lewis* (N. Car.), 2 Hawks, 98; *State* v. *Mikesell*, 70 Iowa, 176; *State* v. *Ingles* (N. Car.), 2 Hayw. 4.

This is law everywhere and to it the following supplement is to be added: That where a person is put in legal jeopardy of a conviction for an offense which contains essential elements which are indispensable parts of another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same transaction, so as to render the essential elements in fact, the same. *Bell* v. *State* (1898), 103 Georgia, 597; 1 Bishop, New Crim. Law, § 1062; *Grafton* v. *United States*, 206 U. S. 333; *Gavieres* v. *United States*, 220 U. S. 338. *Morey* v. *Commonwealth*, 108 Massachusetts, 443, is contrary, both in decision and principle, to decisions of this court. See also *Sorenson* v. *United States*, 168 Fed. Rep. 785.

That the crimes of burglary and larceny are the same by nature is shown by the fact that they may be joined in the same count of the same indictment. *United States* v. *Yennie*, 74 Fed. Rep. 221; *State* v. *McClurg*, 35 W. Va. 280; *Breese* v. *State*, 12 Oh. St. 146; 1 Bishop, New Crim. Law, § 1062.

The character of the offense is controlling and not the fact that the same evidence necessary to support one indictment will not support a second indictment. In the character of the offense now before the court if the same evidence test is to be applied the prosecuting officers may indict, try, convict, and punish a man for at least 14 offenses with 53 years' imprisonment and fines amounting

to $74,200, by a slight twist and variance in the allegations of the counts. And in some instances, as in the instant case, the proof of all these allegations shall in practice be identical. The offenses being identical in law, having the same indispensable incidents included in each, the Constitution forbids the assessment of but one penalty.

MR. JUSTICE DAY delivered the opinion of the court.

This case was submitted at the same time with *Ebeling* v. *Morgan*, just decided, *ante*, p. 625, and involves to a considerable extent the same questions. The appellees, Devine and Pfeiffer, pleaded guilty to an indictment containing two counts in the District Court of the United States for the Eastern Division of the Southern District of Ohio, the first count being under § 192 of the Penal Code, charging that the appellees did on January 13, 1911, in the County of Delaware, in the State of Ohio, unlawfully and forcibly break into and enter a building used in whole as a post office of the United States, with the intent then and there to commit larceny in such building and post office to wit, to steal and purloin property and funds then and there in use by and belonging to the Post Office Department of the United States. The second count was drawn under § 190, of the penal code, charging that the appellees, on the same date and at the same place, did unlawfully and knowingly steal, purloin, take, and convey away certain property and moneys of the United States, then and there in use by and belonging to the Post Office Department of the United States, to wit, postage stamps and postal funds, etc. One was sentenced to confinement in the United States Penitentiary at Leavenworth, Kansas, for four years on the first count, and for two years on the second count of the indictment, the sentence to be cumulative and not concurrent. The other appellee was likewise sentenced for three and one-half

years' imprisonment and a fine of $100 on the first count, and two years on the second count. It is admitted that the acts set forth in the second count were performed by the appellees in the post office under the burglarious entry charged in the first count. Having served the larger part of their sentences under the first count, appellees filed their petition in the District Court of the United States for the District of Kansas, asking for a writ of *habeas corpus,* and to be discharged from confinement at the expiration of the sentence under the first count. The District Court, believing the case to be controlled by the case of *Munson* v. *McClaughrey,* 198 Fed. Rep. 72, decided by the Circuit Court of Appeals for the Eighth Circuit, entered an order discharging the appellees from imprisonment at the expiration of their term of confinement under the first count of the indictment.

It is the contention of the appellees that protection against double jeopardy set forth in the Fifth Amendment to the Constitution of the United States required their discharge, because the several things charged in the two counts were done at the same time and as a part of the same transaction.

The statutes under which the indictment was found are as follows:

"SEC. 190. Whoever shall steal, purloin, or embezzle any mail bag or other property in use by or belonging to the Post Office Department, or shall appropriate any such property to his own or any other than its proper use . . . shall be fined not more than two hundred dollars, or imprisoned not more than three years, or both."

"SEC. 192. Whoever shall forcibly break into, or attempt to break into any post office . . . with intent to commit in such post office . . . any larceny or other depredation, shall be fined not more than one thousand dollars, and imprisoned not more than five years."

Whether under these sections of the statute two offenses

in the same transaction may be committed and separately charged and punished, has been the subject of consideration in the Federal courts, and the cases in those courts are in direct conflict. In *Halligan* v. *Wayne* (C. C. A., 9th Ct.), 179 Fed. Rep. 112, and *Munson* v. *McClaughry* (C. C. A., 8th Ct.), 198 Fed. Rep. 72, it was held that upon conviction on an indictment containing two counts, one charging burglary with intent to commit larceny, and the other larceny, upon a general verdict of guilty, there can be but a single sentence, and that for the burglary only; and that after the defendant has served a sentence for that offense he is entitled to release on *habeas corpus*. The rule has been held to be otherwise in *Ex parte Peters* (Circ. Ct., W. D. Mo.), 12 Fed. Rep. 461, and in *Anderson* v. *Moyer* (Dist. Ct., N. D. Ga.), 193 Fed. Rep. 499.

We think it is manifest that Congress in the enactment of these sections intended to describe separate and distinct offenses, for in § 190 it is made an offense to steal any mail bag or other property belonging to the Post Office Department, irrespective of whether it was necessary in order to reach the property to forcibly break and enter into a post office building. The offense denounced by that section is complete when the property is stolen, if it belonged to the Post Office Department, however the larceny be attempted. Section 192 makes it an offense to forcibly break into or attempt to break into a post office, with intent to commit in such post office a larceny or other depredation. This offense is complete when the post office is forcibly broken into, with intent to steal or commit other depredation. It describes an offense distinct and apart from the larceny or embezzlement which is defined and made punishable under § 190. If the forcible entry into the post office has been accomplished with the intent to commit the offenses as described, or any one of them, the crime is complete, although the intent to steal or

commit depredation in the post office building may have been frustrated or abandoned without accomplishment. And so, under § 190, if the property is in fact stolen, it is immaterial how the post office was entered, whether by force or as a matter of right, or whether the building was entered into at all. It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses. Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself. This is the result of the authorities as stated by Mr. Bishop in his new work on Criminal Law (Eighth Edition):

"If in the night a man breaks and enters a dwelling house to steal therein, and steals, he may be punished for two offenses or one, at the election of the prosecuting power. An allegation simply of breaking, entering, and stealing states the burglary in a form which makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. But equally well a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate thing, and thereon the defendant may be convicted and sentenced for both." (Section 1062.) [1] . . . "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second can not be main-

[1] This view was held in the following state cases:

Wilson v. *State*, 24 Connecticut, 57; *Dodd* v. *State*, 33 Arkansas, 517; *Speers* v. *Commonwealth*, 17 Grat. (Va.) 570; *State* v. *Hackett*, 47 Minnesota, 425; *Josslyn* v. *Commonwealth*, 47 Massachusetts, 236; *Iowa* v. *Ingalls*, 98 Iowa, 728; *Gordon* v. *State*, 71 Alabama, 315; *Clark* v. *State*, 59 Tex. Cr. 246; *State* v. *Hooker*, 145 N. C. 581; *People* v. *Parrow*, 80 Michigan, 567; *State* v. *Martin*, 76 Missouri, 337.

tained; when there could not, it can be." (Section 1052, p. 630.)

That the two offenses may be joined in one indictment is made plain by § 1024 of the Revised Statutes of the United States, which provides:

"Where 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 consolidated."

The reason for the rule that but a single offense is committed and subject to punishment is stated in *Munson* v. *McClaughry*, 198 Fed. Rep. 72, as follows:

"A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing act."

But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress. In *Burton* v. *United States*, 202 U. S. 344, the defendant was charged in separate counts with receiving compensation in violation of the act and also agreeing to receive compensation in violation of the same statute. In that case the contention was that the defendant could not legally be indicted for two separate offenses, one agreeing to receive compensation,

and the other receiving such compensation, in violation of the statute, but this court held that the statute was so written, and said:

"There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. In this case, the subject matter of the sixth count, which charged an agreement to receive $2,500, was more extensive than that charged in the seventh count, which alleged the receipt of $500. But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. 'It is the legislature, not the court, which is to define a crime, and ordain its punishment.' *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *Hackfeld & Co.* v. *United States*, 197 U. S. 442, 450."

As to the contention of double jeopardy upon which the petition of *habeas corpus* is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to *Carter* v. *McClaughry*, 183 U. S. 365; *Burton* v. *United States*, 202 U. S. 344, 377, and the recent case of *Gavieres* v. *United States*, 220 U. S. 338.

It follows that the judgment of the District Court, discharging the appellees, must be reversed, and the case remanded to that court with instructions to dismiss the petition.

Reversed.

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

BOTHWELL *v.* BINGHAM COUNTY, IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 266. Argued May 6, 1915.—Decided June 1, 1915.

The determinative fact of whether property formerly part of the public domain of the United States is subject to taxation by the State is the absence of any beneficial interest in the land on the part of the United States at the time of the assessment.

Neither the Carey Act of August 18, 1894, nor the agreement thereunder with the State of Idaho in regard to irrigation of arid lands segregated from the public domain, purports to exempt the lands from taxation or take them out of the settled rule respecting taxation by the State of lands acquired under public land laws.

Where proceedings to acquire title to public land have reached the point where nothing remains to be done by the entryman, and the United States has no beneficial interest therein and does not exclude the entryman from the use thereof, the entryman is regarded as the beneficial owner and the land is subject to taxation, even though the legal title may not have been passed to him; and in this respect it is immaterial whether the title passes direct from the Government or through the State, under provisions of the Carey Act.

24 Idaho, 125, affirmed.

THE facts, which involve the construction of the Carey Act of August 18, 1894, and the right of the State to tax

property taken up thereunder by an entryman after he had become entitled to the patent, but before the patent was issued, are stated in the opinion.

Mr. William A. Lee, with whom *Mr. J. D. Skeen*, *Mr. William H. Wilkins* and *Mr. Edward B. Critchlow* were on the brief, for plaintiff in error:

Section 4, Article 7, of the constitution of the State of Idaho, provides: that the property of the United States, the State, counties, towns, cities and other municipal corporations, and public libraries, shall be exempt from taxation. This constitutional provision but affirms the law of the United States. *McCullough* v. *Maryland*, 4 Wheat. 316; *Van Brocklin* v. *Anderson*, 117 U. S. 151.

The principle is qualified, however, to the extent that where the United States holds only the naked legal title to the land and the full equitable title has passed by the performance of every act going to the foundation of the right, the land is subject to state taxation. *Kansas Pacific R. R.* v. *Prescott*, 16 Wall. 603; *Union Pacific R. R.* v. *McShane*, 22 Wall. 444; *Central Colorado Imp. Co.* v. *Pueblo County*, 95 U. S. 259; *Hussman* v. *Durham*, 165 U. S. 144.

It follows that if, as in this case, the United States conveys land to a State in trust for a specific purpose, something more than a mere naked title is retained until the trust is fully executed by the trustee. Every act going to the foundation of the right is not performed until the trustee divests itself of the trust property, and in this case it could be done only by the issuance of patent. *Tucker* v. *Ferguson*, 22 Wall. 572.

The issuance of the patent by the United States to the State of Idaho did not terminate the control over the land by the United States. By the terms of the grant its control was continued until actually disposed of by the issuance of the patents to the individual entrymen. While it continued to hold the title in trust, appeals to the

Interior Department might have been made by the entrymen, and during the course of such appeals, action by the State Land Board, acting for the trustee, would have been stayed. *McDaid* v. *Oklahoma*, 150 U. S. 209; *Sioux City & St. Paul R. R.* v. *United States*, 159 U. S. 350.

The rule, that the issuance of a final receipt in homestead and desert land claims brings the land covered within the class of property subject to taxation by the State, has no application in this case, because by the grant a trust was created with the State as trustee, and by the term of the trust, no individual entryman is entitled, as a matter of right, to a patent until the trust is fully executed.

No proof of reclamation was ever submitted by plaintiff in error to the Secretary of the Interior, or by anyone authorized by him to receive and accept the same.

Whether the land came within the class of property subject to taxation during the year 1911, is determined as of the date of January 9, 1911, when the tax lien attached. *Union Pacific R. R.* v. *McShane*, 22 Wall. 444.

The United States, or the State of Idaho, as its trustee, by the contract, withheld the title until all the things required to constitute reclamation of the land had been done.

Mr. R. W. Adair and *Mr. J. H. Peterson*, Attorney General of the State of Idaho, with whom *Mr. E. G. Davis*, Assistant Attorney General of the State of Idaho, was on the brief, for defendant in error.

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

This was a suit to enjoin a proposed sale for taxes of 150 acres of land in Idaho acquired under the Carey Act of August 18, 1894, § 4, c. 301, 28 Stat. 422, and the amenda-

tory acts of June 11, 1896, c. 420, 29 Stat. 434, and March 3, 1901, § 3, c. 853, 31 Stat. 1188, the objection urged against the sale being that the proceedings for the acquisition of the title had not at the time of the tax assessment reached the point where the land could be taxed by the State. At a hearing upon an agreed statement of facts the defendants prevailed and the Supreme Court of the State affirmed the judgment. 24 Idaho, 125.

The tract was part of upwards of 50,000 acres of arid lands which were segregated from the public domain in July, 1899, pursuant to an agreement, sanctioned by the Carey Act, whereby the State engaged to have the lands irrigated, reclaimed and brought under cultivation, and to dispose of them only to actual settlers in tracts of not exceeding 160 acres. Originally the act required that the reclamation be accomplished within ten years after the date of the act, but the amendment of 1901 directed that the ten years be computed from the approval of the State's application for the segregation and empowered the Secretary of the Interior, in his discretion, to prolong the period five years.

In the original act there was a provision that "as fast as any State may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled," and the amendment of 1896 brought into the act a further provision that "when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation."

Following the segregation in 1899 the State took appropriate steps to provide canals and a supply of water

whereby the lands could be irrigated, reclaimed and brought under cultivation, and before December, 1910, caused to be completed a suitable system of canals actually furnishing an ample supply of water to irrigate and reclaim 49,858.16 acres, including the tract in question. Proof of this was made to the Secretary of the Interior in the mode prescribed by existing regulations (see 26 L. D. 74; 37 L. D. 624, 631) and that officer, finding the proof sufficient, directed that the 49,858.16 acres be patented to the State. This direction was given December 21, 1910, and the patent was issued January 9, 1911.

While the canal system was in process of completion and after water was provided for some of the lands, the plaintiff, who possessed the necessary qualifications and had acquired the requisite perpetual water right, applied to the State to make entry of the tract in question and made the prescribed preliminary payments. See Idaho Rev. Codes, 1908, § 1626. The entry was allowed and the plaintiff settled upon the tract, made it his place of residence, irrigated and reclaimed it, and brought it under actual cultivation. Thereafter, on June 25, 1909, he submitted to the State due proof of what he had done, paid the balance of the purchase price, and received from the State a certificate of final entry. See Rev. Codes, § 1628. Nothing more was required of him by the Carey Act, by the law of Idaho, or by any regulation made under either. He received a patent from the State February 11, 1911, about a month after it received one from the United States.

January 9, 1911, the day the State received a patent from the United States, was the date as of which property was required by the law of Idaho to be assessed for taxation for the ensuing year. Rev. Codes, § 1653. This tract was so assessed and the tax in question was based upon that assessment. The assessment, the tax and the intended sale were all free from objection, if the tract was

within the taxing power of the State on January 9, 1911.

At that time the United States no longer had any beneficial interest in the tract. Every condition upon which the ownership was to be transferred to the plaintiff had been fully performed. Thus the equitable title had passed to him and he had a present right to the legal title. The State received the latter as a trustee for him and was in duty bound to give him a patent—a duty which it promptly discharged, although not until after the time for the assessment.

Neither the Carey Act nor the agreement thereunder with the State purported to exempt the land from taxation or to take it out of the settled rule respecting the taxing of lands acquired under the public land laws. According to that rule, as this court frequently has said, when the proceedings for the acquisition of the title have reached the point where nothing more remains to be done by the entryman, and the Government no longer has any beneficial interest in the land and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land as subject to taxation, even though the duty of passing the legal title to him has not been discharged—the principle underlying the rule being that one who has acquired the beneficial ownership of the land, and is not excluded from its enjoyment, cannot be permitted to use the fact that the naked legal title remains in the Government to avoid his just share of state taxation. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 505; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 530; *Hussman* v. *Durham*, 165 U. S. 144, 147; *Sargent* v. *Herrick*, 221 U. S. 404, 406.

That the title was being passed through the State to the entryman or purchaser rather than by a direct conveyance is immaterial, the determinative fact being the

absence of any beneficial interest in the land on the part of the United States at the time of the assessment. It follows that no Federal law or right was infringed by the tax.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* CRAFT.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 776. Argued May 12, 1915.—Decided June 1, 1915.

In this case, as there was uncontradicted evidence that decedent survived his injuries, although only for something more than half an hour, and that the injuries were such as to cause extreme pain if he remained conscious, and there was conflicting evidence as to whether he did remain conscious, those questions were properly submitted to the jury; and the question for this court is not which way the evidence preponderated but whether there was evidence from which the jury could reasonably find that decedent did endure conscious pain during the period between his injury and death.

While in this case, there was evidence to go to the jury on those questions, generally such pain and suffering as are substantially contemporaneous with death, or mere incidents to it, afford no estimation or award of damages under such statutes as the Employers' Liability Act.

By the common law the death of a human being, although wrongfully caused, affords no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured; in cases under the Employers' Liability Act, the right of recovery depends entirely upon that statute, the state statutes being superseded thereby.

Under the Employers' Liability Act, as originally enacted in 1908,

there was no provision for the survival of the right given to the injured person and the right as at common law died with him; but under the act as amended in 1910 that right of action survives to the personal representatives of the decedent for the benefit of the widow, husband, children, parents or dependent next of kin, as specified in § 9 of the act as amended.

A provision brought into a Federal statute by way of amendment, expressing the deliberate will of Congress, must be given effect; and, construing §§ 1 and 9 of the Employers' Liability Act, as amended, together, the personal representative of a deceased employé is to recover, on the part of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of decedent while he lived.

Such a recovery is not a double recovery for a single wrong, but a single recovery for a double wrong.

Quære whether under the final clause of § 9 of the Employers' Liability Act, as amended in 1910, providing that there shall be only one recovery for one injury, the personal representative of a deceased employé can recover where there has been a recovery by decedent in his lifetime.

The provisions in § 9 of the Employers' Liability Act, as amended in 1910, that there shall be only one recovery for one injury, does not restrict the personal representative of a decedent who suffered pain after the injury and before death to one basis of recovery to the exclusion of the other or require him to make a choice between them; it does, however, limit him to one recovery of damages for both, and thus avoid needless litigation in separate actions.

While reports of Committees of the different Houses of Congress in regard to bills in their charge cannot be taken as giving to the act as passed a meaning not fairly within its words, they may be persuasive as showing that its words should not be wrongly construed.

The amount of a verdict for damages for suffering, although apparently large, in this case $5,000 for pain endured during a period of thirty minutes, involves only questions of fact and is not reviewable here under § 237, Judicial Code. The power, and with it the duty and responsibility, of dealing with such questions rests upon the courts below.

171 S. W. Rep. 1185, affirmed.

THE facts, which involve the construction and application of the Employers' Liability Act of 1908 and the

Amendment of 1910 and the right of the administrator of an employé killed by negligence of the employer to recover not only for the death of, but also for the pain and suffering endured by, decedent, are stated in the opinion.

Mr. Troy Pace, with whom *Mr. Edward J. White* and *Mr. E. B. Kinsworthy* were on the brief, for plaintiff in error:

Under the Federal Employers' Liability Act of 1908, as amended April 5, 1910, plaintiff was not permitted to recover both for pecuniary loss to next of kin and for decedent's pain and suffering. *Michigan Central Ry.* v. *Vreeland*, 227 U. S. 68.

In some of the statutes of the State there is a survival act as well as a death act, and the latter is held to be limited to cases of instantaneous or immediate death, and cases where the death was not instantaneous or immediate are held to fall under the survival statute. *Sawyer* v. *Perry*, 88 Maine, 42; *Anderson* v. *Wetter*, 15 L. R. A. (N. S.) 1003; *Dolson* v. *Lake Shore & M. S. Ry.*, 128 Michigan, 444; *Belding* v. *Black Hills & Ft. P. R.*, 3 S. Dak. 369. See *contra Sweetland* v. *Chi. & G. T. Ry.*, 117 Michigan, 329.

In a number of States it is held that the death acts provide a complete remedy, whether the death is instantaneous or not, if the death results from the injury; but if it results from some other cause, the survival act provides the only remedy. *Holton* v. *Daly*, 106 Illinois, 131; *Chicago & E. I. Ry.* v. *O'Connor*, 119 Illinois, 586; *Lubrano* v. *Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 797; *McCarthy Case*, 18 Kansas, 46; *Martin* v. *Missouri-Pac. Ry.*, 58 Kansas, 475; *Hulbert* v. *Topeka*, 34 Fed. Rep. 510.

In Kentucky it is held that an administrator, having a right to sue for a decedent's pain and suffering or to sue under the statute for his death, must elect which he will do, and cannot do both. *Conner* v. *Paul*, 12 Bush, 144;

Louis. & Nash. R. R. v. *McElwain*, 98 Kentucky, 700; *Hendricks* v. *Am. Exp. Co.*, 138 Kentucky, 704; *Henderson* v. *Ky. Cent. R. R.*, 86 Kentucky, 389.

All of the cases hold there can only be one action for damages caused by the wrongful act of another. *McCafferty* v. *Penna. R. R.*, 193 Pa. St. 339; *Edwards* v. *Gimbel*, 202 Pa. St. 30; *Fritz* v. *West. Un. Tel. Co.*, 25 Utah, 263; *Consolidated Coal Co.* v. *Dombriski*, 106 Ill. App. 641; *Hartigan* v. *Southern Pac. Co.*, 86 California, 142; *Munro* v. *Dredging Co.*, 84 California, 515; *Andrews* v. *Hartford R. R.*, 34 Connecticut, 57; *Putnam* v. *Southern Pac. Co.*, 21 Oregon, 239; *Legg* v. *Britton*, 64 Vermont, 652; *Littlewood* v. *New York*, 89 N. Y. 24; *Daubert* v. *Western Meat Co.*, 96 Am. St. 154, 139 California, 480; 13 Cyc. 327.

For cases holding that, in case of a wrongful death, two separate actions might be brought by the administrator, one for the benefit of the estate and the other for the benefit of the widow and next of kin, see *Bowes* v. *Boston*, 155 Massachusetts, 344; *Davis* v. *Railway*, 53 Arkansas, 117; *Mahoning Valley Ry.* v. *Van Alstine*, 14 L. R. A. (N. S.) 893; *Stewart* v. *United Electric Co.*, 8 L. R. A. (N. S.) 384, and *Needham* v. *Railway*, 38 Vermont, 294; *Brown* v. *Chicago & N. W. Rd.*, 44 L. R. A. 579; but they are erroneous. See also *Legg* v. *Britton*, 64 Vermont, 652; *Wood* v. *Gray*, (1892), A. C. 576; *Louisville & Nash. R. R.* v. *McElwain*, 98 Kentucky, 385; *McGovern* v. *N. Y. C. &c. R. R.*, 67 N. Y. 417; *McCafferty* v. *Penna. R. R.*, 193 Pa. St. 339.

As to the construction of the act itself see *Gulf &c. Ry.* v. *McGinnis*, 228 U. S. 173; *Louis. & Nash. R. R.* v. *Stewart's Adm'r*, 156 Kentucky, 550.

The jury should not be permitted to make a double allowance in two separate causes of action for the same pecuniary loss.

There was not sufficient proof of conscious suffering. Section 9 of the act of 1910, providing that any right of

action given by the act to a "person suffering injury" shall survive to his personal representative, creates no new cause of action, and has no application where there is an instantaneous killing. *Carolina &c. Ry.* v. *Shewalter*, 161 S. W. Rep. 1136; *Sweetland* v. *Chi. & G. T. Ry.*, 43 L. R. A. 568.

The mere fact that there was evidence of some slight spasmodic action on the part of the deceased, where the other evidence tended to show that death was immediate, has been held not sufficient to prevent the court from directing a verdict for the plaintiff on the ground that the death was instantaneous. Tiffany, Death by Wrongful Act, § 74. *Kearney* v. *Boston & W. B. Corp.*, 8 Cush. 108; *Tully* v. *Fitchburg R. R.*, 134 Massachusetts, 499; *St. Louis, I. M. & S. Ry.* v. *Dawson*, 68 Arkansas, 1; *Mulchahey* v. *Washburn Car Wheel Co.*, 145 Massachusetts, 335; *The Corsair*, 145 U. S. 335; *Burch* v. *St. Louis, I. M. & S. Ry.*, 108 Arkansas, 396.

The verdict is excessive. *St. Louis, I. M. & S. Ry.* v. *Stamps*, 84 Arkansas, 241; *St. Louis, I. M. & S. Ry.* v. *Pate*, 90 Arkansas, 136; see *St. Louis, I. M. & S. Ry.* v. *Scott*, 102 Arkansas, 417; *St. Louis, I. M. & S. Ry.* v. *Robertson*, 103 Arkansas, 361; *Chicago, R. I. & P. Ry.* v. *White*, 165 S. W. Rep. 627; *The Robert Graham Dun*, 70 Fed. Rep. 270.

Mr. William E. Richardson, with whom *Mr. Jackson H. Ralston*, *Mr. Gustave Jones* and *Mr. Lon L. Campbell* were on the brief, for defendant in error:

Under the Federal Employers' Liability Act of 1908, as amended on April 5, 1910, the plaintiff was permitted to recover both for pecuniary loss and the next of kin for his pain and suffering endured by the decedent. *Fulgam* v. *Midland Valley R. R.*, 167 Fed. Rep. 660; *Walsh* v. *N. Y., N. H. & H. R. R.*, 173 Fed. Rep. 494.

The purpose of Congress in making this amendment of

April 5, 1910, is clearly and convincingly stated (Sen. Rep. 432, 61 Cong., 2d Sess.). For definitions of the term injury see *Thornton* v. *Thornton*, 63 N. Car. 211; *Macauley* v. *Tierney*, 19 R. I. 255; *State* v. *Reddington*, 7 S. Dak. 368; *Nor. Pac. R. R.* v. *Maerkl*, 198 Fed. Rep. 1; *Cain* v. *Southern Railway*, 190 Fed. Rep. 211; *St. Louis, I. M. & S. Ry.* v. *Hesterley*, 228 U. S. 702; *St. Louis & San Fran. R. R.* v. *Conarty*, 106 Arkansas, 421; *Kansas City Southern Ry.* v. *Leslie*, 167 S. W. Rep. 83.

The state court specifically decided that the deceased was conscious of great agony for a period of thirty minutes. Unlike appeals in writs of error to the Federal courts, on writ of error to the highest court of a State, the findings of fact of the state court are accepted as conclusive. *Hedrick* v. *Atchison &c. Ry. Co.*, 167 U. S. 673; *Keokuk Bridge Co.* v. *Illinois*, 175 U. S. 626; *Jenkins* v. *Neff*, 186 U. S. 230; *Gardner* v. *Bonesteel*, 180 U. S. 362; *Chrisman* v. *Miller*, 197 U. S. 313; *Chapman Land Co.* v. *Biglow*, 206 U. S. 41; *Clipper Mining Co.* v. *Eli Mining Co.*, 194 U. S. 220; *Thayer* v. *Spratt*, 189 U. S. 346; *Quimby* v. *Boyd*, 128 U. S. 488.

The verdict of a jury settles all questions of fact on a writ of error from this court to a state court. *Smiley* v. *Kansas*, 196 U. S. 447; *Shauer* v. *Alterton*, 151 U. S. 607; *Noble* v. *Mitchell*, 164 U. S. 367.

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

This was an action under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and the amendment of April 5, 1910, c. 143, 36 Stat. 291, by an administrator to recover for injuries to, and the death of, his intestate. The action was for the benefit of the father, there being no surviving widow, child or mother, and the damages sought were for (a) pecuniary loss to the father by reason

of the death and (b) conscious pain and suffering of the decedent before the injuries proved fatal. In the trial court the plaintiff had a verdict and judgment awarding $1,000 for the pecuniary loss to the father and $11,000 for the pain and suffering of the decedent, and the Supreme Court of the State, after reducing the latter sum to $5,000, affirmed the judgment. 171 S. W. Rep. 1185.

Without questioning that the evidence justified an assessment of damages for the father's pecuniary loss, the defendant insists, as it did in both state courts, that the recovery could not include anything for pain and suffering of the decedent, first, because there was no evidence that he endured any conscious pain or suffering, and, second, because the statute requires that the recovery in such cases be restricted to either the pecuniary loss to the designated beneficiaries or the damage sustained by the injured person while he lived, and does not permit a recovery for both.

The first objection must, as we think, be overruled. The record discloses that the decedent survived his injuries more than a half hour and that they were such as were calculated to cause him extreme pain and suffering, if he remained conscious. A car passed partly over his body, breaking some of the bones, lacerating the flesh and opening the abdomen, and then held him fast under the wheels with a brake rod pressing his face to the ground. It took fifteen minutes to lift the car and release his body and fifteen minutes more to start him to the hospital in an ambulance. It was after this that he died, the time not being more definitely stated. As to whether he was conscious and capable of suffering pain the evidence was conflicting. Some of the witnesses testified that he was "groaning every once in a while" and that when they were endeavoring to pull him from under the car "he would raise his arm" and "try to pull himself," while others testified that they did not notice these indications

of consciousness and that he seemed to be unconscious from the beginning. The jury found that he was conscious and both state courts accepted that solution of the dispute. Of course, the question here is not which way the evidence preponderated, but whether there was evidence from which the jury reasonably could find that while he lived he endured conscious pain and suffering as a result of his injuries. That question, we are persuaded, must be answered in the affirmative. But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here. *The Corsair*, 145 U. S. 335, 348; *Kearney* v. *Boston & Worcester R. R.*, 9 Cush. 108; *Kennedy* v. *Standard Sugar Refinery*, 125 Massachusetts, 90; *Tully* v. *Fitchburg R. R.*, 134 Massachusetts, 499, 504; *Mulchahey* v. *Washburn Car Wheel Co.*, 145 Massachusetts, 281; *St. Louis &c. Ry.* v. *Dawson*, 68 Arkansas, 1, 4; *Burch* v. *St. Louis &c. Ry.*, 108 Arkansas, 396, 408.

By the common law the death of a human being, although wrongfully caused, affords no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured. *Insurance Co.* v. *Brame*, 95 U. S. 754, 756; *The Harrisburg*, 119 U. S. 199, 204, 213; *Martin* v. *Balt. & Ohio R. R.*, 151 U. S. 673, 697; *Michigan Central R. R.* v. *Vreeland*, 227 U. S. 59, 67–68. Therefore in cases like this the right of recovery depends entirely upon statute law. Here the state statute is not applicable because superseded, as respects the class of cases to which this one belongs, by the Federal Employers' Liability Act. *Mondou* v. *N. Y., New Haven & H. R. R.*, 223 U. S. 1, 53–55; *Michigan Central R. R.* v. *Vreeland, supra; St. Louis*

&c. Ry. v. *Seale*, 229 U. S. 156, 158; *Taylor* v. *Taylor*, 232 U. S. 363. So, it is by that act that we must test the objection that the recovery could not include damages for the decedent's conscious pain and suffering along with damages for the father's pecuniary loss.

The original act was adopted by Congress April 22, 1908. In its first section it provides for two distinct rights of action based upon altogether different principles, although primarily resting upon the same wrongful act or neglect. It invests the injured employé with a right to such damages as will compensate him for his personal loss and suffering—a right which arises only where his injuries are not immediately fatal. And where his injuries prove fatal, either immediately or subsequently (*Michigan Central R. R.* v. *Vreeland*, *supra*, p. 68; *Louisville & St. Louis R. R.* v. *Clarke*, 152 U. S. 230, 238), it invests his personal representative, as a trustee for designated relatives, with a right to such damages as will compensate the latter for any pecuniary loss which they sustain by the death. At first there was no provision for a survival of the right given to the injured person, and so under the operation of the rule of the common law it would die with him.

Of the right given to the personal representative we said in the *Vreeland Case*, p. 68: "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only." And in *American R. R.* v. *Didricksen*, 227 U. S. 145, 149, we said, referring to the original act: "The cause of action which was created in behalf of the injured employé did not sur-

vive his death, nor pass to his representatives. But the act, in case of the death of such an employé from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé. The damage is limited strictly to the financial loss thus sustained."

If the matter turned upon the original act alone it is plain that the recovery here could not include damages for the decedent's pain and suffering, for only through a provision for a survival of his right could such damages be recovered after his death. But the original act is not alone to be considered. On April 5, 1910, prior to the decedent's injuries the act was "amended by adding the following section:"

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury."

No change was made in § 1. *Taylor* v. *Taylor*, 232 U. S. 363, 370. It continues, as before, to provide for two distinct rights of action: one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person "shall survive" to his personal representative "for the benefit of" the same relatives in whose behalf the other right is given. Brought into the

act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and § 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong. *Davis* v. *Railway*, 53 Arkansas, 117; *Commonwealth* v. *Metropolitan R. R.*, 107 Massachusetts, 236; *Bowes* v. *Boston*, 155 Massachusetts, 344, 349; *Stewart* v. *United Electric Light Co.*, 104 Maryland, 332; *Mahoning Valley Ry.* v. *Van Alstine*, 77 Ohio St. 395; *Brown* v. *Chicago & Northwestern Ry.*, 102 Wisconsin, 137; *Nemecek* v. *Filer and Stowell Co.*, 126 Wisconsin, 71;

Eichorn v. *New Orleans &c. Power Co.*, 112 Louisiana, 235; *Vicksburg & Meridian R. R.* v. *Phillips*, 64 Mississippi, 693.

Much stress is laid upon the concluding clause in the new section, "but in such cases there shall be only one recovery for the same injury." Passing and reserving the question of its application where there has been a recovery by the decedent in his lifetime (see *Michigan Central R. R.* v. *Vreeland*, *supra*, p. 70), we think this clause, as applied to cases like the present, is not intended to restrict the personal representative to one right to the exclusion of the other, or to require that he make a choice between them, but to limit him to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action. This view gives full effect to every word in the clause and ascribes to it a reasonable purpose without bringing it into conflict with other provisions the terms of which are plain and unequivocal. Had Congress intended that the personal representative should make an election between the two rights of action and sue upon one only, it is not easy to believe that it would have chosen the words in this clause to express that intention.

In *Nor. Pac. Ry.* v. *Maerkl*, 198 Fed. Rep. 1, an injured employé brought an action under the statute to recover for his injuries and shortly thereafter died by reason of them. The action was revived in the name of his personal representative and by an amended and supplemental petition damages were sought for the suffering of the deceased while he lived and also for the pecuniary loss to his widow and children by his death. Over an objection that there should be an election between the two rights of action, the plaintiff secured a verdict and judgment assessing the total damages at $9,576.80, being $936.80 on the first right of action and $8,640.00 on the second. The recovery was sustained by the Circuit Court of Appeals

for the Ninth Circuit, the court saying that "the plain meaning" of the new section is that damages for the deceased's personal loss and suffering and for the pecuniary loss to the designated beneficiaries by the death, "not only may be recovered by the personal representative of the deceased in one action, but *must* be recovered in one action only, if at all." So far as we are advised by the reported decisions, this is the view which has been taken by all the courts, Federal and state, that have had occasion to consider the question.

A brief reference to the particular circumstances in which the new section was adopted will show that they give material support to the conclusion to which we come after considering its terms.

The original act, as we have said, made no provision for the survival of the right of action given to the injured person, although such a provision existed in the statutes of many of the States. Shortly after the act two cases arose thereunder in each of which the personal representative of an injured employé, who died from his injuries, sought to recover damages for the employé's personal loss and suffering while he lived as well as for the pecuniary loss to the beneficiaries named in the act. In both cases—one in the Circuit Court for the Western District of Arkansas and the other in the Circuit Court for the District of Massachusetts—the right of the injured employé would have survived if the local statutes were applicable, and the ruling in both was that the Federal act was exclusive and superseded the local statutes, that it made no provision for a survival, and therefore that the recovery should be confined to damages for the pecuniary loss resulting to the designated beneficiaries from the death. *Fulgham* v. *Midland Valley R. R.*, 167 Fed. Rep. 660; *Walsh* v. *New York, N. H. & H. R. R.*, 173 Fed. Rep. 494. Following these decisions the amendment embodying the new section was proposed in Congress. In reporting upon it the

Committees on the Judiciary in the Senate and House of Representatives referred at length to the opinions delivered in the two cases, to the absence from the original act of a provision for a survival of the employé's right of action and to the presence of such a provision in the statutes of many of the States, and then recommended the adoption of the amendment, saying that the act should be made "as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States, which are suspended in their operation by force of the Federal legislation upon the subject." Senate Report No. 432, 61st Cong., 2d Sess., pp. 12–15; House Report No. 513, 61st Cong., 2d Sess., pp. 3–6. While these reports cannot be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted.

For these reasons we think the second objection is not tenable.

Finally, it is said that the award of $5,000 as damages for pain and suffering, even though extreme, for so short a period as approximately thirty minutes is excessive. The award does seem large, but the power, and with it the duty and responsibility, of dealing with this matter rested upon the courts below. It involves only a question of fact and is not open to reconsideration here. *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31; *The Justices* v. *Murray*, 9 Wall. 274; *Erie R. R.* v. *Winter*, 143 U. S. 60, 75; *Herencia* v. *Guzman*, 219 U. S. 44; *Southern Railway* v. *Bennett*, 233 U. S. 80.

Judgment affirmed.

HARTFORD LIFE INSURANCE COMPANY *v.* IBS.

ERROR TO THE DISTRICT COURT IN AND FOR THE COUNTY OF RAMSEY, STATE OF MINNESOTA.

No. 213. Argued March 19, 1915.—Decided June 1, 1915.

To exclude from evidence a decree of the courts of the State in which an insurance company is organized adjudging the rights of the corporation as between itself and members of its mortuary fund and to refuse to enforce the provisions of such decree amounts to denying to it the full faith and credit to which it is entitled under the Federal Constitution.

Whether treated as an expectancy or as a contingent interest, the right of the wife to recover from an assessment corporation of which her husband was a member, makes her in privity with him and she is bound by the contracts which he may have entered into with the corporation in regard to the mortuary fund created under contract between the members.

While a mortuary fund made up by contributions from all members may be single, the interest of the members is common and the proper court of the jurisdiction in which the corporation managing the fund chartered has power to determine all questions relating to its internal management; and the decree of such a court in a suit brought on behalf of all similarly interested establishing the rights of members of the fund, is binding upon all members similarly interested, and must be given full faith and credit in the courts of other States in cases between the corporation and such members.

Where a common interest in a fund does exist, and it is impracticable for all concerned to be made parties, it is proper that a class suit should be brought in the proper court of the State in which the corporation managing the fund is chartered, and the decree in such a case is binding upon all the class.

Even if the suit in which a decree in another State is offered is for a different purpose than the one in which the decree was rendered, it must be given full faith and credit and is admissible, and must be regarded as conclusive, as to the right, question, or fact determined so long as it remains unmodified. *Southern Pacific Co.* v. *U. S.*, 168 U. S. 48.

121 Minnesota, 310, reversed.

THE facts, which involve the question of whether the state courts of Minnesota gave full faith and credit to a judgment of the State of Connecticut establishing the rights of an insurance company and holders of mortuary assessable certificates, are stated in the opinion.

Mr. Frederick W. Lehmann, with whom *Mr. James C. Jones*, *Mr. John M. Holmes* and *Mr. George F. Haid* were on the brief, for plaintiff in error:

The issue as to the right and propriety of maintaining a Mortuary Fund was involved in both the Connecticut and the Minnesota cases. *Southern Pacific* v. *United States*, 168 U. S. 1; *Klein* v. *Insurance Co.*, 104 U. S. 88.

The plaintiff in the Minnesota case stood as to the Connecticut case in privity with her husband, and he was by representation a party to the Connecticut case. *Smith* v. *Swormstedt*, 16 How. 288; *Wallace* v. *Adams*, 204 U. S. 415; 2 Perry on Trusts, § 885; 2 Beach on Trusts, § 498; *Scott* v. *Donald*, 165 U. S. 116.

The Connecticut court was a court of competent jurisdiction to determine the question of the right of the company to maintain the Mortuary Fund, and its decree was binding upon the company and all its members. *Condon* v. *Mutual Reserve, &c.*, 89 Maryland, 99; *Clark* v. *Mutual Reserve*, 14 App. D. C. 154; *Taylor* v. *Mutual Reserve*, 97 Virginia, 60; *State* v. *Shain*, 254 Missouri, 78.

The Minnesota court did not give full faith and credit to the judicial proceedings in Connecticut, and refused to give any effect whatever to the decree of the Connecticut court. *Nations* v. *Johnson*, 24 How. 195; *Huntington* v. *Attrill*, 146 U. S. 657; *Insurance Co.* v. *Harris*, 97 U. S. 381; *Harris* v. *Balk*, 198 U. S. 215; *Selig* v. *Hamilton*, 234 U. S. 652.

Mr. O. E. Holman, with whom *Mr. C. D. O'Brien* and *Mr. Edmund S. Durment*, were on the brief, for defendant in error:

The defendant in error was not a party to the Connecticut suit either of record, by privity or representation.

The defendant in error was not in privity with her husband, the insured.

The insured was not a party to the Connecticut suit by representation.

Neither the beneficiary nor the insured was bound by the Connecticut decrees; neither was served with process therein, either personal or constructive; nor did either appear.

The issues in the two actions were not the same.

The Minnesota court was at liberty to determine for itself the jurisdictional questions whether, under the general law, the defendant in error was a party to the Dresser suit and whether the issues in the two suits were the same, and was under no obligation to treat the Connecticut decrees as a bar or estoppel to this action.

The decision of the Supreme Court of Minnesota is not against the title, privilege or immunity especially set up or claimed by the plaintiff in error under the United States Constitution.

The decision of the Supreme Court of Minnesota does not impair the obligation of the contract within the meaning of Art. 1, § 10, of the United States Constitution. *Bacon* v. *Texas*, 163 U. S. 207; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111; *Blount* v. *Walker*, 134 U. S. 607; *Boswell's Lessee* v. *Otis*, 9 How. 348; *Brooklyn* v. *Insurance Co.*, 9 Otto, 362; *Carey* v. *Brown*, 2 Otto, 171; *Central Bank* v. *Hume*, 128 U. S. 195; *Commercial Pub. Co.* v. *Beckwith*, 188 U. S. 567; *Condon* v. *Mutual Reserve*, 89 Maryland, 99; *Cromwell* v. *Sac County*, 4 Otto, 351; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632; *Equitable Life Assurance Society* v. *Patterson*, 1 Fed. Rep. 126; *Ex parte Howard*, 9 Wall. 175; *Hart* v. *Mouton*, 80 N. W. Rep. 601; *In Re Strantz*, 27 N. E. Rep. 259; *Johnson* v. *Hartford Life Insurance Co.*, 166 Mo. App. 261; *Jurgens*

v. *New York Life Ins. Co.*, 114 California, 161; *Kerrison* v. *Stewart*, 3 Otto, 155; *Pennoyer* v. *Neff*, 5 Otto, 714; *Reynolds* v. *Stockton*, 140 U. S. 254; *Russel* v. *Place*, 4 Otto, 606; *Scott* v. *Donald*, 165 U. S. 107; *Empire* v. *Darlington*, 11 Otto, 87; *Union Central Life Ins. Co.* v. *Buxer*, 49 L. R. A. 737; *Vicksburg* v. *Henson*, 231 U. S. 259; *Wabash Ry. Co.* v. *Adelbert College*, 208 U. S. 38; *Webster* v. *Reid*, 11 How. 437; *Williams* v. *Gibbs*, 17 How. 239; 24 Am. & Eng. Ency. Law, 2nd ed. 750; 23 Cyc. 1246, 1253–1261.

Mr. Justice Lamar delivered the opinion of the court.

On April 4, 1885, The Hartford Life Insurance Co. issued to Herman Ibs a certificate of membership in its Safety Fund Department which was conducted on the Mutual Assessment plan. The certificate provided that if the policy was kept in force, by the payment of *all assessments duly levied upon all the members to create a Mortuary Fund*, his wife should be entitled to receive at his death an indemnity of $2,000 *payable out of such Mortuary Fund.*

On May 2, 1910, under Call 127, he was assessed $35.95 to meet 145 claims which matured during the quarter ending March 31. He failed to pay and his policy was cancelled June 23, 1910. He died June 27 and thereafter his wife brought suit in a Minnesota court against the Company. It defended on the ground that the policy had been forfeited by reason of Ibs' failure to pay the assessment levied to meet the 145 claims. To this the plaintiff replied that most of these claims had been paid out of the Mortuary Fund during the quarter and that the balance of cash on hand March 31 was sufficient to have paid all of the other claims. Because of these facts she claimed the assessment of May 2 was both unnecessary and void.

In answer to this the Company insisted that the Fund was maintained as a source from which to make prompt

settlement of claims, but that such advances did not prevent the levy of the quarterly assessment which when collected was to be used in replenishing the Fund. In support of this defense it offered a certified copy of the decree of a Connecticut court, in the case of *Dresser and Other Certificate Holders* v. *Hartford Life Ins. Co.*, in which it was adjudged that the Company had the right so to maintain and use the Fund. The plaintiff objected to the admission of this decree on the ground, among others, that she was not a party to the proceeding in which it was rendered. The court sustained her objections, excluded the decree, and directed a verdict in her favor. That ruling having been affirmed by the Supreme Court of the State (121 Minnesota, 310), the case was brought here by the Insurance Company on a record which raises the sole question as to whether the Minnesota courts failed to give full faith and credit to the judicial proceedings of another State as required by Art. IV, § 1 of the Constitution.

In order to answer that question it becomes necessary to make a brief statement of the facts giving rise to the suit and to the terms of the decree—not for the purpose of determining whether the decision was correct but in order to decide whether the Connecticut court had jurisdiction to enter a decree binding on a beneficiary who was not a party to the proceeding.

The Hartford Life Insurance Company, though a stock corporation under the laws of Connecticut, had what was known as the "Safety Fund Department," conducted on the Mutual Assessment plan. The Company kept the books, levied the assessments, deposited the collections in the Mortuary Fund, and paid claims therefrom as they matured. It was not otherwise liable on the policies.

The Mutual Insurance plan contemplated the creation of a Safety Fund of $1,000,000 from membership fees. In addition to this there was to be a Mortuary Fund, raised

by graduated assessments levied on all the members for use in payment of death claims. These assessments were levied periodically and provision was made that in fixing the amount to be levied an allowance should be made "for discontinuance in membership." It so happened that the lapses were not so numerous as had been estimated and consequently each assessment realized something more than was needed to pay the matured claims. This difference, between the collections and the insurance paid, was retained in the Mortuary Fund and, in time, the "excess margins" amounted to nearly $400,000.

In 1908 the Hartford Life Insurance Company determined to discontinue the Safety Fund Department and to write no more insurance on the Assessment plan. Thereafter no new members were admitted. This change of policy was the occasion of a disagreement between the Certificate-Holders and the Company. Accordingly, Dresser and thirty other members, residing in different States, brought suit in a Connecticut court, "in their own behalf and on behalf of all others similarly situated," against the Company, its Directors and Trustees. The Bill attacked the management of the Company and, among other things, insisted that it had been and was still levying assessments too many in number and too large in amount. The Bill also alleged that the Company had recently decided to discontinue writing insurance on the Assessment plan and was endeavoring to induce members to surrender their Certificates and to take out ordinary life policies in the Company's stock department. By reason of this change of policy and the consequent decrease in membership in the Safety Fund Department and the increase in assessments the Bill alleged that the present Certificate-Holders, who had created the Mortuary Fund, were entitled to an immediate distribution of the moneys therein.

The Company's demurrer was sustained and the Bill

dismissed. Dresser and the other certificate-holders then took the case to the Supreme Court of Connecticut where the judgment was reversed. 80 Connecticut, 681. The case having been remanded there was an answer and a hearing. On March 23, 1910, the court made findings of law and fact, many of which are not material to the matter involved in the present litigation. In reference to the Mortuary Fund, the trial court found that, though acting in good faith, the Company in making assessments had overestimated the number of lapses in membership and, consequently, the assessments had raised more than was needed to pay claims; that these excesses or margins had accumulated and amounted to many thousands of dollars; that these excess collections were in the Mortuary Fund and

"are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said Fund is constantly reimbursed.

"The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate-holders, but it is held that it is proper and reasonable that the Company should hold such Fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the company should hold more than the amount of one average quarterly assessment for the previous year.

". . . The Mortuary Fund arising as above described or from any other source together with all income or interest thereon belongs to the Men's Division of the Safety Fund Department, and the Insurance Company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said Department, and that any

excess above the average of the quarterly assessment for the previous year shall be distributed in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment."

From other evidence in the present case it appeared that 145 members died during the quarter which ended March 31, 1910. Their certificates amounted to $323,919.95. The cash in the Mortuary Fund was sufficient to meet all of these claims and out of it $198,994.19 had been paid prior to March 31, leaving therein more than enough to settle the remaining certificates, aggregating $124,925.76, which, though accruing during the quarter, had not been finally proved on March 31.

It required at least 30 days in which to adjust claims, levy the assessment, make the calculation of the amount due by each of the more than 12,000 members and send out the proper notices. Having made the necessary calculations, the Company, on May 2, 1910, made an assessment of $323,919.95, as of March 31, 1910, with which to meet the 145 claims specified. It gave notice to Ibs that his dues and assessment to meet these 145 claims was $35.95 payable on June 5. He failed to pay and a second notice was given that unless the Company received the assessment by June 20, 1910, his policy would be forfeited. He still neglected to pay and on June 23 the Company canceled the policy. Ibs died on June 27. The widow then sued; and in answer to the Company's claim that the policy had been forfeited she contended, as already stated, that the assessment of $323,919.95 was void because $198,473.58 had, in fact, been paid out of the Mortuary Fund before March 31 and there was on that date a balance therein sufficient to pay all of the other claims included in the call.

1. But if the Mortuary Fund had been thus finally appropriated to the payment of claims—without the right of a reimbursement from the next assessment—the Fund

would have been permanently destroyed and the Company would have been deprived of the right to maintain and use it as a source from which thereafter to make prompt settlement. That the Company had such right was expressly recognized and adjudged in the Connecticut decree. To exclude it from evidence and to decline to enforce its provisions was to deny it the full faith and credit to which it was entitled under the provisions of Art. IV, § 1 of the Constitution of the United States.

2. The plaintiff insists, however, that she was not a party to the proceedings in which the decree was entered and, therefore, not bound by its terms. But in this regard she was in privity with her husband. For while, under the terms of the contract embodied in the certificate, he may not have had the right to assign the policy, or to change the beneficiary, or to lessen the amount payable at his death, yet,—whether treated as an expectancy or as a contingent interest—her right to receive an indemnity depended upon her husband being a member at the time of his death, since failure to pay the assessments would work a forfeiture. As the members were the owners of a Mortuary Fund which had been created under the terms of a plan which was, in effect, a contract between themselves, there was no reason why they and the Company might not enter into a further contract as to its present distribution or future use. If they failed in making an arrangement among themselves there was no reason why—in case of such disagreement—their conflicting claims and rights could not be determined by the judgment of a tribunal of competent jurisdiction.

3. The Fund was single, but having been made up of contributions from thousands of members their interest was common. It would have been destructive of their mutual rights in the plan of Mutual Insurance to use the Mortuary Fund in one way for claims of members residing in one State and to use it in another way as to claims of

members residing in a different State. To make advances replenished by assessments against those living in Connecticut—and to make advances without the right to replenish against those living in Wisconsin—would have destroyed the very equality the Assessment plan was intended to secure. Manifestly the question as to the ownership and proper administration of the Fund could not be left at large for collateral decision in every suit on certificates held by those who had failed to pay the assessment. For—whether the members of the "Safety Fund Department" are regarded as occupying a position analogous to that of shareholders; or are treated as beneficiaries of trust property in the hands of the Company, as Trustee, in the State of Connecticut,—the courts of that State had jurisdiction of all questions relating to the internal management of the corporation. *Selig* v. *Hamilton*, 234 U. S. 652; *Insurance Co.* v. *Harris*, 97 U. S. 336; *Condon* v. *Mutual Reserve*, 89 Maryland, 99; *Maguire* v. *Mortgage Co.*, 203 Fed. Rep. 858. It was for the court of the State where the Company was chartered and where the Fund was maintained to say what was the character of the members' interest—whether they were entitled to have it distributed in cash; or used in paying the next assessment; or retained as a Fund for the prompt settlement of claims with the right and duty on the part of the Company, as their Trustee, to replenish the same by collections from succeeding assessments. But it was impossible for the Company to bring a suit against 12,000 members living in different parts of the United States. It was equally impossible for the 12,000 members to bring a suit against the Company to determine the questions involved. Under these circumstances Dresser and thirty other members, holding certificates, brought suit "in their own behalf and in behalf of all others similarly situated."

4. That allegation, of course, would not by itself determine the character of the proceeding (*Wabash Railroad* v.

Adelbert College, 208 U. S. 58). For, in order that the decree should be binding upon those certificate-holders who were not actually parties to the proceeding, it had to appear that Dresser and the other complainants had an interest that was, in fact, similar to that of the other members of the class, and that it was impracticable for all concerned to be made parties. But, when such common interest in fact did exist, it was proper that a Class suit should be brought in a court of the State where the Company was chartered and where the Mortuary Fund was kept. The decree in such a suit, brought by the Company against some members, as representatives of all, or brought against the Company by 30 certificate-holders for "the benefit of themselves and all others similarly situated," would be binding upon all other certificate-holders.

"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." *Smith* v. *Swormstedt*, 16 How. 303. See also *Hawkins* v. *Glenn*, 131 U. S. 330; *Bealls* v. *Illinois R. R.*, 133 U. S. 290; *Kerrison* v. *Stewart*, 93 U. S. 155; *Supreme Council of Royal Arcanum* v. *Green*, this day decided, *ante*, p. 531. The principle is recognized both in England and in this country. 1 Pomeroy Eq. Jur. (3d ed.), §§ 267, 268. In *Corey* v. *Sherman*, 96 Iowa, 114, and

Carlton v. *Southern Mutual Ins. Co.*, 72 Georgia, 371 (2); 379 (5–10), the rule was applied in cases involving the rights of those interested in mutual insurance funds raised by collections from many policy-holders.

5. It is said, however, that even if the decree, determining the status and use to be made of the Mortuary Fund, was binding upon members and beneficiaries, it could not be offered in evidence in a suit on a policy of insurance, since the cause of action and the thing adjudged in the two cases was different—one involving the status of the Fund and the rights of members therein while the present case related to the right of a beneficiary to recover on a policy and the power of the Company to declare a forfeiture. But the defendant's contention that the policy had lapsed, because of the failure of Ibs to pay the assessment, and the plaintiff's reply that the assessment was void because the Mortuary Fund was sufficient to meet Call 127, raised an issue as to the right of the Insurance Company to levy the assessment. On that issue the Connecticut decree was admissible, since it adjudged that the Company had the right to make advances to pay claims and could subsequently collect the amount of such claims by an assessment levied as in the present case. Its right so to do having been determined by a court of competent jurisdiction, the decree was binding between the parties or their privies in any subsequent case in which the same right was directly or collaterally involved. For "*even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.*" *Southern Pacific Co.* v. *United States*, 168 U. S. 48–49. So also it was held in *Forsyth* v. *Hammond* (166 U. S. 518), that "though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one

action is conclusive between the parties in all subsequent actions."

There are other questions in the case which present no Federal question, but for error in refusing to admit the decree of the Connecticut court the judgment is

Reversed.

SAWYER *v.* GRAY.

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

No. 632. Argued April 22, 1915.—Decided June 1, 1915.

Daniels v. *Wagner*, *ante*, p. 547, followed to the effect that the Secretary of the Interior has no discretionary power to refuse to allow land properly selected for exchange under the Forest Lieu Land Act of June 4, 1897, to be patented to an applicant who has complied with all statutory requirements in regard to such exchange.

THE facts, which involve the construction of the Forest Lieu Lands Act of 1897 and the extent of discretionary power on the Secretary of the Interior to reject applications for exchange of lands thereunder, are stated in the opinion.

Mr. Francis W. Clements, with whom *Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for appellants.

Mr. H. H. Field, with whom *Mr. F. M. Dudley* was on the brief, for appellees.

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

This case is controlled by *Daniels* v. *Wagner*, No. 238, *ante*, p. 547, recently decided. The suit was brought for

the purpose of obtaining a decree recognizing the claim of ownership of the complainants to the west half of section 32, Township 11 North, Range 4 East of the Willamette Meridian, County of Lewis, State of Washington, and of further having it decreed that the defendants holding under patents of the United States were subject to a trust in favor of the complainants because the Land Department by a mistake of law had patented the land to the defendants or their assignors when, if the law had been complied with, the patents should have been issued to the complainants. Some of the defendants were the original patentees and others held under assignments of right based upon such patents and as to all the bill explicitly charged actual notice or such a state of fact as would constitute constructive notice and want of good faith.

The facts as alleged in the complaint were briefly these: On March 29, 1900, the complainants, or F. A. Hyde & Company under whom they held, applied to the Local Land Officer at Vancouver, Washington, to enter 1120 acres of unappropriated public lands under the Act of June 4, 1897, in lieu of lands in California owned by F. A. Hyde & Co., which had been included in the Pine Mountain and Zaca Lake Forest Reserve. The bill alleged that all the necessary steps to comply with the law and regulations concerning the selection of the lieu land had been complied with. It was further averred that at the time this application was filed there was pending in the Local Land Office an application of the State of Washington for a survey of the township in which the lieu land applied for was situated to enable the State to make selections of land which it was entitled under the law to make and which it was the duty of the State to make within sixty days after survey. It was alleged that the lieu land application was forwarded by the local land officers to the Commissioner of the General Land Office, as it was their duty under the law to do, and that the same was rejected by the Commis-

sioner of the General Land Office on the ground that the land was not subject to the lieu entry because of the pendency of the application of the State for survey, and that the action of the Commissioner was affirmed by the Secretary of the Interior. The bill charged that under the law and the settled practice of the Land Department the rejection of the application was wrong as it should have been held in abeyance to await the completion of the survey and the selection to be made by the State within the limits of the survey under its asserted rights, and after the selection by the State should have then attached to the land provided the land was not included in the selection made by the State. The bill further alleged that on March 2, 1902, after the action of the Secretary of the Interior above stated, the complainants, or F. A. Hyde & Company under whom they claimed, made a further application to be allowed to enter the land in controversy; that is, the west half of section 32, township 11 north, range 4 east of the Willamette Meridian in Lewis County, Washington, as lieu land, the land to which said entry related being included in the larger area previously applied for and rejected under the circumstances stated. It was averred that at the time said application was made the survey asked for by the State of Washington was no longer pending because it had been completed and the State had made its selection of lands within the area of the survey, which selections did not include the land in question. The existence of notice actual or constructive and the want of good faith was also charged as against the defendants concerning the fact of this application. It was moreover alleged that it had become a custom in the Department to allow persons who owned land which had been included in forest reserves on full compliance with all the provisions of law to give a power of attorney to make selections of lieu lands under the Act of 1897 and that the papers establishing the surrender to the United States of

the land and the power of attorney evidencing the right to make a new selection in lieu thereof were known as lieu scrip; but that the Department had passed an order suspending all right to make lieu entries based upon what was known as Hyde scrip, that is, the surrender by F. A. Hyde & Company of land situated in a reserve as a basis for the selection of lieu land. It was alleged that under this order, without rejecting the particular application of the complainants which was pending for action, the Land Department in violation of law and the rights of the complainants had patented the land covered by the second application to the defendants or those under whom they held. Hence the relief which we have at the outset stated was prayed.

The bill was demurred to for want of equity. The demurrer was sustained. The case was taken to the Circuit Court of Appeals, where the judgment was affirmed, the court resting its opinion in express terms upon the ruling which had been previously made by it in *Daniels* v. *Wagner*, which ruling has been here since reversed in the case referred to at the outset.

In the discussion at bar reference is made by the appellees to the first application to enter the land pending the request of the State for a survey and reliance is placed upon that fact to establish that the decree below rests upon an independent ground of law and fact not involving the existence of the discretionary power passed upon in the *Daniels Case*. But conceding, for the sake of the argument only the soundness of the contention, this does not control the case, as the rights of the complainants are in addition based upon the second application to make the lieu entry, which, as we have seen, was filed after the survey and after the State had made such selections as it desired and after the time for selections by it had expired. The case therefore must necessarily rest upon the general action of the Department concerning what was known as Hyde

scrip, and this in view of the manner in which the right was asserted necessarily raises the question of the existence of the discretionary power which was passed upon in the *Daniels Case*, a result clearly indicated by the action of the court below in basing its ruling in this case upon that which it had previously made in the *Daniels Case*. We think therefore that as our previous decision in the *Daniels Case* unmistakably establishes that the ground upon which the court maintained the demurrer in this case was an erroneous one, it must follow, as there is no ground independent of that upon which the action of the court can be sustained, that the decree must be reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed.

THE STATE OF GEORGIA *v.* TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED.

MOTION TO ENTER A FINAL DECREE AGAINST THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED.

No. 1, Original.—Ordered to be entered June 1, 1915.

Decree entered pursuant to opinion delivered May 1915, *ante*, p. 475, and appointing inspector to observe operations of plant of defendant, Ducktown Sulphur, Copper & Iron Company, Limited, and requiring said defendant to prevent escape of fumes carrying more than a specified amount of sulphur.

DECREE

On consideration of the motion of complainant for final injunction, the application of defendant Ducktown Sulphur, Copper & Iron Company, Limited, to show changed conditions, the proof submitted thereon, and of the argument of counsel thereupon had, and the Court being

of opinion that by reducing the amount of sulphur discharged into the air said defendant probably can operate its plant without subjecting the territory of Georgia to serious danger of immediate injury, and deeming it desirable to be more fully informed concerning the true conditions and results which may be obtained by subduing the noxious gases discharged,

IT IS ACCORDINGLY ordered, adjudged and decreed:

(1) That the defendant Ducktown Sulphur, Copper & Iron Company, Limited, shall hereafter keep daily records showing fully and in detail the course and result of its operations.

(2) That Dr. John T. McGill, of Vanderbilt University, Nashville, Tennessee, is hereby appointed Inspector to observe the operations of said defendant's plant and works. He shall be given by it at all times free and full access to its books, records and premises, and during the next six months he shall make frequent and careful observations—at least one each fortnight—of the conditions of the plant and works, the manner of their operation, the quantity and character of smoke emitted therefrom, and the resulting effect upon vegetation within the vicinity and in the State of Georgia. At the end of that time he shall make a full report of his observations accompanied by recommendations as to appropriate future action. To cover necessary costs and expenses incident to these services and the reasonable compensation of the Inspector, the defendant Ducktown Sulphur, Copper & Iron Company, Limited, is hereby directed to deposit with the Clerk of this Court, within ten days, the sum of five thousand dollars. Of this sum not exceeding two thousand dollars shall be paid from time to time, prior to October 12th next, by the Clerk to the Inspector, upon his written application, to cover costs, expenses, and on account of his services, etc.

(3) That said defendant hereafter shall not permit the

escape into the air from its works of fumes carrying more than 45% of the sulphur contained in the green ore subjected to smelting.

(4) That it shall not hereafter permit the escape into the air of gases the total sulphur content of which shall exceed twenty tons during one day from April 10th to October 1st of each year or exceed forty tons in one day during any other season.

(5) That the cause will be retained upon the docket for such further action as may be proper and either party may at any time hereafter apply for relief as it may be advised.

June 1, 1915.

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In establishing "angle of repose" for banks of excavation, honest exercise of judgment by engineers in charge sufficient; and contractor not entitled to damages by reason of sloughing of banks on account of too sharp angle. *Id.*

Cost of recovering concrete forms buried by sloughing of banks of excavation held not recoverable by contractor. *Id.*

Government held not responsible to contractor for promise of additional compensation for cofferdams to protect work, made by officer without authority and which was subsequently revoked. *Id.*

Provision for extra work held not to supersede paragraph requiring work to be done by contractor himself; and where conditions contemplated by contract required use of cofferdams, contractor not entitled to extra compensation therefor. *Id.*

Letter from Government engineer notifying contractor that larger amount of material than that specified in contract would probably be required, held not to be a contract for the additional amount or modification of original contract. *Smoot* v. *United States*..... 38

Liability under: Attorneys originally employed, under written contract containing provisions against revocation, to collect claim against Government, and who rendered substantial services in connection therewith, but had been superseded by other attorneys over their objection and offer to proceed with case, held entitled to compensation to amount equal to that provided by contract. *McGowan* v. *Parish* 285

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While judgment against corporation may be made conclusive upon stockholders, as to existence and amount of debt, property of third party may not be taken to satisfy debt because he is a stockholder and indebted to corporation, without opportunity to be heard. *Coe* v. *Armour Fertilizer Works* 413

State statute allowing, after execution returned "no property" against corporation, execution to issue against stockholder for same debt to be enforced against his property to extent of his unpaid subscription, without notice or other preliminary step, is repugnant to Fourteenth Amendment. *Id.*

Foreign: State may determine conditions upon which foreign corporation may do business within its limits, and altogether exclude one, not doing an interstate business, from doing business therein, so long as no Federal constitutional or statutory rights are destroyed or abridged. *Phoenix Ins. Co.* v. *McMaster* 63

Exercise in good faith of statutory authority by state officers to license and reject doing of intrastate business by foreign corporations, not denial of equal protection to excluded corporation, where action based on classification not arbitrary or unreasonable. *Id.*

Requiring foreign insurance corporations having less than certain proportionate amount of investments in state securities to make deposits as condition to doing business within State, while those having the amount might give surety bonds, not unconstitutionally arbitrary. *Id.*

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Under § 24, par. 20, Jud. Code, District Court has jurisdiction of suit against United States for refund of taxes paid. *Id.*

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Under par. 20, § 24, Jud. Code, court has jurisdiction of suit against United States for refund of money paid for stamps affixed to charter parties under § 25, War Revenue Act of 1898. *United States* v. *Hvoslef* 1

Under refunding acts such claims are founded upon law of Congress within meaning of Tucker Act and Judicial Code. *Id.*

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That a director, but not resident agent, of foreign corporation, resides within State, does not give courts thereof jurisdiction over the corporation which is not doing business and has no resident agent therein; and this applies to a judgment even though by implied reservation its effect is limited to confines of State. *Id.*

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One extradited from Great Britain not protected by § 5275, Rev. Stat., from trial and conviction for crime committed in State after extradition. *Id.*
Under § 189, Crim. Code, offense is complete each time any one mail bag is torn or injured, irrespective of any attack upon or mutilation of any other bag. *Ebeling* v. *Morgan*. .. 625
Under § 189, Crim. Code, successive cuttings of different mail bags separate offenses. *Id.*
Same course of conduct and upon same occasion may amount to separate offenses. *Id.*
In prosecution under § 189, Crim. Code, proof of cutting one mail sack will not support counts as to other sacks, but the cutting into each sack constitutes separate crime. *Id.*
Under §§ 190, 192, Crim. Code, two offenses—breaking into a post office and stealing property belonging to Post Office Department—may be committed and separately charged and punished. *Morgan* v. *Devine* 632
Congress may define offenses against the law and its purpose was manifest in enacting §§ 190, 192, Crim. Code, to create separate offenses under each section. *Id.*
Test of whether breaking and larceny constitute two separate offenses is whether separate acts have been committed with requisite criminal intent and such as are punishable by the statute. *Id.*
Test of identity of offenses when double jeopardy pleaded is whether same evidence required to sustain them; and if not, then fact that both charges relate to and grow out of one transaction does not make single offense where more than one defined by statute. *Id.*
One convicted under separate counts of same indictment for

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violation of §§ 190, 192, Crim. Code, and sentenced separately under each, held not, after having served sentence under one count, entitled to be released on ground of double jeopardy because the several things charged were done at same time and as part of one transaction. *Id.*

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No notice or hearing necessary where assessment of duties is *in rem.* *Id.*

In case of fraudulent entry, inability of Government to proceed *in rem* does not prevent it from enforcing personal liability of importer. *Id.*

Importer not concluded by reliquidation order made more than year after entry where complaint contains no allegation of presence of protest or of fraud, but may plead and defend even though he did not file protest and make payment required in case of original liquidation. *Id.*

In suit to recover duty assessed under such reliquidation, Government must conform to general rule of pleading where recovery sought on ground of fraud. *Id.*

DAMAGES:

In cases under Employers' Liability Act right of recovery depends entirely upon that statute, state statutes being superseded thereby. *St. Louis, I. M. & S. Ry.* v. *Craft* 648

At common law death by wrongful act affords no basis of recovery of damages, and right of action for personal injuries dies with person injured. *Id.*

Recovery under Employers' Liability Act as amended. *Id.*

Diminution under Employers' Liability Act; duty of jury in determining amount. *Seaboard Air Line* v. *Tilghman* 499

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DESCENT AND DISTRIBUTION:

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Where homesteader entitled to patent, his heirs on his death take as such under § 2448, Rev. Stat., and not directly under § 2291. *Doran* v. *Kennedy* 362

Law governing descent and distribution of Indian allotments under Supplemental Creek Agreement of 1902. *McDougal* v. *McKay* 372

Where Creek Indian allottee under Supplemental Agreement of 1902 died leaving father of Creek blood and mother of non-Creek blood, father takes fee simple to allotment; had both been of Creek blood and duly enrolled each would have taken one-half. *Id.*

Court will not disregard effect of decisions of state and Federal courts which have become rules of property and on which many titles have been acquired. *Id.*

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Jurisdiction under § 250, Jud. Code, general except in cases under first class. *McGowan* v. *Parish* 285

Where jurisdiction invoked on substantial ground other than that of jurisdiction of trial court, it extends to determination of all questions presented by record, irrespective of disposition of particular question on which appeal rests. *Id.*

Section 250, Jud. Code, confers no jurisdiction on this court to review judgment of Court of Appeals where question of authority of United States arising under the patent laws; the only mode of review being by certiorari or certificate. *Chott* v. *Ewing* 197

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What regulations State may establish as to discipline of its educational institutions, and how to be enforced, for determination of state courts, whose decision conclusive in absence of denial of due process of law. *Id.*

Mississippi statute of 1912, prohibiting certain fraternities in its educational institutions, not unconstitutional either as denying students due process of law or as denying some of them equal protection of the law. *Id.*

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In Porto Rico, minor deprived of property by private sale may maintain ejectment on coming of age, without first seeking rescission of partition. *Longpre* v. *Diaz* 512

Under Art. 442, Civ. Code of Porto Rico, heir who possessed property in personal good faith relieved from liability to account after ejectment, even though ancestor acquired property otherwise. *Id.*

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Unsuccessful defendant, unless purchaser in good faith, must account for fruits gathered during possession; and one purchasing property of a minor under void instrument not purchaser in good faith. *Id.*

Where holder of gas and oil lease cannot maintain ejectment in state court, he cannot, under §§ 721, 914, Rev. Stat., do so in Federal courts in the State. *Guffey* v. *Smith* 101, 120

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EMPLOYERS' LIABILITY ACT:

Scope: Right of recovery for wrongful death depends entirely upon the act, state statutes being superseded thereby. *St. Louis, I. M. & S. Ry.* v. *Craft* 648

Who within: Congress used term "employé" in its natural sense and not as including persons on train engaged in various services for masters other than carrier. *Robinson* v. *Baltimore & Ohio R. R.* 84

The amendment of 1910 gave to the personal representatives of decedent, for the benefit of the persons specified, the right of action which was in the injured person and which theretofore died with him. *St. Louis, I. M. & S. Ry.* v. *Craft* 648

Contracts prohibited: A contract between Pullman Company and employé, who is also employé of railroad company, releasing the former and all railroads on which Pullman car operated from liability, is invalid as to railroad under § 5 of act. *Robinson* v. *Baltimore & Ohio R. R.* 84

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that of diminution of damages. *Seaboard Air Line* v. *Tilghman* 499

Damages recoverable: Provisions in § 9, as amended, that there shall be only one recovery, does not restrict personal representative of decedent who suffered pain after injury to one basis of recovery to exclusion of other or require him to make choice, but does limit him to one recovery for both. *St. Louis, I. M. & S. Ry.* v. *Craft* 648

Under §§ 1 and 9, as amended, personal representative to recover, on part of designated beneficiaries, such damages as will compensate them for their own pecuniary loss and such as will be reasonably compensatory for loss and suffering of decedent while he lived. *Id.*

Such recovery not a double one for single wrong, but a single one for a double wrong. *Id.*

Quære whether personal representative of deceased employé can recover where recovery by decedent in lifetime. *Id.*

Generally such pain and suffering as are substantially contemporaneous with death, or mere incidents to it, afford no basis for separate estimation or award of damages under the statute. *Id.*

Where there was uncontradicted evidence that decedent survived his injuries for something more than half an hour, and that the injuries were such as to cause extreme pain if he remained conscious, and there was conflicting evidence as to whether he did so remain, those questions were properly submitted to the jury; and the question for this court is not which way the evidence preponderated but whether there was evidence from which the jury could reasonably find that decedent did endure conscious pain during the period between his injury and death. *Id.*

Where causal negligence attributable partly to carrier and partly to injured employé, latter may recover only diminished sum bearing same relation to full damages that negligence attributable to carrier bears to that attributable to both. *Seaboard Air Line* v. *Tilghman* 499

Not for jury to determine amount in which damages should be diminished by reason of contributory negligence of employé without being advised by court of statutory rule therefor. *Id.*

Pleading and evidence: In suit under Act contract between plaintiff and third party may be admissible to show that plaintiff was not defendant's employé, even though demurrer

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Where trial court might have dismissed for want of equity jurisdiction, but did not do so, this court not called upon to pass on question. *Id.*
Right to object to jurisdiction on ground of adequate remedy at law may be waived. *Id.*
Where officers of Government do not have to invoke § 3477, Rev. Stat., and are willing to pay amount of claim into court and so protect rights of one claiming interest in warrant, and all parties consent, and grounds for equity exist and there is no clear adequate remedy at law, court may exercise equity jurisdiction. *Id.*
Remedies and procedure in equity in Federal courts not determined by local laws or rules of decision, but by general principles, rules and usages of uniform operation therein. *Guffey* v. *Smith* 101, 120
In Federal courts, a clause in a lease permitting lessee to surrender is no obstacle to enforcing lease in equity against subsequent lessee committing waste. *Id.*
Whether lease enforceable in equity determined in view of circumstances under which given; and lease in this case held not so unfair and inequitable as to preclude relief. *Id.*
Where ejectment not maintainable by holder of gas and oil lease against subsequent lessee, and there is no other adequate remedy, former may obtain equitable relief in Federal courts where requisite amount in controversy and diverse citizenship exists, even though such suit not maintainable in state courts. *Id.*
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Under the statute of Idaho giving remedy for wrongful death, recovery is not for benefit of estate of decedent, but for that of his heirs as established by law of State. *Spokane & Inland Empire R. R.* v. *Whitley* 487

Probate court has jurisdiction to order sale under state law of property within homestead entry to which homesteader entitled to patent before his decease. *Doran* v. *Kennedy* ... 362

Provision of § 2296, Rev. Stat., does not deprive probate court of jurisdiction over land of which decedent entitled to patent. *Id.*

Where homesteader entitled to patent, his heirs on his death take as such under § 2448, Rev. Stat., and not directly under § 2291. *Id.*

See **Employers' Liability Act; Guardian and Ward.**

ESTOPPEL:

Receipt of shipment by carrier without notice to shipper of its inability to perform service will estop it from setting up excuse for non-service. *Eastern Ry.* v. *Littlefield* 140

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EVIDENCE:

Provision in policy of insurance prescribing express condition cannot be varied by parol evidence to effect that insurer knew condition was being and had been violated during existence of prior policy of which existing policy purported to be a renewal. *Lumber Underwriters* v. *Rife* 605

Rule that burden to show bad faith on one charging it not applicable where it is shown *ipso facto* by unlawful acquisition. *Longpre* v. *Diaz* 512

Commerce Commission is allowed reasonable latitude in interrogating witness in proper proceeding to ascertain if device to obtain forbidden end is used. *Ellis* v. *Interstate Com. Comm* 434

Until corporation, not carrier, furnishing instrumentalities to shipper shown to be mere tool of latter for obtaining preferences, witness need not answer questions concerning private business of corporation, but should answer questions in regard to furnishing instrumentalities so far as they affect matters which under § 15, Commerce Act, are subject to Commission. *Id.*

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Interstate Commerce Commission may not in mere fishing expedition interrogate witness as to affairs of stranger on chance of discreditable disclosure. *Id.*

In suit under Employers' Liability Act contract between plaintiff and third party may be admissible to show that plaintiff was not defendant's employé, even though demurrer sustained to special plea that contract contained release of liability. *Robinson* v. *Baltimore & Ohio R. R.*..... 84

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Section 2677, Gen. Stat. 1906, of Florida, as amended in 1909, relative to execution against corporations and their stockholders, is repugnant to due process clause of Fourteenth Amendment. *Coe* v. *Armour Fertilizer Works*..... 413

State statute allowing, after execution returned "no property" against corporation, execution to issue against stockholder for same debt to be enforced against his property to extent of his unpaid subscription, without notice or other preliminary step, is repugnant to Fourteenth Amendment. *Id.*

Execution held not a mere attachment establishing lien. *Id.*

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That officer of Land Department commits a wrong by denying right expressly conferred by law cannot become generating source of discretionary power to make the act legal. *Id.*

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Tax on charter parties held tax on exports within prohibition of Art. I, § 9, of Constitution. *Id.*

Freedom from taxation on exports under Art. I, § 9, Constitution, means that process of exportation shall not be obstructed by any burden of taxation. *Id.*

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Inhibition on, not intended to obstruct mere alterations in conditions deemed necessary for orderly infliction of humane punishment. *Malloy* v. *South Carolina* 180

Only those laws that create or aggravate the crime, increase the punishment, or change the rules of evidence for purpose of conviction, fall within prohibition. *Id.*

Changing mode of infliction of penalty from hanging to electrocution does not increase punishment and is not unconstitutional under prohibition of Constitution. *Id.*

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One extradited from Great Britain not protected by § 5275, Rev. Stat., from trial and conviction for crime committed in State after extradition. *Collins* v. *Johnston* 502

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Where averments of fact in complaint contradicted by answer, and dismissal for want of equity may indicate dismissal on merits, court assumes that state court adopted facts set up in answer. *Reinman* v. *Little Rock* 171

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FEDERAL QUESTION:

Contention that state statute forbidding ownership of real estate by non-resident aliens is repugnant to Fourteenth Amendment simply because it does forbid such ownership, is frivolous. *Troop* v. *Ulysses Land Co.* 580

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into effect until two years after title had vested in defendants in error or in their grantors under state law, held too frivolous to sustain jurisdiction under § 238, Jud. Code; and this even though widow had some use of intestate's property which continued until after treaty became operative, if title was not suspended. *Id.*

Facts alleged in regard to damages caused by negligent operation of carrier defendant held to exclude affixing to such acts character of state action so as to bring them within Fourteenth Amendment. *St. Anthony Church* v. *Pennsylvania R. R.* 575

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Decision of highest state court that method of calling police statute into operation is proper, does not involve Federal question. *Booth* v. *Indiana* 391

Where order of state railroad commission as to stoppage of interstate trains is based on requirement of state statute, validity of which sustained by state court, this court must pass upon validity of statute. *Chicago, B. & Q. Ry.* v. *Wisconsin R. R. Comm.* 220

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Assertion that one seeking to exchange lands under Forest Act not entitled, held devoid of merit where bill shows that Secretary expressly found good faith. *Daniels* v. *Merrithew* 570
See **Public Lands.**

FOURTEENTH AMENDMENT. See **Constitutional Law.**

FRATERNAL ORGANIZATIONS:
Rights of members of fraternal and beneficial corporation can only be determined by resort to its constitution and by-laws. *Royal Arcanum* v. *Green* 531
For purpose of controversies as to assessments, society is the representative of all its members. *Id.*

FRATERNITIES. See **Educational Institutions.**

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GUARDIAN AND WARD:
Mother of Indian minors whose father not an Indian held

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natural guardian with power to relinquish to United States their interest in allotment. *Henkel* v. *United States*..... 43
Guardianship of United States over Indians not affected by citizenship of allottees. *United States* v. *Noble*..... 74
Under Porto Rican law in 1892, widow and guardian *ad litem* without authority to give property of minor in payment of debt of deceased father in private sale; nor had any judge authority to approve such a voluntary partition as here involved. *Longpre* v. *Diaz*..... 512
Such disposition void and minor on majority could sue in ejectment without first seeking rescission of partition. *Id.*

HABEAS CORPUS:
Writ cannot be employed as substitute for writ of error. *Collins* v. *Johnston*..... 502
In *habeas corpus* proceedings court confined to examination of fundamental and jurisdictional questions. *Id.*
Where record shows that petitioner's allegations of mob domination in trial court had been considered by state court and, upon evidence there taken but not disclosed in Federal court, found groundless, that finding taken as true until reasonable ground shown to contrary. *Frank* v. *Mangum*.... 309
In absence of claim that offense based on unconstitutional statute, question of whether petitioner unconstitutionally deprived of liberty not determinable until conclusion of course of justice in state courts, and Federal courts must consider proceedings of both trial and appellate courts of State. *Id.*

HARBOR LINES:
Right of owner of wharf to compensation for removal of part thereof outside of new harbor lines. See *Greenleaf Lumber Co.* v. *Garrison*..... 251
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HEARING:
Condemnation without, unconstitutional. *Riverside Mills* v. *Menefee*..... 189
Not necessary where assessment of duties on imports is *in rem*. *United States* v. *Sherman*..... 146
Sufficiency as to, of tax sale statute. See *Chapman* v. *Zobelein*..... 135
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HEIRS. See **Adoption; Descent and Distribution; Indians; Public Lands.** PAGE

HOMESTEADS. See **Public Lands.**

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IDAHO:

Under the statute giving remedy for wrongful death, recovery is not for benefit of estate of decedent, but for that of his heirs as established by law of State. *Spokane & Inland Empire R. R.* v. *Whitley* 487

ILLINOIS:

Lessee failing to pay rent when due may cure default by payment at any time prior to demand and notice or within time named in notice. *Guffey* v. *Smith* 101, 120

Holder of oil and gas lease cannot maintain ejectment. *Id.*

Oil and gas lease held to pass to lessee, his heirs and assigns, a present vested freehold interest in premises; and option on part of lessee to surrender does not create tenancy at will, give lessor option to compel surrender, or make lease wanting in mutuality. *Id.*

IMPORTS:

Suit against importer for fraudulently entering goods. *United States* v. *Sherman* 146

See **Customs Law.**

INDIANA:

Coal mine wash house law not unconstitutional under Fourteenth Amendment. *Booth* v. *Indiana* 391

INDIANS:

Descent and distribution: Where Creek allottee under Supplemental Agreement of 1902 died leaving father of Creek blood and mother of non-Creek blood, father takes fee simple to allotment; had both been of Creek blood and duly enrolled each would have taken one-half. *McDougal* v. *McKay* 372

Allotment made under Supplemental Creek Agreement of 1902 not a new acquisition, but an ancestral estate, within meaning of c. 49, Mansfield's Digest. *McDougal* v. *McKay* 372

Pigeon v. *Buck* 386

Same ruling applicable to allotment of full blooded Chickasaw. *Pigeon* v. *Buck* 386

Law governing descent and distribution of allotments under Supplemental Creek Agreement of 1902. *McDougal* v. *McKay* 372

Court will not disregard effect of decisions of state and

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Federal courts which have become rules of property and on which many titles have been acquired. *Id.*

Control over lands of: Reclamation Act of 1902 gave Secretary of Interior power to acquire rights and property of allottees by paying for improvements and giving right to lieu lands. *Henkel* v. *United States*..... 43

Authority of United States to devote certain lands to irrigation purposes. *Id.*

Restrictions on alienation: Restrictions upon alienation are absolute and bind land for specified period, and neither the act of June 10, 1896, nor that of June 7, 1897, providing for leases, gave allottee or his heirs any power to dispose of his or their interest in the lands subject to the lease or any part of it. *United States* v. *Noble*..... 74

Restrictions on alienation of allotted lands held not to extend to sale of improvements to United States with right to select other lands, for purpose of devoting allotted lands to irrigation purposes as provided by Congress. *Henkel* v. *United States*..... 43

Assignments of interest in rents and royalties which pertained to the reversion of land leased under the acts of 1896 and 1897, are valid. *United States* v. *Noble*..... 74

"Overlapping leases" of Indian allotments condemned. *Id.*

Rule that general power to lease for not exceeding specified period without saying either in possession or reversion, only authorizes lease in possession, applicable to Indian allottees leasing under authority of act of Congress, and leases made for the full period subject to an existing and partly expired lease for the same number of years, are unauthorized and void. *Id.*

United States may sue to set aside conveyances or contracts transferring restrictions upon alienation of allotments. *Id.*

Guardianship: Guardianship of United States not affected by citizenship of allottees; and so held as to Quapaw Indians. *United States* v. *Noble*..... 74

Mother of Indian minors whose father not an Indian held natural guardian with power to relinquish to United States their interest in allotment. *Henkel* v. *United States*..... 43

INFANTS:

One purchasing property of minor under void instrument not purchaser in good faith. *Longpre* v. *Diaz*..... 512

Right to maintain ejectment on coming of age. See *Id.*

INSTRUCTIONS TO JURY: PAGE

Charge in action for personal injuries found unobjectionable. *Texas & Pacific Ry.* v. *Hill* 208

INSURANCE:

Provision in policy of insurance prescribing express condition cannot be varied by parol evidence to effect that insurer knew condition was being and had been violated during existence of prior policy of which existing policy purported to be a renewal. *Lumber Underwriters* v. *Rife* 605

On proof of different contract from that expressed in policy, equity will reform; but insured may not take policy without reading it and enforce it at law otherwise than according to its terms. *Id.*

Policy a document complete in itself; and an endorsement that it is a renewal of a prior existing policy which had provision for renewal therein has no bearing on express terms of instrument. *Id.*

Interest in mortuary fund made up by contributions from all members of an insurance company is common. *Hartford Life Ins. Co.* v. *Ibs* 662

Whether treated as an expectancy or as a contingent interest, the right of the wife to recover from an assessment corporation of which her husband was a member, makes her in privity with him and she is bound by the contracts which he may have entered into with the corporation in regard to the mortuary fund created under contract between the members. *Id.*

Taxes on policies of marine insurance on exports prohibited by Art. I, § 9, of Constitution. *Thames & Mersey Ins. Co.* v. *United States* 19

INSURANCE COMPANIES:

Requiring foreign insurance corporations having less than certain proportionate amount of investments in state securities to make deposits as condition to doing business within State, while those having the amount might give surety bonds, not unconstitutionally arbitrary. *Phoenix Ins. Co.* v. *McMaster* 63

INTERSTATE COMMERCE:

1. *Power of Congress over:* Power of Congress to regulate commerce paramount to right of one acting under state authority to erect anything in navigable waters. *Greenleaf Lumber Co.* v. *Garrison* 251

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2. *Power of States over:* Until Congress exerts its authority, State may exercise its police power, even incidentally affecting such commerce. *Sligh* v. *Kirkwood*..... 52

State may require of carriers adequate local facilities, even to stoppage of interstate trains; but when local requirements met such stoppage becomes illegal interference with interstate commerce. *Chicago, B. & Q. Ry.* v. *Wisconsin R. R. Comm.*..... 220

State law not contrived in aid of policies of Congress, but to enforce policy of State differently conceived, not one in aid of interstate commerce. *Charleston & W. C. Ry.* v. *Varnville Co.*..... 597

Notwithstanding §§ 8, 22 of Commerce Act, jurisdiction of state courts in existing causes of action not superseded where determination of matters calling for exercise of administrative power and discretion of Commerce Commission or which are within exclusive jurisdiction of Federal courts, are not involved. *Pennsylvania R. R.* v. *Puritan Coal Co.*..... 121

3. *Preferences and discriminations:* Every advantage which may enure to shipper as result of position of plant, his ownership or wealth, is not necessarily an illegal preference. *Ellis* v. *Interstate Com. Comm.*..... 434

4. *Reparation:* By § 8 of Commerce Act, shipper has right of action against carrier for damages occasioned by the doing of prohibited thing; and by § 9 has option to proceed before Commission or in Federal court. *Pennsylvania R. R.* v. *Puritan Coal Co.*..... 121

Suit for damages occasioned by violation or discriminatory enforcement of carrier's rule of practice, arising in interstate commerce, within jurisdiction of either state or Federal courts. *Id.*

Carrier not liable for failure to supply cars as result of sudden and great demands which could not be foreseen, but must treat shippers fairly if not identically. *Id.*

State courts have jurisdiction of action of shipper against carrier for damages for failure to furnish needed cars; and motive of carrier is immaterial. *Pennsylvania R. R.* v. *Puritan Coal Co.*..... 121

Eastern Railway v. *Littlefield*..... 140

5. *Burdens on and interference with:* Section 2573, Code of 1912 of South Carolina, relative to adjustment of claims against carriers, an unconstitutional burden on interstate

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commerce and in conflict with Carmack Amendment. *Charleston & W. C. Ry.* v. *Varnville Co.* 597

State statute which is burden on interstate commerce not saved by calling it exercise of police power. *Id.*

Wisconsin statute requiring interstate trains to make certain stops held unconstitutional under commerce clause of Constitution. *Chicago, B. & Q. Ry.* v. *Wisconsin R. R. Comm.* .. 220

This court may determine sufficiency of local facilities furnished by carrier in determining whether order of state commission is interference. *Id.*

Florida statute of 1911, prohibiting delivery for shipment of citrus fruits immature and otherwise unfit for consumption, not an unconstitutional attempt to regulate. *Sligh* v. *Kirkwood* 52

6. *Tariffs:* Duly filed tariff of carrier must be charged by it and paid by shipper or passenger without deviation therefrom. *Louisville & Nashville R. R.* v. *Maxwell* 94

Shippers and travelers must abide by duly filed tariff, unless found unreasonable by Commission. *Id.*

Neither misquotation of rates nor ignorance is excuse for charging or paying less or more than filed rate. *Id.*

Passenger must pay filed tariff for route taken, notwithstanding misquotation by carrier's agent and acceptance by passenger in good faith. *Id.*

7. *Transportation:* Definition of transportation in § 1 of Commerce Act includes instrumentalities which owners and builders let to railroads, but the definition is a preliminary to requirement that carrier shall furnish instrumentalities upon reasonable request, not that owners and builders thereof shall be regarded as carriers contrary to truth. *Ellis* v. *Interstate Com. Comm.* 434

INTERSTATE COMMERCE COMMISSION:

Until corporation, not carrier, furnishing instrumentalities to shipper shown to be mere tool of latter for obtaining preferences, witness need not answer questions concerning private business of corporation, but should answer questions in regard to furnishing instrumentalities so far as they affect matters which under § 15, Commerce Act, are subject to Commission. *Ellis* v. *Interstate Com. Comm.* 434

Where intervening corporation is means by which owner of property transported incidentally renders services its charges are subject to supervision by Commission. *Id.*

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Commission is allowed reasonable latitude in interrogating witness in proper proceeding to ascertain if device to obtain forbidden end is used. *Id.*

Commission may not in mere fishing expedition interrogate witness as to affairs of stranger on chance of discreditable disclosure. *Id.*

Control of Commission over private cars is effected by control over carriers subject to Commerce Act and not over builders and owners thereof not subject thereto. *Id.*

Question of fairness of carrier's rule of distribution of cars in case of shortage is for Commission. *Pennsylvania R. R.* v. *Puritan Coal Co.* 121

Preliminary finding of Commission not necessary to suit by shipper against carrier for damages occasioned by discrimination in distribution of cars. *Id.*

IRRIGATION:

Authority of United States to devote certain Indian lands to purposes of. See *Henkel* v. *United States*..... 43

JUDGMENTS AND DECREES:

Full faith and credit clause of Constitution does not require authenticated proof of decree to include all pleadings and proceedings. *Parker* v. *McLain* 469

Where original decree sued on does not purport to lay reciprocal duty on judgment creditor, full faith and credit not denied because judgment on decree does not impose such duty. *Id.*

Where trial court refuses to hold that rights of parties were determined by law of another State in which decree rendered establishing them, and to apply such law, a question arises under the full faith and credit clause of the Constitution. *Royal Arcanum* v. *Green* 531

Judgment of State of incorporation sustaining as legal an amendment to constitution and by-laws of fraternal and beneficial corporation, is entitled to full faith and credit in courts of another State. *Id.*

Exclusion from evidence of decree of courts of State in which insurance company organized, adjudging rights of corporation as between itself and members of its mortuary fund, and refusal to enforce provisions of such decree, amount to denial of full faith and credit. *Hartford Life Ins. Co.* v. *Ibs.* 662

Decree of court having jurisdiction to determine all questions relating to internal management of corporation man-

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aging mortuary fund, in suit brought on behalf of all similarly situated, establishing rights of members of fund, is binding upon all members similarly situated, and is entitled to full faith and credit in courts of other States in suits between the corporation and such members. *Id.*

Even if such suits are for a different purpose than the one in which decree entered, it must be given full faith and credit, and is conclusive so long as unmodified. *Id.*

Where, under laws of State of commission of wrongful act causing death, right of action is for benefit of widow and mother of decedent, and the widow, suing as administratrix, recovered judgment in another State, court of State in which wrongful act committed, in suit by mother, not bound to regard such judgment as having been prosecuted by or on behalf of the mother; nor did attempt of mother to obtain a part of the proceeds of such judgment, which was successfully denied, amount to a ratification thereof, entitling it to full faith and credit in the suit by the mother. *Spokane & Inland Empire R. R.* v. *Whitley* 487

That judgment may not, under full faith and credit clause, be enforced in another State, affords no ground for court entering it without jurisdiction in violation of due process of law. *Riverside Mills* v. *Menefee* 189

Due process cannot be denied in fixing, by judgment against one beyond jurisdiction of court, an amount due, even though enforcement of judgment postponed until issue of execution. *Id.*

Consent decree that claimed portion of warrant be deposited in court amounts to waiver of jurisdictional objections and renders irrelevant all questions as to actual lien on warrant. *McGowan* v. *Parish* 285

While judgment against corporation may be made conclusive upon stockholders, as to existence and amount of debt, property of third party may not be taken to satisfy debt because he is a stockholder and indebted to corporation, without opportunity to be heard. *Coe* v. *Armour Fertilizer Works* 413

Judgment of probate court having jurisdiction to order sale cannot be collaterally attacked. *Doran* v. *Kennedy* 362

Final decree ordered in 206 U. S. 230, restraining Ducktown Sulphur, Copper & Iron Company from operating its plant except upon terms specified in opinion, and the case retained for further action. *Georgia* v. *Tennessee Copper Co.* 474

Decree pursuant to opinion and appointing inspector to ob-

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serve operations of plant of defendant and requiring defendant to prevent escape of fumes carrying more than a specified amount of sulphur. *Georgia* v. *Tennessee Copper Co.* 678

See **Jurisdiction.**

JUDICIAL CODE:

Intended to reduce jurisdiction of this court. *Chott* v. *Ewing* 197

Apparent conflict between fifth and concluding paragraphs of § 250 eliminated by turning primarily to context of section and secondarily to provisions in *pari materia*. *Id.*

Provisions construed:

Section 24. *American Surety Co.* v. *Shulz* 159
Rounds v. *Cloverport Foundry* 303
Thames & Mersey Ins. Co. v. *United States* 19
United States v. *Emery* 28
United States v. *Hvoslef* 1

Section 128. *Louisville & N. R. R.* v. *Western Union Tel. Co.* 300

Section 237. *Coe* v. *Armour Fertilizer Works* 413
Cumberland Glass Co. v. *DeWitt* 447
Minneapolis &c. Ry. v. *Popplar* 369
Parker v. *McLain* 469
Reinman v. *Little Rock* 171

Section 238. *Collins* v. *Johnston* 502
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Section 250. *Chott* v. *Ewing* 197
McGowan v. *Parish* 285

Section 251. *Chott* v. *Ewing* 197

Section 262. *United States* v. *Chicago, B. & Q. Ry* 410

Section 266. *McGowan* v. *Parish* 285

Section 297. *Thames & Mersey Ins. Co.* v. *United States* . . . 19
United States v. *Hvoslef* 1

JUDICIAL DISCRETION:

This court will not interfere with exercise unless limits of soundness transcended. *Texas & Pacific Ry.* v. *Hill* 208

Exclusion of jurors and granting and refusal of postponement are within discretion of trial court. *Id.*

JUDICIAL NOTICE:

Notice taken that raising of citrus fruits one of great industries of Florida. *Sligh* v. *Kirkwood* 52

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JURISDICTION:

I. Generally.

Suit for damages occasioned by violation or discriminatory enforcement of carrier's rule of practice, arising in interstate commerce, within jurisdiction of either state or Federal courts. *Pennsylvania R. R.* v. *Puritan Coal Co.* 121

Where ejectment not maintainable by holder of gas and oil lease against subsequent lessee, and there is no other adequate remedy, former may obtain equitable relief in Federal courts where requisite amount in controversy and diverse citizenship exists, even though such suit not maintainable in state courts. *Guffey* v. *Smith* 101, 120

Where officers of Government do not have to invoke § 3477, Rev. Stat., and are willing to pay amount of claim into court and so protect rights of one claiming interest in warrant, and all parties consent, and grounds for equity exist and there is no clear adequate remedy at law, court may exercise equity jurisdiction. *McGowan* v. *Parish* 285

Right to object to equity jurisdiction on ground of adequate remedy at law may be waived. *Id.*

Consent decree that claimed portion of warrant be deposited in court amounts to waiver of jurisdictional objections and renders irrelevant all questions as to actual lien on warrant. *Id.*

Question of deprivation of liberty without due process of law involves jurisdiction not of any particular court but power and authority of State itself. *Frank* v. *Mangum* 309

Provision of § 2296, Rev. Stat., does not deprive probate court of jurisdiction over land of which decedent entitled to patent. *Doran* v. *Kennedy*..... 362

Probate court has jurisdiction to order sale under state law of property within homestead entry to which homesteader entitled to patent before his decease. *Id.*

Refusal of trial court to permit proffered defense, even if erroneous, does not ordinarily affect jurisdiction or amount to more than error. *Collins* v. *Johnston* 502

Proper court of jurisdiction in which corporation managing mortuary fund chartered has power to determine all questions relating to its internal management. *Hartford Life Ins. Co.* v. *Ibs*..... 662

Judicial Code intended to reduce jurisdiction of this court. *Chott* v. *Ewing*..... 197

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Where jurisdiction invoked on substantial ground other than that of jurisdiction of trial court, it extends to determination of all questions presented by record, irrespective of disposition of particular question on which appeal rests. *McGowan* v. *Parish* 285

Where jurisdiction depends upon amount involved, record must fairly show that value in controversy exceeds amount fixed by statute, the criterion being that which is actually in dispute. *Export Lumber Co.* v. *Port Banga Co.* 388

Where plaintiff's prayer for larger amount than judgment recovered and defendant alone appeals, amount in controversy is amount of judgment and total amount of appellant's claim against plaintiff. *Id.*

See **Appeal and Error; Equity; Estates of Decedents; Federal Question.**

II. **Jurisdiction of this court.**

1. *Over judgments of Circuit Court of Appeals:* Corporations created by act of Congress inherently entitled to invoke jurisdiction of this court to review judgment of Circuit Court of Appeals. *Texas & Pacific Ry.* v. *Hill* 208

Texas & Pacific Ry. v. *Marcus* 215

Judgment of Circuit Court of Appeals not reviewable when allegation in complaint of diversity of citizenship was disregarded, unless there remain in the complaint averments of rights under Constitution and laws of United States adequate to sustain jurisdiction. *St. Anthony Church* v. *Pennsylvania R. R.* 575

Inadequacy of averments in bill to sustain jurisdiction under Constitution and laws of United States not cured by showing that nature and character of acts relied upon sufficient to justify implication that such Constitution and laws were relied upon. *Id.*

Refusal of Circuit Court of Appeals to decide case on merits because of erroneous holding that necessary diversity of citizenship wanting, held not basis for review by this court. *Brown* v. *Fletcher* 583

Although this court has jurisdiction to decide on merits case in which it finds diversity of citizenship which the Circuit Court of Appeals found did not exist, it will not exercise it, but will remand case to Circuit Court of Appeals for discharge of duty to hear and decide. *Id.*

Where diverse citizenship exists, decree of Circuit Court of Appeals final, unless bill contains additional averments of

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cause of action arising under Constitution and laws of United States. *Merriam Co.* v. *Syndicate Pub. Co.* 618
Where jurisdiction of District Court invoked on ground of diversity of citizenship and averments of Federal right frivolous or foreclosed, appeal dismissed. *Id.*
Where jurisdiction below rests on diverse citizenship, and averments of unfair trade lack any elements of cause of action under Federal Constitution or laws, no appeal lies. *Id.*
Contention based on attempted registration as trade-mark of word "Webster" affords no jurisdiction for this court to review. *Id.*
2. *Over judgments of District Court:* Appeal lies from final order of District Court made upon petition of Commerce Commission directing witness to answer certain questions and produce documents. *Ellis* v. *Interstate Com. Comm.* 434
Case not disposed of on merits where such action out of harmony with provisions of Jud. Code relative to direct review on questions of jurisdiction and those giving finality to judgments of Circuit Court of Appeals. *Brown* v. *Fletcher* 583
Contention of denial of rights under treaty that did not go into effect until two years after title had vested in defendants in error or in their grantors under state law, held too frivolous to sustain jurisdiction under § 238, Jud. Code; and this even though widow had some use of intestate's property which continued until after treaty became operative, if title was not suspended. *Troop* v. *Ulysses Land Co.* 580
3. *Over judgments of Court of Appeals of District of Columbia:* Jurisdiction under § 250, Jud. Code, general except in cases under first class. *McGowan* v. *Parish* 285
Section 250, Jud. Code, confers no jurisdiction to review judgment of Court of Appeals of District of Columbia where question of authority of United States arising under the patent laws; the only mode of review being by certiorari or certificate. *Chott* v. *Ewing* 197
Apparent conflict between fifth and concluding paragraphs of § 250, Jud. Code, eliminated by turning primarily to context of section and secondarily to provisions *in pari materia.* *Id.*
4. *Over judgments of state courts:* Any enactment to which State gives force of law a state statute within meaning of § 237, Jud. Code. *Reinman* v. *Little Rock* 171
Where, in determining rights of locator of mining claim state court construes Federal statute, this court has jurisdiction

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under § 237, Jud. Code. *Stewart Mining Co.* v. *Ontario Mining Co.* 350

On review under § 237, Jud. Code, questions non-Federal in character not considered; nor can court pass on whether rule of carrier was or was not disobeyed in case dependent upon Safety Appliance Act. *Minneapolis, St. P. & S. Ry.* v. *Popplar* 369

In suit against carrier for services for handling grain through elevators, held that offer of evidence, rejected by referee, as to ownership of stock of elevator company by shipper, did not bring in Commerce Act and there was no Federal question involved giving this court jurisdiction under § 237, Jud. Code. *Pennsylvania R. R.* v. *Keystone Elevator* 432

This court without jurisdiction under § 237, Jud. Code, to review judgment of state court based on state statute substantially identical with Federal Safety Appliance Law and affirmed by appellate courts of State. *Erie R. R.* v. *Solomon* 427

Even if highest state court certified that it had been necessary in such case to consider the Federal law and determine the constitutional validity of the state law, such questions held too frivolous to afford basis for jurisdiction. *Id.*

Plea of former judgment in Federal court adjudicating Federal right, asserts right which, if denied, makes case reviewable under § 237, Jud. Code. *Cumberland Glass Co.* v. *De Witt* 447

To give this court jurisdiction under § 237, Jud. Code, assertion of Federal right must not be frivolous or wholly without foundation. *Parker* v. *McLain* 469

Where trial court refuses to hold that rights of parties were determined by law of another State in which decree rendered establishing them, and to apply such law, a question arises under the full faith and credit clause of the Constitution; and there is jurisdiction under § 237, Jud. Code. *Royal Arcanum* v. *Green* 531

Question of excessiveness of verdict in action for wrongful death not reviewable here under § 237, Jud. Code. *St. Louis, I. M. & S. Ry.* v. *Craft* 648

This court without jurisdiction under § 237, Jud. Code, where later act goes no farther than prior one whose obligation is claimed to be impaired thereby. *New Orleans Tax Payers* v. *Sewerage Board* 33

5. *Over judgments of Supreme Court of Philippine Islands:*

Under § 10 of act of 1902, there is no appeal from Supreme Court of Philippine Islands unless amount in controversy

JURISDICTION—*Continued.* PAGE

exceeds $25,000. *Export Lumber Co.* v. *Port Banga Co.* 388

III. **Of Circuit Court of Appeals.**

Where jurisdiction of District Court depends entirely upon diverse citizenship, judgment of Circuit Court of Appeals final under § 128, Jud. Code. *Louisville & Nashville R. R.* v. *Western Union Tel. Co.* 300

Where diverse citizenship exists, decree of Circuit Court of Appeals final, unless bill contains additional averments of cause of action arising under Constitution and laws of United States. *Merriam Co.* v. *Syndicate Pub. Co.* 618

In cases arising under Trade-mark Act of 1905, judgment final. *Id.*

IV. **Of District Courts.**

Under § 24, Jud. Code, court has jurisdiction of suit to enforce supersedeas bond given under §§ 1000, 1007, Rev. Stat. *American Surety Co.* v. *Shultz* 159

Under § 24, par. 20, Jud. Code, court has jurisdiction of suit against United States for refund of taxes paid under Corporation Tax Law. *United States* v. *Emery* 28

Court has jurisdiction of suit against United States for refund of money paid for stamps affixed to charter parties under § 25, War Revenue Act of 1898, where claim does not exceed $10,000. *United States* v. *Hvoslef* 1

Under refunding acts such claims are founded upon law of Congress within meaning of Tucker Act and Judicial Code. *Id.*

Although Government in demurrer asserts special appearance, if pleading raises not only question of jurisdiction of subject-matter of action but also that of merits, there is a general appearance which waives objection to jurisdiction. *Thames & Mersey Ins. Co.* v. *United States* 19

The court having jurisdiction of claim against United States is that of District of plaintiff's residence, but that requirement is subject to waiver by failure to specifically object to jurisdiction before pleading to merits. *United States* v. *Hvoslef* 1

Such requirement waived by general appearance. *Thames & Mersey Ins. Co.* v. *United States* 19

Where it appears from plaintiff's statement that his case is for infringement and arose under patent laws, the court has jurisdiction, notwithstanding he may also rely upon a contract as furnishing mode in which damages should be ascertained. *Healy* v. *Sea Gull Specialty Co* 479

JURISDICTION—*Continued.* PAGE

Section 24, Jud. Code, not applicable to assignment of interest of *cestui que trust* of testamentary trust fund. *Brown* v. *Fletcher* 583

Suit by trustee in bankruptcy to recover against wrongdoers who had appropriated bankrupt's property without his assent, not one within §§ 23b, 70e, of Bankruptcy Act. *Park* v. *Cameron* 616

Where foundation of right claimed is state law suit to assert it arises under state law; and that it has attached a condition that only Federal legislature can fulfil, does not make case one arising under law of United States under § 24, Jud. Code. *Louisville & Nashville R. R.* v. *Western Union Tel. Co* 300

V. **Of Interstate Commerce Commission.** See **Interstate Commerce Commission.**

VI. **Of Court of Claims.**

Under par. 20, § 24, Jud. Code, court has jurisdiction of suit against United States for refund of money paid for stamps affixed to charter parties under § 25, War Revenue Act of 1898. *United States* v. *Hvoslef* 1

Under refunding acts such claims are founded upon law of Congress within meaning of Tucker Act and Judicial Code. *Id.*

VII. **Of state courts.**

State courts have jurisdiction of action of shipper against carrier for damages for failure to furnish needed cars; and motive of carrier is immaterial. *Pennsylvania R. R.* v. *Puritan Coal Co* 121

Eastern Railway v. *Littlefield* 140

Suit for damages occasioned by violation or discriminatory enforcement of carrier's rule of practice, arising in interstate commerce, within jurisdiction of state courts. *Pennsylvania R. R.* v. *Puritan Coal Co* 121

Notwithstanding §§ 8, 22 of Commerce Act, jurisdiction of state courts in existing causes of action not superseded where determination of matters calling for exercise of administrative power and discretion of Commerce Commission or which are within exclusive jurisdiction of Federal courts, are not involved. *Id.*

Courts of one State cannot, without violating due process clause, extend authority beyond their jurisdiction to condemn resident of another State when neither his person nor property within jurisdiction of former. *Riverside Mills* v. *Menefee* 189

JURISDICTION—*Continued.* PAGE

That a director, but not resident agent, of foreign corporation, resides within State, does not give courts thereof jurisdiction over the corporation which is not doing business and has no resident agent therein; and this applies to a judgment even though by implied reservation its effect is limited to confines of State. *Id.*

Pleading to merits on removal to Federal court and after continuance obtained therein amounts to waiver of objection to jurisdiction of state court. *Texas & Pacific Ry.* v. *Hill*..... 208

In action *in personam* state court has jurisdiction to issue auxiliary attachment against vessel. *Rounds* v. *Cloverport Foundry*..... 303

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Constitution and by-laws of fraternal and beneficial corporation construed by laws of State of incorporation. *Id.*

While right given by law of one State may be enforceable in another, if not opposed to its policy, when so enforced the law of enacting State governs. *Spokane & Inland Empire R. R.* v. *Whitley* 487

When suit is brought in another jurisdiction, such provisions of law of place of wrongful act as are merely procedural may be treated as non-essential; but in an action for death by wrongful act the law of the place of commission of the act must be looked to, to determine the obligation, to whom it runs, and the persons entitled. *Id.*

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Oil and gas lease held to pass to lessee, his heirs and assigns, a present vested freehold interest in premises; and option on part of lessee to surrender does not create tenancy at will, give lessor option to compel surrender, or make lease wanting in mutuality. *Guffey* v. *Smith* 101, 120

Where ejectment not maintainable by holder of gas and oil lease against subsequent lessee, and there is no other adequate remedy, former may obtain equitable relief in Federal courts where requisite amount in controversy and diverse citizenship exists, even though such suit not maintainable in state courts. *Id.*

In Federal courts, a clause in a lease permitting lessee to surrender is no obstacle to enforcing lease in equity against subsequent lessee committing waste. *Id.*

Whether lease enforceable in equity determined in view of circumstances under which given; and lease in this case held not so unfair and inequitable as to preclude relief. *Id.*

Under statutes of Illinois, lessee failing to pay rent when due may cure default by payment at any time prior to demand and notice or within time named in notice. *Id.*

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Where state court has sustained action of state officer as within his statutory authority, that question not open here, but only question whether conduct of state authority transgresses Federal Constitution. *Phoenix Ins. Co.* v. *McMaster*..... 63

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Entryman's interest prior to actual possession more than mere color of title. From time of entry homesteader has right of possession as against all save United States. *Id.*

Where homesteader entitled to patent, his heirs on his death take as such under § 2448, Rev. Stat., and not directly under § 2291. *Doran* v. *Kennedy* 362

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One cannot be deprived of an accrued right by exercise of discretion or wrong committed by land officers. *Daniels* v. *Wagner* 547

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That officer of Land Department commits a wrong by denying right expressly conferred by law cannot become generating source of discretionary power to make the act legal. *Id.*

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Homesteader held not to have ratified action of Land Department in effecting compromise with trespasser on his land. *Knapp* v. *Alexander Co.* 162

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Determinative fact of whether property formerly part of public domain is subject to taxation by State is absence of beneficial interest of United States at time of assessment. *Id.*

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Probate court has jurisdiction to order sale under state law of property within homestead entry to which homesteader entitled to patent before his decease. *Doran* v. *Kennedy* .. 362

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Reclamation Act of 1902 gave Secretary power to acquire rights and property of allottee Indians by paying for improvements and giving right to lieu lands. *Henkel* v. *United States* 43

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What regulations State may establish as to discipline of its educational institutions, and how to be enforced, for determination of state courts, whose decision conclusive in absence of denial of due process of law. *Id.*
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tutions by putting those already connected with organizations, joining of which is to be prohibited, within excepted class by themselves. *Id.*

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Right to abolish jury trial without violating Fourteenth Amendment includes right to limit effect of error respecting incident of trial. *Frank* v. *Mangum* 309

May establish rule of practice that defendant may waive his right to be present on rendition of verdict, without violating due process of law. *Id.*

Fourteenth Amendment does not preclude State from adopting and enforcing rule of procedure that objection to absence of prisoner on rendition of verdict cannot be taken on motion to set aside verdict as nullity after motion for new trial made on other grounds, exclusive of this one, denied. *Id.*

Can grant no right to soil of bed of navigable waters which is not subject to Federal regulation. *Greenleaf Lumber Co.* v. *Garrison* 251

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Regulation of common carriers: May require of carriers adequate local facilities, even to stoppage of interstate trains, but when local requirements met such stoppage become illegal interference with interstate commerce. *Chicago, B. & Q. Ry.* v. *Wisconsin R. R. Comm.* 220

Regulation of corporations: May determine conditions upon which foreign corporation may do business within its limits, and altogether exclude one, not doing an interstate business, from doing business therein, so long as no Federal constitutional or statutory rights are destroyed or abridged. *Phoenix Ins. Co.* v. *McMaster* 63

Power over interstate commerce: Until Congress exerts its authority over interstate commerce, State may exercise its police power, even incidentally affecting such commerce. *Sligh* v. *Kirkwood* 52

Statute which is burden on interstate commerce not saved by calling it exercise of police power. *Charleston & W. C. Ry.* v. *Varnville Co.* 597

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Neither Carey Act nor agreement thereunder with Idaho in regard to irrigation of lands segregated from public domain, purports to exempt the lands from taxation or take them out of settled rule respecting state taxation. *Id.*

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Under § 24, Jud. Code, District Court has jurisdiction of suit to enforce bond given under §§ 1000, 1007, Rev. Stat. *Id.*

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Freedom from taxation on exports under Art. I, § 9, Constitution, means that process of exportation shall not be obstructed by any burden of taxation. *United States* v. *Hvoslef* 1

Tax on charter parties held tax on exports within prohibition of Art. I, § 9, of Constitution. *Id.*

Power of Congress to lay tonnage tax on entry not inclusive of power to lay taxes on exports. *Id.*

Taxes on policies of marine insurance on exports prohibited by Art. I, § 9, of Constitution. *Thames & Mersey Ins. Co.* v. *United States* 19

A statutory provision that the person, firm or corporation constructing and operating a railroad shall be exempt from taxation in respect to his, their or its interest therein under the construction contract and in respect to the rolling stock and other equipment of the road, held not to extend to tax on privilege to operate as a corporation. *Interborough Transit Co.* v. *Sohmer* 276

Determinative fact of whether property formerly part of public domain is subject to taxation by State is absence of beneficial interest of United States at time of assessment. *Bothwell* v. *Bingham County* 642

Neither Carey Act nor agreement thereunder with Idaho in regard to irrigation of lands segregated from public domain, purports to exempt the lands from taxation or take them out of settled rule respecting state taxation. *Id.*

Where nothing remains to be done by entryman he is regarded as beneficial owner and the land is subject to state taxation, even though legal title may not have passed; and it is immaterial whether title passes direct from Government or through State. *Id.*

Statute providing for sale of property for taxes, which gives opportunity to be heard as to fairness of assessment, provides for notice of time and place of sale with right of redemption for five years, does not deprive owner of property without due process of law. *Chapman* v. *Zobelein* 135

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