UNITED STATES REPORTS

VOLUME 239

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1915

CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.[2]
CHARLES EVANS HUGHES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JOSEPH RUCKER LAMAR, Associate Justice.[3]
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.

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] Mr. Justice Day was absent from the bench on account of illness from January 3, 1916, until after the publication of this volume.

[3] Mr. Justice Lamar on account of illness did not take his seat upon the bench during October Term 1915. He died at his residence at Washington on January 2, 1916. See page iii, *post*. Further reference to Mr. Justice Lamar will appear in a later volume.

SUPREME COURT OF THE UNITED STATES.

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

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, CHARLES E. HUGHES, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

For the Fifth Circuit, JOSEPH R. LAMAR, Associate Justice.

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JAMES C. MCREYNOLDS, Associate Justice.

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

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

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 3, 1916.

THE CHIEF JUSTICE said:

Gentlemen of the Bar: It gives me the profoundest sorrow to state the severance which has taken place of those ties of personal affection and respect which united us to our brother, MR. JUSTICE LAMAR, caused by his untimely death last night. And this sorrow I know is shared by his brethren of the Bar, to whom he was so strongly and devotedly attached, and will, I am confident, be participated in by all his countrymen as they come to feel that the country will be for the future deprived of the blessings which would have come from the future discharge of his duties as a member of this court with that conspicuous ability and enlightened devotion to duty so clearly manifested during the period which has gone by since he took up his duties here this day five years ago.

The funeral ceremonies will take place at his home in Augusta, Georgia, on Wednesday next. MR. JUSTICE VAN DEVANTER, MR. JUSTICE PITNEY, and MR. JUSTICE MCREYNOLDS will, as a committee appointed by the court, attend the funeral as its representatives. As a mark of the affection we bore him and of respect for his memory, the court will stand adjourned until Thursday morning next.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1915.

CERECEDO *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 285. Argued October 13, 1915.—Decided October 25, 1915.

Postponing consideration of a motion to dismiss until the hearing of the case on the merits is not a decision that the court has power to review the judgment.

The rule in cases coming from the District Court of the United States for Porto Rico is that the existence of constitutional questions must appear in a bill of exceptions.

Even though this court may have an extraordinary discretion in extreme cases to supply the absence of a bill of exceptions, there is no ground in this case for the exercise of such discretion.

THE facts, which involve the jurisdiction of this court to review judgments of the District Court of the United States for Porto Rico, are stated in the opinion.

Mr. Paul Fuller and *Mr. Howard Thayer Kingsbury*, for plaintiffs in error submitted:

This court has jurisdiction.

The search warrants were void and the searches and

seizures made thereunder were in violation of the Constitution.

The trial court should have ordered the return of the papers unlawfully seized and should not have admitted them in evidence.

The United States attorney should have returned upon defendants' demand the papers unlawfully seized.

Private papers written by the defendants or any of them, taken from their possession by compulsory process, should not have been admitted in evidence.

The trial court admitted other incompetent and irrelevant evidence.

The trial court's refusal to extend the time in which to file a bill of exceptions, and to permit the substitution of the supplemental assignment of errors was an abuse of discretion.

In support of these contentions, see *Adams* v. *New York*, 192 U. S. 585; *Boyd* v. *United States*, 116 U. S. 616; *Burton* v. *United States*, 196 U. S. 283; *Chateaugay Iron Co.* v. *Blake*, 144 U. S. 476; *Crowley* v. *United States*, 194 U. S. 461; *Downes* v. *Bidwell*, 182 U. S. 244; *Entick* v. *Carrington*, 19 Howell's St. Tr. 1029; *Guardian Assurance Co.* v. *Quintana*, 227 U. S. 103; *Herbert* v. *Butler*, 97 U. S. 319; *Hall* v. *United States*, 150 U. S. 76; *Hardy* v. *Harbin*, 154 U. S. 598; *Rodriguez* v. *United States*, 188 U. S. 156; *Wilson* v. *United States*, 149 U. S. 60; *Williams* v. *United States*, 168 U. S. 382; *Weeks* v. *United States*, 232 U. S. 383.

Mr. Assistant Attorney General Warren for the United States.

Memorandum opinion by Mr. Chief Justice White, by direction of the court.

The plaintiffs in error prosecute this writ under the assumption that the court below denied rights asserted

by them under the Constitution, by refusing as prayed, to return papers taken from them under a search warrant and in permitting the papers over objection to be offered in evidence. There is no bill of exceptions in the record and nothing which enables us to lawfully ascertain the existence of the constitutional questions relied upon. *Clune* v. *United States*, 159 U. S. 590; *Metropolitan R. R. Co.* v. *District of Columbia*, 195 U. S. 322; *Porto Rico* v. *Emanuel*, 235 U. S. 251, 255.

There is nothing, therefore, before us unless there be merit in contentions to the contrary which are pressed and which we briefly dispose of. First: On the face of things it is obvious that the postponing at the last term of the consideration of a motion to dismiss was not a decision of the question of power to review. Second: Even indulging, for the sake of the argument only, in the assumption of the correctness of the proposition urged that an extraordinary discretion might exist in some extreme case to supply the entire absence of a bill of exceptions, we see no ground whatever for the premise that this is a case of that character.

Dismissed for want of jurisdiction.

GEGIOW *v.* UHL, ACTING COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

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

No. 340. Argued October 14, 15, 1915.—Decided October 25, 1915.

The courts have jurisdiction to determine whether the reasons given by the Commissioner of Immigration for excluding aliens under the Alien Immigration Act agree with the requirements of the Act;

and, if the record shows that the Commissioner exceeded his powers, the alien may obtain his release upon *habeas corpus*.

The Alien Immigration Act by enumerating conditions upon which aliens may be denied admission prohibits the denial of admission in other cases.

The conclusiveness of the decisions of immigration officers under § 25 of the Immigration Act is conclusiveness of questions of fact; but the court may review the findings of a Commissioner on the question of whether the alien comes under the Act. *Gonzales* v. *Williams*, 192 U. S. 1.

An alien cannot be excluded under the Alien Immigration Act simply because the immigration officers declare that he may become a public charge on account of overstocked conditions of the labor market at the point of immediate destination.

Under § 1 of the Alien Immigration Act, the ground of exclusion of persons enumerated are permanent personal objections irrespective of local conditions.

A phrase contained in a list such as that of disabilities in § 1 of the Alien Immigration Act is to be read as generically similar to the others mentioned before and after.

The Alien Immigration Act deals with admission of aliens to the United States and not to particular points of destination therein.

Where the determination of a class of questions covered by a statute is left to the President, this court will not presume that a greater power is entrusted by implication to subordinate officers or that the same result can be effected under the guise of a decision.

215 Fed. Rep. 573, reversed.

THE facts, which involve the construction of the Alien Immigration Act and the power of the Commissioner of Immigration to exclude aliens on the ground of likelihood of their becoming a public charge, are stated in the opinion.

Mr. Max J. Kohler and *Mr. Morris Jablow*, with whom *Mr. Abram I. Elkus* and *Mr. Ralph Barnett* were on the brief, for petitioners:

Alien immigrants are entitled to due process of law under the Fifth Amendment, and under § 25 of the Immigration Law, and generally under our treaties with foreign

countries. It is a denial of due process of law to deny proper hearing or to order deportation on undisclosed assumption of controverted facts and denial of opportunity to meet them, and grave irregularities on the hearing of the appeal thereon, as it is also where there is no competent evidence whatsoever justifying an exclusion.

Even as regards matters that may be judicially noticed, without formal proof, the matter relied upon must be specifically referred to on the trial, and produced, so that the immigrant may know what is relied upon to exclude him, and can meet it by proof.

Even if boards of special inquiry have the powers of courts, to take judicial notice of facts which courts might notice judicially, when properly presented before them, still even courts cannot notice judicially such facts as are here involved, under the authorities governing judicial notice, especially on the basis of alleged newspaper reports, not produced or even identified.

The immigration authorities are not authorized to exclude aliens on the supposed ground of unfavorable industrial conditions in the place to which they are destined, because such factor is not one vested in the immigration authorities by Congress as a justifiable ground for exclusion, nor are the petty immigration officials competent to pass upon such uncertain and complicated, ever-varying, conditions; nor is any satisfactory method of apprising them of the same provided by law; nor on the other hand, are the immigrants wedded to any particular destination, but are quite certain to go to a place economically more desirable than their original proposed destination, if conditions in the latter place so suggest.

Where the courts on *habeas* assume jurisdiction to review an order of exclusion, they are themselves to determine the question of admissibility, and not merely to remand relator for a new hearing to the immigration authorities.

The Solicitor General for respondent:

Congress has power to make the fact of a favorable administrative decision the condition of entry of aliens, withholding from the courts jurisdiction to review the evidence on which the decision is based.

Congress has complete power to exclude all aliens and to determine the conditions of their entry. *Lapina* v. *Williams*, 232 U. S. 78, 88; *United States* v. *Ju Toy*, 198 U. S. 253, 261.

The administrative determination made the condition of entry need not be based upon a hearing at which the alien has an opportunity to present evidence. *Buttfield* v. *Stranahan*, 192 U. S. 470; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Origet* v. *Hedden*, 155 U. S. 228.

When Congress has made a favorable administrative decision the sole and indispensable condition precedent to entry, and has declared an adverse decision to be final, the courts have no power to review the evidence upon which the latter is based. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 660.

In the Immigration Act Congress has made the fact of the decision by immigration officials the sole condition of entry. The fact of the decision being established, any inquiry into the evidence is improper.

The act by § 25 declares that the adverse administrative decision shall be final. *Pearson* v. *Williams*, 202 U. S. 281.

The statute imports that want of any sustaining evidence shall not of itself constitute a ground for judicial impeachment of the adverse administrative decision.

The officers do not lose exclusive jurisdiction by judging all the evidence erroneously. *Chin Yow* v. *United States*, 208 U. S. 8, 13; *Harlan* v. *McGourin*, 218 U. S. 442.

Want of any sustaining evidence in the record does not *per se* establish fraud or lack of good faith. *Gregory* v.

White, 213 Fed. Rep. 768; *Nishimura Ekiu* v. *United States, supra.*

Under this act the courts have no jurisdiction to review the evidence. *Fok Yung Yo* v. *United States*, 185 U. S. 296; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Gregory* v. *White, supra; Lee Gon Yung* v. *United States*, 185 U. S. 306; *Lee Lung* v. *Patterson*, 186 U. S. 175; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Nishimura Ekiu* v. *United States, supra.*

Cases under statutes providing for administrative proceedings of a different kind are not applicable. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88; *Lewis* v. *Frick*, 233 U. S. 291; *American School* v. *McAnnulty*, 187 U. S. 94; *Zakonaite* v. *Wolf*, 226 U. S. 272.

Petitioners' contentions that they had no opportunity to cross-examine opposing witnesses or to know the evidence against them, or to rebut opposing evidence, are not valid.

The Immigration Act does not entitle the alien to confront and cross-examine witnesses.

The hearing provided in the act need not be such that the alien has opportunity to know adverse evidence and rebut it.

The evidence before the board supports their determination that petitioners were likely to become a public charge. *Auffmordt* v. *Hedden*, 137 U. S. 310; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Chicago Ry. Co.* v. *Babcock*, 204 U. S. 585; *Chin Yow* v. *United States*, 208 U. S. 8; *Coyne Publishing Co.* v. *Paine*, 194 U. S. 497; *Davidson* v. *New Orleans*, 96 U. S. 97; *Ex parte Gregory*, 210 Fed. Rep. 680; *Fok Yung Yo* v. *United States*, 185 U. S. 296; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Glasgow* v. *Moyer*, 225 U. S. 420; *Gregory, Matter of*, 219 U. S. 210; *Harlan* v. *McGourin*, 218 U. S. 442; *Healy* v. *Backus*, 221 Fed. Rep. 358; *Interstate Com. Comm.* v. *L. & N. R. R.*, 227 U. S. 88; *Japanese Immigrant Case*, 189 U. S. 86; *Lapina* v. *Wil-*

liams, 232 U. S. 78; *Lee Gon Yung* v. *United States*, 185 U. S. 306; *Lee Lung* v. *Patterson*, 186 U. S. 168; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Lewis* v. *Frick*, 233 U. S. 291; *Low Wah Suey* v. *Backus*, 225 U. S. 460; *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Origet* v. *Hedden*, 155 U. S. 228; *Pearson* v. *Williams*, 202 U. S. 281.

Mr. Justice Holmes delivered the opinion of the court.

The petitioners are Russians seeking to enter the United States. They have been detained for deportation by the Acting Commissioner of Immigration and have sued out a writ of *habeas corpus*. The writ was dismissed by the District Court and the Circuit Court of Appeals. 211 Fed. Rep. 236. 215 Fed. Rep. 573. 131 C. C. A. 641. By the return it appears that they are part of a group of illiterate laborers, only one of whom, it seems, Gegiow, speaks even the ordinary Russian tongue, and in view of that fact it was suggested in a letter from the Acting Commissioner to the Commissioner General that their ignorance tended to make them form a clique to the detriment of the community; but that is a trouble incident to the immigration of foreigners generally which it is for legislators not for commissioners to consider, and may be laid on one side. The objection relied upon in the return is that the petitioners were "likely to become public charges for the following, among other reasons: That they arrived here with very little money, [$40 and $25, respectively,] and are bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded" &c. We assume the report to be candid, and, if so, it shows that the only ground for

the order was the state of the labor market at Portland at that time; the amount of money possessed and ignorance of our language being thrown in only as make-weights. It is true that the return says for that 'among other reasons.' But the state of the labor market is the only one disclosed in the evidence or the facts that were noticed at the hearing, and the only one that was before the Secretary of Labor on Appeal; and as the order was general for a group of twenty it cannot fairly be interpreted to stand upon reasons undisclosed. Therefore it is unnecessary to consider whether to have the reasons disclosed is one of the alien's rights. The only matter that we have to deal with is the construction of the statute with reference to the present case.

The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, relied on by the Government. As was said in *Gonzales* v. *Williams*, 192 U. S. 1, 15, "as Gonzales did not come within the act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary." Such a case stands no better than a decision without a fair hearing, which has been held to be bad. *Chin Yow* v. *United States*, 208 U. S. 8. See further *Zakonaite* v. *Wolf*, 226 U. S. 272. *Lewis* v. *Frick*, 233 U. S. 291, 297.

The single question on this record is whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate

destination is overstocked. In the act of February 20, 1907, c. 1134, § 2; 34 Stat. 898; as amended by the act of March 26, 1910, c. 128, § 1; 36 Stat. 263, determining who shall be excluded, 'Persons likely to become a public charge' are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes and so forth. The persons enumerated in short are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions unless the one phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after.

The statute deals with admission to the United States, not to Portland, and in § 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked. Yet, as officers of the General Government, they would seem to be more concerned with that than with the conditions of any particular city or State. Detriment to labor conditions is allowed to be considered in § 1, but it is confined to those in the continental territory of the United States and the matter is to be determined by the President. We cannot suppose that so much greater a power was entrusted by implication in the same act to every commissioner of immigration, even though subject to appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge.

Order reversed.

CENTRAL TRUST COMPANY OF ILLINOIS, AND TRUSTEE OF RHEINSTROM, *v.* LUEDERS.

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

No. 445. Motion to dismiss submitted October 12, 1915.—Decided October 25, 1915.

The provision in § 4 of the Act of January 28, 1915, c. 22, 38 Stat. 803, making judgments and decrees of the Circuit Courts of Appeals in bankruptcy proceedings final except on *certiorari* by this court, applies to all cases including those involving and requiring interpretation of state statutes and application of the Federal Constitution.

Appeal from 221 Fed. Rep. 829, dismissed.

THE facts, which involve the jurisdiction of this court of appeals in bankruptcy proceedings from the Circuit Court of Appeals under § 4 of the Act of January 28, 1915, are stated in the opinion.

Mr. Walter A. DeCamp, Mr. Dudley V. Sutphin, Mr. Leo J. Brumleve, Jr., Mr. Edward F. Peters and *Mr. Paul V. Connolly* for appellees, in support of the motion.

Mr. Lessing Rosenthal, Mr. Charles H. Hamill, Mr. Leo F. Wormser, Mr. Judson Harmon, Mr. Edward Colston, Mr. A. W. Goldsmith and *Mr. George Hoadly* for appellants, in opposition to the motion:

The jurisdiction of this court, conferred by § 241, Jud. Code (as construed in *Houghton* v. *Burden*, 228 U. S. 161, 165), has not been divested by the Amending Act of January 28, 1915.

Where an Act of Congress is directed to a class of cases which had so increased in number as to impose a burden of litigation upon this court, the Act will be given effect

in the light of the object of its enactment and will not be construed as a limitation upon the jurisdiction of this court in a case not belonging to that class, even though the operation of the Act must be restrained within narrower limits than its literal words import. *United States* v. *Am. Bell Tel. Co.*, 159 U. S. 548; *Petri* v. *Commercial Bank*, 142 U. S. 644, 650; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459; *United States* v. *Rabinowich*, 238 U. S. 78.

Where the correctness of a judgment of the Circuit Court of Appeals depends upon the construction or application of the Constitution of the United States, the defeated party, provided it has asserted its constitutional rights from the outset, is entitled, as of right, to a reexamination of the judgment by this court, even though the decree of the District Court was rendered sitting in bankruptcy. *Spreckels Sugar Co.* v. *McClain*, 192 U. S. 397.

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

The I. Rheinstrom & Sons Company was adjudged a bankrupt in April, 1912. Liens upon its property were claimed by appellees under a Kentucky statute which appellants (general creditors) maintained contravened the Fourteenth Amendment to the Constitution of the United States. Overruling the Referee, the District Court allowed the liens (207 Fed. Rep. 119) and this action was approved by the Circuit Court of Appeals, March 2, 1915, in an opinion which expressly upheld the validity of the statute (221 Fed. Rep. 829). Appellees have moved to dismiss the present appeal.

Section 4, Act of Congress, approved January 28, 1915, c. 22, 38 Stat. 803, 804, provides: "That the judgments and decrees of the circuit courts of appeals in all proceed-

ings and cases arising under the bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree."

Manifestly, the words of the quoted section include the decree below and inhibit an appeal therefrom. It is argued, however, that they should be so construed as to exclude causes requiring interpretation of state statutes and application of the Federal Constitution and thereby limited in effect to the supposed purpose of Congress to relieve this court only from the necessity of reviewing bankruptcy cases which "involve complicated questions of fact rather than of law." We see no reason to doubt that the plain language of the enactment aptly expresses the fixed legislative intent. The appeal is accordingly

Dismissed for want of jurisdiction.

STEWART, TREASURER WYANDOTTE COUNTY, KANSAS, *v.* CITY OF KANSAS CITY, KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 284. Motion to dismiss or affirm submitted October 18, 1915.—Decided November 1, 1915.

What the duty of a county officer is under the law of the State of which he is an instrument is a local question and this court has no jurisdiction under § 237, Judicial Code, to review the judgment of the state court.

A county officer has no personal interest in a litigation brought to compel him to apply public moneys in his hands in accordance with the state law, and he cannot defend such a suit on the ground that the statute is unconstitutional as depriving him as an individual or as a taxpayer of his property without due process of law or denying him the equal protection of the law.

Municipalities of the State are creatures of the State and the power of the State thereover is very broad and may be exercised in many ways affecting the property of, and giving rise to inequalities between, municipalities without encountering the due process and equal protection provisions of the Fourteenth Amendment.

The statute of Kansas requiring counties to reimburse municipalities of the first class, but not of other classes, for rebates allowed for prompt payment of taxes is not unconstitutional under the due process or equal protection provisions of the Fourteenth Amendment.

Writ of error to review 90 Kansas, 846, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, to review a judgment of the state court in a case involving the rights and duties of a county officer, are stated in the opinion.

Mr. William H. McCamish and *Mr. R. J. Higgins* for defendant in error in support of the motion.

Mr. L. W. Keplinger and *Mr. C. W. Trickett* for plaintiff in error in opposition to the motion.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action originated in a petition for mandamus filed in the District Court of Wyandotte County, Kansas, by defendant in error against plaintiff in error to require the latter to account for the sum of $30,840.24 alleged to be due defendant in error under certain taxing statutes of the State.

Judgment was entered for defendant in error which was affirmed on appeal by the Supreme Court of the State. The case was then brought here.

Motion is made to dismiss, on the ground that no Federal question was raised or passed on by the state court, or alternatively to affirm the judgment.

The controversy is stated by the Supreme Court of the State as follows, 90 Kansas, 846, 847:

"The question in dispute concerns the disposition of the penalties imposed by law for delinquency in the payment of taxes levied by and for the city. In substance it is this: Is the county required to reimburse a city of the first class for the amount by which the taxes collected for the city are reduced by rebates granted for prompt payment, and at the same time to pay over to the city the amount collected as penalties for delay in the payment of taxes levied by the city, while in the case of taxes levied by cities of the second and third classes, and by townships and school districts, the rebates are charged to the county and the penalties credited to it?"

The question was answered in the affirmative, citing and construing the state statutes and upon a consideration of the legislative power of the State over its municipal subdivisions. Plaintiff in error urged and now urges that the

statutes so construed deprive taxpayers of the county who reside outside of cities of the first class of property without due process of law and deny them the equal protection of the law.

Plaintiff in error is not impleaded as a taxpayer nor does he defend as such. He is sued as a county officer and defends by virtue of the exercise of his functions as a county officer. In other words, he defends by virtue of laws of which he is an instrument. Constituted by the laws of the State, he yet attempts to resist one of its laws. Whether he may do so is purely a local question. *Smith* v. *Indiana*, 191 U. S. 138. He certainly has no personal interest in the litigation. *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *McCandless* v. *Pratt*, 211 U. S. 437; *Marshall* v. *Dye*, 231 U. S. 250.

If, however, plaintiff in error is not estopped by that consideration he encounters another. It is manifest that the statute assailed was enacted by the State in regulation of its municipalities, and the power to do this is very broad. It was said in *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 676, that "counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will." This power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities. It has been exercised to enlarge or contract the boundaries of municipal corporations, invest them with special powers, divide and apportion their property. *Kies* v. *Lowrey*, 199 U. S. 233; *Braxton County Court* v. *West Virginia*, *supra*. It would be difficult to define the restrictions upon this power of control and keep it efficient. It is very certain that the Kansas statute does not transcend the limitations. We think the questions raised are more formal than substantial, and the writ of error is

Dismissed.

UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* RIEFLER.

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

No. 11. Argued October 27, 1915.—Decided November 1, 1915.

An instrument agreeing to indemnify a bond company for giving an official bond, signed and sealed and delivered to the officer to be bonded with authority to deliver it to the bonding company, and which was so delivered and was relied upon by the bonding company in issuing its bond, *held*, in this case, to have been a completed contract on the delivery thereof to the bonding company which was not required to notify the parties thereto of its acceptance.

THE facts, which involve the liability of defendants on a bond of indemnity to a surety company, are stated in the opinion.

Mr. A. F. Reichmann, with whom *Mr. Noble B. Judah*, *Mr. Monroe L. Willard*, *Mr. Henry M. Wolf* and *Mr. Arthur M. Cox* were on the brief, for plaintiff in error:

The instrument sued on in this case is a bond of indemnity and not a contract of guaranty. There is a generic as well as a historic distinction between bonds of indemnity and contracts of guaranty. 14 Am. & Eng. Ency. 1127; 16 id. 168; 20 Cyc. 1397–1402; 22 id. 79, 80; *Vandiver* v. *Pollak*, 107 Alabama, 547; 1 Brandt on Suretyship, 3d ed., § 5.

Bonds of indemnity are original and primary obligations not within the statute of frauds; while contracts of guaranty are secondary or collateral undertakings and are within the scope of the statute. Cases *supra* and DeColyar on Guaranties, 1; *Hawes* v. *Murphy*, 191 Massachusetts, 469; *Spurrier* v. *Nottingham*, 7 Ky. Law Reps.

453; *Campbell* v. *Pucket*, 1 Posey Unrep. Cas. 465; *Hartley* v. *Sandford*, 66 N. J. Law, 40; *Hall* v. *Weaver*, 34 Fed. Rep. 104, 107; *McIntosh-Huntington Co.* v. *Reed*, 89 Fed. Rep. 464; *Horn* v. *Bray*, 51 Indiana, 555; *Anderson* v. *Spence*, 72 Indiana, 315; *Minick* v. *Huff*, 41 Nebraska, 516; *Fidelity Co.* v. *Lawlor*, 64 Minnesota, 144; *Boyer* v. *Soules*, 105 Michigan, 31; *Smith* v. *Delaney*, 64 Connecticut, 264; *Perley* v. *Spring*, 12 Massachusetts, 297; *Aldrich* v. *Amase*, 75 Massachusetts (9 Gray), 76; *Lucas* v. *Chamberlain*, 8 B. Mon. 276; *Jones* v. *Shorter*, 1 Georgia, 294; *Bonebright* v. *Pease*, 3 Michigan, 318; *Chapin* v. *Merrill*, 4 Wend. 657; *Jones* v. *Bacon*, 145 N. Y. 446; *Resseter* v. *Waterman*, 151 Illinois, 169; *Saint* v. *Wheeler*, 95 Alabama, 362; *Kearnes* v. *Montgomery*, 4 W. Va. 29.

A guarantee must ordinarily exhaust his remedies against the person primarily liable before resorting to his guarantor. But an indemnitee can hold his indemnitor without first seeking reimbursement from any third person. Pingrey on Suretyship, § 360; *Page* v. *White Machine Co.*, 34 S. W. Rep. (Tex.) 988; *Reigart* v. *White*, 52 Pa. St. 438; 20 Cyc. 1446, 1453; *Springfield* v. *Boyle*, 164 Massachusetts, 591; *Kempton* v. *Coffin*, 29 Massachusetts (12 Pick.), 129; *Conery* v. *Cannan*, 26 La. Ann. 123; 22 Cyc. 102; *Getty* v. *Schantz*, 100 Fed. Rep. 577; *Phenix Ins. Co.* v. *Louis. & Nash. R. R.*, 8 Fed. Rep. 142; *Osborne* v. *Smith*, 18 Fed. Rep. 126.

An indemnitee must have actually paid a judgment or given his own obligation to the creditor which has been accepted as payment before he can maintain an action upon the instrument of indemnity; while a guarantee may maintain an action against a guarantor to compel payment of the debt itself. *Central Trust Co.* v. *Louisville Trust Co.*, 100 Fed. Rep. 545; *Resseter* v. *Waterman*, 151 Illinois, 169, 177; *Barclay* v. *Gooch*, 2 Espinasse, 571; *Carter* v. *Adamson*, 21 Arkansas, 287; *Solany* v. *Webster*, 35 Florida,

363; *Hay* v. *Hansborough*, 1 Freem. Ch. 533; *Gregory* v. *Hartley*, 6 Nebraska, 356; *Aberdeen* v. *Blackmar*, 6 Hill, 324; *Hearn* v. *Landee*, 74 (11 Bush) Kentucky, 669; *Miller* v. *Fries*, 66 N. J. Law, 377; *Cochran* v. *Selling*, 36 Oregon, 333.

While a guarantor's undertaking is for the benefit of the creditor, the undertaking of a surety's indemnitor is not. The creditor cannot maintain any action upon it. *United States* v. *United Surety Co.*, 192 Fed. Rep. 992; *State* v. *St. L. & San Fran. Ry.*, 125 Missouri, 596; *Texas Mid. R. R.* v. *Miers*, 37 S. W. Rep. 640.

As a general rule an indemnitor is neither a guarantor nor a surety. He is a principal, although he is frequently referred to by the courts as a surety. *Wise* v. *Miller*, 45 Oh. St. 388; *Appleton* v. *Bascom*, 3 Metc. 169.

Historically, contracts of indemnity are creations of the common law, and are usually specialties (except the implied obligation created by law on the part of a principal to indemnify his surety when no express obligation has been given); while contracts of guaranty are commercial contracts having their origin in the rules of the law merchant and are usually simple contracts. *Courtis* v. *Dennis*, 7 Metc. 510; *Edmundston* v. *Drake*, 5 Pet. 624; *Lee* v. *Dick*, 10 Pet. 482; Daniels on Negotiable Inst., par. 1755; *Bell* v. *Bruen*, 1 How. 169; *Lawrence* v. *McCalmant*, 2 How. 426; *Smith* v. *Dann*, 6 Hill (N. Y.), 543; Note to *Lanusse* v. *Barker*, 3 Wheat. 148; *Kincheloe* v. *Holmes*, 7 B. Mon. (Ky.) 5.

Instruments of guaranty (unlike instruments of indemnity) are divided into two classes, (a) overtures or offers to guaranty (to which class belongs *Davis Sewing Machine Co.* v. *Richards*), and (b) absolute guaranties (to which class belongs *Davis* v. *Wells*). Pitman on Principal (1843), 28; DeColyer on Guaranty, 3; 14 Am. & Eng. Ency., 2d ed., 1145; 20 Cyc. 1404 and 1407; 25 Cent. Dig., § 9, and 9 Dec. Dig., par. 7.

The doctrine that notice of acceptance is necessary to bind a guarantor applies only to instruments which are overtures or offers to guaranty. *Russell* v. *Clarke*, 7 Cranch, 69; *Edmundston* v. *Drake*, 5 Pet. 624; *Douglass* v. *Reynolds*, 7 Pet. 113; *Lee* v. *Dick*, 10 Pet. 482; *Adams* v. *Jones*, 12 Pet. 207; *Reynolds* v. *Douglass*, 12 Pet. 504; *Davis Machine Co.* v. *Richards*, 115 U. S. 524; *Barnes Cycle Co.* v. *Reed*, 84 Fed. Rep. 601; *Steadman* v. *Guthrie*, 4 Metc. (Ky.) 146, at page 157; *Kincheloe* v. *Holmes*, 7 B. Mon. 5; *Oaks* v. *Weller*, 13 Vermont, 106; *Newman* v. *Streator Coal Co.*, 19 Ill. App. 594; *Ruffner* v. *Love*, 33 Ill. App. 601; *Neagle* v. *Sprague*, 63 Ill. App. 25.

The rule does not apply to instruments which are absolute guaranties. To this class belongs *Davis* v. *Wells*, 104 U. S. 159; *Wildes* v. *Savage*, 1 Story, 22; *Kent* v. *Silver*, 108 Fed. Rep. 365; *Dowd* v. *National Park Bank*, 54 Fed. Rep. 846; *Bond* v. *John V. Farwell*, 172 Fed. Rep. 58; *Cook* v. *Orne*, 37 Illinois, 186; *Newcomb Bros.* v. *Emerson*, 17 Ind. App. 482; *Sears* v. *Swift & Company*, 66 Ill. App. 496; *American Exchange National Bank* v. *Severns*, 121 Ill. App. 480; *Acorn Brass Co.* v. *Gilmore*, 142 Ill. App. 567; *Frost* v. *Standard Metal Co.*, 215 Illinois, 240; *Pressed Radiator Co.* v. *Hughes*, 155 Ill. App. 80; *Bryant* v. *Stout*, 44 N. E. Rep. 68; *Deering & Co.* v. *Mortell*, 110 N. W. Rep. 886; *Lane* v. *Mayer*, 44 N. E. Rep. 73; *Shows* v. *Steiner*, 57 So. Rep. 700; *Watkins Medical Co.* v. *Brand*, 143 Kentucky, 468; *People's Bank* v. *Stewart*, 152 Mo. App. 314; *J. L. Mott Iron Works* v. *Clark*, 69 S. E. Rep. 227; *Bank of California* v. *Union Packing Co.*, 111 Pac. Rep. 573; *Emerson Mfg. Co.* v. *Rustad*, 120 N. W. Rep. 1094; *Sheppard* v. *Daniel Miller Co.*, 68 S. E. Rep. 451; *Sheffield* v. *Whitfield*, 65 S. E. Rep. 807; *Booth* v. *Irving Bank*, 82 Atl. Rep. 652; *McConnon & Co.* v. *Laursen*, 135 N. W. Rep. 213; *Furst Mfg. Co.* v. *Black*, 111 Indiana, 308.

The doctrine of notice of acceptance is not applicable to

bonds of indemnity or to any form of instrument which is an original undertaking.

A bond of indemnity or other original undertaking when executed, delivered and acted upon becomes effective. *Haupt* v. *James*, 120 S. W. Rep. 541; *McIntosh* v. *Reed*, 89 Fed. Rep. 464; *Newcomb Bros. Co.* v. *Emerson*, 17 Ind. App. 482; *Wise* v. *Miller*, 45 Oh. St. 388; *Hall* v. *Weaver*, 34 Fed. Rep. 104; *Lane* v. *Mayer*, 44 N. E. Rep. 73; *Bruce* v. *Lambour*, 127 Louisiana, 969; *Haywood* v. *Townsend*, 38 N. Y. Supp. 517; *Singer Mfg. Co.* v. *Freerks*, 98 N. W. Rep. 705; *Lachman* v. *Block*, 15 So. Rep. 649; *Swope* v. *Forney*, 17 Indiana, 385; *Saint* v. *Wheeler*, 95 Alabama, 362; *Fidelity Life Ins. Co.* v. *Stegall*, 111 Pac. Rep. 389; *Wheeler* v. *Rohrer*, 52 N. E. Rep. 780; *Page* v. *White Machine Co.*, 34 S. W. Rep. 988; *White Machine Co.* v. *Powell*, 74 S. W. Rep. 746; *Engler* v. *Fire Ins. Co.*, 46 Maryland, 322; *Walker* v. *Brinkley*, 42 S. E. Rep. 333; *Klosterman* v. *Olcott*, 41 N. W. Rep. 250; *Fiala* v. *Ainsworth*, 88 N. W. Rep. 135; *Bank of U. S.* v. *Dandridge*, 12 Wheat. 64; *Bird* v. *Washburn*, 10 Pick. 223; *Boyd* v. *Agricultural Ins. Co.*, 76 Pac. Rep. 986.

It is not necessary that the indemnitors should receive any benefit as a consideration to render them liable. The liability incurred by the indemnitee and the harm and injury suffered by it constitute a valid and sufficient consideration for the bond of indemnity. *Chapin* v. *Merrill*, 4 Wend. 657; *Emerson* v. *Slater*, 22 How. 28, 43.

Mr. Walter McC. Allen, with whom *Mr. Albert Salzenstein* was on the brief, for defendants in error:

The instrument was a mere offer and not an absolute and complete obligation under the facts certified in the case. *Davis* v. *Wells*, 104 U. S. 159; *Davis* v. *Richards*, 115 U. S. 524; *Deering* v. *Mortell*, 16 L. R. A. (N. S.) 363; *Barnes Cycle Co.* v. *Reed*, 84 Fed. Rep. 603; *S. C.*, 91 Fed.

Rep. 481; 20 Harvard Law Rev. 486; *Lachman* v. *Block*, 47 La. Ann. 505.

The instrument is not a bond of indemnity. While it does not evidence a completed contract of any kind, yet as an instrument it is, as to the defendants who signed it—as distinguished from those who did not sign it—one of guaranty and not of indemnity. 16 Am. & Eng. Ency., p. 168; 22 Cyc., pp. 79, 80; 1 Am. & Eng. Ency., p. 1128; Pingrey on Suretyship, § 4; 20 Cyc., pp. 1397–1400; *Kearnes* v. *Montgomery*, 4 W. Va. 29; *Courtis* v. *Dennis*, 7 Metc. 518; *Hall* v. *Weaver*, 34 Fed. Rep. 106; Brandt on Suretyship, § 1; 15 Halsbury's Laws of Eng., p. 444.

Mutuality of assent is essential to every contract and requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to make a binding contract. In this case there was no signification of assent or notice of acceptance. The instrument never became a binding obligation, regardless of the question as to whether it was in form an instrument of guaranty or of indemnity. *Davis* v. *Wells*, 104 U. S. 159; *Davis Machine Co.* v. *Richards*, 115 U. S. 524; *Lachman* v. *Block*, 15 So. Rep. 649; Louisiana Code, § 1797; *Deering* v. *Mortell*, 16 L. R. A. (N. S.) 353; *Bishop* v. *Eaton*, 161 Massachusetts, 496; Anson on Contracts, 15, 16; *Frost* v. *Standard Metal Co.*, 215 Illinois, 245; *S. C.*, 116 Ill. App. 642; *Ruffner* v. *Love*, 33 Ill. App. 601; *Newman* v. *Streator Coal Co.*, 19 Ill. App. 602; *Sears* v. *Swift*, 66 Ill. App. 496; *Myer* v. *Ruhstadt*, 66 Ill. App. 346; *Acme Mfg. Co.* v. *Reed*, 197 Pa. St. 359.

The fact that the instrument in suit was in the form of a bond under seal does not take it out of the general rule requiring notice of acceptance. *Davis* v. *Wells*, 104 U. S. 159; *Hall* v. *Weaver*, 34 Fed. Rep. 104; *Burke* v. *Delaney*, 153 U. S. 235; *Jordan* v. *Davis*, 108 Illinois, 336; *Philadelphia R. R.* v. *Howard*, 13 How. 334; *Rountree* v. *Smith*, 152 Illinois, 493; *Stanley* v. *White*, 160 Illinois, 605;

Ware v. *Allen*, 128 U. S. 597; *Pawling* v. *United States*, 4 Cranch, 219; 4 Wigmore on Evidence, §§ 2408, 2410, 2442; *Curry* v. *Colburn*, 99 Wisconsin, 319.

MR. JUSTICE HOLMES delivered the opinion of the court.

The facts certified are simple. One Dooling, being required to give an official bond, applied in Springfield, Illinois, to an agent of the plaintiff in error, a bonding company having its home office in Baltimore, Maryland, was informed that the Company would become his surety only on condition that he furnish indemnity, and was handed a printed form of indemnity bond. The defendants in error at Dooling's request signed and sealed this bond for the purposes therein expressed and authorized Dooling to deliver it to the Company through its Springfield agent, which Dooling did. The agent, who is not shown to have had authority to execute bonds, forwarded it for acceptance. The Company relying upon it became surety for Dooling. One of the recitals of the bond was that the Company "has become or is about to become surety, at the request of the said Frank E. Dooling, on a certain bond in the sum of Five Thousand Two Hundred Dollars, wherein Frank E. Dooling is principal, as Recorder of Springfield District Court No. 25, Court of Honor, located at Springfield, Illinois, a copy of which bond is hereto attached No. 52012-5, which bond is made a part hereof." The condition was that Dooling should keep the Company indemnified for all loss by reason of its suretyship. A copy of the Company's bond was not attached and at the date of the indemnity bond had not been executed. Dooling was not a party to the indemnity bond. The defendants in error received no pecuniary consideration for their act and were not notified of the acceptance of their bond or of the execution of the other by the Company. The questions propounded are:

"(1) Was the instrument which was signed by Riefler and Hall, and relied on by the Company, a completed contract of indemnity or guaranty? (2) Or was it merely an offer to become indemnitors or guarantors, requiring notice of acceptance by the Company in accordance with *Davis* v. *Wells*, 104 U. S. 159, and *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524? (3) And, if in substance the instrument was merely an offer, does the fact that it was in the form of a bond under seal take it out of the rule of those authorities?"

If the bond in suit had been delivered directly to the Company and had been pronounced satisfactory there would have been no need to notify Riefler and Hall of the Company's subsequently executing the Dooling bond. Riefler and Hall assumed an obligation in present words to indemnify the Company against an exactly identified suretyship that the Company had gone or was about to go into, as they stated. The Company was about to go into it and went into it. If Riefler and Hall had made only a parol offer in the same terms, the Company by becoming surety would have furnished the consideration that would have converted the offer into a contract, but notice is held necessary in *Davis Sewing Machine Co.* v. *Richards*. If it had been a covenant the Company's act would have satisfied the condition upon which the covenant applied. *O'Brien* v. *Boland*, 166 Massachusetts, 481, 483. As it was a bond, the Company's entering into its undertaking in like manner furnished the subject-matter to which the obligation by its terms applied. In the case of either covenant or bond there was no need for notice that an event had happened that the defendants' contract contemplated as sure to happen, if it had not already come to pass.

The only ground for hesitation is that seemingly the bond in suit might have been rejected by the Company as unsatisfactory, and that therefore it may be argued

that Riefler and Hall were entitled to notice that it had been accepted. But we are of opinion that in the circumstances of this case it is reasonable to understand that they took the risk. They were chargeable with notice that by their act their bond had come to the hands of the Company. The bond on its face contemplated that the Company would accept it and act upon it at once, and disclosed the precise extent of the obligation assumed. It seems to us that when such a bond, carrying, as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee and in fact is accepted by it, notice is not necessary that a condition subsequent to the delivery by which the obligee might have made it ineffectual has not been fulfilled. The contract is complete without the notice, *Butler & Baker's Case*, 3 Co. Rep. 25, 26b; *Xenos* v. *Wickham*, L. R. 2 H. L. 296; Pollock, Contracts, 8th ed., 7, 8, and we see no commercial reason why the principles ordinarily governing contracts under seal should not be applied. *Bird* v. *Washburn*, 10 Pick. 223. In *Davis* v. *Wells, supra*, the guaranty was an open continuing one up to $10,000, but it was under seal and was held binding, although additional reasons were advanced.

We answer the first question: Yes.

MR. JUSTICE MCKENNA dissents.

STEINFELD *v.* ZECKENDORF.

APPEAL FROM AND ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 239. Argued October 19, 20, 1915.—Decided November 1, 1915.

A court is not precluded from construing a document because its construction is affected by facts and circumstances not open to dispute.

Whatever may be the rule as to legislatures and statutes this court may determine from the knowledge of its members whether the court below has acted as this court intended it should upon a mandate recently entered.

Cases come to this court from Arizona in the usual form, and this court has no jurisdiction on appeal from a judgment of the Supreme Court of that State even though entered on the mandate of this court in a case originally coming here from the Supreme Court of the Territory of Arizona.

As the judgment entered by the Supreme Court of the State in this case is not inconsistent with the opinion of this court there is no reason for disturbing it.

This court will not consider provisions in a judgment of the state court entered on the mandate of this court as to matters non-federal.

15 Arizona, 335, affirmed.

THE facts, which involve the jurisdiction of this court on appeals from and writs of error to the state court and the construction of the mandate of this court and the power and duty of the Supreme Court to act thereon, are stated in the opinion.

Mr. James M. Beck and *Mr. Francis J. Heney*, with whom *Mr. Eugene S. Ives* was on the brief, for plaintiff in error:

The jurisdiction of this court on the former appeal was limited to the single question of law, do the findings of fact support the judgment? And consequently that was the subject-matter of the proceeding here. *Zeckendorf* v.

Steinfeld, 225 U. S. 445; *Eagle Mining Co.* v. *Hamilton*, 218 U. S. 513; *Idaho Land Co.* v. *Bradford*, 132 U. S. 513.

This court in the exercise of such appellate jurisdiction cannot and will not supply, by intendment or inference, any missing material fact, even if there were sufficient evidence or sufficient probative facts in the findings, from which the lower court might have inferred such missing material fact. *Sun Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485; *Burr* v. *Des Moines Co.*, 68 U. S. 99; *Hecht* v. *Boughton*, 105 U. S. 235; *Lincoln* v. *French*, 105 U. S. 614; *Dower* v. *Richards*, 151 U. S. 659; *Wilson* v. *Merchants' Trust Co.*, 183 U. S. 121; *Raimond* v. *Terrebonne Parish*, 132 U. S. 192; *Lehnen* v. *Dickson*, 148 U. S. 71; *Barnes* v. *Williams*, 11 Wheat. 414; *Powers* v. *United States*, 119 Fed. Rep. 563; *The E. A. Packer*, 140 U. S. 360.

French v. *Edwards*, 21 Wall. 147, as construed in *French* v. *Edwards*, 91 U. S. 423, and *Ex Parte Medway*, 90 U. S. 504, are on all fours with the case at bar.

The mandates of this court are to be interpreted according to the subject-matter of the proceeding here, and, if possible, so as not to cause injustice. *Supervisors* v. *Kennicott*, 94 U. S. 449.

Steinfeld has never had his day in court on these questions of fact.

Whenever a trial court fails to find any material fact by reason of a wrong theory of the case adopted either by itself or an intermediate appellate court, the court of last resort, if it reverses the judgment, should direct or at least authorize a new trial to prevent injustice to appellee or defendant in error. *Edmonston* v. *McLoud*, 16 N. Y. 543; *Griffin* v. *Marquardt*, 17 N. Y. 28; *Ball* v. *Rankin*, 101 Pac. Rep. 1105.

When an appellate court, on the evidence as it is presented in the record, or on findings of fact which are conclusive upon it reverses, generally, the judgment of the

lower court, an appellee or defendant in error is entitled as a matter of right to a retrial of the case, and the mandate of this court should be interpreted accordingly. *Lincoln* v. *French*, 105 U. S. 614; Elliott's App. Pro., § 580; *Talcott* v. *Delta Land Co.*, 73 Pac. Rep. 256; *Faulkner* v. *Healy*, 107 California, 49; *Stearns* v. *Aguirre*, 7 California, 443; *Prentice* v. *Crane*, 88 N. E. Rep. 655; *Ryan* v. *Tomlinson*, 39 California, 639.

Should the court, however, conclude that its opinion and decision on the former appeal must be interpreted as in effect an instruction to the trial court to enter judgment against Steinfeld on the first cause of action, then, nevertheless, that judgment is erroneous, and is too large by $101,059.99. *In re Washington*, 140 U. S. 92; *Himely* v. *Rose*, 5 Cranch, 312; *McMannomy* v. *Chi. D. & V. R. Co.*, 47 N. E. Rep. 713.

Mr. Frank H. Hereford, Mr. Edwin A. Meserve and *Mr. Selim M. Franklin*, with whom *Mr. Edwin F. Jones* was on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This case first came here by appeal from the Supreme Court of Arizona while Arizona was still a territory. Before the decision by this court Arizona became a State, and the judgment, so far as now in controversy, having been reversed, the case was remanded "for such further proceedings as may not be inconsistent with the opinion of this Court," the formula usual in cases coming from a State. 225 U. S. 445, 459. The ground for the present attempt to reopen the merits is that the state court has misinterpreted the mandate that it received. *Martin* v. *Hunter*, 1 Wheat. 304, 354. See *Julian* v. *Central Trust Co.*, 193 U. S. 93.

The case is stated at length in the former decision. All

that is necessary to explain the present question may be put in shorter form. The suit was brought by Zeckendorf as a stockholder in the Silver Bell Mining Company to recover money alleged to belong to the Company and appropriated by Steinfeld. There was a further cause of action alleged but that has been disposed of. The money represents the proceeds of the Silver Bell mine and a group of mines adjoining the Silver Bell and purchased by Steinfeld, it was assumed by the parties, as trustee for the company. Steinfeld sold all the mines for $515,000, $115,000 cash, $400,000 in notes for $100,000 each, and his action was confirmed. At the time of the conveyance to the purchaser it was agreed by a contract in writing that the purchase price should belong to the Silver Bell Copper Company, and in the same instrument it was provided that the four notes should be held by Steinfeld as trustee and as security against his personal obligations in the matter. Steinfeld received the cash and the proceeds of the first two notes, paid certain liabilities of the company and deposited the residue, except $50,000 attached in his hands, in the Bank of California in his own name.

In December, 1903, Zeckendorf brought a suit to restrain the turning over of the deposited funds by the bank to Steinfeld, and on December 26, 1903, a stockholders' meeting was held at which all parties were represented and a vote of rescission was passed upon which the present question arises. For Steinfeld it is argued that the whole agreement was rescinded. The other side contends that the rescission went only to the clause giving Steinfeld a right to the personal custody of the money. The directors, consisting of Steinfeld and his creatures, although not understanding the rescission to go beyond the indemnity clause, passed a vote behind Zeckendorf's back under which the proceeds of the sale were divided and one-half given to Steinfeld. After the judgment of this court the state court conceived itself bound by the mandate to

enter judgment for the plaintiff and did so. It now is contended on Steinfeld's part that he never has had his day in court to present his case; for, it is said, the territorial court simply ruled as matter of law that the vote of rescission rescinded the contract *in toto*, and this court, if it thought, as it did that the ruling was wrong, properly could do no more than to send the case back for a finding of fact as to the true purport of the vote. If this should be done Steinfeld alleges that he has evidence that he wishes to present.

A court is not necessarily precluded from construing a document because the construction is affected by facts and circumstances not open to dispute. But the question now is not whether this court was right or wrong, but what it did. The mandate issued within the memory of present members of the court, and there is no doubt that the court below did what we intended that it should. In the time of Edward I., Hengham interrupted discussion of the Stat. Westm. II. by saying 'We know it better than you, for we made it.' *Ne glosez point le Statut; nous le savoms meuz de vous, qar nous les feimes.* Y. B. 33 Ed. I. Mich., Rolls Ed., 83. However it may be as to a statute, the objection seems reasonable when applied to a mandate that has been followed as it was meant and the following words among others show clearly enough that we expressed our intent: "In our view, the facts found show that . . . the subsequent attempt to rescind the action by which the proceeds of the sale of the English group of mines became the property of the Silver Bell Company and to give the proceeds to Steinfeld must be held for naught." 225 U. S. 450. If the Territory had not become a State a judgment would have been ordered. The more reserved phrase was used by reason of the change, but with no change in what consistency with our opinion was deemed to require.

We see no reason for supposing that cases were intended

to come to this court from Arizona in other than the usual form. Therefore in any event this appeal would have to be dismissed. To meet this possibility a writ of error was allowed at the last moment. We have considered the record as if made up under the writ. But apart from technical objections that have been urged the only question that would be open is whether the judgment below was inconsistent with the opinion of this court, and as it very plainly is not, there is no reason for disturbing it. Our mandate was not concerned with the allowance of attorneys' fees and some other matters that were argued, and therefore they present no Federal question and need not be considered.

Appeal dismissed.
Judgment affirmed.

MANILA INVESTMENT COMPANY *v.* TRAMMELL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 250. Motion to affirm or dismiss submitted October 12, 1915.—Decided November 1, 1915.

Mere breach of contract on the part of state officers does not amount to a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment.

Where the allegation of the bill relied on to give jurisdiction shows mere breach of contract on the part of state officers the case does not present a real and substantial controversy involving the construction or effect of the Federal Constitution and the District Court does not have jurisdiction on that ground.

THE facts, which involve the jurisdiction of the District Court of the United States in cases involving constitutional questions, are stated in the opinion.

Mr. N. B. K. Pettingill and *Mr. Arthur F. Odlin* for appellants in opposition to the motion.

Mr. Thomas F. West, Attorney General of the State of Florida, *Mr. E. J. L'Engle* and *Mr. P. H. Odom* for appellees in support of the motion.

Memorandum opinion by Mr. Justice Day, by direction of the court.

This case was begun in the District Court of the United States for the Southern District of Florida, upon a bill praying to have the title to certain lands decreed to be held in trust for complainant by the Board of Trustees of the Internal Improvement Fund of Florida, and to recover lands deeded to others but likewise held in trust for complainants. The court below dismissed the bill for want of jurisdiction.

An examination of the bill shows that the ground of recovery rests upon the allegation that the trustees contracted to convey the lands in question to the complainants, and afterwards, by formal resolution, the Board repudiated its former action, and refused to recognize the alleged trust, and declared the complainants' title null and void. Complainants contend that this action by the trustees, as an agency of the State, in repudiation of its former action and the conveyance of part of the land to others in violation of the trust, constituted a taking of its property without due process of law, in violation of the provisions of the Fourteenth Amendment. This is the only ground of Federal jurisdiction insisted upon.

The case presented no real and substantial controversy involving the construction or effect of the Federal Constitution. The allegations relied upon to give jurisdiction show a breach of contract merely and bring the case within the principles decided by this court in *St. Paul Gas Light*

Co. v. *St. Paul*, 181 U. S. 142; *Dawson* v. *Columbia Avenue &c. Co.*, 197 U. S. 178; *Shawnee Sewerage Co.* v. *Stearns*, 220 U. S. 462; *McCormick* v. *Oklahoma City*, 236 U. S. 657.

Affirmed.

TRUAX AND THE ATTORNEY GENERAL OF THE STATE OF ARIZONA *v.* RAICH.

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

No. 361. Argued October 15, 1915.—Decided November 1, 1915.

A suit against officers of the State who are about to proceed wrongfully to complainant's injury in enforcing an unconstitutional statute is not a suit against the State within the meaning of the Eleventh Amendment.

While, generally speaking, a court of equity has no jurisdiction over prosecution, punishment or pardon of crimes or misdemeanors, equity may, when such action is essential to the safeguarding of property rights, restrain criminal prosecutions under unconstitutional statutes.

The right to earn a livelihood and to continue employment unmolested by efforts to enforce void enactments is entitled to protection in equity in the absence of an adequate remedy at law.

The fact that an employment is at the will of the employer and employé does not make it one at the will of others, and unjustified interference of third parties is actionable although the employment may be at will.

Although a statute may only render an employer liable to prosecution, if it operates directly upon the employment of the employé and its enforcement would compel the discharge of an employé, the latter is affected directly, has no adequate remedy at law, and if the statute is unconstitutional, is entitled to equitable relief.

An alien admitted to the United States under the Federal law has not only the privilege of entering and abiding in the United States but also of entering and abiding in any State, and being an inhabitant of any State entitles him, under the Fourteenth Amendment, to the equal protection of its laws.

The description in the Fourteenth Amendment of any person within the jurisdiction of the United States includes aliens. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The right to work for a living in the common occupations of the community is of the essence of that personal freedom and opportunity which it was the purpose of the Fourteenth Amendment to secure.

The power to control immigration—to admit or exclude aliens—is vested solely in the Federal Government, and the States may not deprive aliens so admitted of the right to earn a livelihood as that would be tantamount to denying their entrance and abode.

A State may not, in order to protect citizens of the United States, in their employment against non-citizens of the United States in that State, require that employers only employ a specified percentage of alien employés—such a statute denies to alien inhabitants the equal protection of the law and so held as to statute of Arizona of December 14, 1914.

Such a statute is not the less unconstitutional because it allows employers to employ a specified percentage of alien employés.

The rule that a State may recognize degrees of evil and adapt its legislation accordingly, applies to matters concerning which the State has authority to legislate.

Whether the statute of Arizona attempting to regulate employment of aliens, is void as conflicting with rights of aliens under treaties with their respective nations not determined in this case as the statute is held unconstitutional under the equal protection provision of the Fourteenth Amendment.

219 Fed. Rep. 273, affirmed.

THE facts, which involve the constitutionality under the equal protection provision of the Fourteenth Amendment of the Act of December 14, 1914, of the State of Arizona relative to the employment of aliens in that State, are stated in the opinion.

Mr. Wiley E. Jones, Attorney General of the State of Arizona, *Mr. Leslie C. Hardy*, Assistant Attorney General of the State of Arizona, with whom *Mr. George W. Harben*, Assistant Attorney General of the State of Arizona, *Mr. J. Addison Hicks* and *Mr. W. B. Cleary* were on the brief, for appellants.

Mr. Alexander Britton, with whom *Mr. Evans Browne* and *Mr. Francis W. Clements* were on the brief, for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

Under the initiative provision of the constitution of Arizona (Art. IV, § 1), there was adopted the following measure which was proclaimed by the Governor as a law of the State on December 14, 1914:

"An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof,

"Be it enacted by the People of the State of Arizona:

"SECTION 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native-born citizens of the United States or some sub-division thereof.

"SEC. 2. Any company, corporation, partnership, association or individual, their agent or agents, found guilty of violating any of the provisions of this Act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred ($100.00) dollars, and imprisoned for not less than thirty (30) days.

"SEC. 3. Any employé who shall misrepresent, or make false statement, as to his or her nativity or citizenship, shall, upon conviction thereof, be subject to a fine of not less than one hundred ($100.00) dollars, and imprisoned for not less than thirty (30) days." Laws of Arizona, 1915. Initiative Measure, p. 12.

Mike Raich (the appellee), a native of Austria, and an inhabitant of the State of Arizona but not a qualified elector, was employed as a cook by the appellant William Truax, Sr., in his restaurant in the City of Bisbee, Cochise County. Truax had nine employés, of whom seven were neither 'native-born citizens' of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the District Court of the United States for the District of Arizona, asserting among other things that the act denied to him the equal protection of the laws and hence was contrary to the Fourteenth Amendment of the Constitution of the United States. Wiley E. Jones, the attorney general of the State, and W. G. Gilmore, the county attorney of Cochise County, were made defendants in addition to the employer Truax, upon the allegation that these officers would prosecute the employer unless he complied with its terms and that in order to avoid such a prosecution the employer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

Soon after the bill was filed, an application was made for an injunction *pendente lite*. After notice of this application, Truax was arrested for a violation of the act, upon a complaint prepared by one of the assistants in the office of the County Attorney of Cochise County, and as it appeared that by reason of the determination of the officers to enforce the act there was danger of the complainant's immediate discharge from employment, the district judge granted a temporary restraining order.

The allegations of the bill were not controverted. The

defendants joined in a motion to dismiss upon the grounds (1) that the suit was against the State of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by § 266 of the Judicial Code. The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. Rep. 273. This direct appeal has been taken.

As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, which has repeatedly been followed. *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *West. Un. Tel. Co.* v. *Andrews*, 216 U. S. 165; *Herndon* v. *C., R. I. & P. Ry.*, 218 U. S. 135, 155; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643–645; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 607, 620; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 293.

It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*In re Sawyer*, 124 U. S. 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal pros-

ecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 218; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young, supra; Philadelphia Co.* v. *Stimson, supra*, p. 621. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. *Moran* v. *Dunphy*, 177 Massachusetts, 485, 487; *Berry* v. *Donovan*, 188 Massachusetts, 353; *Brennan* v. *United Hatters*, 73 N. J. Law, 729, 743; *Perkins* v. *Pendleton*, 90 Maine, 166; *Lucke* v. *Clothing Cutters*, 77 Maryland, 396; *London Guar. & Acc. Co.* v. *Horn*, 101 Ill. App. 355, *S. C.*, 206 Illinois, 493; *Chipley* v. *Atkinson*, 23 Florida, 206; *Blumenthal* v. *Shaw*, 23 C. C. A. 290, *S. C.*, 77 Fed. Rep. 954. It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employés to bring the

alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.

The question then is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. (See *Gegiow* v. *Uhl, Commissioner,* decided October 25, 1915, *ante,* p. 3.) Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—'any person within its jurisdiction'—as it has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment), 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' See also *Wong Wing* v. *United States,* 163 U. S. 228, 242; *United States* v. *Wong Kim Ark,* 169 U. S. 649, 695. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against

both aliens and the citizens of other States. Thus in *McCready* v. *Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein* v. *Lynham*, 100 U. S. 483; *Blythe* v. *Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time 'regardless of kind or class of work, or sex of workers' shall employ 'not less than eighty per cent. qualified electors or native born citizens of the United States or some subdivision thereof.' It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which requires nine employés. The purpose of an act must be found in its natural operation and effect (*Henderson* v. *Mayor*, 92 U. S. 259, 268; *Bailey* v. *Alabama*, 219 U. S. 219, 244), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as 'An act to protect the citizens of the United States in their employment against non-citizens

of the United States, in Arizona.' As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described. Literally, its terms might be taken to include with aliens those naturalized citizens who by reason of change of residence might not be at the time qualified electors in any subdivision of the United States, but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins, supra; Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere

fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor'; that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent. of his employés. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. *Otis* v. *Parker*, 187 U. S. 606; *Silz* v. *Hesterburg*, 211 U. S. 31; *Purity Co.* v. *Lynch*, 226 U. S. 192. If the restriction to twenty per cent. now imposed is maintainable the State undoubtedly has the power if it sees fit to make the per-

centage less. We have nothing before us to justify the limitation to twenty per cent. save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent. of the employés to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203, 207; *McLean* v. *Arkansas*, 211 U. S. 539, 551; *Miller* v. *Wilson*, 236 U. S. 373, 384); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law.

The question of rights under treaties was not expressly presented by the bill, and, although mentioned in the argument, does not require attention in view of the invalidity of the act under the Fourteenth Amendment.

Order affirmed.

MR. JUSTICE MCREYNOLDS dissenting.

I am unable to agree with the opinion of the majority of the court. It seems to me plain that this is a suit against

a State to which the Eleventh Amendment declares "the judicial power of the United States shall not be construed to extend." *Fitts* v. *McGhee*, 172 U. S. 516. If *Ex parte Young*, 209 U. S. 123, and the cases following it support the doctrine that Federal courts may enjoin the enforcement of criminal statutes enacted by state legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the Amendment ought to be given effect, not refined away.

That the challenged act is invalid I think admits of no serious doubt.

RIO GRANDE WESTERN RAILWAY COMPANY *v.* STRINGHAM.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Nos. 4, 5. Submitted October 19, 1915.—Decided November 1, 1915.

A railway company brought suit to establish its title under the Right-of-Way Act of 1875 to certain lands in fee and the trial court found for defendant; on appeal the appellate court reversed with directions to enter judgment awarding the railway company a right of way; on the trial court entering such a judgment the railway company again appealed contending that according to the true effect of the Right-of-Way Act it had title in fee, but the appellate court affirmed the judgment as entered. On writs of error taken to both judgments, on separate writs, *held* that:

As the first judgment of the appellate court disposed of the case on the merits and left nothing to the discretion of the trial court it was final in the sense of § 237, Judicial Code, and the writ of error was rightly taken to that judgment, but not to the second judgment.

The right of way granted by the Act of 1875 is neither a mere easement, nor a fee simple absolute, but a limited fee made on implied condition of reverter in the event of non-user.

The judgment awarding to the railway company a right of way in the terms of the Right-of-Way Act used those terms with the same meaning they have in the act and accorded to the company all that it was entitled to.

38 Utah, 113, affirmed.

Writ of error to review 39 Utah, 236, dismissed.

THE facts, which involve the construction of the Railroad Right-of-Way Act of March 3, 1875, are stated in the opinion.

Mr. Waldemar Van Cott, Mr. E. M. Allison, Jr., and *Mr. William D. Riter* for plaintiff in error:

A railway company which complies with the act of Congress of March 3, 1875, acquires a title in fee simple, and not merely an easement or right of way. *New Mexico* v. *U. S. Trust Co.*, 172 U. S. 171; *Nor. Pac. R. R.* v. *Townsend*, 190 U. S. 267; *West. Un. Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540, 570; *Oregon Short Line* v. *Stalker*, 95 Pac. Rep. 56; *Nor. Pac. R. R.* v. *Myers-Parr Co.*, 103 Pac. Rep. 453.

There was no appearance, nor was any brief filed for defendants in error.

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

This was a suit to quiet the title to a strip of land claimed and used by the plaintiff as a railroad right of way under the act of March 3, 1875, c. 152, 18 Stat. 482, and to which the defendants asserted title under a patent for a placer mining claim. At the trial the facts were specially found and judgment for the defendants was entered upon the findings. In reviewing that judgment the Supreme

Court of the State, accepting the findings below, held that the plaintiff in virtue of proceedings had in the Land Department under the Right-of-Way Act while the land was yet public acquired a right of way two hundred feet wide through the lands afterwards embraced in the mining claim and that the defendants' title under the placer patent was subject to this right of way, and thereupon reversed the judgment and remanded the case with a direction to "enter a judgment awarding to the plaintiff title to a right of way over the lands in question one hundred feet wide on each side of the center of the track." 38 Utah, 113. Acting upon this direction the trial court vacated its prior judgment and entered another adjudging the plaintiff to be "the owner of a right of way" through the mining claim one hundred feet wide on each side of the center line of the railroad, declaring the plaintiff's title to such right of way good and valid, and enjoining the defendants from asserting any claim whatever to the premises, or any part thereof, adverse to the plaintiff's "said right of way." The plaintiff again appealed insisting that it was only adjudged to be the owner of a right of way when according to the true effect of the Right-of-Way Act it had a title in fee simple, as was asserted in its complaint. But the judgment was affirmed, the court saying (39 Utah, 236):

"If counsel for appellant thought that this court, in the prior opinion, did not correctly define and determine the extent of appellant's rights to the land in dispute, or did not fully safeguard its rights as defined and adjudged, they should have filed a petition for a rehearing. This they did not do. The conclusions of law and judgment having been drawn and entered in conformity with the decision of this court, we are precluded from further considering the case. The former decision became, and is the law of the case, and this court, as well as the litigants, are bound thereby."

Being in doubt which of the judgments of the appellate court should be brought here for review to present properly the question respecting the nature of its title, the plaintiff concluded to bring up both, each by a separate writ of error.

Manifestly the first judgment was final within the meaning of Jud. Code, § 237. It disposed of the whole case on the merits, directed what judgment should be entered and left nothing to the judicial discretion of the trial court. *Board of Commissioners* v. *Lucas*, 93 U. S. 108; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Mower* v. *Fletcher*, 114 U. S. 127; *Chesapeake & Pot. Tel. Co.* v. *Manning*, 186 U. S. 238. And as the question sought to be presented arises upon the first judgment—it being final in the sense of § 237—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here. See *Northern Pacific R. R.* v. *Ellis*, 144 U. S. 458; *Great West. Tel. Co.* v. *Burnham*, 162 U. S. 339; *Chesapeake & Ohio Ry.* v. *McCabe*, 213 U. S. 207, 214.

What the act relied upon grants to a railroad company complying with its requirements is spoken of throughout the act as a "right of way," and by way of qualifying future disposals of lands to which such a right has attached, the act declares that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 183; *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, 271; *United States* v. *Michigan*, 190 U. S. 379, 398; *West. Un. Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540,

570. The judgment under review does not in words so characterize the plaintiff's right nor was it essential that it should do so. It describes the right in the exact terms of the Right-of-Way Act and evidently uses those terms with the same meaning they have in the act. So interpreting the judgment, as plainly must be done, we think it accords to the plaintiff all to which it is entitled under the act.

In No. 4 Judgment affirmed.
In No. 5 Writ of error dismissed.

BRIGGS *v.* UNITED SHOE MACHINERY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 638. Submitted October 12, 1915.—Decided November 1, 1915.

A suit for royalties reserved upon the sale of a patent right is not a suit arising under the patent laws and the District Court does not have jurisdiction on that ground.

The bill in this case does not present a case in equity within §§ 4915 or 4918, Rev. Stat.

The general powers of the Federal courts when sitting as courts of equity can only be exerted in cases otherwise within the jurisdiction of those courts as defined by Congress.

Only the United States can maintain a bill for the annulment of a patent on the ground of its procurement by fraud.

THE facts, which involve the jurisdiction of the District Court of the United States in cases arising under the patent laws, are stated in the opinion.

Mr. William A. Milliken for appellant.

Mr. Horace A. Dodge and *Mr. Alex. D. Salinger* for appellee.

Memorandum opinion by MR. JUSTICE VAN DEVANTER, by direction of the court.

Whether this suit between citizens of the same State is one arising under the patent laws is the only question presented by this direct appeal under Jud. Code, § 238. The District Court gave a negative answer to the question and dismissed the suit for want of jurisdiction.

The bill shows that its dominant and ultimate object is to enforce payment of royalties reserved to the plaintiff by a contract whereby he sold to the defendant certain existing and contemplated patents for improvements in shoe-sewing machines, and that to clear the way for a recovery of all the royalties claimed it seeks the annulment of a patent for such an improvement issued to Andrew Eppler after the contract and then assigned to the defendant, and also an adjudication that the plaintiff is entitled to a patent for the improvement covered by the Eppler patent.

A suit for royalties reserved upon the sale of a patent right is not a suit arising under the patent laws. This is settled by repeated decisions. *Albright* v. *Teas*, 106 U. S. 613; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 285; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 259, and cases cited.

While the patent laws (Rev. Stat., §§ 4915, 4918) permit an applicant for a patent whose application has been refused by the Commissioner of Patents, or by the Court of Appeals[1] of the District of Columbia upon appeal from the Commissioner, to establish his right to receive a patent by a suit in equity, and also permit a patentee to maintain a suit in equity against the owner of an inter-

[1] See § 9, act February 9, 1893, c. 74, 27 Stat. 434.

fering patent to annul the latter, the present bill falls so far short of presenting a case within either section that it reasonably cannot be said to invoke the application of either. Recognizing that this is so, counsel for the plaintiff in his brief not only frankly concedes that he finds no statute in point, but endeavors to maintain the jurisdiction of the District Court by a reference to the general powers of Federal courts when sitting as courts of equity, evidently forgetting that such powers can be exerted only in cases otherwise within the jurisdiction of those courts as defined by Congress.

Some stress is laid in the brief upon portions of the bill charging fraud in the procurement of the Eppler patent, but as only the United States can maintain a bill to annul the patent on that ground (*Mowry* v. *Whitney*, 14 Wall. 434; *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 368; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 555) these allegations cannot affect the solution of the question of jurisdiction here presented.

Our conclusion is that this is not a suit arising under the patent laws.

Decree affirmed.

PENNSYLVANIA COMPANY *v.* DONAT.

ERROR TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 564. Motion to dismiss or affirm submitted October 18, 1915.—Decided November 1, 1915.

In an action based on the Employers' Liability Act the trial court properly submitted to the jury for its determination whether on the facts shown in regard to movement of cars coming from without the State, the plaintiff was or was not engaged in interestate commerce and

properly refused to charge that he was not so engaged and therefore could not recover.

A writ of error to review such a judgment is so frivolous as not to need further argument and a motion to affirm must be granted under § 5 of Rule 6.

224 Fed. Rep. 1021, affirmed.

THE facts, which involve the duty of this court in the case of a frivolous appeal in a case under the Employers' Liability Act, are stated in the opinion.

Mr. Rufus S. Day, Mr. Samuel Herrick, Mr. R. B. Newcomb, Mr. James B. Harper, Mr. A. G. Newcomb, Mr. E. C. Chapman, Mr. George M. Skiles, Mr. Thomas J. Green, Mr. Roscoe C. Skiles and *Mr. Otto E. Fuelber,* for defendant in error in support of the motion.

Mr. Samuel O. Pickens, Mr. Frederic D. McKenney, Mr. Elmer E. Leonard, Mr. James H. Rose and *Mr. Fred E. Zollars* for plaintiff in error in opposition to the motion.

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

The question presented upon this writ of error is "so frivolous as not to need further argument," and the motion to affirm the judgment below must be granted. (Rule 6, § 5.)

Basing his claim upon the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, Marion Donat began the original action in the United States District Court for Indiana against the Pennsylvania Company, a carrier by railroad, to recover damages for personal injuries alleged to have been suffered by him while employed as a yard conductor. The trial court refused a request to charge that he was not engaged in interstate commerce when the accident occurred and therefore could not re-

cover. This refusal is the sole ground upon which error is now asserted.

Two loaded coal cars coming from without the State were received in the carrier's yard at Fort Wayne, Indiana. They were destined to Olds' private switch-track connecting with the yard; and acting under instructions Donat commenced the switching movement requisite to place them thereon. There was evidence tending to show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged about the removal defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. Rep. 1021) the Circuit Court of Appeals was clearly right. *N. Y. Cent. & Hudson River R. R.* v. *Carr*, 238 U. S. 260, 262–263.

Affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* DEVINE, ADMINISTRATOR OF MASON.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 391. Motion to dismiss or affirm submitted October 25, 1915.—Decided November 8, 1915.

In a suit in the state court under the Employers' Liability Act, defendant's contentions that plaintiff's intestate was not engaged in interstate commerce and that a state statute limiting amount of recovery controlled involve Federal questions, and, unless wholly frivolous, this court has jurisdiction.

In this case, however, as both of the propositions are so wanting in sub-

stance as not to require further argument, the judgment is affirmed under Rule 6, paragraph 5.

Previous decisions of this court have conclusively established the exclusive operation of the Employers' Liability Act over the subject with which it deals to the exclusion of all state statutes relating thereto.

266 Illinois, 248, affirmed.

THE facts, which involve the jurisdiction of this court to review a judgment of the state court on writ of error under § 237, Jud. Code, and the disposition of such writ when frivolous under Rule 6, par. 5, are stated in the opinion.

Mr. James C. McShane for defendant in error in support of motion to dismiss or affirm.

Mr. Thomas P. Littlepage and *Mr. M. L. Bell* for plaintiff in error in opposition to the motion cited:

Behrens v. *Ill. Cent. R. R.*, 192 Fed. Rep. 582; *Cent. Vermont Ry.* v. *White*, 238 U. S. 507; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142; *Haire* v. *Rice*, 204 U. S. 291; *Home for Incurables* v. *New York*, 187 U. S. 155; *Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Mo. Pac. Ry.* v. *Castle*, 224 U. S. 541; *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668; *Second Employers' Liability Cases*, 223 U. S. 1; *So. Pac.* v. *Schuyler*, 227 U. S. 601; *St. L. & Iron Mtn. R. R.* v. *McWhirter*, 229 U. S. 265; *St. L. & Iron Mtn. Ry.* v. *Taylor*, 210 U. S. 281.

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

The recovery under the Employers' Liability Act in the trial court, affirmed by the intermediate and supreme court, was for the damage caused by the death of Mason through the negligence of the defendant company. 266

Illinois, 248. Two propositions are relied upon for reversal: first, a refusal to instruct a verdict on the ground that there was no evidence tending to show either negligence or that the company or the deceased at the time of the particular transaction from which the injury arose was engaged in interstate commerce, and second, a further refusal to instruct that a state statute limiting the amount of recovery was controlling although the suit was under the act of Congress. These contentions are Federal (*Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Central Vermont Ry.* v. *White*, 238 U. S. 507, 509) and there is jurisdiction, as we do not find them wholly frivolous.

Overruling the motion to dismiss, we come to consider whether we should grant the motion to affirm, and for that purpose we must decide whether the propositions are so wanting in substance as not to require further argument. Rule 6, paragraph 5. We are of the opinion that as to both propositions an affirmative answer is required. We say this because as to the first it is apparent that there is no ground upon which to rest the assertion that there was no tendency of proof whatever on the subjects stated, but to the contrary the record makes it clear, and the arguments in support of the proposition demonstrate, that it alone involves a mere dispute concerning the weight of conflicting tendencies of proof. And the same conclusion is necessary as to the second, because in substance and effect the want of merit in that proposition has by necessary intendment been so conclusively established by the previous decisions of this court concerning the exclusive operation and effect of the Employers' Liability Act over the subject with which it deals as to exclude all ground for the contention which the proposition makes. *Second Employers' Liability Cases*, 223 U. S. 1, 53–55; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 66–67; *St. Louis, Iron Mtn. & So. Ry.* v. *Craft*, 237 U. S. 648, 655.

Affirmed.

STRATTON *v.* STRATTON.

ERROR TO THE COURT OF APPEALS OF THE SEVENTH APPELLATE DISTRICT OF THE STATE OF OHIO.

No. 618. Motion to dismiss or affirm submitted October 25, 1915.—Decided November 8, 1915.

A judgment of an intermediate appellate state court is not a final judgment of the state court of last resort within the meaning of § 237, Judicial Code, if the highest court of the State has a discretionary power to review which has not been invoked and refused.

The usual practice in the various States where discretionary power to review exists in the highest court of the State is to invoke the exercise of such discretion in order that upon the refusal to do so there may be no question concerning the right to review in this court.

Appeal from a judgment of the Court of Appeals of Ohio dismissed on the ground that under the constitution and laws of Ohio the Supreme Court of the State had a discretionary power of review which had not been invoked and refused.

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

Mr. D. A. Hollingsworth, Mr. C. A. Vail and *Mr. E. E. Erskine,* for defendant in error in support of the motion to dismiss or affirm.

Mr. Addison C. Lewis and *Mr. David M. Gruber* for plaintiff in error in opposition to the motion.

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

To reverse a judgment rendered by the Ohio Court of Appeals of the Seventh Appellate District on the ground of

Federal errors committed, this writ of error is prosecuted to that court. There is a motion to dismiss based on the ground that the court of last authority, the Supreme Court of the State, was the highest court in which a decision in the suit could be had. This rests not upon the contention that in all cases as a matter of right and of duty the Supreme Court was given authority to review the judgments and decrees of the Courts of Appeals, but upon the proposition that under the constitution and laws of Ohio the Supreme Court was vested with power to review in every case the judgments or decrees of the Courts of Appeals where in the exercise of its judgment the Supreme Court deemed them to be of such public or great general interest as to require review.

The premise upon which the proposition is based being undoubtedly accurate, indeed not disputable (Ohio Constitution, Art. IV, § 2; *City of Akron* v. *Roth*, 88 Ohio St. 457), we think the motion to dismiss must prevail. True, it is urged that under the Ohio law the jurisdiction of the Supreme Court was not imperative, but gracious or discretionary, that is, depending upon its judgment as to whether the case was one of public or great general interest—an exceptional class in which the case before us, it is insisted, we must now decide was not embraced. But this simply invites us to assume jurisdiction by exercising an authority which we have not, that is, by indulging in conjecture as to what would or would not have been the judgment of the Supreme Court of Ohio if it had been called upon to exert the discretion vested in it by state laws. When the significance of the proposition upon which the claim of jurisdiction is based is thus fixed, it is not open to contention, as it has long since been adversely disposed of. *Fisher* v. *Perkins*, 122 U. S. 522; *Mullen* v. *West. Un. Beef Co.*, 173 U. S. 116. Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various States where discretionary power

to review exists in the highest court of the State, to invoke the exercise of such discretion in order that upon the refusal to do so there might be no question concerning the right to review in this court. See *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364; *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264; *St. Louis San Francisco Ry.* v. *Seale*, 229 U. S. 156.

Dismissed for want of jurisdiction.

CITY OF NEW YORK *v.* SAGE.

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

No. 34. Argued October 27, 1915.—Decided November 8, 1915.

On condemnation proceedings adaptability to the purposes for which the land could be used most profitably can be considered only so far as the public would have considered it had the land been offered for sale in the absence of the exercise of eminent domain.

The owner is entitled to the value of the property taken; that is, what it fairly may be believed a purchaser in fair market conditions would have given for it and not what a tribunal at a later date may think a purchaser would have been wise to give.

The owner is not entitled to added value resulting from the union of his lot with other lots when the union was the result of the exercise of eminent domain and would not otherwise have been practicable.

The owner is entitled to rise in value before the taking not caused by the expectation of that event.

In this case, involving condemnation of property in New York, *held* that although maps showing the parcels to be taken had been filed and notices posted on the property, one not a resident of New York, purchasing before the petition was filed could properly remove the case into the Federal court as the proceeding was not commenced until after the petition for appointment of commissioners had been filed.

206 Fed. Rep. 369, reversed.

THE facts, which involve the validity of an award by commissioners for land taken for the Ashokan reservoir in New York, are stated in the opinion.

Mr. Louis C. White and *Mr. W. McM. Speer* with whom *Mr. Frank L. Polk* was on the brief, for petitioner:

The Circuit Court of Appeals erred in holding this case within *Boom Co.* v. *Patterson*, 98 U. S. 403.

There is absolutely no evidence that the market value of the property taken had been increased by reason of availability and adaptability for reservoir purposes.

The state court having held that there can be no recovery for reservoir availability and adaptability of parcels taken by the City of New York for the Ashokan reservoir considered in connection with other parcels, the Federal court will accept those decisions as the law of the State of New York and as binding on it.

The Circuit Court of Appeals erred in holding that this was a controversy between citizens of different States removable from the State to the United States court.

The judgment of the United States Circuit Court of Appeals should be reversed and the additional award for availability and adaptability for reservoir purposes disallowed.

In support of these contentions see *Backus* v. *Fourth Street Depot*, 169 U. S. 557; *Boom Co.* v. *Patterson*, 98 U. S. 403; *Chamber of Commerce* v. *Boston*, 217 U. S. 189; 195 Massachusetts, 338; *Burgess* v. *Seligman*, 107 U. S. 20; *King* v. *New York*, 36 N. Y. 182; *Marchant* v. *Penna. R. R.*, 153 U. S. 380; *Matter of Grade Crossing*, 17 App. Div. 54; *Matter of Peterson*, 94 App. Div. 143; *Matter of Water Supply*, 211 N. Y. 174; *Matter of Simmons*, 58 Misc. (N. Y.) 581; 130 App. Div. 350; 195 N. Y. 573; *McGovern* v. *New York*, 229 U. S. 363; *Minnesota Rate Cases*, 230 U. S. 352; *Shoemaker* v. *United States*, 147 U. S. 282; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

Mr. Edward A. Alexander for respondent:

It was not error to refuse to remand this proceeding to the state court.

The courts had no power to modify the award, without nullifying the state constitution.

The findings of the Commissioners of Appraisal were findings of fact, which an appellate court has not jurisdiction to review.

The Commissioners of Appraisal followed the decisions of the state court.

The adaptability of land for reservoir or water supply purposes has been uniformly taken into consideration, as an element, in estimating its value in a number of well-decided and carefully considered cases, both in the United States and Great Britain.

The lower courts were right in holding this case within the principle of *Boom Co.* v. *Patterson*, 98 U. S. 403.

Although there were prior demands, such are unnecessary to be proved, to entitle the owner to the element of value, due to the adaptability and availability of his property, as part of a natural reservoir site, and such value is not in any sense speculative. *Chandler-Dunbar Co.* v. *United States*, 229 U. S. 53; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189; *McGovern* v. *City of New York*, 229 U. S. 363, and the *Minnesota Rate Cases*, 230 U. S. 352, do not apply to the facts in the case at bar.

The fact that the defendant in error did not, or could not, alone, use his property as a reservoir site, does not deprive the property of its value, as a portion of a reservoir site.

The fact that the defendant in error was the owner of only a part of a reservoir site, does not prevent that element of value being considered.

The valuation made by the Commissioners of Appraisal, was not the value of the property to the condemning

party, but the market value of the property in the open market, between a willing seller and a willing buyer.

If there is any conflict between the decisions of the state and Federal courts, the Federal courts are not bound, by state court decisions, on questions of general law, such as the valuation of real estate.

The entire record shows that the demand for this property for reservoir purposes, increased its market value.

Numerous authorities of the state and Federal courts support these contentions.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding for the taking of land for the Ashokan reservoir, similar to the one before us in *McGovern* v. *New York*, 229 U. S. 363. After Commissioners were appointed to ascertain the compensation to be paid the case was removed to the Circuit Court, diverse citizenship being alleged. There was a motion to remand which was overruled and subsequently the Commissioners reported that "the sum of $7,624.45 for land and buildings and the further sum of $4,324.45 for reservoir availability and adaptability being a grand total of the sum of $11,948.90 is the sum ascertained and determined by us . . . to be paid to the owners of and all persons interested in said land for the taking of the fee thereof, designated . . . as Parcel 733." They also recommended the allowance of five per cent. on the above award for legal fees and expenses, and of $1,372.31 to named witnesses in specified sums. The report was confirmed by the Circuit Judge, 190 Fed. Rep. 413, and afterwards by the Circuit Court of Appeals. 206 Fed. Rep. 369. 124 C. C. A. 251.

Upon an inspection of the record it appears to us, as the language of the Commissioners on its face suggests, that their report does not mean that the claimant's land had a

market value of $11,948.90—that it would have brought that sum at a fair sale—but that they considered the value of the reservoir as a whole and allowed what they thought a fair proportion of the increase, over and above the market value of the lot, to the owner of the land, subject to the opinion of the court upon the point of law thus raised. Upon that point we are of opinion that they were wrong.

The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

It is said that in this case there was testimony that the lot was worth more than the total allowed. But the only

explanation of the separation of items by the Commissioners is that they were not prepared to say that the market value of the lot was $11,948.90, seeing that the claimant bought it a few days before for $4,500, but that they thought the additional value gained by the City's act should be taken into account and shared between the City and the owner of the land—a proposition to which we cannot assent. *Minnesota Rate Cases*, 230 U. S. 352, 451. *McGovern* v. *New York*, 229 U. S. 363, 372.

The motion to remand was made on the ground that Sage bought after the condemnation proceedings were commenced and therefore was not entitled to remove the suit to the Circuit Court. The maps showing the parcels of real estate to be taken had been filed and notices had been posted on the property before the conveyance to Sage, but the petition for the appointment of Commissioners was not filed until after it had been made. We see no reason to differ from the opinion of the Judges below that the proceeding was not commenced at the date when Sage took.

Decree reversed.

LA ROQUE *v.* UNITED STATES.

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

No. 240. Argued October 15, 18, 1915.—Decided November 8, 1915.

The Nelson Act of January 14, 1889, c. 24, 25 Stat. 642, for allotment to Chippewas of the White Earth Indian Reservation contemplated only selections on the part of living Indians acting for themselves or through designated representatives. There was no displacement of the usual rule that incidents of tribal membership, like the membership itself, are terminated by death.

While not conclusive, the construction given to an act of Congress relative to Indian allotments, in the course of its actual execution by the Secretary of the Interior, is entitled to great respect and ought not to be overruled without cogent and persuasive reasons.

The fact that the act provided for a census of the Indians is not conclusive that the allotments were to be made to all those included in the census. *Fairbanks* v. *United States*, 223 U. S. 215.

The act of March 3, 1891, c. 561, 26 Stat. 1099, establishing a six year limitation for actions by the United States to annul patents, has been construed as being part of the public land laws and refers to patents issued for public lands and does not relate to suits to annul trust patents for allotments of reserved Indian lands.

The act of April 23, 1904, c. 1489, 33 Stat. 297, limiting and defining the authority of the Secretary of the Interior to correct mistakes in, and to cancel, trust patents for Indian allotments does not restrict or define the powers or jurisdiction of the court to cancel such a patent.

198 Fed. Rep. 645, affirmed.

THE facts, which involve the construction of the Nelson Act of 1889 and an allotment to a Chippewa Indian in the White Earth Indian Reservation in Minnesota, are stated in the opinion.

Mr. J. T. Van Metre for appellant.

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

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

This is a suit to cancel a so-called trust patent for an allotment in the White Earth Indian Reservation in Minnesota on the ground that the allotment was made inadvertently and in contravention of the act of January 14, 1889, c. 24, 25 Stat. 642, known as the Nelson Act. In the Circuit Court there was a decree dismissing the bill

upon the merits and this was reversed by the Circuit Court of Appeals with instructions to enter a decree according to the prayer of the bill subject to a qualification not here material. 198 Fed. Rep. 645.

The facts are not in dispute and are these: Vincent La Roque, in whose name the trust patent issued, was a Chippewa Indian born in 1883 of parents residing on the White Earth Reservation and was among those whose names were included in the census of Minnesota Chippewas made under the Nelson Act. Had he lived he would have been entitled to take an allotment under that act. He died shortly after 1889 without an allotment being selected by or for him. Thereafter an application in his name for the allotment in question was presented to the allotting officers, and upon this application the allotment was made and the trust patent was issued, both in his name, as if the selection were made while he was living. Henry La Roque, the defendant, is his father and as sole heir claims the land under the allotment and trust patent.

Whether the Nelson Act contemplated that allotments should be made on behalf of Indians otherwise entitled thereto but who should die without selecting or receiving them is the principal question for decision. The regulations and decisions of the Secretary of the Interior, under whose supervision the act was to be administered, show that it was construed by that officer as confining the right of selection to living Indians and that he so instructed the allotting officers. While not conclusive, this construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings & Dakota R. R.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Hammers*, 221 U. S. 220, 225, 228; *Logan* v. *Davis*, 233 U. S. 613, 627. Not only so, but it receives additional force from its adoption by the Circuit Court of Appeals for the Eighth Circuit

in *Woodbury* v. *United States*, 170 Fed. Rep. 302, where it was said by District Judge Amidon in speaking for that court: "Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestor, in addition to their personal right, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction."

The Nelson Act embodied a plan for securing a cession by the several bands of Chippewa Indians in Minnesota of all reservations occupied by them except portions of the White Earth and Red Lake reservations required to make allotments, for removing to the White Earth Reservation all the bands save those on the Red Lake Reservation, for making allotments in severalty in the unceded lands, and for disposing of the ceded lands, placing the net proceeds at interest and distributing them in severalty at the end of fifty years. Section 1 required that a census be made of each tribe or band for the purpose of ascertaining whether the proper number of Indians assented to the cession and "of making the allotments and payments" contemplated; and section 3 directed that, following the census, the cession and the removal to the White Earth Reservation, allotments in severalty be made, as soon as practicable, to the Red Lake Chippewas in the Red Lake Reservation, and to the others in the White Earth Reservation, "in conformity with" the general allotment act of February 8, 1887, c. 119, 24 Stat. 388, subject to a proviso that any Indian living on any of the ceded reservations might, in his discretion, take his allotment therein instead of moving to the White Earth Reservation.

The general allotment act of 1887, in conformity with which the Chippewa allotments were to be made, after

authorizing a survey of the reservation to be allotted, provided for an allotment in severalty of a designated area "to any Indian located thereon," and then directed that all allotments "be selected by the Indians, heads of families selecting for their minor children" and the agents selecting for orphan children, and that "if any one entitled to an allotment shall fail to make a selection within four years . . ., the Secretary of the Interior may direct a selection for such Indian" to be made by an agent.

We think the terms of the general act contemplated only selections on the part of living Indians acting for themselves or through designated representatives. The express provision for selections in behalf of children and of Indians failing to select for themselves and the absence of any provision in respect of Indians dying without selections are persuasive that no selections in the right of the latter were to be made. In other words, as to them there was no displacement of the usual rule that the incidents of tribal membership, like the membership itself, are terminated by death. See *Gritts* v. *Fisher*, 224 U. S. 640, 642; *Oakes* v. *United States*, 172 Fed. Rep. 305, 307. It is upon this view that the execution of the general act and other similar acts has proceeded. 30 Land Dec. 532; 40 *Id.* 9; 42 *Id.* 446, 582; *Woodbury* v. *United States*, 170 Fed. Rep. 302.

As calling for a different construction of the Nelson Act the defendant relies upon the provision for a census of the Indians and upon the report of the negotiations with them resulting in the cession contemplated by the act, the contentions advanced being that the provision for a census makes it clear that the census when completed was to be accepted as finally determining who were to receive allotments, and that the report of the negotiations shows that the Indians gave their assent to the cession in the belief that the right to select and receive an allotment would not

be terminated by death but would pass to the heirs of the deceased. We are unable to assent to either contention. While the act directed that a census be made "for the purpose," among others, "of making the allotments" contemplated, we think this meant nothing more than that the census should serve as a preliminary guide in ascertaining to whom allotments should be made. There was no direction that it be treated as controlling—or that allotments be made to all whose names appeared therein or only to them. The work of allotment could not be undertaken at once. The cession was not to be effective until approved by the President. Many of the Indians were to be removed from the ceded reservations to the White Earth Reservation, and much other work was required to prepare the way. So, it must have been contemplated that many changes would occur in the membership of the several bands through deaths and births before the allotments could be made. In *Fairbanks* v. *United States*, 223 U. S. 215, we held that children born into the bands after the census were entitled to allotments, although not listed in it, and we perceive no reason for giving the census any greater effect in this case than was given to it in that. No doubt it is to be accepted as an authorized listing of the members of the several bands who were living when it was made, but it has no other bearing in cases like the present. The contention that the Indians understood that the right to select and receive an allotment would not be terminated by death but would pass to the heirs of the deceased is based upon excerpts from addresses made to the Indians by the Commissioners representing the Government in the negotiations. Even when read apart from the context these excerpts afford little basis for the contention and when read with the context they make against the contention rather than for it. The real effect of what was said was that on the death of any Indian "after receiving an allotment" the land would pass

to his heirs, which is quite consistent with our construction of the act.

The suit was brought between six and seven years after the date of the trust patent, and because of this it is urged that the suit was barred by § 8 of the act of March 3, 1891, c. 561, 26 Stat. 1099 (see also c. 559, p. 1093), which provides that "suits by the United States . . . to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." This contention must be overruled upon the authority of *Northern Pacific Ry.* v. *United States*, 227 U. S. 355, 367, where it was held that this section is part of the public land laws and refers to patents issued for public lands of the United States. This trust patent was not issued for public lands of the United States but for reserved Indian lands to which the public land laws had no application. And it may be well to observe in passing that the Circuit Court of Appeals directed that there be embodied in the decree a provision that the Government holds the lands in the same way it held them before the patent was issued, that is, as reserved Indian lands.

Another objection to the suit is predicated upon the act of April 23, 1904, c. 1489, 33 Stat. 297, limiting and defining the authority of the Secretary of the Interior to correct mistakes in and to cancel trust patents for Indian allotments, but of this it is enough to say that we concur in the view of the Circuit Court of Appeals that this section, which makes no reference to the courts, discloses no purpose to restrict or define their jurisdiction or powers in suits such as this.

Decree affirmed.

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

ANDERSON, COLLECTOR OF INTERNAL REVENUE, *v.* THE FORTY-TWO BROADWAY COMPANY.

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

No. 246. Argued October 18, 1915.—Decided November 8, 1915.

The Corporation Tax of 1909, 36 Stat. 112, was not an income tax but an excise upon the conduct of business in a corporate capacity, the tax being measured by reference to the income in a manner prescribed by the act itself.

Where a corporation carries a current indebtedness exceeding the amount of its paid-up capital stock, the interest deductions allowed in determining the net income subject to the corporation tax is limited to so much of the indebtedness as does not exceed the capital.

Congress has power to adopt a basis of distinction between corporations carrying indebtedness that exceeds the amount of the capital and those that do not, and the provision in the Corporation Tax Act limiting the amount of interest deductions to so much of the indebtedness as does not exceed the capital stock is not an arbitrary classification.

The operations of corporations having indebtedness exceeding their capital stock may be considered as conducted more for the benefit of the creditors than of the stockholders, and the contributions of the corporation to the expenses of the Government be admeasured with this fact in view; and so *held* as to a corporation having $600 capital stock and $4,750,000 bonded indebtedness.

THE facts, which involve the construction of the Corporation Tax Act of 1909 and the liability of a realty corporation to pay the tax imposed thereby, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the petitioner.

Mr. Roger S. Baldwin for the respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action to recover a tax alleged to have been erroneously imposed upon respondent for the year 1910 under the Corporation Tax Act of August 5, 1909 (36 Stat. 112, c. 6, § 38), and paid under protest, respondents contending that in ascertaining its net income for the purposes of the tax the entire amount of the interest paid by it within the year upon its mortgage indebtedness ought to have been allowed, the result of which would have been to leave no net income to be taxed; whereas the assessing officer allowed a deduction of interest upon an amount equal only to the capital stock of the company.

Respondent is a corporation of the class commonly known as realty corporations, was organized for the purpose of constructing and renting a building in the city of New York, and transacts no other business. Its paid-up capital stock is only $600, while it has a bonded indebtedness of $4,750,000, secured by mortgages upon its real estate, consisting of a piece of land purchased and a building constructed upon it substantially with borrowed money, to secure the repayment of which the bonds and mortgages were given.

Both the District Court (209 Fed. Rep. 991) and the Circuit Court of Appeals (213 Fed. Rep. 777) held that the interest payments upon the entire mortgage indebtedness were deductible from the gross income of the corporation under clause 1 of paragraph 2 of § 38 of the Act, and gave judgment against the Collector for a refund of the entire tax.

Those portions of the section that are essential to a determination of the controversy are set forth in the margin.[1] The District Court, conceding that the provi-

[1] SEC. 38. That every corporation . . . organized for profit and having a capital stock represented by shares . . . shall be subject to pay annually a special excise tax with respect to the carrying on or

sion of the third clause of the second paragraph, standing alone, would constitute sufficient authority for the action of the assessor, nevertheless held that the force of this provision must be limited, in view of the general purpose of the section to tax only "net income" (construed to mean "gross income after deducting all outgo necessarily incident to the business"), and also in view of the first clause of the second paragraph, which permits of a deduction of "all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property." The court therefore held that, in the case of such a corporation as respondent, the amounts paid for interest on the mortgages must be deducted in order to arrive at net income. The Circuit Court of Appeals entertained a similar view, holding that such interest payments, in the case of a realty corporation, were ordinary and necessary expenses in the maintenance and operation of the business, and were also charges required

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doing business by such corporation . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year . . . *Provided, however*, That nothing in this section contained shall apply to—[certain specified classes of organizations, not including realty corporations].

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation . . . received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; . . . (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, . . . and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; . . .

to be paid as a condition to the continued use or possession of its property, within the meaning of sub-division 1; and that sub-division 3 must be limited in its effect to "the usual corporate indebtedness which is not an ordinary expense of maintenance, nor a charge, payment of which is a condition of the continued use or possession of property."

With these views we cannot agree. There was error, as it seems to us, in seeking a theoretically accurate definition of "net income," instead of adopting the meaning which is so clearly defined in the Act itself.

As has been repeatedly pointed out by this court in previous cases (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145, 150, 151; *McCoach* v. *Minehill Railway*, 228 U. S. 295, 306 *et seq.; United States* v. *Whitridge*, 231 U. S. 144, 147; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414), the act of 1909 was not in any proper sense an income tax law, nor intended as such, but was an excise upon the conduct of business in a corporate capacity, the tax being measured by reference to the income in a manner prescribed by the act itself. And it is very clear, from a reading of § 38, that the phrase "entire net income," as used in its first paragraph, has no other meaning than that which is particularly set forth in the second paragraph, which declares, in terms, how "such net income shall be ascertained." It may well be that mortgage interest may, under special circumstances, be treated as among the "ordinary and necessary expenses," or as included among the charges "required to be made as a condition to the continued use or possession of property." (See 28 Opin. A. G. 198.) But interest upon the "bonded or other indebtedness" of the corporation, whether such indebtedness be secured by mortgage or not, comes within the specific provision of the third clause, whose effect, in our opinion, is not in this respect limited by anything contained in the first. Congress evidently had in view the fact that some corporations (other than banks and like

institutions, which, for obvious reasons, are separately considered), carry a current indebtedness exceeding the amount of the paid-up capital stock, and with respect to such corporations intended to limit the interest deduction to so much of the indebtedness as did not exceed the capital. Nor can we see the least ground for the insistence that this results in an arbitrary classification. It is not necessary to attribute to Congress a purpose to discourage or impose an extra burden upon corporations carrying on their operations with a nominal capital stock, or with an indebtedness largely exceeding the amount of the capital. It is more reasonable to say that Congress deemed that where the indebtedness does exceed the capital it should no longer be treated as an incident, but that the carrying of the indebtedness should be considered as a principal object of the corporate activities, that the operations of such a corporation are conducted more for the benefit of the creditors than of the stockholders, and that the contribution of the corporation to the expenses of the Government should be admeasured with this fact in view. There is no question of the power of Congress to adopt such a basis of distinction, and, since the line must be drawn somewhere, it was certainly not arbitrary to draw it at the precise point where the pecuniary interest of creditors overbalanced that of stockholders.

Judgment reversed, and the cause remanded to the District Court for further proceedings in accordance with this opinion.

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

UNITED STATES *v.* BARNOW.

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

No. 454. Argued October 18, 1915.—Decided November 8, 1915.

The prohibition in § 32, Criminal Code, against falsely assuming or pretending to be an officer of the United States or employé acting under its authority is not confined to false personation of some particular person or class of persons but prohibits any false assumption or pretense of office or employment under the authority of the United States, or any department or officer of the Government, if done with intent to defraud, and accompanied with any of the specified acts done in the pretended character.

The offense under § 32, Criminal Code, is complete on the false personation or pretense and the demanding or obtaining money as the result thereof, even if the person defrauded be not financially injured in consequence thereof.

It is within the power of the United States to prohibit the false personation of its officers or the false assumption of being an officer of the United States, and legislation to that end does not interfere with, or encroach upon, the functions of the States, and so *held* as to § 32, Criminal Code, construed in this case as including a prohibition of the false pretense of holding a non-existent office under non-existent officers of the United States Government.

221 Fed. Rep. 140, reversed.

THE facts which involve the construction of § 32 of the Criminal Code and the validity of an indictment thereunder and the extent of the jurisdiction of this court under the Criminal Appeals Act, are stated in the opinion.

Mr. Solicitor General Davis, with whom *Mr. Robert Szold* was on the brief, for the United States.

Mr. Daniel Thew Wright, with whom *Mr. T. Morris Wampler* and *Mr. Henry D. Green* were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case is brought here under the Criminal Appeals Act (c. 2564, 34 Stat. 1246), to review a judgment of the District Court (221 Fed. Rep. 140), sustaining a demurrer to an indictment founded upon § 32 of the Criminal Code of March 4, 1909 (c. 321, 35 Stat. 1088, 1095). By that section these offenses are prohibited:

(1) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employé acting under the authority of the United States, or any department, or any officer of the Government thereof, and taking upon oneself to act as such.

(2) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employé, etc., and in such pretended character demanding or obtaining from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper, document, or other valuable thing.

The indictment contains six counts, of which the first, third, and fifth are based upon the former, and the second, fourth, and sixth upon the latter of these prohibitions. The first count charges that defendant, with intent to defraud a certain person named, did falsely pretend to be an employé of the United States acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in that he visited the person named and falsely pretended to him that he was such an employé of the United States, employed as aforesaid for the purpose aforesaid. The third and fifth counts differ only as to the names of the persons mentioned and the dates of the alleged offenses.

The second count charges that defendant, with intent to defraud a certain person named, did falsely pretend to be an employé of the United States acting under the authority of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," and in such pretended character did obtain from the person named the sum of ten dollars, which he would not have given to defendant unless he had supposed him to be an employé of the Government, and had supposed that the money was to be paid over to the Government on account of the subscription price of the books, etc. The fourth and sixth counts are in like form.

It was and is admitted that there was not in existence such an employé or such an employment as it was alleged the defendant pretended.

The District Court held that the gist of the offense is the false personation of an officer or employé of the United States, and in order to constitute such an offense there must be personation of some particular person or class of persons, since there cannot be a false personation of a supposititious individual who never existed or whose class never existed. Upon this construction of the statute, all of the counts fell.

We think this is to read the act in too narrow a sense. Not doubting that a false personation of a particular officer or employé of the Government, or a false pretense of holding an office or employment that actually exists in the Government of the United States, is within the denunciation of § 32, we think it has a broader reach. No convincing reason is suggested for construing it more narrowly than the plain import of its language. To "falsely assume or pretend to be an officer or employé acting under the authority of the United States, or any Department, or any officer of the Government thereof," is the thing prohibited. One who falsely assumes or pre-

tends to hold an office that has a *de jure* existence is admittedly within its meaning. That is, where the assumption or pretense is false in part but contains a modicum of truth, the statute is violated. Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence? It is insisted that the words next following—"shall take upon himself to act as such, or shall in such pretended character demand or obtain," etc.—indicate an intent to punish only false personation of existing officers or employés, and not a false representation as to some supposititious employment by the Government. But to "take upon himself to act as such" means no more than to assume to act in the pretended character. It requires something beyond the false pretense with intent to defraud; there must be some act in keeping with the pretense (see *People* v. *Cronin*, 80 Michigan, 646); but it would strain the meaning of the section to hold that the offender must act as a veritable officer of the Government would act. And so, in the second branch of the section, the demanding or obtaining of the thing of value must be done "in such pretended character"—words that are far from importing that the office or employment must be one that is duly established by law.

It is said that to give to the statute the broader meaning extends it beyond the limitations that surround the power of Congress, and encroaches upon the functions of the several States to protect their own citizens and residents from fraud. We are referred to *United States* v. *Fox*, 95 U. S. 670, 672, where it was declared by Mr. Justice Field, speaking for the court: "An act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter

within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate." Accepting this criterion, the legislation now under consideration is well within the authority of Congress. In order that the vast and complicated operations of the Government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employés be respected in particular cases, but that a spirit of respect and good-will for the Government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the Government? It is the false pretense of Federal authority that is the mischief to be cured; of course, only when accompanied with fraudulent intent, but such a pretense would rarely be made for benevolent purposes. Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, whether the pretender names an existing or a non-existing office or officer, or, on the other hand, does not particularize with respect to the office that he assumes to hold. Obviously, if the statute punished the offense only when an existing office was assumed, its penalties could be avoided by the easy device of naming a non-existent office.

Therefore, it seems to us, the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States, or any Department or officer of the Government, if done with an intent to defraud, and accompanied with any of the specified acts done in the pretended character, and the District Court

erred in attributing to the Act a more restricted meaning.

We think there was further error in the ruling of the court that the even-numbered counts must fall for the reason, as expressed in the opinion, that there was no allegation to sustain a charge that the person alleged to be defrauded was deprived of any right, interest, or property, or that he was cheated or overreached. In this the court followed *United States* v. *Rush*, 196 Fed. Rep. 579.

Since our review, under the Criminal Appeals Act, is confined to passing upon questions of statutory construction, we are not here concerned with the interpretation placed by the court upon the indictment. *United States* v. *Patten*, 226 U. S. 525, 535, and cases cited. We must, for present purposes, accept that interpretation, hence we express no opinion as to whether the District Court erred in holding that the even-numbered counts did not allege a consummated fraud. The question with which we have to deal is whether the second branch of § 32 of the Criminal Code, upon which the even-numbered counts are founded, requires that the fraud shall be consummated, with consequent injury to the party defrauded, in order that the offense shall be complete.

It has been held that in an indictment under § 5440, Rev. Stat., for a conspiracy to defraud the United States, it is not essential that the conspiracy shall contemplate a financial loss, or that one shall result; and that the statute is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any Department of the Government. *Haas* v. *Henkel*, 216 U. S. 462, 479. And with respect to § 5418, Rev. Stat., prohibiting the forging of any public record "for the purpose of defrauding the United States," a similar decision was reached. *United States* v. *Plyler*, 222 U. S. 15.

Like reasoning, we think, must be applied to § 32 of

the Criminal Code, whether the United States, or "any person," be the intended victim. If, with intent to defraud, and by falsely assuming or pretending to be an officer or employé acting under the authority of the United States, the accused shall, in the pretended character, have demanded or obtained any money, paper, document, or other valuable thing, the offense is complete, notwithstanding some valuable consideration was offered or given by the pretended employé for that which he demanded or obtained. It is the aim of the section not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself. It is inconsistent with this object, as well as with the letter of the statute, to make the question whether one who has parted with his property upon the strength of a fraudulent representation of Federal employment, has received an adequate *quid pro quo* in value, determinative. Of course, we do not mean to intimate that it may not in a proper case be taken into consideration as a circumstance evidential upon the question of intent.

The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

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

NATIONAL BANK OF ATHENS *v.* SHACKELFORD, TRUSTEE IN BANKRUPTCY FOR WEBB.

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

No. 40. Argued October 29, 1915.—Decided November 8, 1915.

A mortgage given for valuable consideration more than four months before the petition was filed, *held* fraudulent and void as to creditors because fraudulently withheld from record until the day the petition was filed.

In this case both courts below having concurred in finding as matter of fact that the mortgage was void because executed and withheld from record for the purpose of hindering and defrauding creditors, this court follows the rule that such finding will not be disturbed unless clearly shown to be erroneous.

208 Fed. Rep. 677, affirmed.

THE facts, which involve the validity of a mortgage lien on the property of the bankrupt, are stated in the opinion.

Mr. John J. Strickland, with whom *Mr. Roy M. Strickland* was on the brief, for appellant.

Mr. Lamar C. Rucker and *Mr. Horace M. Holden*, with whom *Mr. Stephen C. Upson*, *Mr. Howell C. Erwin* and *Mr. Andrew J. Cobb* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This controversy arose in a bankruptcy proceeding and was begun in the United States District Court for the Northern District of Georgia. Appellant claims that it holds a valid lien on certain real estate in the city of Athens, formerly the property of the bankrupt, Webb, under a mortgage deed executed by him November 6, 1911,

but not recorded until noon August 14, 1912, a few hours before the petition in involuntary bankruptcy was filed. Among other things, the trustee asserts that the mortgage is void as to creditors because fraudulently withheld from record. Bankruptcy Act, § 70, c. 541, 30 Stat. 544. Georgia Code, 1910, § 3224.

Having heard the witnesses and upon the entire evidence, the District Court, citing and purporting to follow *In re Duggan*, 183 Fed. Rep. 405 (1910), found and adjudged the deed invalid as against general creditors. Affirming this action the Circuit Court of Appeals for the Fifth Circuit declared: "The evidence in this case tends strongly to show that, although the mortgage given by the bankrupt to the appellant was for a valid consideration and effective as between the parties thereto, the same by understanding, if not agreement, was withheld from record, so as not to affect the mortgagor's credit; and we therefore concur with the trial judge in his disposition of the case." 208 Fed. Rep. 677, 678. In the *Duggan Case* the same court had held fraudulent and void, both as to prior and subsequent creditors, a chattel mortgage executed by a bankrupt but withheld from record under agreement so to do because of the effect which recordation would have on her credit.

Considering all said and adjudicated by the two courts below, we must conclude they concurred in finding, as matter of fact, that the mortgage in question was void as to creditors because executed and withheld from record for the purpose of hindering, delaying or defrauding them. The rule is well settled that a finding of this nature will not be disturbed upon review here unless clearly shown to be erroneous. *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Stuart* v. *Hayden*, 169 U. S. 1, 14. An examination of the record reveals no clear error, and, accordingly, the judgment appealed from must be

Affirmed.

PARKER *v.* MONROIG.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 287. Submitted October 12, 1915.—Decided November 15, 1915.

A community cannot enjoy an acquet free of the obligations inseparably connected with it; and if it takes real estate, as in this case, subject to a servitude imposed by the master of the community before acquisition, it cannot enjoy the property afterwards free from such servitude because of the failure of the wife thereafter to unite therein.

Porto Rico Code, § 4481, is only applicable to cases of lesion in cases of sale embraced in § 4480 of that code, (§ 1375 of the previous code).

THE facts, which involve contracts affecting realty afterwards becoming community property and the liability of the community thereon, are stated in the opinion.

Mr. N. B. K. Pettingill for appellant:

The contract of which specific performance is prayed was unenforceable, because it involved a conveyance of the title to real estate situated in Porto Rico belonging to a conjugal partnership, and only one member of that conjugal partnership had entered into the contract.

Such contract was unenforceable, because it was void under the laws of Porto Rico, where it was made and was to be performed.

A decree for complainants was unwarranted, because it was necessarily prayed against a defendant who was not a party to the contract decreed to be specifically enforced.

The decree as entered was unwarranted, because the easement prayed for by the bill and provided for by the contract enforced was not of the character granted by the decree, and also because the action had been barred by

laches by analogy to the prescription fixed by § 1375 of the Civil Code of Porto Rico.

In support of these contentions, see *Amado* v. *Registrar*, 3 P. R. 134 (2d ed.); *Am. Colortype Co.* v. *Continental Co.*, 188 U. S. 104, 107; *Baltzer* v. *Raleigh &c. R. R.*, 115 U. S. 634, 648; *Bateman* v. *Riley*, 72 N. J. Eq. 316; *Boscio* v. *Registrar*, 14 P. R. 605; *Bruner* v. *Bateman*, 66 Iowa, 488; *Caballero* v. *Registrar*, 12 P. R. 214; *Crim* v. *Nelms*, 78 Alabama, 604; *Graybill* v. *Bough*, 89 Virginia, 899; *Hedges* v. *Dixon County*, 150 U. S. 182, 192; *Hodges* v. *Farnham*, 49 Kansas, 777; *Law* v. *Butler*, 44 Minnesota, 482; *Meek* v. *Lange*, 65 Nebraska, 786; *Parish* v. *United States*, 8 Wall. 489; *P. R. Gen. Tel. Co.* v. *Registrar*, 18 P. R. 823; *Richmond* v. *Robinson*, 12 Michigan, 193, 201; *Richards* v. *Greene*, 73 Illinois, 54; *Stephens* v. *Parish*, 29 Indiana, 260; *Van Ness* v. *Washington*, 4 Pet. 232, 282; *Vidal* v. *Registrar*, 12 P. R. 198.

Mr. Frank Antonsanti and *Mr. Frederick S. Tyler* for appellees.

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

W. G. Henry, who had leased to Cornelius B. Parker, a married man, two farms, one Rio Hondo containing 440 acres and the other El Quinto embracing 278 acres, gave him in writing an option to buy both for the sum of $37,000 in gold payable on or before May 1, 1911. Shortly before that period Parker and the Successors of A. Monroig, a sugar manufacturing corporation, agreed the one to sell and the other to buy a piece of land "composed of about two hundred acres, a part of the farm known as El Quinto" for $125 per acre, and on the same day an agreement in writing was executed between the parties by which Parker created in favor of the corporation an

easement of way across the farms El Quinto and Rio Hondo for the operation of a private railway conditioned on the carrying out by the corporation of the purchase of the portion of El Quinto as stated in the option contract. The option and the agreement to buy were both consummated. Parker acquired the two farms and the corporation bought from Parker 207 acres out of the farm El Quinto, about 70 acres, therefore, remaining in Parker. The formal deeds accomplishing this result are not in the record, but as found by the court below and not disputed, the matter was so arranged that the $25,875 due for the part of El Quinto bought by the corporation was made available for Parker so that he was enabled to use it as part of the $37,000 which under the option he was to pay for the purchase of the whole of El Quinto and Rio Hondo. It further appears from the opinion below that nothing was said in the deed to the corporation as to the right of way over the strip remaining of El Quinto, but at or about the time of the sale a deed was drawn by Parker and his wife giving to the corporation the right of way over Rio Hondo as provided in the option contract.

A controversy grew up between Parker and the corporation as to whether the corporation had not lost the right to the easement of way over the portion of El Quinto retained by Parker, and an attempt of the corporation to exercise the right of servitude was interfered with. This suit was then brought by the corporation and this appeal is prosecuted to obtain the reversal of a decree rendered in favor of the corporation directing the performance of the contract concerning the easement and preventing the interference with the enjoyment of such right.

It is apparent that the substantial controversy is a very narrow one, concerning only the easement of way over the small strip of the farm El Quinto remaining after carving out the portion of that farm bought by the corporation. And the contention as to the non-existence of

the right of way rests exclusively upon a challenge of the validity of the contract as to the right between Parker and the corporation. The contention is that by virtue of the purchase made from Henry of the two farms they became acquets of the community existing between Parker and his wife, and as under the Porto Rican law the assent of the wife to the disposal of real property of the community was essential and such assent was not given by the wife, Parker alone having been a party to the contract giving the corporation the right of way, that contract was absolutely void and not susceptible of being enforced. But the error lies in assuming that the property was community property when the option contract was made in order to measure its legality by such erroneous assumption. On the contrary when the contract made by Parker giving the right of way was entered into the property belonged to Henry and the only right possessed by the community was that which might arise from the exercise by Parker, the head and master of the community, of the option to buy from Henry which he, Parker, had procured. When therefore before the exercise of the option Parker agreed to the establishment of the right of way to attach to the property when bought under his option, such contract modified to that extent the right to buy conferred by the option, or, in other words, submitted the exercise of the option to a limitation which followed the property into the hands of the community and diminished the estate which it would otherwise have been entitled to under the option. Obviously from this it results that there was a legal obligation on the part of the community to respect and give effect to the right of way and that its refusal to do so gave rise to the duty of exerting judicial power to compel performance. And the cogency of these conclusions becomes additionally convincing when it is considered that there is no contention as to wrong against the community resulting from the contract which gave to the

corporation a right to buy a part of the property covered by the option held by Parker especially when from the surrounding circumstances it is clearly to be deduced that the agreement to give to the corporation the right of way was one of the considerations by which it was led to consent to become a purchaser of part of the property which the option embraced, thereby in part at least affording the means by which Parker was enabled to acquire under the option the property which remained. The claim now made thus reduces itself to the contention that the right of the community to purchase under the option must be by it enjoyed free from the obligations inseparably resulting from its exertion; or, in another aspect, that the community having secured through its contract with the corporation the means to enable it to pay for the property which it acquired, can retain the property free from the obligation incurred in favor of the corporation.

There is a contention that the right to enforce the agreement to grant the servitude of way is barred by the limitation provided in § 4481 of the Porto Rican Code of 1913 (§ 1735 of the previous code). But on the face of the provision relied upon it is plainly applicable only to actions for lesion in cases of sale embraced by § 4480 of the same code, and has therefore no possible relation to the subject before us. So also there is a contention that the decree below was too broad since it enforced a perpetual easement instead of one depending upon the continued use of the property for the purposes for which the easement was created. But we think this contention is also wholly without merit because the decree when rightly interpreted is not susceptible of the extreme construction placed upon it.

Affirmed.

UNITED STATES OF AMERICA *v.* NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

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

No. 44. Argued November 3, 1915.—Decided November 15, 1915.

Even if a statute declares a transaction void for want of certain enumerated forms, the party for whose protection the requirement is made may waive it; void in such cases meaning only voidable at that party's choice.

The object of Rev. Stat., § 3744, providing that certain officers of the Government reduce all contracts to writing, is to furnish the needed protection for the United States and not for the private individual who does not need such protection; and, notwithstanding informality of execution on the part of the Government, if the other contracting parties did actually contract, he can be held to performance.

209 Fed. Rep. 1007, reversed.

THE facts, which involve the construction of § 3744, Rev. Stat., and the liability of a contractor on a contract with the Government for transportation of coal, are stated in the opinion.

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

Revised Stat., § 3774, is no bar to suit by the Government on executory parol contracts.

The statute does not render the contract illegal but only unenforceable. It affects not the validity of the contract but the remedy thereon. *Clark* v. *United States*, 95 U. S. 539; *St. Louis Hay Co.* v. *United States*, 191 U. S. 159; *United States* v. *Andrews*, 207 U. S. 229; Browne on Stat. of Frauds, 5th ed., § 115a.

Revised Stat., § 3774, is solely for the protection of the

Government. *Clark* v. *United States, supra; Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Verdier,* 164 U. S. 213.

The Government may waive compliance with statutory forms required for its protection. *Bailey* v. *United States,* 109 U. S. 432; *McGowan* v. *Parish,* 237 U. S. 285, 294, 295, and cases cited.

Since the Government is not expressly named in the statutes, its remedy by suit on a valid common-law contract is not barred.

The Government may take the benefit of a statute, but it is not bound thereby unless expressly named. *Stanley* v. *Schwalby,* 147 U. S. 508, 514; *S. C.,* 162 U. S. 255.

The signed offer and acceptance in writing constitute compliance with the statute. *Adams* v. *United States,* 1 Ct. Cl. 192; *Johnston* v. *United States,* 41 Ct. Cl. 76.

The statute does not apply to executed contracts and is no bar to suit on a parol contract after performance by plaintiff. *St. Louis Hay Co.* v. *United States,* 191 U. S. 159, 163; *United States* v. *Andrews,* 207 U. S. 229.

Mr. James H. Hayden, with whom *Mr. Norman B. Beecher* and *Mr. Ray Rood Allen* were on the brief, for defendant in error:

The breach of contract complained of could not have occurred for there was no contract to break. The company never became obligated to furnish the transportation or to indemnify the United States.

The transportation of the Navy Department's coal to San Francisco was a matter from which it alone could derive benefit. In procuring the diversion of the Baker Company's steamers the Department did not relieve the New York and Porto Rico Steamship Company of any obligation to furnish transportation, for no such obligation had been assumed. The United States cannot recover on *quantum meruit.*

In support of these contentions, see *Adams* v. *United States*, 1 Ct. Cls. (N. & H.) 192; *American Dredging Co.* v. *United States*, 49 Ct. Cls. 350; *Clark* v. *United States*, 95 U. S. 539; *Cooke* v. *United States*, 91 U. S. 389; *Danolds* v. *United States*, 5 Ct. Cls. 65; *Gillespie* v. *United States*, 47 Ct. Cls. 310; *Henderson* v. *United States*, 4 Ct. Cls. 75, 81, 84; *Johnston* v. *United States*, 41 Ct. Cls. 76 and 46 Ct. Cls. 616; *Langford* v. *United States*, 101 U. S. 341, 342; *Levy* v. *Bush*, 45 N. Y. 589, 596; *McLaughlin* v. *United States*, 37 Ct. Cls. 150, 185; *Monroe* v. *United States*, 184 U. S. 524; *Montecute* v. *Maxwell*, 1 P. Williams, 518; *Nichols* v. *Mitchell*, 30 Wisconsin, 329, 332; *Richmond Iron Co.* v. *Chesterfield Coal Co.*, 160 Fed. Rep. 832; *Russell* v. *Le Grand*, 16 Massachusetts, 35; *St. Louis Hay Co.* v. *United States*, 191 U. S. 159; *Seymour* v. *Cushway*, 100 Wisconsin, 580, 592; *South Boston Iron Co.* v. *United States*, 118 U. S. 37; 18 Ct. Cls. 165; *Southern Pacific Co.* v. *United States*, 28 Ct. Cls. 77, 105; *Purcell Envelope Co.* v. *United States*, 47 Ct. Cls. 24; *United States* v. *Andrews & Co.*, 207 U. S. 229; *United States* v. *N. A. C. Co.*, 74 Fed. Rep. 145, 151; *Wheeler* v. *Reynolds*, 66 N. Y. 227, 234; Cong. Globe, Vol. 31, pp. 276, 369, 390, 403, 421; Vol. 32, p. 206; 3 Jones Com. on Evidence (1913), § 412, p. 68.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit by the United States to recover the increased cost of transportation for coal, above a price that the defendant had agreed to accept for the service; the latter having notified the Government that it would not furnish the steamers agreed. There is no dispute as to the facts. On November 9, 1909, the plaintiff requested in writing that the defendant make a tender for the transportation of not less than 8,000 tons of coal from certain Atlantic ports at the option of the plaintiff to Mare Island or San Francisco, with stipulations as to

time. On November 13 the defendant submitted an offer which the plaintiff accepted by telegraph on the same day. On November 15 the defendant wrote acknowledging the telegram and saying that it could advise in due course what steamers it would tender. There was further correspondence on the footing of a mutual contract, but on December 14, the defendant's attorney wrote stating that it believed that a combination had been made with intent 'to cause it to make default under its engagement to your Department or else to suffer heavy loss,' and requesting the plaintiff to procure the transportation if it could be done at reasonable cost, letting the writer know the terms of any contract before it was closed. The plaintiff thereupon got the transportation elsewhere. The declaration is in three counts; two upon the contract and a third for money paid at the defendant's request. At the first trial the plaintiff had judgment. 197 Fed. Rep. 995. This judgment was reversed by the Circuit Court of Appeals. 206 Fed. Rep. 443. 124 C. C. A. 325. At a second trial on this same record both parties moved that a verdict be directed, and a verdict was directed for the defendant. The judgment was affirmed by the Circuit Court of Appeals. 209 Fed. Rep. 1007. 126 C. C. A. 668.

The only matter for our consideration is whether the court below was right in ruling as matter of law that there was no binding contract, and therefore we may lay on one side some details that were dwelt upon by the defendant but that do not affect this question. The ground of the defence is Rev. Stats., § 3744. By this section it is made the duty of the Secretaries of War, the Navy and the Interior to cause every contract made by their authority on behalf of the Government 'to be reduced to writing, and signed by the contracting parties with their names at the end thereof'; all the copies and papers in relation to the same to be attached together by a ribbon and seal, &c. A formal proposal, varying, the defendant says, from that

which was accepted in the letters, was sent to the defendant, and received by it on December 11, but never was signed, and the defendant contends that, however it might be otherwise, the statute makes the informal agreement by correspondence void.

The statute does not address itself in terms to the effect of the form upon the liability of the parties, like the Statute of Frauds. Whatever effect it has in that way is not a matter of interpretation in a strict sense, but is implied. The extent of the implication is to be gathered from the purpose of the section and such other considerations as may give us light. The section originally was part of the Act of June 2, 1862, c. 93, 12 Stat. 411, and its purpose is manifested by the scope of the act and its title. It is called "An Act to prevent and punish Fraud on the Part of Officers intrusted with making of Contracts for the Government," and this was recognized as the purpose in *Clark* v. *United States*, 95 U. S. 539. In that case some of the Justices thought that the decision went too far in treating the section as a statute of frauds even in favor of the United States; and while it is established that a contract not complying with the statute cannot be enforced against the Government, it never has been decided that such a contract cannot be enforced against the other party. The prevailing opinion cannot be taken to signify that the informal contract is illegal since it went on to permit a recovery upon a *quantum valebat* when the undertaking had been performed by a claimant against the United States. *United States* v. *Andrews*, 207 U. S. 229, 243. Of course the statute does not mean that its maker, the Government, one of the ostensible parties, is guilty of unlawful conduct, or that the other party is committing a wrong in making preliminary arrangements, if later the Secretary of the Navy does not do what the act makes it his duty to do.

There is no principle of mutuality applicable to a case

like this, any more than there necessarily is in a statute requiring a writing signed by the party sought to be charged. The United States needs the protection of publicity, form, regularity of returns and affidavit, Rev. Stats., §§ 3709, 3718–3724, 3745–3747, in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the Government not upon him. We see no reason for extending the implication of the act beyond the evil that it seeks to prevent. Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice.

Judgment reversed.

GSELL *v.* INSULAR COLLECTOR OF CUSTOMS.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 31. Submitted May 14, 1915; ordered that briefs be filed on the jurisdictional question June 21, 1915; briefs filed October 11, 1915.—Decided November 15, 1915.

The manner of review in this court of judgments of the Supreme Court of the Philippine Islands is regulated by the act of July 1, 1902, 32 Stat. 691.

Under the act of July 1, 1902, this court has jurisdiction to review the judgment of the Supreme Court of the Philippine Islands in actions in which a statute of the United States is involved.

A decision as to classification of merchandise imported into the Philippine Islands involves the construction of the Philippine Tariff Act, and that being a statute of the United States, this court has jurisdiction to review the judgment if properly brought up.

Under the act of July 1, 1902, the same regulations and procedure apply

to the review by this court of judgments of the Supreme Court of the Philippine Islands as to final judgments of the Circuit Courts, and this provision being essential, such regulations and procedure must be complied with.

The procedure for review by this court of judgments of the Circuit Courts and Circuit Courts of Appeals in customs cases has always been by appeal and not by writ of error.

There is more than mere difference in form and procedure between a review by appeal and one by writ of error; upon the former, questions of law and fact are involved; while upon the latter, the review is limited to questions of law.

Review by writ of error is inapplicable to customs cases involving the facts necessary to determine the proper classification under the statute, and judgments of the Supreme Court of the Philippine Islands in customs cases cannot be reviewed upon writ of error.

Writ of error to review 24 Phil. Isl'd, 369, dismissed.

THE facts, which involve the jurisdiction of this court of writs of error to review judgments of the Supreme Court of the Philippine Islands, are stated in the opinion.

Mr. Harry W. Van Dyke for plaintiff in error.

Mr. S. T. Ansell and *Mr. L. W. Call* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes to this court on a writ of error to the Supreme Court of the Philippine Islands, the purpose of which is to review a judgment of that court, affirming a judgment of the Court of First Instance of Manila, which reversed a decision of the Insular Collector as to the proper classification under the tariff act of a certain commodity, known as wool noils, imported into the Philippine Islands. The contention of the importer is that the material is admissible under the free list. The decision was that such material properly classified was subject to a duty of ten per cent. *ad valorem*. At the last term of this court, this case was submitted for consideration, and an order was

entered, requesting that briefs be filed before the present term on the question of the jurisdiction of this court to review the decision of the Supreme Court of the Philippine Islands, and, if reviewable, whether by writ of error or appeal.

The manner of review in this court of the judgments of the Supreme Court of the Philippine Islands is regulated by act of Congress of July 1, 1902, c. 1369, § 10, 32 Stat. 691, 695, which provides:

"That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

This section gives this court jurisdiction to review, revise, reverse, modify, and affirm the final judgments or decrees of the Supreme Court of the Philippine Islands, among others, in actions in which a statute of the United States is involved. The Philippine Tariff Act of August 5, 1909, c. 8, 36 Stat. 130, which is under consideration in this case, is a statute of the United States, and the decision

as to the classification of the merchandise in question involves a statute of the United States, and the case is properly brought for review into this court.

As to the manner of review, this statute is distinct, and provides that such final judgments and decrees of the Supreme Court of the Philippine Islands, can be reviewed, revised, reversed, modified, or affirmed by this court on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States. This provision as to the manner of review is an essential part of the act, and in considering it, this court held, in *Fisher* v. *Baker*, 203 U. S. 174,—where an attempt was made to review an order in a proceeding in *habeas corpus* by writ of error,—that, inasmuch as the final order in such cases in the Circuit and District Courts of the United States can only be reviewed by appeal, the same rule governs procedure to review a final order of the Supreme Court of the Philippine Islands, and the writ of error was accordingly dismissed. See, in this connection, *De la Rama* v. *De la Rama*, 201 U. S. 303; *Behn* v. *Campbell*, 205 U. S. 403.

We therefore proceed to inquire as to the manner of review of orders of this character, in revenue cases in the United States, under the statutes and regulations governing such proceedings, when taken from the final judgments and decrees of the Circuit Courts of the United States. Before the act of June 10, 1890, c. 407, 26 Stat. 131, there was a right of review of revenue cases by appeal from the Circuit Courts of the United States to this court (Rev. Stats., § 699). By the act of June 10, 1890, § 15, 26 Stat. 131, 138, an appeal was given from the decision of the Board of Appraisers as to the construction of the law and the facts, respecting the classification of merchandise, and the rate of duty imposed, to the Circuit Courts of the United States. The decision of the Circuit Court was

final unless the court should be of opinion that the question involved was of sufficient importance to require a review by this court, in which case an appeal was allowed from the Circuit Court to this court. In this state of the law, the Court of Appeals Act was passed March 3, 1891, c. 517, 26 Stat. 826, in which the judgment of the Court of Appeals was made final, among other instances, in revenue cases. It was held that that act, read in connection with former legislation, gave the Circuit Court of Appeals jurisdiction to review judgments of the Circuit Court in revenue cases. *Louisville Public Warehouse Co.* v. *Collector of Customs*, 49 Fed. Rep. 561, Circuit Court of Appeals, Sixth Circuit, opinion by Judge, afterwards Mr. Justice Jackson. The remedy must be sought by appeal, and not by writ of error. *United States* v. *Diamond Match Co.*, 115 Fed. Rep. 288, Sixth Circuit. In 1908, the Revenue Act was amended May 27, 1908, c. 205, 35 Stat. 403, 405, so that the decision of the Circuit Court was made final in such revenue cases, unless the court certified that the question was of enough importance to go to the Court of Appeals, in which case there was a right to review the judgment of the Court of Appeals by writ of certiorari in this court. The Customs Court Act gives jurisdiction to review the decisions of the Board of General Appraisers by appeal. This act has no application to the Philippine Islands. From this it may be seen that the procedure for review in the Circuit Courts of the United States, as well as in the Circuit Courts of Appeal and in this court, has at all times been by way of appeal, and not by writ of error. *United States* v. *Klingenberg*, 153 U. S. 93, 103, 104.

Turning now to the procedure in the Philippine Islands (Acts of Philippine Commission, No. 864), we find that the decision of the Insular Collector may be reviewed in a Court of First Instance, and afterwards in the Supreme Court of the Philippine Islands, as was done in the present case. In the Supreme Court, while that court has the

case upon so-called bills of exception, the whole record is certified and the case is considered, as the opinion shows upon the facts and the law applicable thereto. Thus the proceeding in the Supreme Court is practically an appeal. In the opinion and judgment in that court it is styled an appeal. The right to review the judgment in this court is, as we have said, controlled by the Federal Act of 1902, 32 Stat. 691, and is in the same manner, *i. e.*, by appeal or writ of error, and with the same procedure, so far as applicable, as is applied to final judgments and decrees of the Circuit Courts of the United States. From what has been said, it is apparent that such review from the orders of the Circuit Courts of the United States was uniformly by appeal, and not by writ of error. Nor is the different method of review a mere difference in form and procedure only. Upon appeal, as the statutes already referred to and the decisions of this court show, it was intended to take before the reviewing court the questions of law and fact involved, upon all competent evidence taken and heard before the Board of General Appraisers and before the Circuit Court. Such was the uniform method and purpose of review, under all the statutes and procedure, which, so far as applicable, are to be read into the Philippine Act, and such is still the policy of the Federal Statutes in permitting review of the decisions of the Boards of General Appraisers in the United States by appeal to the Court of Customs Appeal. By writ of error the review is limited to questions of law, a method of procedure inapplicable to customs cases where the facts must be considered in order to determine the proper classification of the merchandise and the duty to which it is subject.

We reach the conclusion that the writ of error, by which it is sought to review the judgment of the Supreme Court of the Philippine Islands in this case, should be dismissed for want of jurisdiction, and it is so ordered.

Dismissed.

SOUTHERN RAILWAY COMPANY *v.* CAMPBELL.

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

No. 53. Argued November 4, 1915.—Decided November 15, 1915.

Where the only questions are whether the carrier's rule was applicable to the case and was properly applied, this court is not concerned with the reasonableness of the rule.

Whether a rule of the carrier in regard to forfeiture of mileage books is reasonable is a question for the Interstate Commerce Commission.

Where the carrier's own rule provides that the mileage book can be forfeited if presented for passage by anyone other than the original purchaser the carrier cannot forfeit the book because the original purchaser presents it for transportation of someone other than himself.

The state court does not deny a Federal right to a railroad company by simply holding it strictly to its own terms in connection with mileage books.

94 So. Car. 95, affirmed.

THE facts, which involve the right of a railroad company to forfeit a mileage book, and the construction of the rules under which such a book was issued in this case, are stated in the opinion.

Mr. John K. Graves, with whom *Mr. L. E. Jeffries* was on the brief for plaintiff in error:

In the opinion of the Supreme Court of South Carolina no reference is made to the schedules, applicable in this case, governing the sale and issuance of mileage books and mileage exchange tickets, in force in pursuance of the Act to Regulate Commerce. The effect of this act on the ordinary rules of common law apparently was not considered.

It is not entirely clear on what ground or grounds the South Carolina court rested its opinion. It seems to hold that the book and the ticket should not have been forfeited because the husband, the original purchaser of the mileage book, in presenting them for his wife without fraud, was not violating the provision as to forfeiture, since the book and ticket were presented by the original purchaser.

The court also seems to hold that the acts of the various agents in exchanging the coupons for the exchange tickets were such acts as to waive the provision as to forfeiture. The provision of the tariff was clearly applicable in this case, and the decision of the South Carolina Supreme Court in violation of its terms was clearly erroneous.

In support of the contentions of plaintiff in error, see *Armour Packing Co.* v. *United States*, 209 U. S. 56; *B. & O. R. R.* v. *Hamburger*, 155 Fed. Rep. 849; *B. & O. S. W. R. R.* v. *Evans*, 82 N. E. Rep. 773; *Bitterman* v. *Louis. & Nash. R. R.*, 207 U. S. 205; *B. & M. R. R.* v. *Hooker*, 233 U. S. 97; *Chi. & Alton R. R.* v. *Kirby*, 225 U. S. 156; *Gulf, C. & S. F. R. R.* v. *Hefley*, 158 U. S. 98; *Ill. Cent. R. R.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Kans. City R. R.* v. *Albers*, 223 U. S. 573; *Kans. City S. R. R.* v. *Carl*, 227 U. S. 639; *Marche* v. *Central R. R.*, 21 I. C. C. 195; *M., K. & T. R. R.* v. *Harriman*, 227 U. S. 657; *Newton Gum Co.* v. *C., B. & Q. R. R.*, 162 C. C. A. 341; *N. Y. Cent. R. R.* v. *United States*, 212 U. S. 500; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184; *St. Louis S. W. Ry.* v. *Burckett*, 229 U. S. 603; *Southern Ry.* v. *Harrison*, 119 Alabama, 539; *Tex. & Pac. Ry.* v. *Mugg*, 202 U. S. 242; *Tex. & Pac. R. Co.* v. *Abilene Cotton Co.*, 204 U. S. 426; *United States* v. *Miller*, 223 U. S. 599.

Mr. John G. Capers, with whom *Mr. William G. Sirrine* was on the brief for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by Samuel J. Campbell against the Southern Railway Company to recover damages for the wrongful forfeiture of the plaintiff's mileage book. The Company sought to justify the forfeiture under its tariff regulations which had been duly filed with the Interstate Commerce Commission. The defense was overruled by the state court. 94 So. Car. 95.

The admitted facts are these: On November 20, 1910, Mr. Campbell, being the owner of a thousand-mile coupon book, or mileage book, purchased another mileage book of the same sort from the agent of the Southern Railway Company at Greensboro, North Carolina, and thereupon presented both books to the agent of the Company and obtained, in exchange for coupons, two 'mileage exchange tickets' to Greenville, South Carolina. With these tickets he and his wife traveled to Greenville, the tickets being accepted by one of the Company's collectors. A few days later he presented his mileage books to the agent of the Company at Greenville and obtained, for the proper number of coupons, two exchange tickets to Greensboro. When he presented these tickets for the transportation of himself and his wife, the ticket collector asked if he had mileage books and required him to produce them. Upon looking at the books the ticket collector returned one of them to Mr. Campbell but forfeited the other, which contained unused coupons for six hundred miles. The exchange ticket, which had been issued for the coupons taken from the book, was also forfeited, and the ticket collector demanded and received payment in cash of the fare for the plaintiff's wife.

The tariff regulations and conditions which related to mileage books, or mileage tickets, and were filed with the Interstate Commerce Commission were as follows:

"Exchange Requirement.—Mileage coupons (except as

noted below) will not be honored for passage on trains or steamers or in checking baggage (except from non-agency stations and agency stations not open for the sale of tickets) but must be presented at ticket office and there exchanged for continuous passage ticket, which continuous passage ticket will be honored in checking baggage and for passage when presented in connection with the mileage ticket.

"Non-Transferable.—If a mileage ticket or ticket issued in exchange for coupons therefrom be presented to an agent or conductor by any other than the original purchaser, it will not be honored but will be forfeited, and any agent or conductor of any line over which it reads shall have the right to take up and cancel such ticket or tickets."

A jury was waived, and the case was submitted to the trial judge upon a stipulation that if judgment went for the plaintiff he should recover the value of the mileage book (twelve dollars) and twenty-five dollars damages. Judgment was entered accordingly.

We are not concerned with the reasonableness of the rule; that, if challenged, would be a question for the Interstate Commerce Commission. The question now is as to the application of the rule. Nor need we consider the right of the ticket collector to demand payment for the transportation of the plaintiff's wife. The case, as the state court said, turns upon the right to forfeit the mileage book with its unused coupons.

The condition expressed in the rule is that the mileage book, or mileage ticket, as it is termed, shall be presented by the original purchaser. The plaintiff was the original purchaser and presented it. The Company seeks to construe the rule as if it read that the mileage book should be forfeited if presented by the original purchaser for the transportation of a person other than himself. The rule does not so read. It was not made a ground of forfeiture

that the original purchaser asked for more than he was entitled to get. For example, when the plaintiff presented his books at the station to procure tickets for himself and wife in exchange for coupons, it could not be said that he forfeited either of the books, or both, because he asked too much. He was in no different position when he produced the books before the conductor, with the tickets which the Company's agent had given him in exchange for coupons. He was still the original purchaser, and the provision for forfeiture when the mileage book is presented by some one else does not hit the case.

We cannot say that the state court denied a Federal right when it held the Railway Company strictly to its own terms.

Judgment affirmed.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY *v.* COMMONWEALTH OF KENTUCKY.

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

No. 328. Argued October 20, 21, 1915.—Decided November 15, 1915.

The state court, having placed its decision sustaining a tax on the ground that the corporation taxed was doing business within the State, and hence liable under the statute taxing corporations carrying on business, this court need only consider the question of whether the company was so transacting business as to render it subject to the taxing power of the State, and need not consider whether another statute under which the tax might have been levied was unconstitutional as impairing the obligation of the legislative contract under which the corporation entered the State.

Whether acts done by a corporation at the time to which a tax relates are of such a nature as to subject it to the local authority on the ground that such acts can only be done with the permission of the State is a Federal question, and this court has authority to review the decision of the state court in that respect.

The principle that taxation without jurisdiction violates the due

process provision of the Fourteenth Amendment applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts beyond the sphere of local control.

The continuance of insurance contracts on the lives of residents of the State already written by the company does not depend upon the consent of the State, nor has a State the power to treat the mere continuance of the obligations of existing policies of insurance held by residents as the transaction of local business justifying the imposition of a privilege tax in the absence of actual conduct of business within the limits of the State. *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143, distinguished.

The imposition of taxes on premiums collected on policies on residents of Kentucky in pursuance of the statutes of that State after the company has ceased to do business therein, *held*, in this case, to be an unconstitutional exercise of power under the due process provision of the Fourteenth Amendment.

160 Kentucky, 16, reversed.

THE facts, which involve the constitutionality of a statute of Kentucky taxing insurance companies on premiums paid outside the State on policies on lives of residents of the State and the determination of what constitutes doing business within the State by an insurance company, are stated in the opinion.

Mr. Wm. Marshall Bullitt, with whom *Mr. Charles C. Lockwood*, *Mr. Keith L. Bullitt*, and *Mr. Clarence C. Smith* were on the brief, for plaintiff in error:

The tax levied by Ky. Stat., § 4226, is a license tax imposed on foreign insurance companies for the privilege of doing business within Kentucky. *Northwestern Mut. Life* v. *James*, 138 Kentucky, 48, 52; *Southern B. & L. Assn.* v. *Norman*, 98 Kentucky, 294, 298; *Fidelity & Casualty Co.* v. *Louisville*, 106 Kentucky, 207, 211; *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143.

Kentucky Stat., § 4226, as construed by the Court of Appeals, violates the "due process" clause of the Fourteenth Amendment, because:

The State cannot tax a license or privilege which it

does not grant. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *New York* v. *Roberts*, 171 U. S. 658, 664; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 164; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396; *Delaware &c. R. R.* v. *Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 204; *Buck* v. *Beach*, 206 U. S. 392, 400.

The Insurance Company has done nothing, since its withdrawal, which can be construed as "doing business" in Kentucky so as to justify the exaction by that State of a privilege or license tax. *Hunter* v. *Mutual Reserve Ins. Co.*, 218 U. S. 573; *State* v. *Connecticut Mutual*, 106 Tennessee, 258.

The receipt by the Insurance Company of premiums in New York, after its withdrawal from Kentucky, was not by virtue of any privilege or license of Kentucky; and hence neither the premiums so received nor the privilege of receiving them are taxable by Kentucky.

The Company cannot be taxed for the act of the policy holders. *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 118 U. S. 283, 292; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591.

The Company's act was in New York, not Kentucky. *Prewitt* v. *Security Mutual*, 119 Kentucky, 321; *Bedford* v. *Eastern B. & L. Assn.*, 181 U. S. 227; *People* v. *Miller*, 179 N. Y. 227; *State* v. *Conn. Mut. Life*, 106 Tennessee, 258.

The bare legal liability to Kentucky policy holders is not taxable by that State. *N. Y. Life* v. *Deer Lodge County*, 231 U. S. 495, 508; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 588; *N. Y. Life Ins. Co.* v. *Head*, 234 U. S. 149, 161.

Equitable Life Society v. *Pennsylvania*, 238 U. S. 143, can be distinguished and is relied on.

Mr. John A. Judy, with whom *Mr. James Garnett*, Attorney General of the State of Kentucky, was on the brief, for defendant in error:

This action is not brought under § 4230a and said section has never been relied upon by the defendant in error.

The State of Kentucky is simply attempting to force the plaintiff in error to comply with a contract made at the time the plaintiff in error entered the State of Kentucky.

A State has the absolute right to prescribe the terms upon which a foreign corporation shall engage in business in that State. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Fire Association* v. *New York*, 119 U. S. 110; *Hooper* v. *California*, 155 U. S. 648; *People &c.* v. *Roberts*, 171 U. S. 658; *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143.

After an insurance company has applied for and been granted permission to insure the lives of citizens of a State and has agreed to pay the tax for such privilege, it cannot avoid that tax by attempting to withdraw from the State and cease writing new business. *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143.

N. Y. Life Ins. Co. v. *Head*, 234 U. S. 149; *Allgeyer* v. *Louisiana*, 165 U. S. 578, do not apply to this case.

So far as the State of Kentucky is concerned, the Provident Savings Life Assurance Society is doing business in Kentucky as long as it has insured the lives of citizens of Kentucky under policies written while it was authorized to do business in Kentucky. *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 603; *Mutual Reserve Assn.* v. *Phelps*, 190 U. S. 157.

There is nothing in this case other than the construction of a Statute of Kentucky, and the highest court of that State in construing it as it has, has not in any way infringed upon any rights under the Constitution of the United States.

Mr. Justice Hughes delivered the opinion of the court.

The Provident Savings Life Assurance Society, a New York corporation, transacted business in Kentucky prior

to January 1, 1907, and paid the annual license tax of two per cent. on premiums. Kentucky Statutes, § 4226. This suit was brought by the Commonwealth to recover the tax on premiums received in the years 1907 to 1911, inclusive. The Company answered, denying liability upon the ground that on January 1, 1907, it had entirely ceased to do business in Kentucky and that all premiums received after that date on policies previously issued in Kentucky were received in New York.

Prior to the amendments made in the year 1906, § 4226 of the Kentucky Statutes provided as follows:

"SEC. 4226. Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall on the first day of July in each year, or thirty days thereafter, return to the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the 30th of June last preceding, or since the last returns were made and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained." Kentucky Statutes, ed. 1903.

This section was amended in 1906 by making the fiscal year to end on December thirty-first instead of June thirtieth, by prohibiting deductions for dividends, and by amplifying the description of premium receipts. (See *Mutual Benefit Life Insurance Co.* v. *Commonwealth*, 128 Kentucky, 174; *Northwestern Mutual Life Insurance Co.* v. *James*, 138 Kentucky, 48.) The amended section was as follows:

"SEC. 4226. Every life insurance company, other than fraternal assessment life insurance companies, not or-

ganized under the laws of this State, but doing business therein, shall, on the first day of January in each year, or within thirty days thereafter, return to the Auditor of Public Accounts for deposit in the insurance department a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the 31st day of December, and no deduction shall be made for dividends, or since the last returns were made, on all premium receipts, which shall include single premiums, annuity premiums, and premiums received for renewal, revival or reinstatement of policies, annual and periodical premiums, dividends applied for premiums and additions, and all other premium payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this State, or out of this State on business done in this State, and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained."

In 1906, the legislature added the following provision, which is found in § 4230a of the Kentucky Statutes:

"SEC. 4230a. (2.) Any insurance company that has been authorized to transact business in this State shall continue to make the reports required herein as long as it collects any premiums as provided for herein, and shall pay taxes thereon, even after it has voluntarily ceased to write insurance in the State or has withdrawn therefrom, or its license is suspended or revoked by the Insurance Commissioner, and for failure to make report of the premiums collected and pay the taxes due thereon, shall be fined five hundred dollars for such offense."

It does not appear that the changes in § 4226 were involved in the present controversy as there was no dispute as to the amount of the premiums received in the years

in question, or as to deductions. But the Company insisted that § 4230a was invalid under the contract clause of the Federal Constitution (Art. I, § 10) and also that the imposition of the tax on premiums received after the Company had withdrawn from the State was contrary to the due process clause of the Fourteenth Amendment. Demurrer to the answer was overruled, the motion of the defendant that the demurrer relate back to the petition was sustained, and the petition was dismissed. Judgment to this effect was reversed by the Court of Appeals of Kentucky and the cause was remanded with direction to sustain the demurrer to the answer and for further proceedings consistent with the opinion of the appellate court. *Commonwealth* v. *Provident Savings*, 155 Kentucky, 197.

The Company then amended its answer, renewing its constitutional objections. Enlarging the statement of facts, it averred that on January 1, 1907, it had withdrawn all its agents from Kentucky, had closed all its offices and had ceased to solicit or write insurance, or maintain any agent, or collect any premiums, within that jurisdiction. On January 1, 1911, the Postal Life Insurance Company, a New York corporation, had reinsured all the business of the defendant. Between January 1, 1907, and January 1, 1911, all premiums paid to the defendant upon policies theretofore issued in Kentucky were paid to it at its home office in New York City through the mail. The Postal Life Insurance Company did not have at any time an office or agents in Kentucky or transact any business in that State, and all premiums that it received were paid to it in New York through the mail.

Demurrer to the amended answer was sustained and judgment was entered in favor of the Commonwealth. The Court of Appeals affirmed the judgment (*Provident Savings* v. *Commonwealth*, 160 Kentucky, 16) and this writ of error has been sued out.

The Court of Appeals did not put its decision upon the provision of § 4230a. This provision, it was said, was declaratory of the existing law, and the Company's obligation was taken to be defined by § 4226. The tax was a license tax (*Northwestern Mutual Life Insurance Co.* v. *James*, 138 Kentucky, 48, 52), payable annually, and by the express terms of the act was payable by the foreign life insurance corporations 'doing business' within the State. Both parties agree that it was imposed "for the privilege of doing business in Kentucky." The State contends that it is seeking to enforce an agreement which by implication from the statutory provision the Company must be deemed to have made when it entered the State. But there is no suggestion that it had ever been decided prior to this litigation that the described companies were bound under § 4226 to pay the annual tax irrespective of the continued transaction of business within the jurisdiction during the years to which the tax related. Nor, as we understand it, was the statute so construed in the present case. It is true that the court stated in its opinion that the Company on being admitted to the State agreed to pay the tax imposed by § 4226 and that the Company did not have 'the right and power to revoke this agreement as it attempted to do the first of January, 1907.' But, immediately following this statement, the court proceeded to hold with an explicitness which does not permit us to doubt the basis of its decision that the Company was liable to the tax because it continued, despite the asserted withdrawal, to do business within the State during the period for which the tax was sought to be collected. If the tax in controversy was demanded by the State and was enforced upon the ground that it was payable for a privilege which the Company admittedly enjoyed in prior years, it was manifestly immaterial to inquire whether or not the Company was continuing to transact a local business during the succeeding period. In

that aspect, the question would be whether with respect to the alleged agreement the decision could be deemed to be one which in reality gave effect to the subsequent legislation (of 1906) and involved the application of the contract clause. If, however, the tax now sought to be imposed was for a privilege exercised during the years to which the tax related it would be necessary to find that the Company was doing business within the State at that time. Evidently in view of this necessity, the Court of Appeals said upon the first appeal:

"Counsel for appellee mainly rests its case upon the definition of 'what is doing business?' Is a life insurance company doing business in a State only so long as it is writing new business? If this is true, then the appellant has no case. However, counsel for appellant insists that an insurance company is doing business in this State in the meaning of the statute so long as it is insuring the lives of residents of this State and furnishing protection to the beneficiaries named in the policies against loss from death of the insured, this being the chief business for which insurance companies are organized, and we are unable to see how the court" (referring to the court of first instance) "held, that a company collecting premiums on policies issued in this State, when it was authorized to do business in this State, can be said 'not to be doing business,' when it was still insuring those same lives and collecting the premiums upon the policies." 155 Kentucky, 197, 201.

Upon the second appeal the court merely referred to its ruling on the first appeal and to other cases (*Commonwealth* v. *Illinois Life Insurance Co.*, 159 Kentucky, 589; *Commonwealth* v. *Washington Life Insurance Co.*, 159 Kentucky, 581) in which that decision had been followed without further discussion of grounds. We do not, therefore, find it necessary to consider the applicability of the contract clause of the Federal Constitution, inasmuch as it

appears that the decision turned upon the conclusion that the Company continued after January 1, 1907, to transact business within the jurisdiction. Otherwise, according to the final ruling, the State would have had 'no case.'

The present case thus differs from that of *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143. It was not disputed that the Equitable Company was actually doing business in Pennsylvania. See *Commonwealth* v. *Equitable Life Assurance Society*, 239 Pa. St. 288, 293. The question was as to the permissible measure of a tax exacted for a privilege admittedly exercised. As this court said: "The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax." 238 U. S. 147. In the present case it is not the measure of the tax for doing business, but the very basis of the tax—that is, whether the Company was doing business within the State—that is in controversy.

Assuming this to be the point in dispute, the question at once arises whether the matter is reviewable in this court. And we cannot doubt that the question whether the State is taxing a foreign corporation for a privilege not granted, that is, whether the acts done by the corporation at the time to which the tax relates are of such a nature as to subject it to the local authority upon the ground that it is doing acts which can only be done with the permission of that authority, must be regarded as a Federal question. Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment (*Louisville & Jefferson Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R.* v. *Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with respect to which the State exercises the taxing

power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked.

It is not controverted that the Company, at the time in question, was not soliciting insurance or collecting moneys in that State. Further, it had no offices or agents in Kentucky. Upon the averments which stand admitted in the record it must be assumed that it was not performing any acts within the jurisdiction of Kentucky. It had sought to withdraw itself completely from the State. The conclusion that it continued to do business within the State, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that State and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the Company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the State's consent. But the continuance of the contracts of insurance already written by the Company was not dependent on the consent of the State. It is true that acts might be done within the State in connection with such policies, as for example in maintaining an office or agents although new insurance was not written or solicited, which could be considered to amount to the continuance of a local business. In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written. These policies are contracts already made; the State cannot de-

stroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227, 241; *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, 163.

The defendant in error relies upon expressions contained in the opinions in *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602, 610, and *Mutual Reserve Fund Life Association* v. *Phelps*, 190 U. S. 147, 157,—expressions which (in a full review of these cases and others) were explained and limited in *Hunter* v. *Mutual Reserve Life Insurance Company*, 218 U. S. 573. The cases cited related to the validity of the service of process upon foreign corporations. And it was held that a foreign insurance corporation which had transacted business within the jurisdiction of a State continued, notwithstanding its withdrawal from the State, to be subject to service of process within the State, in actions arising out of the business so transacted, where the service was made in accordance with the conditions upon which the business was permitted to be done. Thus, in the *Phelps Case*, service was made in Kentucky under § 631 of the Kentucky Statutes providing for service of process upon the commissioner of insurance. The Court of Appeals of Kentucky had decided that the withdrawal of the Company from the State did not terminate the statutory agency for the acceptance of service which had been created as a condition of the Company's admission; the granted authority continued with respect to the business transacted. *Home Benefit Society* v. *Muehl*, 109 Kentucky, 479, 484; *Germania Insurance Co.* v. *Ashby*, 112 Kentucky, 303, 307, 308. But a distinction obtains when the question is whether the mere continuance of the obligation to resident

policy holders under the existing policies can be regarded as constituting in itself the transaction of a local business. This distinction was made clear in the *Hunter Case.* There, the action was brought in New York against an insurance company upon judgments which had been obtained against the company in North Carolina. The question turned upon the validity of the service of process in the North Carolina actions. The insurance company, a New York corporation, had been admitted to do business in North Carolina and had actually transacted business in that State prior to the year 1899. The legislature of North Carolina enacted a statute providing that any corporation desiring to do business in the State after June 1, 1899, must become a domestic corporation. Severe penalties were prescribed for violation. Thereupon, the board of directors of the company passed a resolution 'to withdraw from the State and to dispense with and terminate the services of all its agents.' The agents were withdrawn accordingly and the premiums on policies theretofore issued were subsequently 'remitted by mail to the home office of the company in New York, where the policies and premiums were payable.' There were in that case, outside of this course of business, four transactions within the State after the withdrawal, which were of minor importance and of isolated character. The actions in question, in the North Carolina court, were not brought upon policies issued in North Carolina, and consequently it was sought to sustain the jurisdiction of the court upon the ground that despite the withdrawal of the company, it was still doing business within the State. The court expressly overruled this contention. The court said: "It" (the company) "was given the choice to become a domestic corporation or go out of the State. It chose to go out of the State, and adopted the only way it could to do so. We think such course was open to it and we see no reason to question its good faith." 218 U. S. 583.

It was recognized that the authority which the Company had given with respect to service of process continued in force as to actions growing out of business which had been transacted within the State. But the continuance of the authority to accept service of process resulted from the nature and construction of that authority, and the view that the mere continuance of the obligation of contracts previously made within the State constituted a continuance of 'doing business' within the State so as to give the Company a 'domicil of business' and thus subject it to the State's jurisdiction was distinctly disapproved.

In the present case, the question is not, as in the *Phelps Case*, one as to the right to revoke the agency created under § 631 of the Kentucky Statutes with respect to the service of process in actions arising out of transactions which had taken place within the State. It is as to the power of the State to treat the mere continuance of the obligation of the existing policies held by resident policy holders as the transaction of a local business justifying the imposition of an annual privilege tax in the absence of the actual conduct of business within the limits of the State.

We cannot conclude that the State has this power, and in this view the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

UNITED STATES *v.* FREEMAN.

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

No. 481. Argued October 21, 1915.—Decided November 15, 1915.

The act prohibited by § 240, Criminal Code, making it punishable to ship or cause to be shipped from one State into another State or from a foreign country into a State, a package of intoxicating liquor not marked as required by the statute is essentially a continuing act the performance whereof is begun when the package is delivered to the carrier and completed when it reaches its destination.

The word "ship" as used in § 240, Criminal Code, is not used in the sense of "deliver for shipment," making the offense a completed one upon delivery of the goods.

A criminal statute applicable alike to shipments in interstate and foreign commerce will not be so construed as to render it obviously futile as to foreign commerce; it should be so construed, if its words permit, as to cause it to reach both classes of shipments and to accomplish the object of its enactment.

Section 240, Criminal Code, refers to the continuing act of shipping goods whereby the transportation into a State is accomplished, and the District Court within the State into which the goods are shipped has jurisdiction of the offense under § 42, Judicial Code, as well as the District Court within the State from which the goods are shipped.

THE facts, which involve the jurisdiction of the District Court of the offense of shipping intoxicating liquor in interstate and foreign commerce in violation of, and the construction of § 240, Criminal Code, are stated in the opinion.

Mr. Assistant Attorney General Warren for the United States:

The United States District Court for the District of Kansas has jurisdiction of the prosecution of the defendant in error for shipping the unlabeled packages from Missouri into Kansas, inasmuch as the offense was not complete when the unlabeled packages were delivered to the carrier, but continued throughout their transportation.

The offense "causing" to be shipped constitutes a separate crime from "shipping" and is capable of performance in a separate district.

In support of these contentions, see *Adams Exp. Co.* v. *Kentucky*, 238 U. S. 190; *American Steel Co.* v. *Speed*, 192 U. S. 500; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Bates* v. *United States*, 10 Fed. Rep. 92; *Benson* v. *Henkel*, 198 U. S. 1; *Bridgeman* v. *United States*, 140 Fed. Rep. 577; *Burton* v. *United States*, 142 Fed. Rep. 62; *Davis* v. *United States*, 104 Fed. Rep. 136; *Dealy* v. *United States*, 152 U. S. 539; *Demolli* v. *United States*, 144 Fed. Rep. 363; *Fechteler* v. *Whitmore*, 205 Massachusetts, 6; 2 Foster's Fed. Prac. (5th ed.), p. 1706; *Garfield Coal Co.* v. *Penn Coal Co.*, 199 Massachusetts, 23; *Haas* v. *Henkel*, 216 U. S. 462; *Harrison* v. *Fortlage*, 161 U. S. 57; *Hyde* v. *Shine*, 199 U. S. 62; *Kirmeyer* v. *Kansas*, 236 U. S. 568; *Ledon* v. *Havermeyer*, 121 N. Y. 179; *In re Palliser*, 136 U. S. 257; *Perara* v. *United States*, 221 Fed. Rep. 213; *Putnam* v. *United States*, 162 U. S. 687; *Rhodes* v. *Iowa*, 170 U. S. 412; *Simpson* v. *State*, 44 Am. St. Rep. 75; *Southern Steel Co.* v. *Hickman*, 190 Fed. Rep. 890; *Stillman* v. *White Rock Co.*, 23 Fed. Cas. No. 13446; *United States* v. *Bebout*, 28 Fed. Rep. 522; *United States* v. *Bickford*, 4 Blatchf. 337; *United States* v. *Chavez*, 228 U. S. 525; *United States* v. *87 Barrels*, 180 Fed. Rep. 215; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Hopkins Co.*, 199 Fed. Rep. 649; *United States* v. *Murphy*, 91 Fed. Rep. 120; *United States* v. *Smith*, 115 Fed. Rep. 423; *United States* v.

Thayer, 209 U. S. 39; *United States* v. *Union Supply Co.*, 215 U. S. 50; *United States* v. *White*, 25 Fed. Rep. 716; *United States* v. *Wiltberger*, 5 Wheat. 76; *U. S. Express Co.* v. *Friedman*, 191 Fed. Rep. 1673; *Vance* v. *Vandercook Co.*, 170 U. S. 438; *West Virginia* v. *Adams Exp. Co.*, 219 Fed. Rep. 797; Wharton, Crim. Law (11th ed.), Vol. 1, pp. 404, 423.

There was no appearance or brief for defendant in error.

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

This is an indictment under § 240 of the Criminal Code making it a punishable offense knowingly to "ship or cause to be shipped from one State, . . . into any other State, . . . or from any foreign country into any State, . . ." any package of or containing intoxicating liquor of any kind, "unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." The indictment was returned in the District of Kansas and charges the defendant with violating the statute by knowingly shipping and causing to be shipped from Joplin, Missouri, into Cherokee County, Kansas, six unlabeled trunks severally containing from twelve to fifteen gallons of intoxicating liquor. By a motion to quash and a demurrer it was objected that the offense denounced by the statute is complete when the package is delivered to the carrier for shipment, and therefore that the offense charged was not cognizable in the District of Kansas but only in the Western District of Missouri. Acceding to this construction of the statute, the District Court sustained the motion to quash and the demurrer and entered a judgment discharging the defendant. The Government brings the case here under the

Criminal Appeals Act, of March 2, 1907, c. 2564, 34 Stat. 1246.

As usually understood, to ship a package *from* one State *into* another or *from* a foreign country *into* a State is to accomplish its transportation from the one into the other by a common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. We think it is to such an act that the statute refers. To reach a different conclusion the word "ship" must be read as if it were "deliver for shipment." No doubt it sometimes has that meaning, but it plainly is not so used in this instance. The statute deals with shipping liquor from a foreign country into a State as well as with shipping it from one State into another State. It puts both upon the same plane and makes them equally criminal. Whatever marks the completion of the offense in one likewise marks it in the other. If it be the delivery to the carrier in the case of interstate shipments it equally is this delivery in the case of shipments from a foreign country. And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as is the delivery to the carrier where the shipment is from a foreign country into a State. So, if its words permit, as we think they do, the statute must be given a construction which will cause it to reach both classes of shipments, and thereby to accomplish the purpose of its enactment. *United States* v. *Chavez*, 228 U. S. 525. This, we think, requires that it be construed as referring to the continuing act before indicated whereby the transportation *into* a State is accomplished, whether the package comes from another State or from a foreign country. In this view the completion of the offense will always be within a jurisdiction where the statute can be enforced.

The District Court rightly recognized that, under Jud. Code, § 42, formerly Rev. Stat., § 731, the offense charged was cognizable in the District of Kansas, as well as in the Western District of Missouri, if the place to which the packages were transported was the place of the completion of the offense.

Therefore nothing need be said upon that point.

Judgment reversed.

GLENWOOD LIGHT AND WATER COMPANY *v.* MUTUAL LIGHT, HEAT AND POWER COMPANY.

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

No. 38. Submitted October 29, 1915.—Decided November 15, 1915.

The jurisdictional amount involved in suits for injunction to restrain nuisance or a continuing trespass is to be tested by the value of the object to be gained by complainant.

The amount involved in a suit brought by a telephone company to restrain another company from so erecting poles and wires as to injure complainant's poles, wires and business, *held*, in this case, not to be the expense of defendant's removing its conflicting poles and wires but the value of the right of complainant to maintain and operate its plant and conduct its business free from wrongful interference by defendant.

Complainant's right to conduct its business free from the acts of defendant sought to be enjoined having an uncontroverted value of $3,000, *held* that the District Court had jurisdiction under Judicial Code, § 24, so far as jurisdictional amount in controversy is concerned.

THE facts, which involve the jurisdiction of the District Court under Judicial Code, § 24, and the determination of the amount in controversy in a case for injunction, are stated in the opinion.

Mr. Charles S. Thomas, Mr. George L. Nye and *Mr. William P. Malburn* for appellant.

Mr. John T. Barnett for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a decree of the District Court dismissing a bill of complaint for want of jurisdiction; the jurisdiction having been invoked upon the ground that the suit was between citizens of different States, and that the matter in controversy exceeded the sum or value of three thousand dollars (Jud. Code, § 24; act of March 3, 1911, c. 231, 36 Stat. 1087, 1091). The bill, besides the requisite averments as to the citizenship of the parties, alleges in substance that complainant is the owner by assignment of a franchise granted in the year 1887 by the Town of Glenwood Springs, in the State of Colorado, and subsequently renewed, entitling complainant to erect and maintain a plant for the purpose of supplying the town and its inhabitants with electric light and power; that complainant and its predecessors prior to 1911 constructed an electric light and power system, and erected poles and wires in the alleys of the town, in the manner provided for in the ordinance, and complainant has continued to carry on its business and supply electric current to the town and its inhabitants, and still continues to maintain its poles and wires in the streets and alleys of the town; that in April, 1911, the town attempted to grant to defendant the right to erect a plant and construct

a system for furnishing the town and its inhabitants with electric current, and defendant commenced the construction of a plant, and began to furnish light to the town on or about October first, 1912, since which date its wires have been used for carrying electric current for the purpose of lighting the town and furnishing light to some of its inhabitants; that complainant's poles were erected, so far as practicable, in the alleys of the town, as was provided in its ordinance, and its wires were strung on those poles and connected with the premises of its customers in accordance with the terms of the franchise and the regulations of the town; that defendant has erected its poles and strung its wires principally in the alleys of the town, and particularly in the alleys occupied by the poles and wires of complainant, and for the most part upon the same side of the alleys used and occupied by the poles and wires of complainant, for the purpose and with the intent of interfering with and harassing complainant; that complainant's poles are of the size usually employed in towns and cities approximating the size of Glenwood Springs, but that defendant's poles are about six feet shorter, and on account of the narrowness of the alleys have been set on practically the same line as complainant's poles, so that defendant's cross-arms and wires are brought immediately below and in close proximity to complainant's wires so as to make the maintenance and operation of its wires by complainant exceedingly difficult, as well as dangerous to the property of complainant and its customers owing to the probability of damage by fire caused by short circuits, and dangerous to the safety and lives of complainant's customers and of its linemen and other employés who in the discharge of their duties are required to climb its poles; that, because of this, complainant is and constantly will be threatened, so long as defendant maintains its poles and wires as aforesaid, with liability in case of injuries to persons and property caused by the maintenance of defendant's wires

and electric current in close proximity to the wires and current of complainant; that complainant's business is increasing, and more wires are being constantly required to supply the wants of its customers, and this will require the setting of cross-bars on the poles of complainant below the cross-bars now in use, whereby the wires of complainant will be brought closer to defendant's wires than they are at present, and thereby the danger and expense and the probability of injuries to complainant and its employés and customers will be greatly increased; and that by reason of the premises complainant is and will be subjected to numerous liabilities and actions at law for damages arising out of the conditions created by defendant's acts; that the value of complainant's plant is $150,000, and the damage caused to complainant and its business and property and to its right to maintain its poles and wires without interference or injury in the alleys and streets of the Town of Glenwood Springs where the poles and wires of defendant have been placed in close proximity to complainant's poles and wires is largely in excess of the sum of $3,000.

The prayer is for an injunction to restrain defendant from maintaining its poles and wires on the same side of the alleys and streets as those occupied by complainant's poles and wires, or in such proximity as to injure or endanger the property of complainant and its customers and the safety and lives of complainant's customers and employés, and for general relief.

The answer denies, generally and specifically, the essential facts set up in the bill; denies that the matter in controversy exceeds in value the sum of $3,000; denies that the value of complainant's plant is as much as $150,000; alleges that its value does not exceed $25,000; denies that the damage caused by defendant to complainant or its business or property is in excess of $3,000; and alleges that the cost of the removal of all the poles and wires of de-

fendant claimed to be in dangerous or objectionable proximity to complainant's poles and wires would not exceed $500.

Upon the final hearing, the court, after argument, held that the jurisdictional amount was fixed by the cost to defendant of removing its poles and wires in the streets and alleys where they conflicted or interfered with the poles and wires of complainant, and replacing defendant's poles and wires in such position as to avoid conflict and interference. Thereupon testimony was introduced for the purpose of determining whether such cost would exceed the sum of $3,000, and the court, having determined that under the evidence it would not exceed that amount (which complainant conceded), dismissed the bill for want of jurisdiction, although complainant contended that such method was not the proper method of determining the jurisdictional amount.

The case comes here under § 238, Jud. Code, the question of jurisdiction being certified.

We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, *viz.*, that the jurisdictional amount is to be tested by the value of the object to be gained by complainant. The object of the present suit is not only the abatement of the nuisance, but (under the prayer for general relief) the prevention of any recurrence of the like nuisance in the future. In *Mississippi & Missouri Railroad Co.* v. *Ward*, 2 Black, 485, 492, it was said: "The want of a sufficient amount of damage having been sustained to give the Federal courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern." The same rule has been applied in numerous cases, and under varying circumstances. *Scott* v. *Donald*, 165 U. S. 107, 115; *McNeill* v. *Southern Railway Co.*, 202 U. S. 543,

558; *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322, 336; *Bittermann* v. *Louisville & Nashville R. R.*, 207 U. S. 205, 225; *Berryman* v. *Whitman College*, 222 U. S. 334, 345.

The District Court erred in testing the jurisdiction by the amount that it would cost defendant to remove its poles and wires where they conflict or interfere with those of complainant, and replacing them in such a position as to avoid the interference. Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it has such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction.

Decree reversed, and the cause remanded for further proceedings in accordance with this opinion.

MORRIS CANAL AND BANKING COMPANY *v.* BAIRD.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 1. Argued October 21, 1915.—Decided November 21, 1915.

A transfer, even though under legislative authority, of all the property and franchises of one corporation to another does not vest the latter with freedom from exercise of governmental power which the former enjoyed under its charter. *Rochester Railway* v. *Rochester*, 205 U. S. 236.

An express provision in a legislative charter limiting an exemption from taxation to such property as is possessed, occupied, and used by the company for the actual and necessary purposes for which it was chartered must be strictly construed under the settled rule that transfers do not carry the exemption even though, as in this case,

the State has reserved rights of purchase and eventual ownership of the property.

After property has been transferred by one corporation to another it is not possessed, occupied and used by the former, and an exemption from taxation during such possession, occupation and use no longer applies.

Taxes imposed by the State of New Jersey upon the lessee of the property of the Morris Canal and Banking Company *held* not to be unconstitutional as impairing the obligation of the contract of exemption contained in the charter of the company granted in 1824, that company having leased all of its property to the lessee and the exemption not being transferable and only applicable to property possessed, occupied and used by the canal company; and further *held* that the general rule was not affected in this case by the fact that the State reserved the power to purchase the property of the canal company within a specified period and that within a further specified period such property should become the property of the State.

76 N. J. Law, 627, affirmed.

THE facts, which involve the constitutionality under the contract clause and the construction of a taxing statute of New Jersey and the validity of a tax levied thereunder, are stated in the opinion.

Mr. Gilbert Collins for plaintiffs in error:

The contract of exemption from taxation was not a bounty conferred on any particular company, nor an agreement made merely in view of presumptive benefits to the people. It was a contract of exemption of certain specific property, for an adequate consideration, to wit, the conveyance of the property itself to the State, possession to be taken at the end of a term of years, the owner meantime to devote the property to public use on terms controlled by the State, and for other substantial considerations. *Barnett* v. *Johnson*, 15 N. J. Eq. 481.

The exemption from taxation was limited to the company's property essential to the canal use. *State* v. *Betts*, 24 N. J. L. 555; *Morris Canal* v. *Jersey City*, 12 N. J. Eq. 227; *Morris Canal* v. *Haight*, 35 N. J. L. 178; *Morris*

Canal v. *Love*, 37 N. J. L. 60; *Lehigh Valley R. R.* v. *Newark*, 44 N. J. L. 323; *Morris Canal* v. *Cleaver*, 46 N. J. L. 467. See also *New Jersey* v. *Wilson*, 7 Cranch, 164.

This case presents not only a full and adequate consideration, but has the further support that the property exempted is exempted because it is public property. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 654; *Ches. & Ohio R. R.* v. *Virginia*, 94 U. S. 726; *Central R. R. of Georgia* v. *Georgia*, 92 U. S. 670; *Powers* v. *Detroit &c. Ry.*, 201 U. S. 543; *Tennessee* v. *Whitworth*, 117 U. S. 129; *Humphrey* v. *Pegues*, 83 U. S. 244; *Philadelphia & Wilmington R. R.* v. *Maryland*, 10 How. 377; *Green County* v. *Conness*, 109 U. S. 104.

Cases in which the exemption was denied in the hands of the assignee company fall within four classes none of which included the case at bar:

Where the mortgage, lease or transfer was made without express statutory authority. *Memphis R. R.* v. *Commissioners*, 112 U. S. 609; *Ches. & Ohio R. R.* v. *Miller*, 114 U. S. 176; *Pickard* v. *East Tenn. R. R.*, 130 U. S. 637; *Mercantile Bank* v. *Tennessee*, 161 U. S. 161; *East Tenn. R. R.* v. *Camden Co.*, 102 U. S. 273; *Wilson* v. *Gaines*, 103 U. S. 417; *Louis. & Nash. R. R.* v. *Palmer*, 109 U. S. 244.

Where the corporation claiming the exemption was not created until a constitutional bar to exemption had been interposed. *Trask* v. *McGuire*, 18 Wall. 391; *Keokuk &c. R. R.* v. *Missouri*, 152 U. S. 301; *Atlantic &c. R. R.* v. *Georgia*, 98 U. S. 359; *St. Louis &c. R. R.* v. *Berry*, 113 U. S. 465; *Memphis &c. R. R.* v. *Berry*, 112 U. S. 609; *Minn. & St. Louis Ry.* v. *Gardner*, 177 U. S. 332; *Shields* v. *Ohio*, 95 U. S. 321; *Maine Cent. R. R.* v. *Maine*, 96 U. S. 509; *Yazoo & Miss. Valley Ry.* v. *Adams*, 180 U. S. 1, 18; *New York* v. *Cook*, 148 U. S. 406.

Where from surrounding words and circumstances it is apparent that the legislature did not intend the exemption to pass to the successor. *Phœnix Fire Ins. Co.* v. *Johnson*,

161 U. S. 174; *Chicago &c. R. R.* v. *Missouri*, 122 U. S. 561; *Wilmington &c. R. R.* v. *Allsbrook*, 146 U. S. 279; *Ches. & Ohio R. R.* v. *Miller*, 114 U. S. 176; *East Tenn. R. R.* v. *Camden Co.*, 102 U. S. 273; *Wilson* v. *Gaines*, 103 U. S. 417; *Citizens St. Ry.* v. *Memphis*, 53 Fed. Rep. 715; *Minot* v. *P. W. & B. R. R.*, 18 Wall. 206; *Bancroft* v. *Wicomico Co.*, 121 Fed. Rep. 874, aff'd 135 Fed. Rep. 977.

Where the intent to pass the immunity was not sufficiently clearly expressed. *Covington & Lexington R. R.* v. *Sanford*, 164 U. S. 578; *Norfolk & W. R. R.* v. *Pendleton*, 150 U. S. 673; *People's Gas Light Co.* v. *Chicago*, 194 U. S. 1; *St. Louis & San Fran. Ry.* v. *Gill*, 156 U. S. 656; *Morgan* v. *Louisiana*, 93 U. S. 217.

The reluctance of the courts to enforce contracts of exemption because relieving property from the common burden which public policy requires shall be equally borne, has no just application to the case now before the court. *Minot* v. *P. W. & B. R. R.*, 18 Wall. 206, 225.

The exemption from taxation passed to the lessee. *Boston & Lowell R. R.* v. *Salem & Lowell R. R.*, 68 Massachusetts, 1, 35.

This contract right should not be denied to the transferee, except on the theory that it is a bounty or personal immunity which the State has given to the grantor.

Mr. Robert H. McCarter, with whom *Mr. Edmund Wilson*, Attorney General of the State of New Jersey, was on the brief, for defendants in error.

Mr. Justice McReynolds delivered the opinion of the court.

The Court of Errors and Appeals of New Jersey sustained a tax for the year 1906 levied by the State Board of Assessors, under the railroad and canal tax act of 1884 and supplements thereto, upon the canal and appurtenances leased by the Morris Canal and Banking Com-

pany to the Lehigh Valley Railroad. 76 N. J. L. 627. Plaintiffs in error claim the charter of the lessor company exempts the assessed property from taxation, and to subject it to the charge in question would impair the obligation of that contract contrary to the provisions of Article I, § 10, Federal Constitution.

The Morris Canal and Banking Company was incorporated by a special act of the New Jersey Legislature, passed December 31, 1824,[1] for the purpose of constructing a canal across the State. This statute expressly declared that "said canal when completed shall forever thereafter be esteemed a public highway," gave the State the right to purchase it after ninety-nine years at a fair valuation, and specified that it should become the sole property of the State after one hundred and forty-nine years; but no power was granted the corporation either to sell or lease its works. Section 4 provides:

"No state, county, township, or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof; . . ."

An act approved March 14, 1871 (Acts, p. 444), amended the original charter as follows:

"It shall and may be lawful for the Morris Canal and Banking Company, by and with the consent of a majority in interest of the stockholders of the said company, expressed in writing and duly authenticated by affidavit,

[1] An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers. Acts N. J. 1824, 158–160.

and filed in the office of the secretary of state, to lease the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises, to any person or persons, or corporation, either perpetually or for such shorter time, and upon such rents and agreements, as may be agreed upon between the said contracting parties, and it shall be lawful for the lessee or lessees in said lease to use and enjoy the said property and franchises so demised, for the term in said lease mentioned."

By indenture dated May 4, 1871, the canal company undertook to let and demise to the Lehigh Valley Railroad its entire canal and navigation works, together with all corporate franchises, *rights and privileges*, other than that of being a corporation, to have and to hold unto the lessee, its successors and assigns, perpetually. (The words rights and privileges are not contained in the amendment to the charter.) Likewise it bargained and sold to the railroad all of its cars, trucks, boats, etc., and movable property of every kind and description except certain records and specified articles.

Admitting that the provision in the charter of 1824 granting exemption from taxation constituted a valid contract which subsequent legislation could not impair, the State maintains that it ceased to apply after the lease and sale to the railroad, and the property in question then became subject to assessment.

The doctrine essential to the solution of the question in issue was lucidly stated and the pertinent authorities cited in *Rochester Railway* v. *Rochester*, 205 U. S. 236, Mr. Justice Moody delivering the opinion. Speaking in respect of the transfer of an immunity from the exercise of governmental power granted by contract, he declared (p. 247):

"Although the obligations of such a contract are protected by the Federal Constitution from impairment by

the State, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits, to a successor. . . . But the State, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the State in authorizing or directing its transfer. As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed every doubt is resolved in favor of the continuance of the governmental power and clear and unmistakable evidence of the intent to part with it is required."

And, after a review of former opinions, the conclusion was reached that a transfer, under legislative authority, of "the estate, property, rights, privileges and franchises" of one corporation to another did not vest in the latter the freedom from exercise of governmental power which the former enjoyed under its charter.

The results in *Wright* v. *Central of Georgia Ry.*, 236 U. S. 674, and *Wright* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 687, 690, were based upon the original charters, which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation. Neither of these cases modifies the principles announced and applied in the opinion quoted from above—it is referred to with approval in the latter of them.

By express terms the charter of the Morris Canal and

Banking Company limited the exemption from taxation to such property "as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation." This language must be strictly construed under the settled rule, notwithstanding the rights of purchase and ownership secured by the State, the supposed value of which, it is claimed, was so unusual that a more liberal interpretation should be adopted. After transfer to the railroad the assessed property was not possessed, occupied or used by the canal company; and the exemption, therefore, no longer applied, unless some legislation plainly authorized or directed its transfer.

Only the act of March 14, 1871, can be relied upon to show such authorization or direction. But this merely permitted the lease of "the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises;" and, as clearly pointed out in the *Rochester Case*, *supra*, an exemption from taxation does not pass under a valid lease or sale of corporate property together with appurtenances and franchises.

We find no error in the judgment of the court below, and it is accordingly

Affirmed.

MELLON COMPANY *v.* McCAFFERTY, COUNTY TREASURER.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 27. Submitted October 22, 1915.—Decided November 29, 1915.

Where the decree of the state court rests upon an independent non-Federal ground broad enough to sustain it, irrespective of the Federal right asserted, this court has no jurisdiction to review under § 237, Jud. Code.

Failure to resort to ample and efficient administrative remedies existing under the state law to review assessments claimed to have been unlawfully made, is a non-Federal ground sufficient to sustain a judgment of the state court refusing to enjoin the collection of the tax.

The duty to resort to an adequate remedy provided by statute cannot be escaped by assuming that even if resorted to the wrong complained of would not have been rectified.

Writ of error to review, 38 Oklahoma, 534, dismissed.

THE facts, which involve the jurisdiction of this court to review under § 237, Jud. Code, judgments of the state court where there are non-Federal grounds sufficient to sustain it irrespective of the Federal question involved, are stated in the opinion.

Mr. W. A. Ledbetter, *Mr. H. L. Stuart* and *Mr. R. R. Bell* for plaintiff in error:

The decision of the state court is contrary to and violates the provisions of the Fifth and Fourteenth Amendments. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Cummings* v. *Merchants' National Bank*, 101 U. S. 153.

Under the facts alleged in its petition plaintiff in error was entitled to equitable relief. Section 5771, Comp. Laws Oklahoma 1909; *Bardrick* v. *Dillon*, 7 Oklahoma, 535;

Art. X, § 5, Oklahoma Constitution; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Chicot* v. *Sherwood*, 148 U. S. 529; *Love* v. *A., T. & S. F. Ry.*, 185 Fed. Rep. 321; *Love* v. *A., T. & S. F. Ry.*, 174 Fed. Rep. 59.

Mr. Charles J. Kappler, Mr. John Embry and *Mr. Sam Hooker* for defendants in error:

Where a party has taxable property, within the district, he cannot resort to equitable proceedings to obtain relief, but must follow the methods provided by the statutes of the State in order to procure relief; the remedy, thus provided by the statute, was, and is, exclusive of all others.

The assessment of property and the equalization by the various boards were judicial acts, and being judicial in their nature the judgment of these boards can not be collaterally attacked, but an appeal must be taken therefrom to the courts as provided by law. *Hopper* v. *County*, 143 Pac. Rep. 4; *Silven* v. *Commissioners*, 92 Pac. Rep. 604; *London* v. *Day*, 38 Oklahoma, 428; 2 Cooley on Taxation (3rd ed.), 1382, 1464; *Stanley* v. *Board Supervisors*, 121 U. S. 535; *Thompson* v. *Brady*, 143 Pac. Rep. 6; *Williams* v. *Bank*, 38 Oklahoma, 539; *Carroll* v. *Gerlach*, 11 Oklahoma, 151; *Finney County* v. *Bullard*, 77 Kansas, 349; *West. Un. Tel. Co.* v. *Douglas Co.*, 76 Nebraska, 666; *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburg &c. Ry.* v. *Board Public Works*, 172 U. S. 32; *In re West. Un. Tel. Co.*, 29 Oklahoma, 483, and 35 Oklahoma, 626; *In re McNeal*, 35 Oklahoma, 17; *Fast* v. *Rogers*, 30 Oklahoma, 289.

Plaintiff having failed to take advantage of his right of appeal from the action of the assessor and the board, as prescribed by statute, could not be heard in a court of equity, for he had an adequate and complete remedy at law, and by reason of his own negligence failed to take advantage thereof.

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

The court below affirmed a decree of the trial court dismissing a bill filed by the plaintiff in error to enjoin the collection of state, county and city taxes assessed against it for the year 1910. 38 Oklahoma, 534. The ground for relief alleged was that the assessment had been unlawfully made as the result of an agreement between the city assessor and the county board of equalization, with the approval of the state auditor, that the property of all corporations should be assessed at its true cash value while that of all individuals should be assessed at only sixty per cent. of its cash value. The bill alleged that the result of the assessments so made was to give rise to such inequality and discrimination as to make the assessment illegal under the state constitution and laws and also to cause it to be repugnant to the equal protection and due process clauses of the Fourteenth Amendment. The action of both the courts was taken in disposing of a general demurrer to the bill and both held that the bill stated no equity because it failed to allege that adequate administrative remedies which were provided by the state law for the correction of the wrongful valuation complained of had been resorted to.

As it is not disputed and indeed is from a twofold view indisputable that the action of the court below was right if the premise upon which its ruling was based be accepted, that is, the existence of ample and efficient administrative remedies under the state law and the failure to resort to them (*Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Johnson* v. *Wells, Fargo & Co.*, this day decided, *post*, p. 234) it follows that we are without jurisdiction since under that hypothesis the decree below would rest upon an independent state ground broad enough to sustain it, irrespective of the questions of Federal right asserted.

But it is urged that plain error was committed by the court below in its ruling as to the state law, since some of the remedies, under that law which it was held should have been resorted to for the purpose of correcting the assessment complained of were not so available. Although the error thus complained of manifestly concerns a state question, the argument insists that we have jurisdiction to consider and correct it since the right to do so is inseparable from the duty to give effect to the Constitution. We are of opinion, however, that if for the sake of the argument the proposition be conceded and every remedy which it insists was wrongfully decided to be available be upon the hypothesis stated put out of view and treated as not existing, nevertheless there remain remedies provided by the state law embraced by the ruling below which would cause that ruling to rest upon independent state grounds broad enough to sustain it irrespective of the Federal rights relied upon. The merest outline of the assessment laws of the State will make the grounds of this conclusion clear.

Situated in a municipality, the city assessor was the officer primarily charged with the duty of assessing the property in question, and that officer in conjunction with the mayor or president of the board of trustees and the city clerk composed a city board of equalization with ample powers to redress all individual wrong complained of concerning an assessment and with authority to take steps generally to equalize assessments. Section 7616, Compiled Laws of 1909. From the adverse action of this board upon complaint made a right of appeal existed to the county board of equalization composed of a majority of the county commissioners. The powers of such board were also ample to redress any grievance complained of. Section 7617, Compiled Laws of 1909. In addition there was a state board of equalization having general authority to correct inequalities between counties; in other words,

to redress wrongs which were more extensive in character than those arising from the complaint of individuals as to their particular assessments. Section 7620, Compiled Laws of 1909. From the action of neither of these administrative bodies was there any method of review given prior to 1910. In that year the statutes were reënacted, the principal change being a right given to review the action of the county board by the county court, and that of the state board by the Supreme Court. Chapter 73, Session Laws of 1910, p. 148, and chap. 87, *id.*, p. 173. The error of state law which it is insisted was committed by the court was the ruling that the law of 1910 was in effect for the purpose of the prosecution of an appeal as to the assessment in question from the county board of equalization to the county court, when in fact such remedy could not have been pursued because when the law of 1910 went into effect the county board had completed its work under the assessment for 1910 and had adjourned *sine die*. But conceding this to be true the court below ruled that under the act of 1910 in view of the character of the wrong complained of as to the particular assessment in question there was power vested in the state board of equalization to hear complaint concerning it and hence the duty to invoke its action and, if it was adverse, to appeal from that body to the Supreme Court of the State—a right which could have been availed of, as there is no contention that there was not ample opportunity to so do after the act of 1910 was enacted and went into effect. Moreover, a like situation arises from the ruling below to the effect that it was the duty irrespective of the reënacting act of 1910 under the original law to have complained of the assessment to the city board and to have appealed from its adverse action to the county board of equalization. To avoid this difficulty in the argument it is insisted that a resort to these remedies was not required because they would have been unavailing in view of the nature

of the wrong complained of. But the duty to resort to the adequate remedies provided could not be escaped by assuming that if they had been resorted to the wrong complained of would not have been rectified.

As it follows that under any possible view of the case the judgment below rested upon propositions of state law adequate to sustain it wholly irrespective of the Federal right relied upon, it results that we have no power to review and the writ of error must be dismissed for want of jurisdiction.

And it is so ordered.

SUI *v.* McCOY, INSULAR COLLECTOR OF CUSTOMS OF THE PHILIPPINE ISLANDS.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 54. Submitted November 1, 1915.—Decided November 29, 1915.

The Immigration and Chinese Exclusion Laws of the United States have been carried by act of Congress to the Philippine Islands and authorized to be there put into effect under appropriate legislation by the Insular Government which has so done and in express terms conferred general supervisory authority upon the Insular Collector of Customs.

There is no conflict between the provisions of the act of Congress carrying the Immigration and Chinese Exclusion Acts to the Philippines and the action of the Collector in referring questions relating to the right of a Chinese person to land and to a board in which the power was lodged to act under his supervision in matters concerning immigration.

In this case, *held* that an order for deportation of a person of Chinese descent from the Philippine Islands under the Chinese Exclusion Act was not improperly entered either because of abuse of power by the Insular Collector in referring the matter to the board of inquiry

established under the Immigration Act nor does the record show that such person was denied due process of law by the disregard of testimony produced on his behalf.

21 Phil. Isld. 361, affirmed.

THE facts, which involve the validity of an order of deportation of a Chinese person from Manila and the judgment of the Supreme Court of the Philippine Islands sustaining the same, are stated in the opinion.

Mr. Clement L. Bouvé for appellant.

Mr. S. T. Ansell for appellee.

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

Chieng Ah Soon, a Chinese merchant residing in Manila, proposing to go to China, took a certificate which was susceptible of being used to identify him for the purpose of reëntry in case of his return. About a year afterward, July 19, 1910, Ah Soon returned accompanied by two persons asserted to be his minor sons, one Ah Luy, said to be twenty, and the other, Ah Sui, to be sixteen years of age. His right to land was at once conceded, but the right of the two others being questioned, the Insular Collector referred the matter for inquiry and report to a board which was charged with the duty of considering such question. At once this board heard the testimony offered to prove the right to admission and concluded that Ah Luy had established such right, but that Ah Sui had not. An appeal was prosecuted to the Collector, but before the matter was decided by him on the merits a rehearing was granted presumably by the board and it again heard the matter on July 23, 1910. At the rehearing additional testimony was offered by Ah Sui, but after reëxamination of the matter and considering such testimony, the board adhered to its former conclusion. An appeal was taken

to the Collector and once more before it was decided a second rehearing was allowed and on August 10, 1910, after hearing additional testimony, the original order was again re-affirmed. This last decision was on September 3, 1910, affirmed on appeal by the Insular Collector and on September 15 an application for rehearing was refused and Ah Sui remained, therefore, in the custody of the Collector for deportation.

At once he applied for *habeas corpus* to the Court of First Instance of the City of Manila asserting the illegality of his detention for deportation and his right to land as a minor son of Ah Soon, on the following grounds: (a) An entire want of power in the Insular Collector to have referred the right to land to the board of inquiry and the resulting absolutely void character of the proceedings, whether appellate or otherwise, taken thereunder; (b) Even upon the assumption of existence of power, the absolutely void character of the action of the board and the Collector because of the entire disregard by both of the testimony establishing the paternity of Ah Soon and the resulting right of Ah Sui to land. Although ruling against the assertion of want of power, the trial court yet granted the writ of *habeas corpus* and directed the release of the applicant on the ground of a gross abuse of discretion by the board and the Collector in refusing to give effect to the testimony showing the right to enter, although there was nothing in the proof tending to the contrary. On appeal, the court below, after reviewing the testimony, held that there was no ground to support the conclusion reached by the trial court of arbitrary action and abuse of discretion by the board and the Collector in passing upon the right to land and therefore reversed the order releasing Ah Sui, thus leaving him in custody subject to deportation. 22 Phil. Isld. Rep. 361.

Our jurisdiction is invoked, first, upon the theory that the construction of statutes of the United States is neces-

sarily involved in the assertion of the want of all authority of the Insular Collector of Customs to have appointed the board which primarily determined the right to admission, and second, an assumed violation of the due process of law secured in the Philippine Islands by act of Congress arising from the action taken below because of its asserted arbitrary character caused by the alleged absolute disregard of the testimony establishing the right to enter and the absence of any testimony to the contrary. We come to dispose of these contentions separately.

1. That the Immigration and Chinese Exclusion Laws of the United States have been by act of Congress carried to the Philippine Islands and authorized to be there put into effect under appropriate legislation by the Insular Government, is not disputed. That such government has put such laws into effect and in doing so has in express terms conferred the general supervisory authority required for that purpose to be exerted upon the Insular Collector of Customs, is also not disputed. And that such officer under that authority has provided for a board of examiners primarily to determine, subject to his review, questions arising under the Immigration and Chinese Exclusion Laws, is also not disputed. The contention is based upon the supposed repugnancy to the act of Congress caused by the action of the Collector in giving to such board primary authority to examine under the Chinese Exclusion Acts. The argument is that although under the Immigration Acts provision is made for a board of examiners, no such provision is found in the Chinese Exclusion Acts, since under the latter, although an examination is provided for, it is left to be conducted under rules and regulations adopted by the appropriate authority and in the exercise of that power in the United States examining agents and not an examining board or boards are provided for by the regulations. Upon this and this alone is the conclusion rested that the making of a primary

examination under the Exclusion Acts by a board was in conflict with the United States statutes.

The extremity of the argument is well illustrated by considering the extent of the administrative power conferred by the Insular Government upon the Collector in delegating to him the authority to enforce the Chinese Exclusion Acts since by § 1 of Act No. 702 of the Philippine Commission enacted March 17, 1903, it is provided that "the Collector of Customs for the Philippine Archipelago is hereby authorized and directed . . . to employ for that purpose the personnel of the Philippine Customs Service, the provincial and military officers hereinafter provided, and such other persons as may be necessary." But aside from this we are of the opinion that the mere statement of the supposed conflict answers itself, since there is no room for real contention that there was a want of power in the Collector to appoint the board instead of an agent to aid him in the discharge of the duties devolving upon him. And we are also of the opinion that there was no ground whatever for the contention that a conflict arose between the act of Congress and the action of the Collector because the board selected was one in whom the power had been already lodged to act under the supervision of the Collector concerning matters of immigration.

2. So far as concerns the assertion that there was a violation of the due process of law secured in the Philippine Islands by act of Congress both because of the want of a hearing and the disregard of the testimony we are of the opinion that the first on the face of the record is completely answered by the statement we have made of the abundant opportunity which was afforded for a hearing, of the rehearings granted, and of the reiterated considerations which resulted by the board and the Collector, especially in view of the judicial consideration of the subject of the complaint made in the proceedings which cul-

minated in the decree which is before us for review. As to the charge of the total disregard of all the testimony, we might well content ourselves with referring to the opinion of the court below, but in view of the character of the case we say that from an examination of the record we think such contention is devoid of all merit.

Affirmed.

NORTON, EXECUTOR, *v.* WHITESIDE.

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

No. 55. Argued November 4, 5, 1915.—Decided November 29, 1915.

A mere formal statement in the bill to the effect that the cause of action is one arising under the Constitution and laws of the United States does not suffice to give this court jurisdiction to review the judgment of the Circuit Court of Appeals under § 241, Jud. Code—it must appear that the suit really and substantially involves a dispute or controversy respecting the validity, construction or effect of some law of the United States upon the determination whereof the result depends. *Hull* v. *Burr*, 234 U. S. 712.

Riparian rights attaching to property patented by the United States are determined by the law of the State in which the land is situated. *Hardin* v. *Jordan*, 140 U. S. 371.

The fact that both parties owning parcels of real estate bordering on a navigable boundary river opposite to each other acquired the property from the United States does not change or affect the rule that riparian rights of the parties are to be determined by the law of the respective States in which the properties are situated.

The provisions in the various ordinances and statutes relating to the organization of the Northwest Territory referred to in the bill in this case do not control the riparian rights enjoyed, under the law of the State wherein the property is situated, by parties who acquired the land from the United States within the limits of a State carved out of such Territory.

Averments in a bill as to the general intent of Congress to preserve free navigation of the rivers within the Northwest Territory are unavailing to give jurisdiction to this court to review a judgment of the Circuit Court of Appeals in a case otherwise made final by § 128, Jud. Code, in the absence of any specific legislation of Congress influencing the determination of an asserted Federal question in regard to riparian rights.

The mere fact that Congress directed the improvement of a new channel in a navigable river does not destroy riparian rights existing under state law and create new ones under Federal law.

In this case as the riparian rights asserted by complainant existed, if at all, under the law of the State in which the property is situated and the determination of the issues did not involve the construction of the Constitution or of any law of the United States, but as the jurisdiction rested on diverse citizenship alone, the decree of the Circuit Court is final under § 128, Jud. Code, and this court has no jurisdiction to review it under § 241, Jud. Code.

Writ of error to review, 205 Fed. Rep. 5, dismissed.

THE facts, which involve the jurisdiction of this court under § 241, Judicial Code, to review a judgment of the Circuit Court of Appeals, and the finality of such judgment under § 128, Judicial Code, are stated in the opinion.

Mr. Jed L. Washburn, with whom *Mr. William D. Bailey*, *Mr. Oscar Mitchell*, and *Mr. Albert C. Gillette* were on the brief, for appellant.

Mr. Luther C. Harris and *Mr. Alfred Jaques*, with whom *Mr. Theo. T. Hudson* was on the brief, for appellee Whiteside.

Mr. Daniel G. Cash and *Mr. John B. Richards, Jr.*, for appellee Tallas, submitted.

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

The appellant, who was complainant below, as the owner of certain shore land abutting on a stretch of water

in or near the upper end or far corner of Lake Superior, from one point of view sued to quiet his title to the whole or a part of a certain island which had emerged from the waters in front of his land, or considered from the same point of view in a broader aspect, to protect his asserted riparian rights in the submerged land in front of his shore property. The defendants who are appellees were owners or possessors either of property on the opposite shore or of the whole or part of the emerged island, and the controversy resulted from a difference between the parties as to the character and extent of their riparian rights and as to the ownership of the island which had emerged in the stretch of water between the two shores. The District Court upheld the theory of the existence in the complainant of the riparian rights asserted by him and therefore awarded relief upon that basis except as to a portion of the emerged island as to which it gave no relief because in consequence of adverse possession by one of the defendants, it was considered there was an adequate remedy at law and consequently no right to equitable relief. 188 Fed. Rep. 356. On appeal the court below, not approving the full character or extent of the riparian rights asserted by the complainant and recognized by the trial court, reversed with directions to dismiss the bill (205 Fed. Rep. 5), and it is in consequence of an appeal from that decree that the case is now before us.

A motion to dismiss upon the ground that the decree appealed from is beyond our competency to review because made final under § 128 of the Judicial Code (36 Stat. 1133, c. 231) requires to be disposed of. To test its merits we must first ascertain whether the jurisdiction of the District Court was invoked solely on the ground of diverse citizenship. *St. Anthony's Church* v. *Pennsylvania R. R.*, 237 U. S. 575, 577, and cases cited. That taking the face of the bill from the point of view of mere form of statement, diverse citizenship was not the only ground

of jurisdiction relied upon is apparent since the bill besides diversity of citizenship alleged that the cause of action was one arising under the Constitution and laws of the United States. This, however, does not suffice to solve the question since it is settled that a mere formal statement to that effect is not enough to establish that the suit arises under the Constitution and laws of the United States but that it must appear that "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading. . . ." *Hull* v. *Burr*, 234 U. S. 712, 720, and authorities there cited. Before coming to the text of the complaint, to understandingly test whether it fulfills these requirements we give the merest outline of the condition out of which the controversy grew and to which the complaint related.

The boundary line of Wisconsin under its enabling act, starting from a designated point, ran "through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same," etc. And the boundary line in one respect of Minnesota from the point where it intersected with the St. Louis River followed the main channel of that river "to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British Possessions." From the point of intersection where it first becomes the boundary of the States of Wisconsin and Minnesota, in its flow towards Lake Superior, the St. Louis River approaches Lake Superior in the direction of a large bay or indentation therein. From one point of view the river at once leaving the fast land empties into and is immediately absorbed in this bay. From another

the river before it empties into the lake expands into a stretch of shallow water contained within the north or Minnesota shore upon which is Duluth and the south or Wisconsin shore upon which is the City of Superior, through which shallow stretch a tortuous but navigable channel curvingly continues to flow until by a passage through an intervening bar the river emptying into the bay merges its existence with that of the lake. We say tortuous channel because the banks on either side of the flange-like stretch of water are not symmetrical, but are indented with various bays of divergent shape and expanse, and the water itself is irregularly interspersed with islands or flats which deflect the channel we have described and cause it greatly to meander as it proceeds to its ultimate destination in the bay through the bar in question. It will thus be seen that the difference between the two points of view is this, that one treats the lake as embracing the expanded though shallow stretch of water in question, and the other considers the shallow stretch of water as a part of the river until the point is reached where, traversing the bar, the lake and river are completely and beyond room for any possible question united.

On the Minnesota or north shore of this shallow stretch of water the complainant owned land. The channel flowing through the stretch of water as it approached the complainant's land curved towards the Minnesota shore and therefore in passing in front of that land was nearer the north or Minnesota shore. In the stretch of water nearly opposite the complainant's land, but over towards the south or Wisconsin shore there was a large island known as Big Island, admittedly in the State of Wisconsin, owned by Whiteside, one of the defendants, and about two thousand feet lay between the outer shore of this island and the complainant's land on the northern shore. In the intervening space between the channel and this

island, and therefore on the south or Wisconsin side of the channel, there gradually emerged a smaller island.

It having been determined to improve the navigation in the channel through the stretch of water in question, the plans to accomplish that purpose were approved by the Secretary of War in 1899, and in virtue of an appropriation by Congress the work under the plans was carried out by the United States between the years 1899 and 1902. It is not necessary for the elucidation of the averments of the bill to do more than say that the carrying out of this work resulted in the creation of a new navigable channel which in passing through the stretch of water instead of swinging towards the north or Minnesota shore in front of the complainant's land curved in the other direction and therefore approached nearer the Wisconsin shore than did the old channel. In doing so it consequently reached or struck the emerged island of which we have spoken near its Wisconsin or south side, and cutting through it virtually put the new and enlarged channel on the Wisconsin side of such emerged island. What remained of the island thereafter hence lay between the newly created channel and the lands of the complainant on the north or Minnesota shore. In other words, as the result of the creation of the new channel the lands of the complainant to the extent that the emerged island accomplished that result, were separated from the new channel. In the performance of the work it may be conceded that in cutting through the emerged or small island the excavated earth was largely dumped on the surface of the island towards the Minnesota shore and that either because of the washing of this earth into the old channel or the sedimentary deposit caused by the slackening of the velocity of the water flowing through it, the old channel opposite the land of the complainant became not suitable for, or more difficult of, navigation.

In view of this situation we come to consider the bill,

its averments and the light thrown on them by the relief prayed in order to determine whether in any substantial manner whatever it involved the construction or application of the Constitution or laws of the United States within the criteria embraced by the established rule which we at the outset stated. Instead of following the order of the twenty-four paragraphs which the bill contains, we rearrange and group them under five headings, omitting many redundancies of statement, but leaving out nothing which can throw light upon the cause of action relied upon.

(a) *The parties.* The complainant was alleged to be a citizen of Kentucky and the defendants, Whiteside, Alexander and Tallas, were alleged to be citizens of the State of Minnesota and inhabitants of the district in which the suit was brought.

(b) *The grievances complained of.* It was alleged that the complainant owned land under patents from the United States on the Minnesota side of the stretch of water at the point to which we have referred, that the defendant, Whiteside, under title acquired also from the United States, owned land on the Wisconsin side, Big Island, that Alexander, either in his own right or in connection with Whiteside, claimed some land on the Wisconsin side and resulting riparian rights, and that Tallas had taken possession of a part of the small or emerging island, erected a small structure thereon and without right in law was asserting ownership therein, the land never having been disposed of by public authority. It was averred that both Whiteside and Alexander by virtue of their shore ownership were asserting riparian rights crossing the new or government channel to the old or original channel embracing what remained of the emerged island and that Tallas by virtue of his possession of the island which remained was asserting the right to hold it as owner.

(c) *The rights asserted.* Averring that the stretch of water was a part of Lake Superior, in substance it was

asserted that as the complainant owned shore land on the Minnesota side there existed riparian rights extending out to the center of the channel flowing through the stretch of water, securing to the shore owner the consequent right of direct access to such channel and this right it was in substance alleged embraced the power not only to extend to the old channel, but to the new navigable channel constructed in improvement of navigation by the United States and to enjoy riparian rights coterminous therewith, and that therefore the asserted rights by Whiteside, Alexander and Tallas were in conflict with such right upon the part of the complainant and cast a cloud upon his title giving him the right to equitable relief.

(d) *The legal grounds asserted as the basis of the relief prayed.* The bill alleged the historical fact of the original ownership by Virginia of the territory in which the lands in controversy were embraced, of its passing to the Confederation as a part of the vast domain ceded by Virginia, of the adoption of the Northwest Territory Ordinance in 1787, the stipulation contained in that ordinance that "the navigable waters leading into the Mississippi and St. Lawrence rivers, . . . shall be common highways and forever free as well to the inhabitants of said Territory as to the citizens of the United States and those of other States that may be admitted into the Confederacy, without any tax, impost or duty therefor." The bill further referred to the act of Congress of May, 1796, providing for the sale of lands within the Northwest Territory, including the lands in question, reciting the provision therein "that all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both." It alleged the subsequent carving out of said territory of the States of Ohio, Indiana, Mich-

igan, Wisconsin and part of Minnesota and the reservation in the Enabling Acts preserving the navigable waters bordering upon the same as common highways and extending concurrent jurisdiction to the States bordering thereon. Proceeding, the bill alleged the boundaries of the two States of Wisconsin and Minnesota as stated in the Enabling Acts to which we have referred, including the line of the main channel of the St. Louis River and the center of Lake Superior at the points and as described in the statement which we have previously made. It alleged that under the laws of Minnesota the riparian rights extending to the center of the main navigable channel were valid as asserted by the complainant and in practice had been recognized by the exercise of taxing and other powers. So far as the United States was concerned, growing out of the averments as to the formation of the Northwest Territory and of the States just referred to, it was alleged:

"That in the preservation of public rights on such navigable waters, where the same constitute state boundaries, it was the intent of the Federal Government and of the States to forever maintain and preserve the rights of the respective States and the citizens thereof, to have access to the navigable and navigated channels of such boundary waters and among the most ancient and important rights of private owners, incidental to the ownership of the shore lands abutting upon such boundary waters, is the right to wharf out to and have access to the navigable and navigated channel of such waters from such shore lands, and to have connection from such shore lands, throughout the extent thereof, with commerce upon such navigable and navigated part or channel of such waters, subject always to the paramount control over the whole of such waters by the United States."

It was charged that the emerging of the small island opposite the land of the complainant had occurred after

the survey, sale and patent of complainant's land by the United States. In addition the bill charged that under the power of the United States to regulate commerce, harbor lines had at various times been established which extended from the respective shores to the old channel before the new one was constructed and that under the plans approved by the Secretary of War for the new work it was contemplated that harbor lines should extend from the respective shores to that channel.

(e) *The relief prayed.* The prayer was that the riparian rights of the complainant be recognized and enforced from the shore out to the new navigable channel created by the work done by the United States, and that all rights of the defendants as riparian owners which they asserted to extend across the new channel over to the old channel be declared to be invalid and that they be restrained from asserting or enforcing them.

Coming to test these averments we fail to perceive any ground for holding that the rights asserted rested in any degree whatever upon a substantial claim under the Constitution or laws of the United States or by any possibility involved the construction or application of any law of the United States for the following reasons: *First,* because as to the claim of riparian rights on the navigable waters in question it was long since affirmatively settled that such claim solely involves a question of state law and therefore at the time the bill was filed it was not open to contend to the contrary. *Barney* v. *Keokuk,* 94 U. S. 324; *Hardin* v. *Jordan,* 140 U. S. 371; *Grand Rapids & Ind. R. R.* v. *Butler,* 159 U. S. 87; *Devine* v. *Los Angeles,* 202 U. S. 313. *Second,* because the mere fact that both parties, the one holding on the Wisconsin shore and the other on the Minnesota shore, had acquired the property by them held from the United States, it is also affirmatively settled, in no way changes the situation. *Blackburn* v. *Portland Mining Co.,* 175 U. S. 571; *Florida Central &c. R. R.* v.

Bell, 176 U. S. 321; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505; *Shulthis* v. *McDougal*, 225 U. S. 561, 569. *Third*, because so far as the references in the bill to the organization of the Northwest Territory and to the various provisions relating to navigable waters are concerned, however interesting they may be historically, we can see not the slightest ground for the contention that they were controlling or in any way could influence the question of the nature and character of the riparian rights enjoyed under the state law by the complainants. *Fourth*, because we can discover in the averments of the bill no substantive statement indicating that it was contended to the contrary, unless it be that such purpose could be implied as the result of the general averments of the bill which we have quoted concerning the general intent of Congress to preserve free navigation. But if we were to indulge in such assumption the result would not be different, as the averments in question make no reference to any specific legislation of Congress which would have the slightest influence upon the determination of the existence of the riparian rights which the bill asserted. *Fifth*, because we are clearly of the opinion that the mere fact that Congress in the exercise of its power to improve navigation directed the construction of the new channel affords no basis whatever for the assumption that thereby as a matter of Federal law rights of property, if secured by the state law, were destroyed and new rights of property under the assumption indulged in incompatible with that law were bestowed by Congress. And especially are we constrained to this view by the fact that there is no question here of any interference with work done by the United States under its paramount authority to improve navigation or any attempt to render the result of that work inefficacious. This will be lucidly illustrated by considering for a moment the action of both the courts below, since neither questioned the paramount authority

and right of the United States in aid of navigation to construct the new channel or concerned themselves with any real or imaginary impediment to navigation. This is at once demonstrated by considering that the only difference between the two was the conclusion in the trial court that the effect of constructing the new channel was to extend the riparian rights over and across the old channel to the new, irrespective of the rights of property changed or destroyed thereby, because the new channel was to be treated not as a new work but as the gradual and natural modification of the old, while the court below reached a directly contrary conclusion.

Finally we are of opinion that the question whether the stretch of water and the channel through it be treated as a part of Lake Superior as asserted by the complainant, or be considered at the point in issue as a mere continuation of the St. Louis River as asserted by the defendants (a view held by both the courts below), is wholly negligible for the purpose of determining whether a substantial Federal question was alleged justifying our taking jurisdiction of the cause.

As from what we have said it results that our opinion is that there is no substantial ground for concluding that the jurisdiction of the District Court rested upon any assertion of Federal right, irrespective of diverse citizenship, justifying our review of the court below, it follows that the appeal must be and it is

Dismissed for want of jurisdiction.

FIREBALL GAS TANK & ILLUMINATING COMPANY *v.* COMMERCIAL ACETYLENE COMPANY AND PREST-O-LITE COMPANY.

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

No. 13. Argued October 22, 1915.—Decided November 29, 1915.

A process may be independent of the instruments employed or designed to perform it, and the expiration of a foreign patent for the one may not affect the United States patent for the other.

In this case *held* that the patent of complainants for acetylene gas tanks is distinctly for an apparatus while the foreign patents which have expired and are claimed by defendant to be identical are explicitly for methods.

There having been conflicting opinions of different Circuit Courts of Appeal on questions of invention and infringement as well as the effect of expiration of foreign patents *held* that there was no abuse of discretion in the granting of an interlocutory injunction, but that while there is no identity between complainants' patents and expired foreign patents pleaded by the defendant, all other questions should be reserved for the trial of the cause.

THE facts, which involve the propriety of issuing an interlocutory injunction in a suit for infringement of patents for acetylene gas apparatus, are stated in the opinion.

Mr. John H. Bruninga for petitioners.

Mr. John P. Bartlett for respondents.

MR. JUSTICE MCKENNA delivered the opinion of the court.

By this writ there is brought here for review a decree of the Circuit Court of Appeals affirming an order for an

interlocutory injunction against the infringement of certain letters patent.

The Circuit Court of Appeals considered the question in the case to be the narrow one whether the injunction was properly granted.

Petitioners, who were defendants in the District Court, attack not only that conclusion but contend for the larger relief of a dismissal of the bill.

The Acetylene Company is the owner of letters patent No. 664,383 granted December 25, 1900, for "apparatus for storing and distributing acetylene gas." The Prest-O-Lite Company is the exclusive licensee as to the use of the invention on automobiles, carriages and other movable vehicles. Defendants manufacture and sell what is known as the "Fireball Gas Tank"; Soloman is the president of the defendant.

The bill was filed August 17, 1911, and a motion for a preliminary injunction was made. It was heard upon the bill, exhibits, answer, replication and affidavits. The Circuit Court granted the injunction and the order was affirmed, as we have said, by the Circuit Court of Appeals. The court considered that the question before it was whether the trial court had exercised a sound judicial discretion in granting the injunction, and deciding that the trial court had done so, affirmed its action and refused to dismiss the bill, as it was urged to do. Opinion was reserved upon all of the questions which the record presented except the question of the abuse by the trial court of its discretion in the issue of the injunction, as the court said, "until the affidavit stage of this proceeding shall have been passed, until the rights of the parties shall have been tested by the production, hearing and cross-examination of their witnesses according to the salutary and searching practice of the common law, and until the court below, at the final hearing, has investigated and decided the issues these parties raise in

the light of that testimony and of the argument of counsel."

Whether this prudence should be imitated or a broader scope of decision be made we will determine upon a consideration of the case.

The bill is in the usual form and set forth the respective rights in the patent of complainants, respondents here (we shall refer to them as complainants and to petitioners as defendants), and its infringement by defendants.

The defendants answered separately and each denied infringement and averred that by reason of the proceedings in the Patent Office the patent is limited in its scope to the subject-matter precisely as claimed and defined by the claims of the patent; that the prior art was such that the patent is devoid of novelty and patentable invention; that it is destitute of utility; that it does not comply with the statutes in precise difference from what preceded it, nor sufficiently describe the method of operating it and the process of making, constructing and using it; that complainants have a remedy at law and the court has no jurisdiction; and that the alleged inventors of the patent were not the first and true inventors of it. Certain United States, British and German patents are alleged as ante-dating the invention and certain publications are represented as having disclosed it.

Public uses of the patent are also circumstantially alleged and profits are denied. It is further alleged that the invention of the Claude & Hess United States patent No. 664,383, which is in suit, was patented to George Claude and Albert Hess by British patent No. 29,750 and that the latter had expired or ceased before the issue of patent No. 664,383; that the term of the latter expired not later than June 30, 1910; that a French patent to the same patentees expired June 30, 1911, and that therefore patent No. 664,383 also expired not later than said date; and so with the German patent and other patents.

The first consideration which presents itself is the identity of the United States patent with the foreign patents which by their expiration, if they have expired, have terminated the United States patent.

The letters patent in suit describe the invention as "An Improvement in Apparatus for the Storage and Distribution of Acetylene Gas." Drawings illustrate the patent, and it is stated that it "is designed to carry out a process of storage and distribution involving the employment of a chamber charged with a solvent of the gas to be stored and into which the gas is forced under suitable pressure," and that the apparatus is to be charged at a central station and transported to the place of use as a complete article or package. The apparatus is described and illustrated and it is said that it, embodying the invention, consists essentially in a closed receptacle containing acetylene gas in solution and having an outlet for the gas so positioned as to be normally above the level of the solution and adapted to be provided with a burner or connected with a pipe system for the final use or distribution of the gas which escapes from the solution owing to the diminution of pressure when the outlet is opened. It is constructed and arranged "for the charging process as well as for the discharging process." Inlet and outlet passages are provided with suitable valves or cocks to close the same, and it is desirable, it is said, for the proper operation of the burners supplied in this way that the gas should be delivered thereto under a substantially uniform pressure only slightly above the atmospheric pressure, and for this purpose means are provided. A reducing valve is shown as the means interposed between the interior of the receptacle which contains the dissolved gas and the outlet from which the gas is allowed to escape.

Claims 1, 2 and 5 are those with which we are concerned, and are as follows:

"1. A closed vessel containing a supersaturated solu-

tion of acetylene produced by forcing acetylene into a solvent under pressure, said vessel having an outlet for the acetylene gas which escapes from the solvent when the pressure is released or reduced, and means for controlling said outlet whereby the gas may escape therethrough at substantially uniform pressure, substantially as described.

"2. A prepared package consisting of a tight shell or vessel; a solvent of acetylene contained within said vessel; and acetylene dissolved in and held by said solvent under pressure and constituting therewith a supersaturated solution, the package being provided at a point above the solvent with a reducing valve, substantially as and for the purpose set forth.

* * * * * * * *

"5. As a new article of manufacture, a gas package comprising a holder or tight vessel; a contained charge of acetone; a volume or body of gas dissolved by and compressed and contained within the solvent; and a reducing valve applied to an opening extending to the interior of the holder above the level of the solvent, substantially as set forth."

It is manifest, therefore, that the invention is of an apparatus designed to make use of the property of acetylene and other gases of solubility in a liquid in accordance with the law of solution (Henry's law), which is that the amount of gas absorbed by any liquid is proportioned to the pressure exercised upon the gas. Acetone is mentioned in claim 5 as a solvent.

We may now turn to the various patents whose expiration, it is contended, terminates the United States patent.

The law is (Rev. Stats., § 4887) that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be

more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The question then is one of identity between the United States patent and the foreign patents. The first of the latter relied upon is the British patent to Claude and Hess of 1896. The title is "An Improved Method of Storing Acetylene for Lighting and Other Purposes." The specification states:

"This invention relates to an improved method of storing acetylene, for lighting and other purposes, in a small volume in order that it may be supplied in portable form to the customer, and it consists in dissolving the acetylene under pressure in certain liquids, the effect of pressure being to increase the solubility of the acetylene and so enable a considerable quantity of acetylene to be stored in a small volume in readiness to be supplied for any purpose for which it may be required.

"Liquefied acetylene occupies the least volume but the pressure is very high and may become excessive should the critical temperature (37° .5) of acetylene be accidentally exceeded. On the other hand simple compression of the gas enables dangerous pressures to be avoided, but the quantity which can be stored in this way is too small. For these reasons we avail ourselves of the great solubility of acetylene in certain liquids, and increase this solubility by pressure, and this method of storing acetylene gas is the Invention which we hereby broadly claim as our Invention, whatever may be the liquid employed, the kind of apparatus used, or mode of operation."

Examples of liquids which may be employed as solvents are given. Among these are mentioned "alcohols" and "particularly acetones." It is stated that mixtures and combinations of these bodies vary their solvent power, and of this property the patentees said they availed themselves. And further that the solvent power increases with

pressure and the solution of the gas in a liquid is the principle of the invention.

The process described as carried on, though subject to modifications, is as follows: the gas is dissolved in the liquid chosen and the "solution under pressure, however obtained, is filled into a receiver of metal or of glass (such as used for soda-water) capable of resisting the pressure employed. The receiver has a cock and the necessary adjuncts for connection, directly or through an expansion chamber, with the appliances in which the gas is used by the consumer, the substitution of charged for empty receivers being readily effected. The storage receivers may vary in dimensions from a small portable, to a large fixed gas-holder."

The claims describe the method and invention to be the utilization for the purpose of storage, in a small volume, of large quantities of acetylene gas, of the solubility of the gas in certain liquids by the application of pressure and the novel application as a solvent of acetylene under pressure for the purpose of storage, transportation, and utilization for industrial purposes; and the employment (claim 6) of a receiver containing a liquid charged with acetylene under pressure and from which the acetylene is evolved when required for use.

Defendants have fixed on claim 6 as establishing identity, and the British law of patents is relied on. *British United Shoe Machinery Co.* v. *Fussell & Sons, Ltd.*, 45 P. R. C. 631. The argument is that not only a receiver is claimed but a receiver of the exact or equivalent kind described in the United States patent. Counsel say: "Evolving gas from a receiver in which the gas is under pressure necessarily implies an outlet, an outlet necessarily implies a valve and a valve necessarily implies a control of the escaping gas." They say further, quoting the cited case: "'A man must distinguish what is old from what is new *by* his claim, but he has not got to distinguish what

is old from what is *new* in his claim.'" Applying the principle and asserting that the devices described in the United States patent were old it is contended that they would be implied as necessary elements of the claim.

Taken at its full import the argument would seem to establish that there could be no patent for an apparatus to execute a process if it (apparatus) were a combination of old elements. In many cases, therefore, the argument would confound process and apparatus, but it is established that a process may be independent of the instruments employed or designed to perform it. They may be independent or they may be related. "They may approach each other so nearly that it will be difficult to distinguish the process from the function of the apparatus. In such case the apparatus would be the dominant thing. But the dominance may be reversed and the process carry an exclusive right, no matter what apparatus may be devised to perform it." *Steinmetz* v. *Allen*, 192 U. S. 543, 559. However related they may be, to which may be assigned dominance may be important in considering the patentable novelty of either or, it may be, the infringement of either, but not whether one has expired because the other has. *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U. S. 301, 318. The various questions thus arising may indeed have complexity (*Risdon Locomotive Works* v. *Medart*, 158 U. S. 68), but they must not be confounded.

A great deal of what we have said applies to the German patent. Its claim is for "the employment of liquids charged with acetylene under pressure for the purpose of utilizing acetylene for illumination, motive power, heating and the like, characterized by acetylene being absorbed under pressure by a suitable liquid and the liquid saturated with acetylene being preserved or contained in suitable vessels, from which the acetylene gas can be supplied for use, a pressure regulator being preferably interposed."

This claim is preceded by a lengthy explanation (too lengthy to quote) setting forth the properties of acetylene and its absorption by certain liquids and the dependence of the amount of absorption upon pressure and the use of such properties and pressure for storing and utilizing the gas. It is said, "The vessels for holding the liquid saturated with acetylene must be provided with a cock or valve from which the gas escapes according to the diminution of pressure which occurs, and can then be used for the customary purposes." And an apparatus is described, "with whose aid the storing process can be carried into practice." Care is taken to mention "that the process is in no way limited to the apparatus described and shown." It is clear, therefore, that the process and the described vessel of storage are separate and that the invention is for the former. An apparatus was mentioned in display of the utility of the process. See *Tilghman* v. *Proctor*, 102 U. S. 707. It was not the intention to claim a particular form of device and secure a patent for it.

The title of the French patent is "A System of Storing Acetylene." And it is said that the object of the "invention is a system of storing acetylene whereby acetylene to be used for any purpose whatsoever, especially for lighting, may be enclosed in a restricted space and easily transported."

A description of the process is given and the properties of the gas and its solvent which make the law of the process. And it is said the solution under pressure obtained by the means described, "or by any other means, is placed in a metal recipient (or a glass recipient, like seltzer water siphons) susceptible of resisting the pressure employed. The recipient is provided with a faucet and the necessary fittings to enable it to be connected, either directly or by means of an expander, with the apparatus of consumption at the house of the consumer."

The claims were:

"1. For the storage of large quantities of acetylene in a small space, the application of the solubility of this gas in certain liquids, using pressure for the purpose of increasing the amount of gas dissolved per unit of volume of the liquid, as described above;

"2. For the purpose of effecting the solution under pressure of large quantities of acetylene in a small volume of liquid, the use of methods and apparatus employed to cause the solution under pressure of other gases in other liquids, especially of carbonic acid in water."

There were certificates of addition to the patent, the first of which sets forth the advantage of mixing the liquid with a porous body capable of absorbing it. "An expedient and practical form of accomplishing this" is set forth in the second certificate. The third certificate of addition connects the patent "with a safety appliance to be adapted especially on recipients where the acetylene is dissolved in an appropriated liquid, such as acetone, according to the process described in" the patent.

The contention is that the patent is for a "system," not for a "process or method," and that besides the "'Resumé'" or claims of the first patent especially refer to both "'method and apparatus'" and that "the certificates of addition, especially the last two, unquestionably are for the apparatus, namely, the gas tank."

We think the contentions are untenable. The distinction between system and method is too subtle, and, besides, it is clear that the patentee considered the words as meaning the same thing, and the apparatus referred to was one, it was said, "employed to cause the solution under pressure of other gases in other liquids." It was not the apparatus of the United States patent, though having some features the same.

But it is contended that even if considered as a 'method' patent, "it is merely for the method of operating the

apparatus, constituting the function of the apparatus, and, therefore, under the decision of this court, is for the same invention." And this is contended to be established by *Mosler Safe & Lock Co.* v. *Mosler*, 127 U. S. 354, and by a ruling of the Patent Office upon the application of Claude and Hess for an "Improvement in a Method of Storing Acetylene Gas for Distribution" and the acceptance of that ruling by the applicants.

The *Mosler Case*, it was said in *Miller* v. *Eagle Manfg. Co.*, 151 U. S. 186, 197, held "that a patent having issued for a product, as made by a certain process, a later patent could not be granted for the process which results in the product." The process was a purely mechanical process, and the ruling, it would seem, must be confined to the exact facts of the case, for in *Miller* v. *Eagle Manfg. Co.* it was said (p. 199) that "a single invention may include both the machine and the manufacture it creates, and in such cases, if the inventions are really separable, the inventor may be entitled to a monopoly of each." And *Sewall* v. *Jones*, 91 U. S. 171, 190, was cited for the purpose of showing that there might be a patent for the process and one for the product. *Merrill* v. *Yeomans*, 94 U. S. 568, was also cited (151 U. S., p. 199) as holding that "where a patent described an apparatus, a process, and a product, and the claims cover only the apparatus and the process, the law provided a remedy by a surrender of the patent and a reissue, for the purpose of embracing the product."

The ruling of the Commissioner of Patents referred to above is as follows:

"It was common long prior to the appellants' invention to force under pressure into a liquid solvent thereof in a closed vessel and was also common to draw off gas from a holder where it was contained under pressure, through an opening, the effective size of which was directly controlled by and proportionate to the pressure of the gas

within the holder, or, in other words, through a pressure regulator. The appellants were therefore not the inventors of the step of storing gas, as set forth, nor of the step of permitting gas to escape from a place of storage in the manner set forth. Neither of these steps modifies in any manner the old and expected effect of the other and the final result of the alleged process, namely, distributing gas at a uniform pressure, is the same as that produced by processes old in the art, as above stated. The appellants have therefore not invented a new and patentable process, although, as held in a companion case, they have devised an apparatus by which the old process of storing gas can be made practically and commercially useful. Claims to that apparatus have been allowed and it is believed that it is the only patentable invention disclosed by them.

* * * * * * * *

"It appears, further, that they do not cover proper methods, but merely the functions of mechanism and that they are not patentable in view of the decisions in *Cochrane* v. *Deener*, 94 U. S. 780, and *Boyden Brake Co.* v. *Westinghouse*, 83 O. G. 1067. Claim 3 clearly covers several independent disconnected steps which do not go to make up a patentable process."

The "companion case" referred to by the Commissioner is the patent in suit, and it will be observed that the Commissioner said it was for an apparatus by which the old process of storing gas could be made practically and commercially useful and that claims to it had been allowed. It was, therefore, distinctly a patent for an apparatus, while, on the contrary, all the foreign patents are explicitly for methods. The devices described in them were not a result of the operation of the methods. Some receptacle or apparatus was necessary to be shown to produce and hold the solution of the gas and the liquid employed as a solvent. Something else was necessary for

the use of the solution, and the device of the United States patent was aimed to secure it. It is distinct from the method. Whether it has patentable novelty is another question. And a serious question it is. The solubility of acetylene in liquids, especially in acetone, is availed of in all of the patents, United States and foreign. This cannot be denied—indeed, is admitted—and, as we have seen, there are devices described in the foreign patents for storing the solution and devices indicated for its use. The similarities and differences between the patents have given rise to a diversity of opinion and decision.

The Circuit Court of Appeals for the sixth circuit discerned a difference between the British patent and that in suit and considered that the former was for a process and the latter for an instrument to perform the process and, therefore, the two were not for the same invention and that necessarily the United States patent did not expire with the British patent. 192 Fed. Rep. 321.

The Circuit Court of Appeals for the seventh circuit expressed a contrary view and decided that the British patent and the patent in suit were for substantially the same invention, and the British patent having expired the patent in suit expired with it. The decisions had, respectively, the support of Judge Denison (188 Fed. Rep. 89) and Judge Kohlsaat (188 Fed. Rep. 85; 192 Fed. Rep. 321).

It was decided in the Circuit Court for the eastern district of Wisconsin, Judge Quarles sitting, that the device of the patent in suit was patentable and was not anticipated by anything in the prior art. 166 Fed. Rep. 907; see also 181 Fed. Rep. 387.

It was this conflict of views that induced this writ, but the conflict is not as to all questions in the case. If the decisions of the trial courts may be in opposition on invention and infringement as well as on the effect of the

foreign patents, such conflict cannot be asserted of the opinions of the Circuit Courts of Appeal. That of the eighth circuit—and to which this writ is directed—refrained from a decision on the merits and considered only the propriety of the discretion exercised by the trial court in granting a preliminary injunction; and, reviewing the expression of judicial opinion, decided that the court was justified in making the order. The Court of Appeals went no farther, as we have seen, and we are disposed to a like limitation. The questions are seriously disputable, as the difference in decision indicates, and we think we should follow the Circuit Court of Appeals and imitate the example of *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U. S. 301, 311, 312. We have not the aid—and its value is inestimable—of the judgment of the trial court or of the Circuit Court of Appeals but must consider the question upon conflicting allegations and affidavits. The better course, therefore, is to reserve all questions except that of the identity of the patent in suit with the foreign patents and its termination by their expiration, and, with that reservation, we decide only that there was no abuse of discretion in granting and sustaining the order of injunction.

Affirmed.

PORTER *v.* WILSON.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 58. Submitted November 5, 1915.—Decided November 29, 1915.

This court accepts the decision of the highest court of the State that the state constitution was not violated by any action of the trial court.

In this case, *held* that a decision by the trial court of Oklahoma, based on demurrer to the evidence of the plaintiff and, after weighing that testimony for the purpose of determining the rights of the respective parties, did not abridge immunities and privileges of the plaintiff as a citizen of the United States nor deprive the plaintiff of property without due process of law in violation of the Fourteenth Amendment by disregarding the provisions of § 5039, Rev. Laws Oklahoma, making the provisions of the statute respecting trials by jury applicable to trials by the court.

Section 5 of the act of February 28, 1891, 26 Stat. 794, c. 383, amending the general allotment act of February 8, 1887, 24 Stat. 388, c. 179, had no effect upon the right of inheritance as to Creek Indians in Indian Territory inasmuch as by § 8 of the act of 1887, Creek territory was expressly excepted from the operations of that statute.

The provision in § 38 of the Oklahoma act of May 2, 1890, 26 Stat. 81, legalizing Indian marriages, relate only to marriages theretofore contracted and not to those thereafter contracted.

39 Oklahoma, 500, affirmed.

THE facts, which involve the inheritance of an allotment to a Creek Indian, are stated in the opinion.

Mr. Lewis C. Lawson and *Mr. Frank L. Montgomery* for plaintiff in error.

There was no appearance for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to quiet title, brought in the district court of Hughes County, State of Oklahoma, and in which plain-

tiff in error was plaintiff and defendants in error defendants, and we shall so designate them.

The case concerns the inheritance of an allotment to one Ben Porter, a Creek citizen and member of the Tribe of the Creek Nation. Plaintiff contends that she is the daughter and only child of Porter and Jennie McGilbra, whom he married, it is asserted, in 1893, and with whom he afterwards resided for one and one-half years as husband in accordance with the usages and customs of the Creek Nation. He subsequently separated from her, it is alleged, but never got a divorce from her, and that therefore they remained husband and wife until the time of his death, which occurred about November 23, 1906, he dying intestate, and being seized of the lands in controversy at that time, plaintiff, Nellie Porter, became entitled in fee simple to all of them.

It is averred that after Porter's separation from his wife he "took up" with another woman by the name of Lena Canard who, after the death of Porter, married one William Freeman; that Porter left surviving him one Sam Porter, a half brother, a Seminole Indian and so enrolled, and one Nannie Broadnax, a half sister. From this brother and sister and Mrs. Freeman the defendants in error derive their title.

Defendants deny the marriage of Porter and Jennie McGilbra or that plaintiff was his child or in any way related to him and aver that their grantors "were the sole and exclusive heirs of Porter and as such inherited the lands from him."

The judgment recites that the cause coming on, upon hearing upon the pleadings and upon evidence offered on the part of the plaintiff, and upon the plaintiff resting her cause with the court upon the evidence offered, the defendants demurred to the evidence and the court sustained the demurrer, and found "that the alleged marital relation between Ben Porter and Jennie McGilbra was

not established by the proof and did not exist, either by reason of customs or the laws of the Creek Nation; that the relation was illicit; that the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation." The court entered a decree dismissing plaintiff's bill and forever quieting the title of defendants against plaintiff. The decree was affirmed by the Supreme Court.

The Supreme Court sustained the action of the trial court in rendering judgment upon the evidence, saying, "It is obvious from the record that the court passed upon the entire case," and that "it would be too subtle a refinement to say that the court should have overruled the demurrer and thereupon, on the same evidence, have found for the defendant; otherwise a reversal must follow." And further: "Ultimately plaintiff's right to recover involved a question of fact for the court's determination. That the court did consider the testimony and determine the insufficiency is clearly established from the language of the journal entry. The burden of proof rested upon the plaintiff to prove, not only the Indian customs of the Creek Nation pertaining to marriage, but to establish her rights thereunder. There was more or less conflict in the testimony of plaintiff's witnesses, from which different conclusions might be drawn, and there being testimony reasonably tending to support the judgment of the court, the same will not be weighed by this court to ascertain whether the court's decision is against the preponderance of the testimony." For which conclusion the court cited a number of Oklahoma cases.

Against the action of the trial court and its affirmance by the Supreme Court it is contended that the constitution of the State and the Fourteenth Amendment have been violated in that the plaintiff's privileges and immunities have been abridged and her property taken without due process of law. The foundation of the contention is § 5039 of the Revised Laws of Oklahoma. It provides

that "the provisions of this article respecting trials by jury apply, so far as they are in their nature applicable, to trials by the court." The argument is that under that section "a citizen of the said State and of the United States is entitled to the same protection and enforcement of the law, on a demurrer to the evidence where their causes of action are tried by the court, as when tried to a jury." And, it is further argued, if there be any evidence, "conflicting evidence cannot be weighed or considered by the court" and the demurrer should have been overruled. These contentions are attempted to be supported by citation of many cases and elaborate comment made upon them to sustain the assertion "that a demurrer to the evidence presents a proposition of law and not of fact; and that conflicting evidence in the case is not to be considered, if there be evidence even tending to support the claims of the demurree."

The contention is difficult to handle. It seems to confound so completely the purpose and various qualities of evidence and the functions of a court.

Whether, however, there be a technical difference between the final submission of a case to the court and its submission upon a demurrer to the evidence we need not dwell upon. The difference has been made unimportant, indeed, removed from the present case, by the decision of the Supreme Court. The court decided, as we have seen, that the trial court "did not render its judgment alone upon the demurrer to the evidence, but, after a consideration of the proof submitted by plaintiff, made its findings of fact, thereby necessarily weighing the plaintiff's testimony for the purpose of determining the rights of the respective parties to a recovery." And the court pointed out that "even though it were conceded that technical error was committed, the substantial rights of the plaintiff were not affected; as she had introduced her evidence and rested her case, she was not caused to change

her position, nor did she suffer any disadvantage in the procedure adopted." The court added that it was required by the statutes of the State and its decisions to disregard errors or defects in the pleadings or proceedings which did not affect the substantial rights of the parties.

It is manifest, therefore, that the action of the trial court was in full exercise of the power entrusted to it under the laws of the State, and the contention of plaintiff that the Constitution of the United States is violated is untenable. We, of course, accept the decision of the Supreme Court of the State that the state constitution is not violated.

The next contention of plaintiff is that she inherited the lands by virtue of § 5 of the act of Congress of February 28, 1891, 26 Stat. 794, c. 383, which amended the general allotment act of February 8, 1887, 24 Stat. 388, c. 119. By this section it is provided "that for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act of February 8, 1887, the issue of Indians cohabiting as husband and wife according to the custom and manner of Indian life," shall be "taken and deemed to be legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes, be taken and held to be the legitimate issue of the father of such child."

But by § 8 of the act of February 8, 1887, 24 Stat., p. 391, "the territory occupied by the . . . Creeks . . . in the Indian Territory" was expressly excepted from the provisions of that act. It was hence concluded by the Supreme Court of the State that § 5 of the act of 1891, *supra*, was without effect upon the right of inheritance, as to the Creek Indians in the Indian Territory.

Plaintiff attacks this conclusion by citing § 38 of the act of May 2, 1890, c. 182, 26 Stat. 81, 98, which organized the Territory of Oklahoma. It provides "that all mar-

riages heretofore contracted under the laws or tribal customs of any Indian Nation now located in the Indian Territory are hereby declared valid and the issue of such marriages shall be deemed legitimate and entitled to all inheritances of property or other rights, the same as in case of the issue of other forms of lawful marriage. . . ."

It will be observed that the asserted marriage between Porter and the mother of plaintiff took place in 1893, that is, subsequent to the act of 1890 organizing the Territory of Oklahoma, and therefore was not a marriage within the meaning of § 38, theretofore contracted, and therefore plaintiff's reliance must be upon the provision, before stated, in § 5 of the act of 1891. As that section was expressly restricted to lands allotted under § 5 of the act of 1887, and as the lands occupied by the Creeks in the Indian Territory could not be and were not allotted under the latter section, it follows that the provision relied upon had no application to the lands here in question, they being part of the territory so occupied by the Creeks.

Judgment affirmed.

HEIM *v.* McCALL.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 386. Argued October 12, 1915.—Decided November 29, 1915.

The highest court of the State not having commented on the question of right of plaintiff as a taxpayer to maintain the action although the same was raised, this court may—even not required so to do—assume that the right existed.

It belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which

it will permit public work to be done on its behalf, or on behalf of its municipalities. *Atkins* v. *Kansas*, 191 U. S. 207.

No court can review the action of the State in regard to prescribing conditions upon which its public works shall be done, as regulations in that respect suggest only considerations of policy with which the courts have no concern. *Atkins* v. *Kansas*, 191 U. S. 207.

This court must follow the decisions of the state court that a provision of its general laws in regard to employment of labor on public work applies to its municipalities and to the particular work involved.

In this case, *held* that neither the municipality, nor its contractors nor a taxpayer on its behalf, could assert the rights of an individual, proprietary in character, as against the State itself in determining who should be employed on public work authorized by the State itself.

The equality of rights assured by Articles I and II of the Treaty of 1871 with Italy is in respect of protection and security for person and property.

The provisions in § 14 of the Labor Law of 1909 of New York, that only citizens of the United States shall be employed on public works and that preference shall be given to citizens of that State is not unconstitutional under the privilege and immunities clause of the Constitution of the United States or under the equal provision or due process clause of the Fourteenth Amendment thereto, or as violative of the Treaty of 1871 with Italy.

214 N. Y. 629, affirmed.

BILL in equity to restrain the Public Service Commission for the first district of the State of New York from declaring certain contracts for the construction of portions of the rapid subway system of the City of New York void and forfeited for violation of certain provisions inserted in the contracts in pursuance of § 14 of the Labor Law (so-called) of the State. Laws 1909, ch. 36, Consol. Laws, ch. 31. It reads as follows:

"Section 14. Preference in employment of persons upon public works.—In the construction of public works by the State or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, prefer-

erence shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. . . ." [1]

It is provided that a list of contracts theretofore made, with the names and addresses of the contractors, shall be filed in the office of the Commissioner of Labor, and when new contracts are allowed the names and addresses of such new contractors shall likewise be filed and, upon demand, each contractor shall furnish a list of subcontractors in his employ. Each contractor is required to keep a list of his employés which shall set forth whether they are naturalized or native born citizens of the United States. A violation of the section is made a misdemeanor.

The case went off on demurrer and it is therefore necessary to give a summary of the bill, which we do in narrative form, as follows:

Heim is a property owner and taxpayer of the State of New York. The defendants are the acting Public Service Commissioners for the First District of the State of New York and have been constituted and are the Public Service Commission of that district.

The Board of Rapid Transit Railroad Commissioners for the City of New York under the laws of the State (referred to as the Rapid Transit Act) in 1896 laid out and established a route for said railroad in the city, which was subsequently constructed, equipped and op-

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[1] Section 14 of the Labor Law was amended by act of March 11, 1915, ch. 51, Laws of New York, 1915, as follows:

"SECTION 14. Preference in employment of persons upon public works.—In the construction of public works by the State or a municipality, or by persons contracting with the State or such municipality, preference shall be given to citizens over aliens. Aliens may be employed when citizens are not available. . . ."

erated. Afterwards other routes were established, constructed, equipped and operated.

These routes were located in the boroughs of Manhattan and the Bronx and Brooklyn, and since 1912 and prior thereto have been leased and operated by the Interborough Rapid Transit Company, referred to as the Interborough Company. There has been a like lease of roads in Brooklyn by the Consolidated Railroad Company, called the Brooklyn Company.

The Board of Rapid Transit Commissioners, acting under the laws of the State, decided that other rapid transit railroads were necessary, and determined and established routes and the general plans for the construction thereof.

The lines are described and respectively called Interborough lines and Brooklyn lines.

The Board and the Public Service Commission contemplated that such extension and additions would form, with the existing Interborough and Brooklyn lines, a complete and comprehensive rapid transit system for the accommodation of the entire city. And the construction of such roads was deemed and was and has been an imperative necessity for the comfort and convenience of the residents and taxpayers of the city.

The cost of construction of such new roads was upwards of $235,000,000 and their equipment $44,000,000. The city had no available money and could not borrow the necessary moneys for a large part of such construction or equipment without exceeding its legal and constitutional debt limit by many million dollars.

To utilize the old with the new systems upon a 5-cent fare basis and to overcome the difficulties and delays for lack of funds and accomplish the early construction and operation of the system on the best possible terms for the city, negotiations were entered into between the Public Service Commission and the city authorities on the one

part and the Interborough Company and the Brooklyn Company on the other part with a view of formulating and entering into contracts with the companies for the provision of funds for the construction and operation of roads.

A form of contract was finally agreed upon and a contract was duly signed, executed and delivered by the Interborough Company on the one part and the Public Service Commission in behalf of the city on the other part, on or about March 19, 1913.

As a result of the negotiations another contract was entered into with the New York Municipal Railway Company, which had been formed in the interest of the Brooklyn Company, whereby the latter company agreed to contribute toward the cost of construction and equipment and to lease and operate a portion of the roads in conjunction with the then existing system. There is an enumeration of the provisions of the contracts and the amounts to be contributed by the companies and for the lease of the routes.

The contracts were made a part of the public records and approved by the Board of Estimates and Apportionment and other proper authorities before execution.

The Public Service Commission has let and awarded each of the contracts for construction of the new routes and the Interborough Company became a party to many of them for the purpose stated in the contracts, that is, "solely for the purpose of paying out a part of its contribution towards the cost of construction of the said respective routes."

The new routes were duly approved by the proper authorities and the Public Service Commission in accordance with the general plan of the routes, either obtaining the consent of the property owners along the routes or, failing to obtain such consent, having commissioners appointed by the Appellate Division of the Supreme Court to deter-

mine and report whether the routes were to be constructed and operated according to the plans adopted. The commissioners reported favorably and their report was confirmed by the court, and the general plans "thereafter constituted and now are the routes and general plans of the so-called Dual System of Rapid Transit Railroads herein referred to."

In pursuance of the Rapid Transit Act the Public Service Commission prepared plans and specifications for the construction of the major portion of said routes in accordance with the general plans, and thereafter, before awarding any contract, advertised for proposals in the form of an invitation to contractors and in compliance with the Rapid Transit Act and the acts amending and supplementing it.

Bids were duly made and contracts duly awarded and approved by the proper authorities.

Each of the contracts contained the following provisions: "In obedience to the requirements of section 14 of the Labor Law, it is further provided that if the provisions of said section 14 are not complied with, this contract shall be void." A provision in identical language was contained in the invitation to bidders.

The requirement (it is alleged) both in the proposals and contracts is unconstitutional, void and of no effect, in that it is in conflict with § 2 of Article IV of the Constitution of the United States (that is, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States") and with § 1 of Article XIV of the amendments to the Constitution, and with other sections and provisions; also in violation of the constitution of the State and in conflict with the treaty between the United States and Italy and various other treaties which contain "the Most Favored Nation Clause"—in other words, providing that the citizens of such countries shall enjoy all the privileges, rights and

immunities which the citizens of countries most favored in any existing treaty with the United States enjoy.

All of the contractors promptly made the necessary preparations for the execution of their contracts and all are in the process of performance at different stages, some of them having been performed to the extent of 75% and all performed to a very large extent. In no instance are any of the contractors in default.

In the course of construction each of the contractors has constantly employed and now employs a large number of laborers and mechanics who are residents of the city of New York but who were born in Italy and are subjects of its King, and also employed laborers who, though citizens of the United States, were not citizens of New York, and did not give preference to citizens of the State of New York over such laborers so employed who were not citizens of the State but citizens of the United States.

At the time of the proposals it was known to be and is necessary to employ a large number of such subjects of the King of Italy and citizens of other States and of other countries to perform said contracts within the time and at the prices stated in order to keep the construction and equipment of the Dual System within the total amount provided and specified in the contracts and plans.

The treaty between the United States and Italy of 1871 provides that the subjects of the King of Italy residing in the United States shall have and enjoy the same rights and privileges with respect to persons and property as are secured to the citizens of the United States residing in the United States.

At no time since the letting of such contracts has there been available a sufficient force or number of laborers, citizens of the United States or of the State of New York, to perform the work in accordance with such contracts; and no question was raised until a few days since of the right of the contractors to employ alien laborers, which

the contractors believed that they had a right to do, and they regarded the provision of the law and of the contract prohibiting the same as in effect null and void.

Within the past ten days complaint has been made to the Public Service Commission of the violation of the law and the alien labor provision in the contracts, and the Commission has threatened to refuse to approve further monthly estimates of amounts payable to contractors, thus depriving them of the means of prosecuting the work and the right to perform the same; indeed, have refused to approve certain monthly estimates, and, unless enjoined, will declare such contracts void and terminate the same.

The termination of the contracts will result in irreparable loss and damage and waste of money to the city, the work will be delayed or not done or the cost will be enormously increased because the supply of labor will be diminished, resulting necessarily in the diminution of labor available for the work which will greatly protract the same; and litigation with the contractors will be caused. Also damage will result because of the fact that a large percentage of capital and money necessary for the work is supplied by third parties under contract with the city to supply the same, which contracts were based upon estimates made in advance, and said contracts may be invalidated and the purpose for which they were made defeated.

The total capital to be supplied was $250,000,000, of which the said third parties agreed to supply $115,000,000 and the city the balance. If the contracts be declared void the capital so to be supplied will be inadequate for the work and the money already supplied by the city and the said third parties will have been wasted.

Injunction is prayed against declaring the contracts void and forfeited and refusing to prepare and certify vouchers of the amount of monthly estimates for work done.

There was a demurrer to the bill, which was sustained by the Supreme Court, and injunction denied. The judgment was reversed by the Appellate Division and an injunction ordered, which action was reversed by the Court of Appeals and the bill ordered dismissed. 214 N. Y. 629.

Mr. Thomas F. Conway for plaintiff in error:

This action is properly brought by plaintiff as a taxpayer, to prevent threatened illegal acts of the defendant Public Service Commission to cancel contracts aggregating over $100,000,000 made by the city for the construction of subways, and to prevent the loss and damage that would result to the city if such contracts were canceled. General Munic. Law, § 51; Code Civ. Proc., § 1925; Charter of City of New York, § 59.

Section 14 of the State Labor Law, prohibiting the employment of aliens upon public works and requiring that preference be given to citizens of the State over those of other States, is void as offending against both constitutional provisions and existing treaties.

The power granted to the city by statute, in the exercise of which it is constructing the subways, constitutes it a private railway corporation and in their construction and operation it is exercising no governmental function. It is made by statute both proprietor and owner of the road. Rapid Transit Act, ch. 4, N. Y. Laws 1891, as amended; *Re Rapid Transit Commissioners*, 197 N. Y. 81.

The State has no interest in the moneys which the city was required to provide for the construction of such subways, nor has the State any power to control the city in its expenditures. The city possesses the same unrestricted right, both in the selection of its employés and to contract as would a private corporation or private individual engaged in a similar business. It is not acting as the agent of the State. See statute and case cited. Also

People v. *Detroit*, 28 Michigan, 227; *People* v. *Ingersoll*, 58 N. Y. 1; *People* v. *Fields*, 58 N. Y. 491; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Hunter* v. *Pittsburgh*, 207 U. S. 161, 179.

Section 14 of the Labor Law, therefore, which as enforced deprives it of both such rights, is plainly in violation of the provisions of the Fourteenth Amendment. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Hunter* v. *Pittsburgh*, 207 U. S. 161; *Dartmouth College* v. *Woodward*, 4 Wheat. 517; *New Orleans* v. *Water Works Co.*, 142 U. S. 79; *Loan Association* v. *Topeka*, 20 Wall. 654.

Section 14 is also invalid because it deprives the contractors with the city of freedom of contract guaranteed by the Constitution and of property rights by forfeiting their contracts for noncompliance with its provisions. Cases *supra* and *Hurtado* v. *People*, 110 U. S. 516; *Loan Association* v. *Topeka*, 20 Wall. 655; *Yick Wo* v. *Hopkins*, 188 U. S. 356; *Barbier* v. *Connolly*, 113 U. S. 27; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf &c. R. R. Co.* v. *Ellis*, 165 U. S. 150; *Ward* v. *Maryland*, 12 Wall. 430; *United States* v. *Martin*, 94 U. S. 400; *Parrott's Case*, 1 Fed. Rep. 481.

Section 14 also offends against the provisions of Art. 4, § 2, United States Constitution, guaranteeing to citizens of each State all privileges and immunities of citizens of the several States. *Ward* v. *Maryland*, 12 Wall. 412; *Slaughter House Cases*, 16 Wall. 35; *Paul* v. *Virginia*, 8 Wall. 868.

Its violation in this respect is emphasized by the fact that the courts of the State have uniformly enforced in favor of its own citizens the very rights denied to aliens and to citizens of other States by the statute in question. *Matter of Jacobs*, 98 N. Y. 98; *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *People* v. *Marks*, 99 N. Y. 377; *People* v. *Williams*, 189 N. Y. 131.

As the city had accepted and acted upon the power granted it by the Rapid Transit Act for the construction and operation of its subways prior to the enactment of said section of the Labor Law, it acquired contractual and vested rights to extend and complete the same which were entitled to protection under Art. 1, § 10, of the Constitution but which were invaded and impaired by the act in question. *Russell* v. *Sebastian*, 233 U. S. 195; *Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 533; *Van Hoffman* v. *Quincy*, 4 Wall. 535; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92; *Grand Trunk Ry.* v. *South Bend*, 227 U. S. 544; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *City Railway* v. *Citizens R. R.*, 168 U. S. 557.

Section 14 finds no support in the doctrine underlying the application of the principle of police power. *Connolly* v. *Union Sewer Co.*, 124 U. S. 540; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Colon* v. *Lisk*, 153 N. Y. 188; *People* v. *Orange County Road Co.*, 175 N. Y. 84.

Section 14 is in conflict with the provisions of existing treaties, particularly the treaty with Italy, and therefore is a nullity. Constitution, Art. I, §§ 8, 9, 10; Art. II, § 2; Art. III, § 2; Art. VI, § 2; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Gibbons* v. *Ogden*, 9 Wheat. 213; *United States* v. *Rauscher*, 119 U. S. 407; *Head Money Case*, 112 U. S. 580; *Charlton* v. *Kelly*, 229 U. S. 447; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Geoffroy* v. *Riggs*, 133 U. S. 258; *Parrott's Case*, 1 Fed. Rep. 481; *Baker* v. *Portland*, 5 Sawyer, 566; *Livestock Association* v. *Crescent City Co.*, 1 Abb. (U. S.) 388; *Rutgers* v. *Waddington*, Mayor's Court of New York; *People* v. *Gerke*, 5 California, 431; *South Carolina* v. *United States*, 199 U. S. 437.

This court is not concluded by the decision of the Court of Appeals as to the rights of either the City or the subway contractors as the law applicable to such rights as pre-

sented in this record and the rules applicable are those of general jurisprudence and not matters of local law. *Jefferson Bank* v. *Skelly*, 1 Black. 436; *Wright* v. *Nagle*, 101 U. S. 791; *Ill. Cent. R. R.* v. *Chicago*, 176 U. S. 646; *Butz* v. *Muscatine*, 8 Wall. 575; *Olcott* v. *Supervisors*, 16 Wall. 678; *Boyce* v. *Tabb*, 18 Wall. 548; *Fallbrook District* v. *Bradley*, 164 U. S. 112; *Tennessee* v. *Davis*, 100 U. S. 257; *Pana* v. *Bowler*, 107 U. S. 529; *Union Lime Co.* v. *Chicago &c. R. R.*, 233 U. S. 211.

The subway contracts in question are not the character of public contracts referred to in the statute, and under the authorities cited above this court may so determine, as the legal question involved is not one of local law.

The covenant in the construction contracts to comply with § 14 is not binding on the contractors, the law itself being invalid. *Rodgers* v. *Coler*, 166 N. Y. 1; *North* v. *Featherstonhaugh*, 172 N. Y. 112; *Knowles* v. *New York*, 176 N. Y. 430; *Insurance Co.* v. *Morse*, 20 Wall. 445.

Mr. James F. McKenney, for plaintiffs in error Cranford Company and others, in No. 386, and for plaintiff in error in No. 388, argued simultaneously herewith, submitted.

Mr. George S. Coleman for defendants in error in No. 386, and *Mr. Robert S. Johnstone*, with whom *Mr. Charles Albert Perkins*, District Attorney of New York County, and *Mr. George Z. Medale* were on the brief, for defendants in error in No. 388 argued simultaneously herewith.

After stating the case as above, MR. JUSTICE MCKENNA delivered the opinion of the court.

There seems to have been no question raised as to the right of Heim to maintain the suit, although he is not one of the contractors nor a laborer of the excluded nationality or citizenship. The Appellate Division felt that there might be objection to the right, under the holding of a

cited case. The Court of Appeals, however, made no comment, and we must—certainly may—assume that Heim had a right of suit; and, so assuming, we pass to the merits.

The Supreme Court put its decision upon the power of the State "to provide what laborers shall be employed upon public works" and that "the State has the same right in conducting its business that an individual has" and had, therefore, "a perfect right to enact § 14 of the Labor Law, and it does not violate any rights of an alien under existing treaties."

The Appellate Division of the court, however, was of opinion that the law could not be sustained upon such consideration and saw in it such flagrant discrimination as to be offensive to the Fourteenth Amendment to the Constitution of the United States; and so concluding, the court considered it unnecessary to discuss the effect of treaties.

The court also passed, without absolute decision, the question whether the Labor Law applies to the work of building subways for the Rapid Transit in the City of New York. It was, however, stated in the opinion of the court that in view of the language in a cited case, there was "much ground for saying that even if the State could lawfully impose the test of citizenship upon employés of its own contractors, and the contractors with the city engaged in what is properly state work, it has no more power to impose such test upon the persons employed in building a subway for the city than it would have if the subway were being constructed by a private corporation or individual." Two members of the court were clear that the State had no such power and concurred besides with the majority in holding that the Labor Law was "a violation of both the Federal and state constitutions."

The Court of Appeals reversed the action of the Appellate Division.

The basic principle of the decision of the Court of Appeals was that the State is a recognized unit and those who are not citizens of it are not members of it. Thus recognized it is a body corporate and, "like any other body corporate, it may enter into contracts and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the State, or expending the State's moneys, are trustees for the people of the State (*Illinois Central Railroad* v. *Illinois*, 146 U. S. 387). It is the people, i. e., the members of the State, who are contracting or expending their own moneys through agencies of their own creation." And it was hence decided that in the control of such agencies and the expenditure of such moneys it could prefer its own citizens to aliens without incurring the condemnation of the National or the state constitution. "The statute is nothing more," said Chief Judge Bartlett, concurring in the judgment of the court "in effect than a resolve by an employer as to the character of its employés."

Notwithstanding the simplicity of the determining principle pronounced by the Court of Appeals, its decision is attacked in many and voluminous briefs.

The fundamental proposition of plaintiff in error Heim is that, assuming that § 14 applies to the subway construction contracts in question, it (the law) contravenes the provisions of the Constitution of the United States (a) in that it violates the corporate rights of the city and the rights of its residents and taxpayers, (b) the rights of the various subway contractors with the city, (c) the rights of aliens and citizens of other States resident in New York, and (d) it is in violation of treaty rights.

Plaintiffs in error Cranford Company and Flinn-O'Rourke Company were made defendants upon their motion at the argument for injunction. In the Appellate Division they, their counsel say, "neither assenting to nor denying the special allegations, doubtless urged by com-

plainant's counsel, . . . urged the single ground of the unconstitutionality of the law and its violation of treaties." And these grounds are again urged.

To sustain the charge of unconstitutionality the Fourteenth Amendment is adduced, and the specification is that the law abridges the privileges and immunities of the contractors and those of their alien employés in depriving them of their right of contracting for labor, and that the State of New York, by enacting and enforcing the law, deprives employers and employés of liberty and property without due process of law and denies to both the equal protection of the law.

The treaty that it is urged to be violated is that with Italy, which, it is contended, "put aliens within the State of New York upon an equality with citizens of the State with respect to the right to labor upon public works;" and that Congress has fortified the treaty by § 1977 of the Revised Statutes,—(a part of the Civil Rights legislation).

The application of the law to the subway contracts, and whatever its effect and to what extent it affects the corporate rights of the city or of the subway contractors are local questions (*Stewart* v. *Kansas City, ante*, p. 14), and have in effect been decided adversely to plaintiffs in error by the Court of Appeals. The principle of its decision was, as we have seen, that the law expressed a condition to be observed in the construction of public works; and this necessarily involved the application of § 14 to subway construction and the subordinate relation in which the city stood to the State. Therefore, the contention of plaintiffs in error that the rapid transit lines have given the city rights superior to the control of the State, so far as the law in question is concerned, has met with adverse decision. Whatever of local law or considerations are involved in the decision we are bound by; whatever of dependence the decision has in the general power of a

State over its municipalities has support in many cases. We have recently decided the power exists, and we may be excused from further discussion of it. *Stewart* v. *Kansas City*, *supra*.

With the rejection of the asserted rights of the city must go the asserted rights of residents and taxpayers therein and the rights of subway contractors, so far as they depend upon the asserted freedom of the city from the control of the State.

The claim of a right in the city of such freedom is peculiar. The State created a scheme of rapid transit, constituted officers and invested them with powers to execute the scheme, yet, the contention is, that scheme, officers and powers have become in some way in their exercise and effect superior to the state law, or, according to the explicit contention (we say explicit contention, but it is rather a conclusion from an elaborate argument and much citation of cases), that the city's action in regard to the subway is proprietary in character, and, being such, the city can assert rights against the State, and that individual rights have accrued to residents of the city of which the city is the trustee and which "are so interwoven and bound up with the rapid transit system as to be 'beyond the control of the State.'" Counsel have not given us a sure test of when action by a city is governmental and when proprietary. We need not attempt a characterization. If it be granted that the city acted in the present case in a proprietary character and has secured proprietary rights, to what confusion are we brought! A taxpayer of the city, invoking the rights of the city, asserts against the control by the State of the proprietary action of the city the protection of the Fourteenth Amendment, and then against the proprietary action of the city that Amendment is urged in favor of the contractors with the city, and their exemption from the performance of their contracts declared. There seems to be a jumble of rights.

If the city is not an agent of the State (it is contended the city is not) but a private proprietor (it is contended the city is) it would seem as if it has the rights and powers of such a proprietor, and, as such, may make what contracts please it, including or excluding alien laborers.

But upon these suppositions we need not dwell. It is clear it is with the state law and the city's execution of it as agent of the State that we must deal and only on the assumption that the state law has been held to apply by the Court of Appeals, and, by a consideration of the power to enact it, determine the contentions of all of the plaintiffs in error.

The contentions of plaintiffs in error under the Constitution of the United States and the arguments advanced to support them were at one time formidable in discussion and decision. We can now answer them by authority. They were considered in *Atkin* v. *Kansas,* 191 U. S. 207, 222, 223. It was there declared, and it was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." And it was said, "No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

This was the principle declared and applied by the Court of Appeals in the decision of the present case. Does the instance of the case justify the application of the principle? In *Atkin* v. *Kansas* the law attacked and sustained prescribed the hours (8) which should constitute a day's work for those employed by or on behalf of the State, or by or on behalf of any of its subdivisions. The Fourteenth Amendment was asserted against the law; indeed, there is not a contention made in this case that was not made in that. Immunity of municipal corporations from legis-

lative interference in their property and private contracts was contended for there (as here); also that employés of contractors were not employés of cities. It was contended there (as here) that the capacity in which the city acted, whether public or private, was a question of general law not dependent upon local considerations or statutes, and that this court was not bound by the decision of the state court. And there (as here) was asserted a right to contest the law, though the contracts were made subsequent to and apparently subject to it, upon the ground that they were entered into under the belief that the law was void. Finally the ultimate contention there was (as it is here) that the liberty of contract assured by the Fourteenth Amendment was infringed by the law. In all particulars except one the case was the prototype of this. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases—the right of the individual employer and employé to contract as they shall see fit, the relation of the State to the matter regulated, that is, the public character of the work.

The power of regulation was decided to exist whether a State undertook a public work itself or whether it "invested one of its governmental agencies with power to care" for the work, which, it was said, "whether done by the State directly or by one of its instrumentalities," was "of a public, not private, character." And, being of public character, it (the law—the Kansas statute) did not "infringe the liberty of any one." The declaration was emphasized. "It cannot be deemed," it was said, "a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State." And obversely it was said (as we have already quoted): "On the contrary, it belongs to the State, as the guardian of its people, and

having control of its affairs, to prescribe the *conditions* [italics ours] upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." See also *Ellis* v. *United States*, 206 U. S. 246. The contentions of plaintiffs in error, therefore, which are based on the Fourteenth Amendment cannot be sustained.

Are plaintiffs in error any better off under the treaty provision which they invoke in their bill? The treaty with Italy is the one especially applicable, for the aliens employed are subjects of the King of Italy. By that Treaty (1871) it is provided, Articles II and III, 17 Stat. 845, 846:

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established."

"The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

There were slight modifications of these provisions in the treaty of 1913, as follows: "That the citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant security and protection for their persons and property and for their rights. . . ."

Construing the provision of 1871 the Court of Appeals decided that it "does not limit the power of the State, as a proprietor, to control the construction of its own works and the distribution of its own moneys." The conclusion

is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 145, and a convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property." And the ruling was given point by a citation of the power of the State over its wild game which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the State over the subject-matter, a power which exists in the case at bar, as we have seen.

From these premises we conclude that the Labor Law of New York and its threatened enforcement do not violate the Fourteenth Amendment or the rights of plaintiffs in error thereunder nor under the provisions of the treaty with Italy.

Judgment affirmed.

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

ERROR TO THE COURT OF SPECIAL SESSIONS, FIRST DISTRICT, CITY OF NEW YORK, STATE OF NEW YORK.

No. 388. Argued October 12, 1915.—Decided November 29, 1915.

A state statute regarding employment of laborers otherwise valid is not unconstitutional under the equal provision clause of the Fourteenth Amendment because it makes distinctions between aliens and citizens. There is a basis for such a classification. Otherwise decided on the authority of *Heim* v. *McCall*, *ante*, p. 175.
214 N. Y. 154, affirmed.

THE facts, which involve the constitutionality of § 14 of the Labor Law of New York, are stated in the opinion.

Mr. James F. McKenney for plaintiff in error submitted:

The conviction of plaintiff in error was erroneous because it was based upon a violation of § 14, c. 36, Laws of 1909 of New York, known as the Labor Law, which is void, as in conflict with § 1 of the Fourteenth Amendment; also because it abridges the privileges and immunities of plaintiff in error, a citizen of the United States, and of his alien employés by depriving them of their right to contract for labor. The enactment of said law and enforcement of its provisions deprives plaintiff in error and his employés of liberty and property without due process of law and of the equal protection of the laws.

Section 14 is void, being in conflict with subd. 2, Art. VI of the United States Constitution providing that treaties made under the authority of the United States, shall be the supreme law of the land. Pursuant to said article treaties have been entered into by the United States with various nations including Italy, which treaties

were in effect at the time of the act complained of and at the time of such conviction, and which put aliens within the State of New York upon an equality with citizens of the State with respect to the right to labor upon public works, and Congress had pursuant to said section duly enacted a law (Rev. Stat., § 1977) granting to all persons within the jurisdiction of the United States the same right in every State and Territory to make and enforce contracts as is enjoyed by white citizens. Said treaties and said law nullified the provisions of said § 14 of the Labor Law.

The Fourteenth Amendment, either *ex proprio vigore*, or by virtue of treaties entered into, and laws of Congress enacted, pursuant to the provisions of Article VI of the Constitution, has granted to resident aliens in the State of New York an equal right with citizens of that State to contract to labor upon the public works of the State, and chapter 14 of the Labor Law, being in contravention of that right, was and is unconstitutional and void, and the conviction of plaintiff in error for violation thereof was error, and should be set aside.

Authority for this law does not lie in the police power.

The distinction between citizens and aliens is insufficient to justify the act; nor is freedom to contract sufficient justification for the law.

Section 14 violates the Fourteenth Amendment, reinforced as it is by § 1977, Rev. Stat., and also violates treaties duly entered into by the United States with foreign nations.

The contract agreement to comply with the law falls with the law itself.

The fact that the Legislature of the State of New York after the conviction of plaintiff in error amended § 14 of the Labor Law, does not militate against the rights of the plaintiff in error in this court.

The conviction of plaintiff in error should be reversed

and the case remanded to the Court of Special Sessions of the City of New York for appropriate action.

Numerous authorities of the Federal and state courts sustain these contentions.

Mr. Robert S. Johnstone, with whom *Mr. Charles Albert Perkins*, District Attorney, and *Mr. George Z. Medale* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

This case was argued and submitted with *Heim* v. *McCall, ante*, p. 175, just decided. It involves the criminal feature of § 14 of the Labor Law of the State which was the subject of the opinion in *Heim* v. *McCall, ante*, p. 175. It provided that a violation of the section should constitute a misdemeanor and be punished by fine or imprisonment, or by both.

The case was commenced by information which accused Crane, plaintiff in error, while engaged as a contractor with the city in the construction of a public work of such city, by virtue of a contract entered into with the city, of having employed three persons not then citizens of the United States.

The public work was the construction of catch or sewer basins.

The defense was the unconstitutionality of the law and that it was in violation of the treaties of the United States with foreign countries.

The treaties were put in evidence over the objection of the prosecuting officer and a motion was made to dismiss the information on the grounds above stated. The motion was denied, and plaintiff in error found guilty and sentenced to pay a fine of $50, or, in default thereof, to be committed to the city prison for the term of ten days.

The case was then appealed to the Appellate Division of the Supreme Court and there heard with *Heim* v. *McCall, ante,* p. 175.

The judgment was reversed. This action was not sustained by the Court of Appeals. In that court and in the Appellate Division the cases were heard together and decided by the same opinions, they being rendered in the present case and the judgment of the trial court (Special Term) affirmed. 214 N. Y. 154.

It appeared from the testimony that one of the laborers employed was a subject of the King of Italy (the nationality of the others was not shown), and a treaty between the United States and that country, signed February 25, 1913, was received in evidence over the objection of the district attorney on the ground that "none of the parties to the proceeding is a subject of the King of Italy." Treaties with other countries were also received in evidence. To them the district attorney objected on the ground that none of the parties to the proceedings and "nobody who was connected in any way with the subject-matter of the contract or employed in the performance of the work" was "a subject or citizen of any of the countries referred to."

The provisions of the treaty with Italy are set out in the opinion in the *Heim Case* and the provisions of the other treaties are not, so far as their application is concerned, materially different.

The contentions of plaintiff in error are based on the treaties and on the Fourteenth Amendment of the Constitution of the United States. The specifications of error are the same, though varying in expression, as those in the *Heim Case,* and there considered and declared untenable. There is added the view that a distinction made between aliens and citizens violates the principle of classification. We think this view is also without foundation.

Judgment affirmed.

ATLANTIC COAST LINE RAILROAD *v.* BURNETTE.

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

No. 66. Argued November 9, 1915.—Decided November 29, 1915.

It would be a miscarriage of justice to recover upon a statute not governing the case, in a suit which the statute itself declared commenced too late to be maintained.

A right may be waived or lost by failure to assert it at a proper time. *Burnet* v. *Desmornes*, 226 U. S. 145.

Even though not pleaded, if defendant insists on the point that an action based on the Employers' Liability Act of 1908 has been brought too late and the answer admits that fact, the action cannot be maintained.

Congress within its sphere is a paramount authority over the States and courts cannot, where the will of Congress plainly appears, allow substantive rights to be impaired under the name of procedure.

163 N. Car. 186, reversed.

THE facts, which involve the validity of a judgment for personal injuries based on the Employers' Liability Act of 1908, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. F. S. Spruill* and *Mr. John Spalding Flannery* were on the brief, for plaintiff in error.

There was no appearance or brief for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff (defendant in error), was a fireman employed by the defendant. On October 5, 1907, he was injured by its negligence while working upon a train running from South Carolina to North Carolina. He brought this

action on January 7, 1910, and judgment was ordered for a certain sum by the Supreme Court of the State. 163 N. Car. 186. The Supreme Court assumed that the case was governed by the Employers' Liability Act of April 22, 1908, c. 149; 35 Stat. 65. Two errors are assigned. First, in holding that statute applicable to the cause of action, and second, in allowing a recovery under it in an action begun more than two years after the cause of action accrued. *Id.*, § 6, p. 68. The case was not argued in this court on behalf of the defendant in error, but we gather from the record and the opinion that while, at the trial, the Railroad, upon issues not before us, insisted that the Federal statute was not applicable, the contrary was admitted before the Supreme Court; so that although the admission seems to have been made with the second question only in view, the first point would appear not to have been drawn to the attention of either court and there was no discussion of how the case would stand apart from the act. The second objection was met by deciding that the limitation of two years imposed by § 6 could not be relied upon for want of a plea setting it up.

It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time, *Burnet* v. *Desmornes*, 226 U. S. 145, but when a party has meant to insist on all the rights it might have, such a result would be unusual and extreme. The record shows a case to which the Act of 1908 did not apply, *Winfree* v. *Northern Pacific Ry.*, 227 U. S. 296, and which the earlier Act of 1906 probably could not affect. *Employers' Liability Cases*, 207 U. S. 463, 489. It also shows that the action was brought too late, and that the defendant insisted upon that point, although it had not pleaded what was apparent on the allegations of the declaration and the admissions of the answer.

In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont Railway* v. *White*, 238 U. S. 507, 511. But irrespective of the fact that the act of Congress is paramount, when a law that is relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. *Davis* v. *Mills*, 194 U. S. 451, 454. *The Harrisburg*, 119 U. S. 199. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. *Phillips* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667. At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source. *Winfree* v. *Northern Pacific Ry.*, 227 U. S. 296, 302. If it be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a State as in those of the United States.

The ground that we have stated is sufficient for the reversal of the judgment so far as it proceeds upon the Act of 1908, and therefore we are relieved from the necessity of deciding whether the record is in such shape that the even more fundamental objection to the application of the Act cannot be considered by this court.

Judgment reversed.

NEW ORLEANS–BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 71. Argued November 11, 1915.—Decided November 29, 1915.

Under the charter party in this case, the United States did not so become the owner of the vessel *pro hac vice* as to be liable for injuries during the term of the charter and for demurrage thereafter during period of repair.

The charterer of a vessel does not become owner *pro hac vice* where the control, as in this case, remains with the general owner, even though the direction in which the vessel proceeds is determined by the charterer.

Authority to direct the course of a third person's servant does not prevent his remaining the servant of that third person.

The United States in this case, *held* not to be liable for damages to a vessel under charter due approximately to marine risk. *Morgan* v. *United States*, 14 Wall. 531, followed; *United States* v. *Shea*, 152 U. S. 178, distinguished.

The United States in this case, *held* not liable for damages sustained by a vessel under charter to it when rendering services in aid of another vessel belonging to the United States.

The fact that this case is a hard one does not make the United States legally responsible for the injuries sustained by a vessel during the period chartered. *United States* v. *Russell*, 13 Wall. 623, distinguished.

THE facts, which involve the liability of the United States for injuries to, and demurrage on, a vessel under charter to the Government, are stated in the opinion.

Mr. A. R. Serven for appellant.

Mr. Assistant Attorney General Thompson, with whom

Mr. William Heitz was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for injuries to the steamship Stillwater while under charter to the United States from May 16, 1898, to November 3, 1898, and for demurrage from November 2 to December 14, 1898, while the vessel was undergoing repairs. It was rejected by the Court of Claims on the authority of *Plant Investment Co.* v. *United States*, 45 C. Cls. 374.

The injuries were caused as follows: First, in June, 1898, there was a collision with another steamship in Tampa Bay, it does not appear by whose fault. Three weeks later the Stillwater was driven against the rocks while unloading horses in Daiquiri Bay, Cuba, during a gale, with other incidental damage. On July 27, in Gauanica Bay, Porto Rico, there was another collision with a steamer. On August 3, in obedience to orders against which the captain protested, the Stillwater assisted in lightering the United States auxiliary cruiser St. Paul, at Arroyo, Porto Rico, and while lying alongside the St. Paul in rough water, was damaged by the after gun sponson of the St. Paul being thrown down upon it. On August 4, in obedience to orders from the naval lieutenant in charge, against the protest of the captain, the Stillwater was made fast to the Massachusetts, then on the rocks at Ponce, Porto Rico, and attempted to pull it off. The weather was rough, and in consequence of rolling against the Massachusetts and otherwise the Stillwater was damaged and strained. On August 26, in obedience to orders and against the protest of the captain, the Stillwater was placed alongside the Obdam, in the harbor of Ponce, for the transfer of commissary stores from the latter to her. The ships both rolled and the Stillwater

thumped heavily, and was badly injured. On September 3, at Ponce, the Spanish steamship Vasco ran into the Stillwater in the night time doing some damage, and finally, about three weeks later, the Stillwater went aground on a sand bar and a hole afterwards was found in her bottom. The bill for the repairing of the Stillwater was rendered in a lump sum, showing only the cost as a whole.

By the charter party made on May 12, 1908, Art. I, the claimant "does hereby grant and let" and a Quartermaster of the Army "does hereby take" the vessel for the voyages specified, "and for such longer time as she may be required in the military service of the United States, not to extend beyond" June 30, 1898, unless the charter shall be renewed. II. "The said vessel shall on the 16th day of May, eighteen hundred and ninety-eight, be ready to load and receive on board at New Orleans, La., or elsewhere, whenever tendered alongside, by the Quartermaster, United States Army, or his agent, only such troops, persons, animals, and supplies or cargo as he shall order and direct, and as the said vessel can conveniently stow and carry," reserving room for the vessel's cables and materials, for officers and crew, and for the necessary coal; and when so laden is to deliver the cargo at such port as the Quartermaster's Department may direct, "in good order and condition (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted)." IV. "The said vessel now is, and shall be kept and maintained while in the service of the United States, tight, stanch, strong, and well and sufficiently manned, victualed, tackled, appareled, and ballasted, and furnished in every respect fit for merchant or transport service, at the cost and charge of her owner. The time lost in consequence of any deficiency in these respects, and in making repairs to said vessel not attributable to the fault of the United States or

its agents, is not to be paid for by the United States." V. All port charges and pilotage after leaving New Orleans will be paid by the United States but not the wages of any person employed by the claimant continuously on the vessel as pilot. VI. "The war risk shall be borne by the United States; the marine risk by the owner." VII. The United States is to furnish fuel "until the said vessel is returned to the said Company at New Orleans, La., in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery excepted." VIII. All water is to be furnished by the Government, and all cargo loaded and unloaded at its expense. X. The vessel is valued at $125,000, and if retained in the service of the United States so long that the money paid under the charter (less the cost of running and keeping in repair and a net profit of 33 per cent. on the appraised value), is equal to the appraised value, the vessel is to become the property of the United States without further payment except what then may be due for services under the charter. XI. The United States also, during the charter, may purchase the vessel at its appraised value, with a similar clause for deductions. In XIII and XIV there are provisions for renewal and against a transfer of the contract or any interest therein by the claimant. These, we believe, are all the portions of the charter party material to the present case.

The main contest is upon the question whether by this contract the United States became owner *pro hac vice*, as affecting the extent of the liability assumed. The claimant relies upon the words 'grant and let' on the one side and 'take' on the other, the fixing of the price at which the United States may purchase the vessel, the reference to the vessel being 'returned,' the contemplation that the need of repairs may be attributable to the fault of the United States, the control of the United

States over the destination of the ship, and some details, as showing that the United States was in the place of the owner for the time. But we cannot accept this conclusion. The general owner furnished the crew and a master who at least regarded himself as representing its interests since he protested against commands that he received. It agreed to deliver the cargo in good condition, dangers of the sea &c. excepted. It assumed the marine risk. We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215. *Little* v. *Hackett*, 116 U. S. 366. *Reybold* v. *United States*, 15 Wall. 202. We conclude that the possession followed the navigation and control. The case resembles *Morgan* v. *United States*, 14 Wall. 531, not *United States* v. *Shea*, 152 U. S. 178, as in the latter it was found that the vessel was under the exclusive management and control of the Quartermaster's Department. See further *Hooe* v. *Groverman*, 1 Cranch, 214, 237. *Reed* v. *United States*, 11 Wall. 591.

The claimant contends, however, that if the ship was not demised, the United States is liable under articles IV and VII for not returning the ship in the same order as when received, and for demurrage due to repairs attributable, as it is contended these were, to the fault of the United States. The damage, however, for the most part was due proximately to marine risks, which the claimant assumed. *Morgan* v. *United States*, 14 Wall. 531. The demurrage accrued after November 2, the date on which it is found that the charter was ended. How much of it was due to damage from marine risks does not appear. The service in aid of the Massachusetts and others outside the contract, if any, imposed no liability upon the

United States. *United States* v. *Kimbal*, 13 Wall. 636. *Reybold* v. *United States*, 15 Wall. 202. *Schillinger* v. *United States*, 155 U. S. 163. *Harley* v. *United States*, 198 U. S. 229, 234. *Peabody* v. *United States*, 231 U. S. 530, 539. We see no ground except the impression that this is a hard case to apply the principle of *United States* v. *Russell*, 13 Wall. 623.

Judgment affirmed.

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

PHILLIP WAGNER, INCORPORATED, *v.* LESER ET AL., JUDGES AND TAX COLLECTOR OF BALTIMORE CITY.

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

No. 28. Argued October 25, 26, 1915.—Decided November 29, 1915.

The Fourteenth Amendment does not interfere with the discretionary power of the States to raise necessary revenues by imposing taxes and assessments within their jurisdiction; nor are general taxing systems to be presumed to be lacking in due process of law because of inequalities or objections so long as arbitrary action is avoided.

A State may, without violating the Fourteenth Amendment, exercise its authority to assess property on account of special benefit resulting from an improvement already made.

An assessment for improvements already made and paid for, is not an unconstitutional deprivation of property without due process of law because the amount when paid is to be used for other public purposes to which public funds are properly applicable.

Where the classification of property to be improved and the assessment are fixed by the statute itself and a specified sum fixed ratably

according to area of the property, notice and hearing as to amount and extent of benefits are not required, in the absence of abuse of power, in order to render such legislative action due process of law within the meaning of the Federal Constitution. *Spencer* v. *Merchant*, 125 U. S. 345.

While constitutional protection against deprivation of property without due process of law is available to persons deprived of private rights by arbitrary state action, whether by legislative authority or otherwise, no such deprivation exists where, as in this case, there is no proof of disproportion between the assessment made and the benefit conferred showing arbitrary legislative action.

The Maryland Statutes of 1906 and 1908 providing for imposition of a special tax on property in Baltimore at a specified rate per square foot for a specified number of years for paving the streets of that city *held* not to be arbitrary and unconstitutional as depriving the owners of their property without due process of law.

120 Maryland, 671, affirmed.

THE facts, which involve the constitutionality of a statute of Maryland and a tax levy thereunder on property in Baltimore for improving the paving of streets in that city, are stated in the opinion.

Mr. Geo. Washington Williams and *Mr. Charles J. Bonaparte*, with whom *Mr. John Holt Richardson* was on the brief, for plaintiff in error:

A legislature cannot bind parties interested by a recital of facts, or prescribed conclusive rules of evidence, for either of these would be only an indirect method of disposing of controversies. Cooley, Const. Law, 46.

Due process of law is not confined to judicial proceedings. The article of the Constitution is a restraint on the legislative as well as on the executive and judicial powers of the Government. *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Ulman* v. *Baltimore*, 72 Maryland, 592; *Norwood* v. *Baker*, 172 U. S. 278; *State* v. *Newark*, 37 N. J. L. 415, 423; *Thomas* v. *Gain*, 35 Michigan, 155, 162; *Tidewater Co.* v. *Coster*, 18 N. J. Eq. (3 C. E. Green) 519; *Stuart* v. *Palmer*, 74 N. Y. 183.

There is great dissimilarity between an assessment or tax for general purposes and an assessment for special benefits. Dillon on Mun. Corp., § 761.

The act is invalid because the proceeds derived from the assessment were expressly designed to be applied to the improvement of streets other than those which had been assessed specially, and, therefore, the said assessment is not made to pay for improvements specially benefiting the property thereby assessed.

The act disturbs vested rights, to-wit: By imposing a tax or special assessment upon property for special benefits long since accrued to said property, which improvements had been paid for in whole or in part other than by special assessment upon the property abutting thereon. The act is retrospective in its operation, thereby disturbing the rights, which had accrued to and become fixed in property holders coming within its terms and provisions of said act. *Norwood* v. *Baker*, 172 U. S. 278.

The general law relative to taxation has always been held inapplicable to assessments. The general law requires all property to be assessed for the general purposes of Government according to its value and therefore, if a piece of property escapes the tax assessors it may later be assessed for such time as it has escaped taxation. That would imply carrying out an intention theretofore declared, and would not be retrospective in the legal conception of that term.

Where the municipality has discretion as to whether a local improvement shall be paid for by special assessment or by general taxation, it cannot, after the improvement had been made, levy special assessment therefor. 25 Am. & Eng. Enc. 1176; *Bennett* v. *Seibert*, 10 Inc. App. 380; *Spaulding* v. *Bates*, 25 Inc. App. 490; *Galveston R. R.* v. *Green*, 35 S. W. Rep. 819; *Holliday* v. *Atlanta*, 96 Georgia, 377–381; *Kelly* v. *Luning*, 76 California, 309; *Bennett* v. *Emmetsburg*, 115 N. W. Rep. 582–588; *Pease*

v. *Chicago*, 21 Illinois, 500; *Doutherty* v. *Chicago*, 53 Illinois, 79; *Market Street Case*, 49 California, 546; *Alford* v. *Dallas*, 35 S. W. Rep. 816; Cooley on Taxation, p. 1155; *Seattle* v. *Kelleher*, 195 U. S. 351.

Matter of Flatbush Lands does not apply, and see 60 N. Y. 398.

The front foot rule, when made applicable to the city as a whole, is arbitrary, inequitable, unjust and oppressive. *Ulman* v. *Baltimore*, 72 Maryland, 587; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396; *Parker* v. *Detroit*, id. 399; *Zehnder* v. *The Barber Asphalt Co.*, 106 Fed. Rep. 107.

Special assessments upon property for the cost of public improvements are in violation of the Constitution, if they are in substantial excess of benefits received. *Sears* v. *Boston*, 173 Massachusetts, 550; *Weed* v. *Same*, 172 Massachusetts, 28; *Dexter* v. *Boston*, 176 Massachusetts, 247; *Hall* v. *Street Com.*, 177 Massachusetts, 434; *Lorden* v. *Coffey*, 178 Massachusetts, 489.

The act is illegal and void, because it arbitrarily imposes a fixed sum upon property holders as and for special benefits alleged to have been received, without giving an opportunity to the property holder to show as a matter of fact said property is not benefited to the extent to which it is declared by the act to be benefited, and is therefore a taking of property without due process of law. 8 Cyc. 1083, 1108; *Holden* v. *Hardy*, 169 U. S. 366; *Murray* v. *Hoboken Co.*, 18 How. 272; *Ulman* v. *Baltimore*, 72 Maryland, 587; *Clark* v. *Mitchell*, 69 Missouri, 627; *United States* v. *Cruikshank*, 92 U. S. 542; Cooley's Con. Lim. 503–505; *Columbia Bank Case*, 4 Wheat. 235; Am. & Eng. Encyc. 1173; *Maryland Trust Co.* v. *Baltimore*, 93 Atl. Rep. 454.

Notice should have been given even though the apportionment was made by the legislature; in view of the oppressiveness and arbitrariness of the rule established by the legislature, and its unjust and unequal operation

in this case, notice should have been required, and in its absence, the act should be held unconstitutional.

The act imposes upon the property coming within its terms, a special tax which was not contemplated by the authority which improved the various streets of Baltimore City, at the times of such improvement as a means of meeting the expense of the same.

The act covers all property coming within its terms, even though the statute or ordinance under which such improvements were made, declare that such improvements were made for the public benefit, and not for local advantage to the property abutting upon such improvements.

In this event the two acts would be conflicting and it would certainly be against public policy to adhere to the latter act. Property holders would never be secure in their holdings. An act of this character really amounts to an assessment upon one street for the benefit of another.

The act is void on the ground that it imposes a double tax, in part at least, for the same benefit. *State* v. *Newark*, 37 N. J. L. 415.

Mr. S. S. Field, with whom *Mr. Alexander Preston* was on the brief, for defendants in error.

Mr. Justice Day delivered the opinion of the court.

Phillip Wagner, a corporation, filed its bill on behalf of itself and other taxpayers owning property in Baltimore City, adjoining or abutting upon a public highway which has been paved with improved paving without having been assessed for any part of the cost thereof, and who are similarly situated with the complainant, who is the owner of certain real estate, improved by seven two-story dwelling houses, situated on Philadelphia Road, a public highway within the limits of Baltimore

City, which property abuts and adjoins upon the public highway, which had been paved with improved paving, to-wit, vitrified brick, which property, or its present or former owner, had never been specially assessed for any part of the cost of said improved paving. The bill was filed for the purpose of enjoining the enforcement of a certain act of the General Assembly of the State of Maryland (1906, Chapter 401; 1908, Chapter 202, of the Laws of Maryland), by which statute the General Assembly enacted that a special tax be levied and imposed upon property in the City of Baltimore benefited by improved paving of the amount specified; said tax to continue as to each property for ten years from the time it attached thereto, the proceeds to be used for improved paving in the City of Baltimore, as provided in the act. The act provided that, for these purposes, all landed property in the City of Baltimore, adjoining or abutting upon any public highway, which had been or should thereafter be paved with improved paving without special assessment of any part of the cost upon the abutting or adjoining property owners, by the City of Baltimore or the State Roads Commission, or other public commission or agency, or by said city and such commission or agency, or by either or both, and any railroad or railway company occupying with tracks a portion of such highway, was declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax levied under the act. The property so benefited was divided into three classes: Class A to include all landed property in the City of Baltimore, adjoining or abutting upon a public highway paved with improved paving and having a width of not less than thirty feet so paved; Class B to include all such landed property in the City of Baltimore adjoining or abutting upon a public highway paved with improved paving and having a width of less than thirty feet and

not less than fifteen feet so paved; Class C to include all such landed property in the City of Baltimore adjoining or abutting upon any public highway paved with improved paving and having a width of less than fifteen feet so paved. The Appeal Tax Court of the City of Baltimore is authorized and directed by the act to proceed to classify and list for taxation, as provided by the act, for the year 1913, all landed property in the City of Baltimore which, on the first day of November, 1912, was in a situation to come under the requirements of either of said classes. Before classifying any property under the special tax provided in the act, the Appeal Tax Court was required to give notice to the owner of the property, designating a certain time when the owner might appear before the court and be heard with reference to the liability of his property for the tax, and the class to which it properly belonged. After having given the owner reasonable notice and an opportunity to be heard, the Appeal Tax Court is required to proceed to make the classification provided, and to certify their action, in making such classification to the City Collector in the same manner as in cases of classification of real and leasehold property in the annex for the different rates of taxation as provided under the Act relating thereto; and the City Collector is authorized to add the special tax to the tax bills of the property, to be called "Special Paving Tax," and to collect the same in the manner as ordinary taxes on real estate are collected. The City Collector is required to account for and pay over to the Comptroller, to be by him deposited with the City Register and to be placed to the credit of a new paving fund provided in the Acts of 1906, Chapter 401, and 1908, Chapter 202, and to be exclusively applicable to the cost of the work authorized by said acts, or by any amendment or amendments thereof. Section 3 of the act defines improved paving to mean any substantial, smooth paving above the grade

of ordinary macadam, and to include granite or belgian blocks, vitrified brick or blocks, wood blocks, asphalt or concrete blocks, sheet asphalt, bitulithic bituminous macadam and bituminous concrete. Section 4 specifies the amount of the special tax to be as follows: On all property embraced in Class A, fifteen cents per year per front foot or lineal foot adjoining or abutting upon the public highway; on all property embraced in Class B, ten cents per year per front foot or lineal foot adjoining or abutting upon the public highway; and on all property embraced in Class C, five cents per year per front foot or lineal foot adjoining or abutting upon the public highway.

The bill recites that, under and by virtue of that act, Chapter 688 of the Acts of 1912, the General Assembly has attempted to levy and impose upon the property of the plaintiff and other property owners similarly situated, taxes under the three classes mentioned, and that the Appeal Tax Court of Baltimore is proceeding now to list and classify for taxes the property so attempted to be levied upon by said act, and has classified said property of the plaintiff, designating it as belonging to Class A. The bill then sets forth various grounds upon which it is claimed the act is illegal, the one with which this court is concerned being that it is in violation of the Fourteenth Amendment to the Constitution of the United States.

The Act of 1906, to which reference is made in the act just recited, Chapter 401, as amended by Chapter 202 of the Acts of 1908, provides for the creation of a paving commission for the City of Baltimore, with powers to carry out a plan for a complete system of improved paving of the streets of the city. The Court of Appeals in its opinion in this case states that a fund of $5,000,000 was procured by means of a loan provided for this purpose, which loan was approved by the people at an election held on the 2nd of May, 1911, and that the act was sus-

tained by the Court of Appeals in the case of *Bond* v. *Baltimore*, 118 Maryland, 159; and that the object and purpose of the Act of 1912 was to raise an additional fund of $5,000,000, to complete the plan adopted by the city for improved pavements throughout the city, and that this is to be done by a special paving tax upon property in the city specially benefited by improved paving as provided in the act.

The bill was demurred to upon certain grounds: that the complainant had an adequate remedy at law; that the Act of 1912 in question did not violate the Constitution of the United States or the Constitution or Bill of Rights of the State of Maryland; that the houses of the plaintiff were enjoying special benefit and advantage, fronting upon a street improved with vitrified brick pavement, while other houses in the city are upon unhealthy and unsightly cobble stone streets, for which special advantage the charge put upon the houses of the plaintiff by the act in question amounts to $1.80 per year upon each of the houses, or $18.00 upon each house for the entire ten years. The demurrer sets forth certain other reasons why a court of equity should not intervene not necessary to repeat. The demurrer was overruled in the Circuit Court of Baltimore City, and upon appeal to the Court of Appeals of Maryland, that court reversed the lower court and sustained the constitutionality of the act as against the attacks thereon both under the state and Federal Constitutions. (120 Maryland, 621.)

We will notice such matters as are deemed necessary in order to dispose of the contentions concerning the alleged violation of rights secured to the complainant under the Federal Constitution. The provision of that instrument to which appeal is made by the complainant is the Fourteenth Amendment in the protection secured thereunder against state action which has the effect to deprive of property without due process of law. This

court has frequently affirmed that the general taxing systems of the State are not to be presumed lacking in due process of law because of inequalities or objections, so long as arbitrary action is avoided. It is not the purpose of the Fourteenth Amendment to interfere with the discretionary power of the States to raise necessary revenues by imposing taxes and assessments upon property within their jurisdictions.

It is first contended that the complainant is deprived of its property without due process of law, because the special assessment levied upon its property is for special benefits long since accrued, and that the statute under consideration is retrospective in its operation, thereby disturbing rights which had accrued to and become fixed in the property holders long before the passage of the statute; that the State had no authority because of benefits thus long since conferred to make the assessment in question. But we deem this contention foreclosed by the decision of this court in *Seattle* v. *Kelleher*, 195 U. S. 351. In that case it was contended that there could be no valid assessment for a certain improvement, because it was levied after the work was completed, but this court met that contention by saying (p. 359):

"The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. *Bellows* v. *Weeks*, 41 Vermont, 590, 599, 600; *Mills* v. *Charleton*, 29 Wisconsin, 400, 413; *Hall* v. *Street Commissioners*, 177 Massachusetts, 434, 439. If this were not so it might be hard to justify reassessments. See *Norwood* v. *Baker*, 172 U. S. 269, 293; *Williams* v. *Supervisors of Albany*, 122 U. S. 154; *Frederick* v. *Seattle*, 13 Washington, 428; *Cline* v. *Seattle*, 13 Washington, 444; *Bacon* v. *Seattle*, 15 Washington, 701; Cooley, Taxation, 3d ed., 1280. . . . Of course, it does not matter that this is called a reassessment. A reassessment may

be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free 'to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way. *Norwood* v. *Baker*, 172 U. S. 269, 293; *McNamee* v. *Tacoma*, 24 Washington, 591; *Annie Wright Seminary* v. *Tacoma*, 23 Washington, 109."

The doctrine established by this case is that a subsequent assessment may be levied because of benefits conferred by the former action of the city in improving in front of the lots assessed. As said in the *Kelleher Case* (p. 359), "the benefit was there on the ground at the city's expense." So far as any Federal constitutional requirement is concerned, the State might exercise its authority to assess because of this special benefit, although that assessment was deferred for some time after the work was done at the public expense. And these considerations suggest the answer to another objection made in this connection, that it is proposed to use the assessments for paving other streets within the city. It is true that the assessments are to go into the general fund provided for such general use. But we are unable to see how the constitutional rights of the complainant are violated, so long as there was as to it a benefit formerly conferred, and still existing, which the property had derived at the public expense. The fact that the city was authorized to use the assessment in creating a public fund, in aid of its scheme to pave other streets of the city, was a public purpose, and a legitimate one, for which funds of the city might be used.

It is further urged, and much stress seems to be laid

upon this point, that the complainant and others similarly situated were given no opportunity to be heard as to the amount of benefits conferred upon them, and the proper adjustment of the taxes among property owners. But this question, like the other, is foreclosed by the former decisions of this court. This assessment, and the classification of the property to be improved, were fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front. We think such a tax, when levied by the legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution. In *Spencer* v. *Merchant,* 125 U. S. 345, 356, this court, speaking by Mr. Justice Gray, said:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners."

This case has been followed and approved in subsequent decisions in this court. *Parsons* v. *District of Columbia,* 170 U. S. 45, 50, 56; *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 343. In the latter case, the former cases in this court were reviewed at length, and *Spencer* v.

Merchant, quoted with approval; *Norwood* v. *Baker*, 172 U. S. 269, was commented upon and distinguished. *French* v. *Barber Asphalt Paving Co.*, *supra*, was followed and approved in a series of cases in the same volume: *Wight* v. *Davidson*, 371; *Tonawanda* v. *Lyon*, 389; *Webster* v. *Fargo*, 394; *Cass Farm Co.* v. *Detroit*, 396; *Detroit* v. *Parker*, 399; *Wormley* v. *District*, 402; *Shumate* v. *Heman*, 402; *Farrell* v. *Commissioners*, 404. *French* v. *Barber Asphalt Paving Co.*, *supra*, was referred to with approval in *Hibben* v. *Smith*, 191 U. S. 310, 326. See also *Louis. & Nash. R. R.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430; *Martin* v. *District of Columbia*, 205 U. S. 135.

Norwood v. *Baker*, *supra*, is much relied upon by the plaintiff in error, and while this court has shown no disposition to overrule that case when limited to the decision actually made by the court, much that is said in it must be read in connection with the subsequent cases in this court already referred to. In *Norwood* v. *Baker*, a portion of a person's property, located in a village of Ohio, was condemned for street purposes and the entire cost of opening the street, including the amount paid for the strip condemned, with the costs and expenses of condemnation, was assessed upon the abutting property owner whose land was condemned. This, it was said in *French* v. *Barber Asphalt Paving Co.*, *supra*, was an abuse of the law and an act of confiscation, and not a valid exercise of the taxing power. Taking the decisions in this court together, we think that it results that the legislature of a State may determine the amount to be assessed for a given improvement and designate the lands and property benefited thereby, upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.

We do not understand this to mean that there may

not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of land owners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise. But in the present case there is neither allegation nor proof of such disproportion between the assessment made and the benefit conferred as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject. There can be no question that paving with brick in front of the property of the complainant conferred a substantial benefit, and gave authority for the subsequent legislation which, because of that benefit, original and continuing, warranted an assessment upon the property owner for a confessedly public purpose,—the improvement of the streets of the city.

We are unable to find that the act of the legislature in question, or the manner of its present enforcement, operates to deprive the complainant and others similarly situated of any rights secured to them by the Federal Constitution. The judgment of the Court of Appeals of Maryland is

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissent.

WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 63. Argued November 8, 1915.—Decided November 29, 1915.

A finding by the Court of Claims that there was no mutual mistake between the parties in executing a release but that the instrument expressed the intention of the United States as previously agreed upon, although the other party had mistaken its legal rights without the fault of the United States or its officers, and that such failure to apprehend the legal effect of the release did not make it the subject of reformation, *held* in this case to be binding upon this court.

The Court of Claims was established for the purpose of considering the right of claimants to recover against the United States; and its findings of fact upon matters within its authority should be conclusive unless Congress otherwise provides.

When Congress by special act refers a case to the Court of Claims with right of appeal to this court, such appeal, unless the act otherwise provides, is governed by rules applicable to cases arising under the general jurisdiction of the court.

In this case there being ample testimony to support the finding of the Court of Claims that there was no mutual mistake in the execution of a complete release, and there being no mistake in the form of the instrument, *held* that claimant was not entitled to recover damages caused by delay in the Government furnishing material as the release executed covered all such claims although the representative of the claimant may not have so understood it.

In cases within its general jurisdiction, the Court of Claims has jurisdiction to reform a contract for the purpose of determining whether the claim, if established, is a valid one against the United States. *United States* v. *Milliken Imprinting Co.*, 202 U. S. 168.

46 Ct. Cl. 521, affirmed.

THIS action was brought in the Court of Claims to recover damages on account of delay alleged to be the fault of the United States in preventing completion according to contract of the battleship Massachusetts. The Court of Claims dismissed the petition (46 Ct. Cls. 521).

Large sums were demanded for delays covering other periods than are involved in this appeal, and the case as now presented concerns the right to recover the sum of $27,984.99, being the damages which the Court of Claims found accrued to the claimant for the period of delay after February 1, 1896, for the period of three months and twenty-nine days. The Court of Claims made certain findings of fact, from which it appears that, after the making of the contract, claimant arranged a systematic working program for the construction of the vessel within the contract time, and would have completed the vessel within time had it not been for the failure of the United States to furnish materials to properly carry on the work which by the terms of the contract they had agreed to furnish; that by reason of such failure of the Government, the completion of the vessel was delayed for two years, six months and nine days beyond the contract period; that the armor to be furnished in accordance with said clause was obtained by the United States from other contractors, who, without any fault on the part of the claimant, failed to complete the manufacture thereof in time to deliver the same to the claimants as they had agreed. Omitting the findings covered by the release and contract made on May 26, 1896, and on February 1, 1896, and the amount of damages accruing for such delay, as to the sum now in controversy the court found that on November 23, 1896, after the completion and delivery of the vessel in accordance with the sixth paragraph of the nineteenth clause of the contract, the balance of the amount due thereunder, but held in accordance therewith until the final acceptance of the vessel, was paid to the claimant, and the same was accepted and a release approved by the Secretary of the Navy was entered into by it without any written protest, in the terms following:

"Whereas by the eleventh clause of the contract,

dated November 18, 1890, by and between the William Cramp & Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a coast line battleship of about 10,000 tons displacement, which for the purposes of said contract is designated and known as coast line battleship No. 2, it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be held until the vessel has been finally tried, provided that such final trial shall take place within five months from and after the date of the preliminary acceptance of the vessel; and

"Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claims, to receive the said special reserve, or so much thereof as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

"Whereas the final trial of said vessel was completed on the 24th day of October, 1896; and

"Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

"Now, therefore, in consideration of the premises, the sum of $57,536.60, being the balance of the aforesaid special reserve to which the party of the first part is entitled, being to me, in hand, paid by the United States,

represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, the William Cramp & Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby, for itself, and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid.

"In witness whereof I have hereunto set my hand and affixed the seal of the William Cramp & Sons Ship and Engine Building Company this 23rd day of November, A. D. 1896.

"The Wm. Cramp & Sons Ship and Engine Building Company.

(Seal.) Chas. H. Cramp, President.

"Attest:

"Theodore W. Cramp,

"Assistant Secretary."

The court sets forth the Act of June 10, 1896,[1] referring certain claims to the Secretary of the Navy for investigation and report, and, in part, the report of the Secretary, made December 9, 1896, is as follows:

"I have considered carefully the nature of these claims

[1] The Secretary of the Navy is hereby authorized and directed to examine claims against the Government which may be presented to him by contractors for the building of the hulls or machinery of naval vessels under contracts completed since January first, eighteen hundred and ninety-one, where it is alleged that such contractors have been subjected to loss and damage through delays in the work under said contracts which were not the fault of said contractors, but were due to the action of the Government, and to report to the next session of Congress the result of said investigation, and whether said claims are, in his opinion, subjects for the jurisdiction of the Court of Claims or for the action of Congress upon the same. 29 Stat. ch. 399, p. 374.

and the circumstances out of which they arose and while not attempting to pass on the merits of the same or to determine the amount, if any, that should be allowed on account of the matters mentioned, the fact exists that there was delay in the completion of the contracts beyond the time prescribed therein, and that such delay was in some measure at least due to failure on part of the Government to obtain and furnish the contractors the armor for the vessels as required, and in my judgment the interests of justice demand that they should be referred to the Court of Claims, which can consider these matters with more deliberation and care than could be devoted to them by the committees of the two Houses of Congress. . . .

"It will be observed that the contractors claim relief from the binding force of these agreements on the ground that the same were entered into by them under duress."

After consideration, the court finds the items of cost and expense during the period of delay now under consideration, three months and twenty-nine days, after February 1, 1896, to amount to the sum of $27,984.99, as already stated, and further finds:

"The claimant company submits for the consideration of the court the evidence of the then Secretary of the Navy and the president of the claimant company, who signed the contract on behalf of their respective principals, along with certain other testimony, taken since the decision in the case of the Indiana, to prove that at the time of the signing of the contract as aforesaid it was not within the minds of the parties so signing said contract that the language of paragraph six of the nineteenth clause of said contract, to wit: 'On the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract,' should embrace claims for unliquidated

damages of the character herein sued for, and that in so far as the language of said final release includes such unliquidated claims it was inserted by mistake, inadvertence, or accident, and did not express the true intent of the parties, and that the same should be so reformed as to exclude such claims.

"The court, after due consideration of the evidence aforesaid as well as the evidence adduced on behalf of the defendants, finds that there was no mutual mistake between the parties in the execution of the contract or the releases thereunder; that the language of said contract and releases expressed the intention and purpose of the United States as previously agreed upon, though the contracting party on behalf of the claimant company may have mistaken its legal rights thereunder.

"Upon the foregoing findings of fact the court finds the ultimate facts, so far as they are questions of fact, (1) that at the time of the execution of the releases set forth in finding V the claimant company was not, by reason of the acts or delays of the Government, under duress; and (2) that there was no mutual mistake between the parties in the execution of the contract or the final release thereunder, as the same expressed the true intent and purpose of the United States, and the failure of the officers of the claimant company to apprehend the legal effect thereof was not the fault of the United States or their officers, and that therefore the same are not the subject of reformation."

As a conclusion of law, the court decided on the authority of *United States* v. *Cramp*, 206 U. S. 118, that the claimant was not entitled to recover, and dismissed the petition.

Mr. Joseph Gilfillan for appellant.

Mr. Assistant Attorney General Thompson for the United States.

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

The contract in this case and the release above set forth are in the form shown in *United States* v. *Cramp*, 206 U. S. 118, and except for the considerations to be later dealt with, the present case is ruled by that unless relief in equity can be had, for it was there held that a release executed in the matter of the contract for the battleship Indiana included all claims which grew out of the performance of the contract, although not arising from the actual construction of the vessel. In the subsequent case of *Cramp and Sons* v. *United States*, 216 U. S. 494, the case in 206 U. S. was distinguished because of the different form of release executed in that case, which contained a proviso that it should not include claims arising under the contract other than those which the Secretary of the Navy had jurisdiction to entertain.

As the recital of facts definitely shows, the Court of Claims found, after consideration of the evidence adduced upon behalf of the claimant and the defendant, that there was no mutual mistake between the parties in the execution of the contract and release, and that the contract and release expressed the intention and purpose of the United States, as previously agreed upon, though the contracting party on behalf of the claimant company had mistaken its legal rights. As ultimate facts, the court found, so far as the same were questions of fact, that there was no mutual mistake between the parties in the execution of the contract or the final release; that the same expressed the true intent and purpose of the United States, and that the failure of the officers of the claimant company to apprehend the legal effect thereof was not the fault of the United States or its officers, and was not the subject of reformation. If we are governed by the findings of fact in this, as in other cases

coming from the Court of Claims, these findings conclude the question of fact as to whether the testimony warranted a reformation of the contract upon equitable principles.

The record contains a stipulation, signed by the Assistant Attorney General and counsel for the claimant, in which it is recited that whereas one of the questions raised and decided by the judgment of the Court of Claims is the right of the claimant to equitable relief through the reformation of the contract in suit, and the reformation of certain releases, and that evidence was introduced in behalf of both parties touching the facts upon which the claimant founded its claim for equitable relief, subject to the defendant's objection, and because the record was very voluminous and contained the report of many proceedings not relevant to the right to equitable relief, certain evidence bearing upon that point was stipulated into the record. The stipulation concluded: "Providing, however, that on appeal recourse shall be had to the record of the proceedings and evidence next hereinbefore mentioned, for no purpose whatsoever, except for the consideration and determination of the question with respect to the claimant's right to the equitable relief aforesaid; it being understood and agreed that the Findings of Fact filed by the court May 29, 1911, shall not be affected in any other manner or for any other purpose by the said proceedings and evidence."

In view of this state of the record, we are met with the question, whether, in cases coming from the Court of Claims, of the character of the one now under consideration, the findings of fact are conclusive, as in other cases, or whether it is the duty of this court to determine for itself from the evidence sent up whether the claimant is entitled to equitable relief necessary to the establishment of his claim. The cases relied upon which it is contended make it the duty of this court to independently

consider the evidence are *Harvey* v. *United States*, 105 U. S. 671, and *United States* v. *Old Settlers*, 148 U. S. 427, which we shall notice later on.

In this case the Secretary of the Navy, as it appears from the recital of the facts, recommended that action be brought in the Court of Claims, and it was accordingly instituted in that court. The Court of Claims was given jurisdiction under the act of March 3, 1887 (c. 359, § 1, 24 Stat. 505), of all claims "founded . . . upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." By the rules of this court, the record from the Court of Claims is required to contain a transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case, and a finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them. These facts are to be the ultimate facts established by the evidence, and not the evidence upon which the ultimate facts are based. *Burr* v. *Des Moines R. R.*, 1 Wall. 99, 102.

In the case of *District of Columbia* v. *Barnes*, 197 U. S. 146, it was held, under an act of Congress permitting parties to submit the justice of their claims against the United States for work done in the District of Columbia to the adjudication of a competent court, that equitable jurisdiction was thereby conferred upon the Court of Claims, sufficiently, at least, to order the reformation of a written contract between the claimant and the District, and to award a money judgment on the contract so reformed. In that case it was said that the findings of fact

would not be reviewed in this court, but were regarded as conclusive here, and that this court would determine the questions of law properly brought to its attention upon such findings.

In *United States* v. *Milliken Imprinting Co.*, 202 U. S. 168, which was a suit in the Court of Claims praying for the reformation of a contract and for damages for breach of the same as reformed, this court held that the Court of Claims, under the act of March 3, 1887, had jurisdiction to reform the contract as a basis of a judgment for money damages. In *United States* v. *Sisseton and Wahpeton Bands*, 208 U. S. 561, where a suit was brought under a special act of Congress, giving the Court of Claims jurisdiction to hear testimony and render final judgment, this court held that it would not go behind findings of fact made by the Court of Claims, citing *McClure* v. *United States*, 116 U. S. 145, and *District of Columbia* v. *Barnes*, *supra*. In the first of these cases, *McClure* v. *United States*, a motion was made in this court to order the Court of Claims to transmit to this court all the evidence upon which the case was heard and determined, and in default of sending up such evidence to make certain findings. The suit was brought under a special act of Congress, referring the claims of one Daniel McClure to the Court of Claims, with jurisdiction to hear and determine the same and, if the court should be satisfied that moneys charged against said McClure as Assistant Paymaster General were not in fact received by him, or that other just and equitable grounds existed for credits claimed by him, to make a decree, setting forth the amount to which McClure was entitled, and that an appeal should be allowed to either party as in other cases. This court, after setting forth the statutory authority of this court to make rules and regulations and the rules of this court requiring findings of fact, declined to make the order, and held that when Congress passes a special statute

allowing a suit to be brought in the Court of Claims, with the right of appeal to this court, the appeal will be governed by the rules applicable to cases arising under the general jurisdiction of the court, unless provision is made to the contrary in the special act. The court reviewed the case of *Harvey* v. *United States*, 105 U. S., *supra*, and stated that it was under a special statute authorizing the Court of Claims to proceed in the adjustment of questions between the claimants and the United States as a court of equity jurisdiction, and, according to the principles of equity jurisprudence, reform such contract and render such judgment as justice and right between the claimants and the Government might require. This court said that the appeal given to this court in the *Harvey Case*, under that particular statute, was an appeal in equity which would bring up for review the facts as well as the law, according to equity practice. In the *Old Settlers Case*, 140 U. S. 427, *supra*, the action was brought under a special act of Congress. In that case it was held that it was the intention of Congress by such special act to confer upon the Court of Claims the unrestricted latitude of a court of equity, stating an account, distributing a fund, and framing a decree, and that to that statute the doctrine of the *Harvey Case* applied, and this court proceeded to examine the evidence, after stating that it also had the advantage of the findings of the Court of Claims.

The present case was brought under the jurisdiction conferred upon the Court of Claims as in other cases. It is true that the same was brought upon suggestion of the Secretary under the act of 1896 requiring the Secretary to report whether, in his judgment Congress should act or the case should be referred to the Court of Claims. In cases within the general jurisdiction of the Court of Claims, it has jurisdiction to reform a contract for the purpose of determining whether the claim if established

is a valid one against the United States. *United States* v. *Milliken Imprinting Co.*, 202 U. S., *supra*. There is no good reason which authorizes this court in such cases to undertake a consideration of voluminous records and conflicting testimony to determine a matter which is committed to the jurisdiction of the Court of Claims in exercising the authority conferred by Congress upon that court, and which is specifically within the rules of this court, made under authority of Congress, requiring the Court of Claims to certify findings of fact and conclusions of law. The Court of Claims was established for the purpose of considering the right of claimants to recover against the United States, and when it finds facts upon matters within its authority that should be conclusive under the rules unless Congress otherwise provides. It follows that upon the facts found the claimant was not entitled to recover.

Nor do we find any room for the application in this case of the doctrine laid down in *United States* v. *Clark*, 96 U. S. 37, in which it is held that where the court certifies the evidence, and it appears that there is none to warrant its legal conclusion, a question of law is presented which may be determined here. In this case we are of opinion that there was ample testimony to warrant the conclusion of the Court of Claims, as stated in its findings. It certainly cannot be said that there was no supporting testimony, so as to make the question one of law and not of fact. It does not appear that either of the parties understood that the contract or release should be reduced to writing in any other form than as it was actually written. There was no mistake in the form of the instrument. *United States* v. *Milliken Imprinting Co.*, 202 U. S., *supra*, page 177. The testimony of the former Secretary of the Navy and of the Secretary in office at the time the release was signed to the effect that it was not believed that it would cover claims for

damages for delay, if competent for any purpose whatsoever, certainly did not show that mutual mistake of the parties which upon well-established principles of equity jurisprudence requires the reformation of the contract, and certainly no such special circumstances were developed of fraud, duress, or oppression, as would necessarily require relief against a mistake of law.

We find no error in the judgment of the Court of Claims, and the same is

Affirmed.

MR. JUSTICE MCKENNA dissents from the opinion and judgment in this case. In his opinion, the Court of Claims, in view of the statute of June 10, 1896, authorizing and directing the Secretary of the Navy to examine the claims here involved, and to report to Congress the result of his investigation, and whether such claim was in his opinion subject to the jurisdiction of the Court of Claims or for the action of Congress, implied the intent of Congress that claims of this character should be considered upon broad equitable grounds. Thus considered, Mr. Justice McKenna thinks the claimant entitled to recover for the delay resulting from the fault of the Government notwithstanding the form in which the final receipt was drawn and executed.

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

JOHNSON, TREASURER OF STATE OF SOUTH DAKOTA, *v.* WELLS FARGO & COMPANY.

SAME *v.* TAYLOR, PRESIDENT OF AMERICAN EXPRESS COMPANY.

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

Nos. 277, 278. Argued October 12, 13, 1915.—Decided November 29, 1915.

A requirement of a state constitution that all taxes shall be levied and assessed upon property of corporations as near as may be by the same methods as are provided for taxing property of individuals is violated by giving controlling effect in the valuation of property of a corporation to the gross income derived therefrom, when the property of individuals is assessed for what it is really worth without giving controlling effect to the gross income derived therefrom.

Although a taxing statute upon its face may be unobjectionable, its administration may, by the adoption of unequal methods of valuation, be illegal.

Taxes imposed by the State of South Dakota on express companies based on their gross earnings in the State *held* to be in violation of the provision of the constitution of that State requiring property of corporations to be taxed as nearly as may be as property of individuals.

In a case in which the constitutionality of a method of taxation under a state law is questioned, the Federal court is not bound by the decision of the state court in upholding that method if its constitutionality under the state constitution was not questioned in the case in which such decision was made.

A valuation for assessment so unwarranted by the law and a method of making the assessment, amounting either to a fraud or such gross mistake as to amount to fraud upon the constitutional rights of the person taxed, are grounds of equity for enjoining the enforcement of the tax. *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, distinguished.

After the collection of a tax has been enjoined on the ground that the assessment was unwarranted and violated constitutional rights and no appeal was taken from the decree, the imposition of a tax for the

following year based on a similar assessment amounts to such a continuing violation of constitutional rights as might in itself afford ground for equitable relief.

214 Fed. Rep. 180, affirmed.

THE facts, which involve the constitutionality of tax assessments on property of express companies in South Dakota, are stated in the opinion.

Mr. C. C. Caldwell, Attorney General of the State of South Dakota, and *Mr. L. T. Boucher*, with whom *Mr. Royal C. Johnson* and *Mr. M. H. O'Brien* were on the brief, for appellant:

The State Board of Assessment had the right to consider among other things the income of the plaintiff in the State, so far as they could ascertain it, and the contracts of plaintiff with the railway companies, in fixing a valuation upon its property or system within the State, for the purpose of taxation.

While it is true in a sense, that property is worth what it will sell for within a reasonable time, that is not always true of any property, and is never true as to some property. Express company systems are not being sold on the market every day or year, except that their stocks and bonds to some extent change hands on the open boards of trade when listed, and that part of an express company's plant or system lying within a given State is never sold.

In the commercial world the selling value of a thing is often fixed by the income it can be made to produce, and it does not follow that the fixing of the value of a thing in that way is tantamount to putting the value on the earnings of the owners of the property. The owners of such a property as that of the plaintiff's, in South Dakota, do not earn its income. They are not supposed even to be in South Dakota; they are scattered about the United States and Europe. They simply own the stock, receive the dividends, if any, which the system earns, after de-

ducting the cost of operation, and fixed charges; hence, it was not quite logical to hold that because the board of assessment considered the income of the plaintiff's system in the State, in fixing its value for taxation, that it imposed an assessment upon the earnings of the plaintiffs themselves—the earnings of the owners of the property. *State Railway Taxes*, 92 U. S. 575; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Postal Tel. Co.* v. *Adams*, 155 U. S. 688; *Pittsburgh Ry.* v. *Backus*, 154 U. S. 421; *Fargo* v. *Hart*, 193 U. S. 490; *West. Un. Tel. Co.* v. *Taggert*, 163 U. S. 1; *Atchison Ry.* v. *Sullivan*, 173 Fed. Rep. 464; *Munn* v. *Illinois*, 94 U. S. 113; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Hotel Co.* v. *Los Angeles*, 211 U. S. 123; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Cleveland Ry.* v. *Backus*, 154 U. S. 445; *Adams Exp. Co.* v. *Ohio*, 165 U. S. 221; and 166 U. S. 185; *Missouri* v. *Dockery*, 191 U. S. 170; *Adams Exp. Co.* v. *Poe*, 64 Fed. Rep. 9; *Land* v. *Gowan*, 48 Fed. Rep. 771; *Maish* v. *Arizona*, 164 U. S. 599; *Ogden* v. *Armstrong*, 108 U. S. 224; *C., B. & Q. Ry.* v. *Babcock*, 204 U. S. 585; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 335.

Injunction is not the proper remedy in any event, see *Dawes* v. *Chicago*, 11 Wall. 108; *Snyder* v. *Marks*, 109 U. S. 193; *Taylor* v. *Peoria County*, 92 U. S. 575; *Tennessee* v. *Sneed*, 96 U. S. 69; § 3224, Rev. Stat.; *Singer Machine Co.* v. *Benedict*, 229 U. S. 481.

Mr. Charles W. Stockton, *Mr. Charles O. Bailey* and *Mr. John G. Milburn*, with whom *Mr. John H. Vorhees* was on the brief, for appellees.

Mr. Justice Day delivered the opinion of the court.

These cases were argued at the same time and may be considered together. They are appeals from the decision of the Circuit Court of Appeals of the Eighth Circuit, by

which the present appellant, as Treasurer of the State of South Dakota, was enjoined from assessing certain taxes levied against the appellees by the State Board of Assessment and Equalization of the State of South Dakota, for the year 1910. The bills, brought for the purpose of enjoining the collection of such taxes, were dismissed in the District Court (205 Fed. Rep. 60), which decrees were reversed in the Circuit Court of Appeals, and decrees entered remanding the case to the District Court with instructions to enter decrees for the appellees, restraining the collection of the taxes (214 Fed. Rep. 180).

Under the law of South Dakota, Wells Fargo and Company made a statement showing that its gross earnings within the State for the year ending April 30, 1910, were $131,096.28, and that the value of its office furniture, fixtures, and real estate was $18,473.98. The Board assessed the value of the property of Wells Fargo and Company at $289,877.00, and imposed a tax of twenty-eight mills on the dollar, making a total tax of $8,116.55. Similarly, the Board assessed the value of the American Express Company at $193,260, and levied a tax of $5,411.28. The bills averred a tender of taxes upon the returns, and charged that the assessments made were in violation of the state constitution, and, if enforced, would have the effect to take the property of the express companies without due process of law, in violation of the Federal Constitution.

The constitution of the State of South Dakota, as the same was in force at the time of these assessments, provided (Article XI, § 2), as follows:

"All taxes to be raised in this State shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its

property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property."

From an analysis of this section, it appears that taxes to be valid must be uniform upon all real and personal property; that the legislation providing for the assessment and collection of taxes must be such that every person and corporation may be taxed in proportion to the value of his, her or its property; and that the general laws which provide for the assessing of taxes on corporation property, shall be as near as may be, by the same methods as are provided for the assessing and levying of taxes on individual property.[1]

While this constitution was in full force and effect, the legislature passed an act, providing for the assessment of taxes upon express and sleeping car companies (Chap. 64, Laws of South Dakota, 1907, as amended by Chap. 162 of the Laws of 1909). In § 16 of this Act, express companies are required to transmit statements to the Auditor of State, showing the number of employés engaged by the company in the State, and the number in each county;

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[1] This constitutional provision was in force at the time the taxes in question were assessed, but was changed by the Amendment of 1912, which provides:

"All taxes shall be uniform on all property and shall be levied and collected for public purposes only. The value of each subject of taxation shall be so fixed in money that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Franchises and licenses to do business in the State, gross earnings and net income, shall be considered in taxing corporations and the power to tax corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party. The legislature shall provide by general law for the assessing and levying of taxes on all corporate property, as near as may be by the same methods as are provided for assessing and levying of taxes on individual property."

the number of offices maintained within the State, and in each county; the value of all office furniture, fixtures and real estate owned in the State; the number of miles of railroad over which it conducted its business, and the number of miles in each county; the number of express cars owned by the company and used within the State, and the number of such express cars leased and controlled, but not owned, by such company, and used within the State, or operated under lease or contract in any manner; the gross earnings of the total business of such company transacted within the State for the year ending April 30 preceding, and the value of all the property of such company used in the State. Section 17 of the Act makes provision for assessing the property of express and sleeping car companies, and requires the Board of Assessment and Equalization to take into consideration the gross earnings of the company within the State for the year ending the thirtieth of April preceding, statements made by the company and by the Board of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of the property in the same ratio as the property of individuals, and provides that the statement and information received shall be laid before the Board of Assessment and Equalization, which Board shall review such statement or information and may change the valuation given or add to the statement any property omitted therefrom, and the Board shall levy a tax upon such property, which tax shall be equal to the average amount of state, county, school, municipal, road, bridge, and other local taxes levied upon other property for the preceding year.

There is testimony in the record on the part of the State Treasurer, tending to show that the express companies did not comply with the law as to the making of their returns for the year 1910; that in making the assessment upon the property of the companies within the

State the State Auditor, and as he believed, the other members of the State Board, considered the reports and annual statements of the companies, the reports of the railway companies, the reports and records of the railway commissioners, the contracts for express privileges of the express companies in the State, the earnings of the companies in the State, the various lines of business done by the companies in the State, the length of the companies' systems in the State, the number of their offices, the bulk and value of their fugitive property in the State, not reported in the annual statement, the total value of the property, tangible and intangible, in the State, the amount of money which, in the judgment of the Auditor and other members of the Board, must have been necessary to carry on the various lines of the companies' business in the State, and all other facts which he or the other members of the Board could obtain, tending to throw light upon the value of the companies' property.

On the other hand, the Court of Appeals reaches the conclusion from the testimony that the express companies doing business in the State in 1909 and 1910 were under contracts with the railroad companies to pay to the latter from 45 per cent. to 55 per cent. of their gross earnings from the transportation of express business over their lines, and that as the amounts paid to the railroad companies by the respective express companies were approximately one-half of the amounts of their gross earnings from these railroads in South Dakota, the amounts so paid furnished a measure of the gross earnings of the respective companies, and finds that the Board of Assessment and Equalization, in making the assessment, adopted practically the same percentage of the amounts paid to the railroad companies by each of the express companies as a basis of assessment of the companies respectively. The court reached the conclusion that there was but one rational explanation of this fact, which was that the

Board measured the assessment of the companies by the amounts they had paid to the railroad companies respectively; that is to say, by their gross earnings from their transportation business over the railroads. Otherwise, the court concluded, it would be incredible that the Board could have estimated the taxable value of these companies so that the estimates would come within one-one hundred and sixtieth of the same percentage of the respective amounts which the express companies had paid to the railway companies. The Court of Appeals further held that this uniform relation of the assessments of the three principal express companies doing business in the State to the respective amounts paid to the railroad companies was more persuasive than the testimony of many witnesses as to the things which were taken into consideration by the Board in determining the amount of the assessments.

It is enough to say upon this point that, in our opinion, the record does show that the payment to the railroad companies, if not the only basis of the assessments made by the Board, was the principal factor in fixing the value of the property of the express companies for taxation in the State, and the question arises, was such administration of the statute contrary to the requirement of the South Dakota constitution, already quoted, requiring all taxation to be in proportion to the value of the property assessed, and corporation property to be assessed, as near as may be, by the same methods as are provided for assessing the value of individual property. It appears that the South Dakota statutes, other than those relating to railroads, telephone, telegraph, express and sleeping car companies, do not authorize a valuation which considers gross income, and that individuals and other corporations are taxed according to the value of their property, without reference to the income derived therefrom. In other words, property owned by other corporations and individuals is

assessed for what it is fairly worth, and a valuation for taxation is not fixed by a method which gives controlling effect to the amount of the gross income derived therefrom. We concur with the Court of Appeals that such procedure is in violation of the provision of the South Dakota constitution, specifically requiring that all taxes levied and assessed upon corporation property shall be as near as may be by the same methods as are provided for the assessment of taxes upon individual property.

The stringent provisions of the constitution of South Dakota, then in force, required the adoption of a rule of valuation, as near as might be, of like character in assessing individual and corporate property in the State, and here, the record shows, the valuation of the property of the express companies was based principally upon their gross incomes, determined by the method already described. Such administration of the statute would be illegal, although the law upon its face be unobjectionable. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390.

It is said that this conclusion is not consistent with the decision of the Supreme Court of South Dakota, construing its own constitution with final authority, in *State ex rel. American Express Company* v. *South Dakota*, 3 S. Dak. 338. In that case, while the method of making assessments and valuations by the state board was considered, and the court refused to interfere with such assessments under the circumstances shown, there was no discussion or decision of the constitutionality of the act when administered as in this case. In that case the constitutionality of the act does not seem to have been raised. In 34 S. Dak. 650, the judges of the Supreme Court of the State declined to give an opinion to the Governor as to the constitutionality of the law in question.

In *Adams Express Co.* v. *Ohio*, 165 U. S. 194, the so-called Nichols law, which had been sustained by the Supreme Court of the State of Ohio, was sustained by this

court as against an attack thereon under the Fourteenth Amendment to the Federal Constitution. In that case, the manner of taxation was entirely different from the one now under consideration. The law permitted the taking into consideration of the value of the property as a unit, and then ascertaining and assessing the proportion thereof within the State of Ohio, and it was held that such proportionate taxation did not violate the Fourteenth Amendment to the Federal Constitution. Another case greatly relied upon by appellant is *United States Express Co.* v. *Minnesota*, 223 U. S. 335, in which a statute of the State of Minnesota which undertook to tax express companies upon their property employed within the State, measured by the gross receipts within the State, from which certain deductions were made, was attacked as in violation of the commerce clause of the Federal Constitution, as the receipts which were the basis of the tax were derived in part from interstate transportation. In that case, the law was specifically authorized by the constitution of the State, as a means of reaching a proper valuation of the express companies' property within the State, in lieu of all other taxes. There was no contention in the case that the method used resulted in an excessive valuation. The tax was sustained, as against the attack under the commerce clause, upon the ground that, so far as interstate commerce receipts were referred to, they were in part the measure of a tax within the legislative power of the State, and not in any just sense a burden upon interstate commerce.

We reach the conclusion that the Circuit Court of Appeals did not err in holding this tax as in fact levied and assessed to be in violation of the constitution of the State.

The contention is made that there was no ground for equity jurisdiction, and that therefore the bill should have been dismissed. This court has frequently held that a bill will not lie in the Federal courts to enjoin the collection

of state taxes where a plain, adequate and complete remedy at law has been given to recover back illegal taxes and the attack upon the assessment is based upon the sole ground that the same is illegal and void. See *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, where many of the previous cases in this court are reviewed. But in the present case, it was alleged not only that the assessment was unwarranted by the law, but that the manner of making the assessment amounted to fraud upon the constitutional rights of the express companies, or such gross mistake as would amount to fraud, thus averring a distinct and well recognized ground of equity jurisdiction. It also appears that the tax of 1909 had been enjoined similarly, and that from the decree in that case no appeal had been taken. Such continuing violation of constitutional rights might afford a ground for equitable relief. See *Cummings* v. *National Bank*, 101 U. S. 153, 157, 158; *Stanley* v. *Supervisors*, 121 U. S. 535, 550; *Fargo* v. *Hart*, 193 U. S. 490, 503; *Taylor* v. *Louis. & Nash. R. R.*, 88 Fed. Rep. 350.

We find no error in the judgment of the Circuit Court of Appeals, and the same is

Affirmed.

O'NEILL *v.* LEAMER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 33. Argued October 25, 26, 1915.—Decided November 29, 1915.

The propriety of delegating authority by the legislature to a court in the matter of formation of drainage districts is a state question.

Plaintiffs in error having unsuccessfully contended in the state court that the appropriation of their property for a drainage ditch was essentially for a private purpose and hence deprived them of prop-

erty without due process of law, this court has jurisdiction to review the judgment under § 237, Judicial Code.

The provisions of the Fourteenth Amendment embody fundamental conceptions of justice and do not prevent a State from adopting a public policy to meet special exigencies, such as the irrigation of arid, and the reclamation of wet, lands; nor does anything in the Federal Constitution deny to a State the right to formulate such a policy or to exercise eminent domain to carry it into effect.

The judgment of the state court in determining matters with which it is peculiarly familiar, such as necessity for establishing drainage districts, is entitled to the highest respect.

The Statutes of Nebraska of 1905 and 1909 relative to the establishment of drainage districts and the establishment thereof by the District Court, and the proceedings thereunder establishing such a district and appropriating property thereunder by eminent domain and payment of compensation therefor, *held* not to be unconstitutional as denying equal protection of the law to the owner of property taken, or depriving such owner of property without due process of law, or as impairing the obligation of any contract, or as violating any provision of the Fifteenth Amendment.

93 Nebraska, 786, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment and other provisions of the Federal Constitution of the Drainage District Law of Nebraska, and of a tax levied thereunder, are stated in the opinion.

Mr. William V. Allen, with whom *Mr. M. D. Tyler* was on the brief, for plaintiff in error.

Mr. R. E. Evans, with whom *Mr. A. C. Strong* was on the brief, for defendants in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

Under the laws of Nebraska (Laws 1905, ch. 161; Laws 1909, ch. 147; Cobbey, Ann. Stat., §§ 5561–5597; Rev. Stat. 1913, §§ 1797 *et seq.*) the District Court of the State made an order organizing "Drainage District No. 2

of Dakota County." The lands embraced within the district lay to the southeast of the village of Jackson and consisted of about 7,000 acres of swamp lands upon which were discharged the waters of Elk Creek coming from the northwest. It was recited in the order that the drainage of these lands would be "a public utility" and would "be conducive to the public convenience, health and welfare." Plans were adopted which involved the construction of a ditch across lands of the plaintiffs in error for the purpose of carrying the waters of the creek to Jackson Lake. These were lands which did not receive the flood waters of the creek but were situated northeast of Jackson and outside the drainage district. The defendants in error who had been chosen as supervisors of the drainage district instituted condemnation proceedings in the county court for the purpose of making the necessary appropriation, and awards were made.

This action was then begun by the plaintiffs in error (and another) in the state court to enjoin the construction of the ditch. The plaintiffs assailed the Nebraska statute as repugnant to the state constitution and further averred that to permit the defendants to construct the ditch would deprive the plaintiffs of their property without due process of law and deny to them the equal protection of the laws in violation of the Fourteenth Amendment. It was alleged that the enterprise was "wholly private and in the exclusive pecuniary interest of the so-called corporators" of the drainage district. The trial court made special findings, in substance, as follows: That the drainage district had been legally organized; that the defendants had been constituted its supervisors; that in conformity with the statute the drainage district had been declared by the District Court, upon due notice to all interested parties as required, to be a public corporation of the State; that the district had employed competent civil engineers who had made a complete plan, which

had been presented and duly confirmed, for draining, reclaiming, and protecting the lands in the district from overflow; that the route and ditch, thus approved, provided the most feasible and the safest method for taking care of the waters of the creek; that the description of the ditch, as shown, was a 'definite and accurate description of a proper right of way' through the lands of plaintiffs and others; that having failed to agree with the plaintiffs as to the value of the right of way and the damages which would result from the construction and maintenance of the proposed ditch, the defendants as supervisors had applied to the county judge in the manner provided by law for the appointment of appraisers, who having been duly appointed and having entered upon their duties and viewed the premises had fixed the value of the right of way and the damages to each of the plaintiffs at sums stated and had duly reported accordingly; that the outlet of the proposed ditch in Jackson Lake was formerly the channel of the Missouri River at a low stage, and that by way of this lake there was an adequate and direct outlet for the water of the creek into that river without overflowing the plaintiffs' lands; and that the defendants had not claimed the right to enter upon these lands until the award of the appraisers should have been paid to the county judge for the benefit of the parties respectively. It was thereupon adjudged that when the awards were paid the temporary injunction which had been issued should be dissolved and the action dismissed. This judgment was affirmed by the Supreme Court of the State. 93 Nebraska, 786.

With many of the questions discussed in argument this court is not concerned. It has been held that under the state law the drainage district was a public corporation, duly organized, and was entitled to exercise the power of eminent domain. The propriety of the delegation of authority to the District Court in the matter of the forma-

tion of the drainage district is a state question. The attempt to invoke § 4 of Article IV of the Federal Constitution is obviously futile (*Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118) and the objection as to suffrage qualifications in connection with the organization and management of the district, sought to be based on the Fifteenth Amendment, is likewise wholly devoid of substance. It is also manifest that the State provided a tribunal for the determination of the compensation due to the plaintiffs by reason of the appropriation in question. Constitution of Nebraska, Art. I, § 21; Laws of 1905, ch. 161, § 12; Cobbey, Ann. Stat., §§ 10517 *et seq.;* Rev. Stat. Nebraska, 1913, §§ 5940 *et seq.* Appraisers were appointed, and the plaintiffs had due notice of hearing; they had full opportunity to be heard, to present any relevant question, and to complain of any irregularity or error. The questions of fact as to the definite location of the ditch, the value of the right of way and the extent of the damage to the property affected which would be sustained through construction and operation were the subject of determination in an appropriate proceeding.[1] See *United*

[1] With respect to the rights of the plaintiffs under the state law, the state court said: "The plaintiffs contend that the condemnation proceedings were void because they do not condemn and take certain lands of the plaintiff O'Neill which would be flooded by the waters of the ditch. If the plaintiffs' lands, other than those taken by the condemnation proceedings, are damaged by this improvement, the law affords them a remedy, including the right of appeal to the court of last resort. The statute provides that 'the same proceedings for condemnation of such right of way shall be had in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act.' Section 12. The law is well settled in such case by many decisions of this court. When the remedy at law is adequate, the prosecution of the work cannot be delayed by injunction. . . . It is objected that the application for condemnation did not describe and locate the proposed ditch with sufficient accuracy. . . . The

States v. *Jones*, 109 U. S. 513, 519; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568, 569; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Appleby* v. *Buffalo*, 221 U. S. 524, 532; *McGovern* v. *New York*, 229 U. S. 363, 370, 371. It is said that no notice to the plaintiffs was required or given of the application for the appointment of appraisers. As to this, however, no question of Federal right appears to have been raised or decided in the Supreme Court of the State, nor do we intimate that such a claim would have had basis, if made. It is plain that with respect to none of these matters is there any question for our review. *Appleby* v. *Buffalo*, 221 U. S. 524, 529.

The defendants in error have moved to dismiss upon the ground that there is no Federal question whatever presented by the record. But we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose and hence contrary to the Fourteenth Amendment as amounting to a deprivation of property without due process of law, and that their contention as to their Federal right in this respect was denied by the state court. In this view, jurisdiction attaches (*Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, 417; *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 251, 252; *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Gold Mining Co.*, 200

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drawings, which the appraisers had, showed the exact location of the proposed ditch. There is nothing to indicate that the appraisement of damages was in any way affected by any supposed uncertainty as to the location. The county court had power to correct any irregularities in the method of appraisement. If by reason of the difference in the statute from that construed in *Trester* v. *Missouri P. R. Co.*, 33 Nebraska, 171, that case is not to be regarded as decisive of the case at bar upon this point, which we do not decide, it seems clear that the application was sufficiently definite to give the county court jurisdiction of the proceedings. Errors, if any, not affecting the jurisdiction of the court should have been corrected in that court or upon appeal." 93 Nebraska, pp. 789, 790.

U. S. 527; *Offield* v. *N. Y., N. H. & H. R. R.*, 203 U. S. 372, 377; *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, 605, 606; *Union Lime Co.* v. *Chicago & N. W. Rwy.*, 233 U. S. 211, 218) and we pass to the consideration of the statutory plan.

The provisions of the statute are elaborate but the principal features may be briefly outlined. In a proceeding initiated by a majority in interest of the owners 'in any contiguous body of swamp or overflowed lands,' for the purpose of having such land reclaimed and protected from the effects of water, the District Court for the proper county may declare the drainage district as defined to be a public corporation of the State. To this end, the initiating proprietors must file articles of association, giving the name of the proposed district, the number of years it is to continue, its extent which must not be less than 160 acres, and an appropriate description of parcels and owners. Provision is made for summons to non-signing owners of lands averred to be benefited and for the hearing of objections to the organization. Property not benefited may be excluded from the district. If the organization is approved by the court, the clerk within a time specified is to call a meeting of the owners of the lands within the district for the election of a board of five supervisors to be composed of such proprietors and a majority of whom must be resident within the county or counties in which the district is situated; each owner is to have one vote for each acre owned. Under the direction of this board, which has defined authority and compensation, a topographical survey is to be made of the district, the various tracts and properties are to be classified according to benefits, which are to be assessed, and each parcel within the district is to bear its share of the entire cost and expenses incurred in making the improvements in proportion to benefits. A drain commissioner is to be appointed who, subject to the board's control, is to have general superin-

tendence of works under contracts awarded. If it appears that lands not embraced within the district will be benefited, proceedings may be had to bring them in. Condemnation of lands, easements, or franchises, within or without the district for the purpose of constructing the necessary ditches, dykes, etc., may be had. Provision is made for the hearing of objections to the proposed classification and assessments, and aggrieved objectors may appeal from the decision of the board of supervisors to the District Court. Tax levies upon the properties assessed are provided for, and the board is authorized to issue bonds of the district under stated conditions. Any person owning lands within the district which is separated from the ditch or watercourse for which it has been assessed may secure access to it across intervening lands by resort to a described proceeding. The treasurer of the county in which the district, or the largest part of it, is situated is made 'ex officio treasurer' of the district for the purpose of collecting and disbursing the taxes or assessments laid under the act.

The plaintiffs in error contend that the plan is simply one for the private advantage of the property owners and they direct special attention to the provision of the statute that the fact that the district is to contain 160 acres or more of wet or overflowed lands shall be sufficient cause for declaring the 'public utility' of the improvement. But we do not find that the Supreme Court of the State has sustained the act as applicable to any case in which it was considered upon a judicial examination of the facts that the undertaking served private interests alone. On the contrary, we assume it to be the law of Nebraska that property may be taken in the furtherance of reclamation projects only where it is found that the public welfare is involved. Acts with a different purpose have been held unconstitutional. *Jenal* v. *Green Island Draining Co.*, 12 Nebraska, 163; *Welton* v. *Dickson*, 38 Nebraska, 767.

With respect to the act here in question the state court has emphatically declared that the enterprises which it contemplates are those distinctly of a public character. In *Drainage District No. 1* v. *Richardson County*, 86 Nebraska, 355, where the county was required to contribute on account of special benefits accruing to its highways within a drainage district organized under the statute, the Supreme Court of Nebraska said upon this point: "That question was decided by this court in the case of *Neal* v. *Vansickle*, 72 Nebraska, 105. It was there said: 'That the districts contemplated by the act are intended to be of a purely public and administrative character, is evident as well from the title as from the body of the law itself. Its officers are chosen by popular election and their powers, duties, compensation and terms of service are prescribed by the statute. The sources of its income are predetermined as are also the uses to which it may be applied, and the county treasurer is made the custodian of its funds, and his disbursement of them regulated as in case of other public moneys. In our opinion, it is too late in the day to contend that the irrigation of arid lands, the straightening and improvement of watercourses, the building of levees and the draining of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties and functions.' . . . We see no reason at this time to depart from that opinion, and therefore this contention must be considered foreclosed so far as this court is concerned."

See also *Barnes* v. *Minor*, 80 Nebraska, 189; *State* v. *Hanson*, 80 Nebraska, 724, 742. These decisions were deemed to be controlling in the present case. 93 Nebraska, pp. 788, 789.

We find no ground for a contrary view as to the nature of the authorized enterprise. We have repeatedly said that the provisions of the Fourteenth Amendment, embodying fundamental conceptions of justice, cannot be deemed to prevent a State from adopting a public policy for the irrigation of arid lands or for the reclamation of wet or over-flowed lands. States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect. *Clark* v. *Nash, supra; Strickley* v. *Highland Boy Mining Co., supra; Hairston* v. *Danville & Western Rwy., supra; Union Lime Co.* v. *Chicago & Northwestern Rwy., supra.* It has been held that it is not necessary that the state power should rest simply upon the ground that the undertaking is needed for the public health; there are manifestly other considerations of public advantage in providing a general plan of reclamation by which wet lands throughout the State may be opened to profitable use. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 163. Nor is the statutory scheme to be condemned because it contemplates improvements in districts. Drainage districts may be established as well as school districts. All lands within the established district which require drainage are to enjoy the benefits of the plan. See 2 Lewis on Eminent Domain, 3d ed., p. 571. Nor is it an objection that private property within the district, which is established in execution of the public policy, will be benefited; and it is clearly not improper that the cost and expense should be apportioned according

to benefits. *Fallbrook Irrigation District* v. *Bradley*, *supra*.

In the present instance, the record shows that the drainage district, as organized, embraces a large area with many proprietors, and that, after contest in the original proceeding, the District Court made its deliberate order that the enterprise would be a public utility and conducive to the 'public convenience, health and welfare.' Nothing appears to warrant a different conclusion. Neither in the statutory provisions as construed by the state court nor in their application in the particular case is there basis for finding that the plaintiffs in error have been deprived of their property without due process of law. Rather must it be said that the ruling as to the authority of the State to make the condemnation for the described purpose has, from the standpoint of the Federal Constitution, abundant support in the decisions of this court. *Wurts* v. *Hoagland*, 114 U. S. 606; *Fallbrook Irrigation District* v. *Bradley*, *supra*; *Clark* v. *Nash*, *supra*; *Strickley* v. *Highland Boy Mining Co.*, *supra*.

Judgment affirmed.

HOUCK *v.* LITTLE RIVER DRAINAGE DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 35. Argued October 27, 28, 1915.—Decided November 29, 1915.

So far as the Federal Constitution is concerned, a State may defray the entire expense of creating, developing and improving a political subdivision from state funds raised by general taxation—or it may apportion the burden among the municipalities in which the improvements are made—or it may create tax districts to meet authorized outlays.

The State may, so far as the Federal Constitution is concerned, create

tax districts for special improvements directly by the legislature, or may delegate their institution through court proceedings, and the propriety of such delegation is a matter for the State alone, not reviewable by this court.

A State may by statute directly, or by appropriate legal proceeding, fix the basis of taxation or assessment for a proper governmental outlay, and, unless palpably arbitrary, such action does not violate the due process provision of the Fourteenth Amendment.

The power of taxation is not to be confused with that of eminent domain; it is not necessary to show special benefits in order to lay a tax which is an enforced contribution for the payment of public expenses.

A State may, in its discretion, lay assessments for public work in proportion either to position, frontage, area, market value or estimated benefits; and, unless the exaction is a flagrant abuse of power, it does not amount to deprivation of property without due process of law.

An initial fixed tax per acre laid by a statute of Missouri on a tax-district properly organized under the state law for preliminary expenses of starting a public work, such as drainage of the district, does not deprive the owners of property therein of their property without due process of law, there being manifestly in this case nothing arbitrary in the prescribed rate and it not being necessary to base such a tax upon special benefits.

The statute of Missouri authorizing the imposition of the tax being in force prior to the formation of the taxing district, the tax cannot be considered as retrospective and violative of the due process clause of the Fourteenth Amendment on that ground.

The state court having held that a charter of a taxing district as a public corporation did not constitute a contract that the laws it was created to administer would not be changed, this court sees no reason to disturb the decision.

248 Missouri, 373, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the Drainage District Act of Missouri, and of a tax levied thereunder, are stated in the opinion.

Mr. Benson C. Hardesty and *Mr. Giboney Houck*, with whom *Mr. Thomas D. Hines* was on the brief, for plaintiff in error:

The state court erred in adjudging that § 5538, Rev. Stat. Missouri, 1909, does not contemplate taking private property for public use without the compensation required by "due process of law" provided for by the Fourteenth Amendment.

What may be done under this section construed in connection with all the Missouri drainage laws is the constitutional test to be applied, and plaintiffs in error are neither estopped nor barred from challenging this law. *Stuart* v. *Palmer*, 74 N. Y. 183, 191; *Agens* v. *Mayor*, 37 N. J. L. 416, 420; *Norwood* v. *Baker*, 172 U. S. 269; *No. Pac. Ry.* v. *Pierce*, 23 L. R. A. (N. S.) 286; *Little River District* v. *St. L., M. & S. E. R. R.*, 236 Missouri, 94; Rev. Stat. Missouri, 1909, §§ 5496–5499, 5511–5519, 5538; *Charles* v. *Marion*, 98 Fed. Rep. 166; *Moss* v. *Whitzel*, 108 Fed. Rep. 579, 582; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 226; *Davidson* v. *New Orleans*, 96 U. S. 97, 104; Cooley, Const. Lim. *356; 2 Story, Const., § 1956 (Cooley's ed.); *Squaw Creek District 1* v. *Turney*, 235 Missouri, 80; *Violett* v. *Alexandria*, 92 Virginia, 561; *Ohlmann* v. *Clarkson Mill Co.*, 222 Missouri, 62; *Gist* v. *Rackliffe-Gibson Co.*, 225 Missouri, 116; *Ross* v. *Supervisors*, 128 Iowa, 436.

The avowed purpose and only possible legal purpose of § 5538 is a public one and involves the taking of private property for public use. *Morrison* v. *Morey*, 146 Missouri, 561–563, 584; *Mound City Land Co.* v. *Miller*, 170 Missouri, 249; *Chicago, B. & Q. R. R.* v. *Illinois*, 200 U. S. 561; *Egyptian Levee Co.* v. *Hardin*, 27 Missouri, 496; *St. Louis* v. *Oeters*, 36 Missouri, 456; *Kansas City* v. *Ridenour*, 84 Missouri, 258; *St. Joseph* v. *Anthony*, 30 Missouri, 537; *St. Louis* v. *Rankin*, 96 Missouri, 497; *Independence* v. *Gates*, 110 Missouri, 374; *Kansas City* v. *Ward*, 134 Missouri, 172.

"Due process of law" requires compensation for private property taken for public use. *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 695; *Corrigan* v. *Gage*, 68 Missouri,

541; *Albright* v. *Fisher*, 164 Missouri, 68; *St. Louis* v. *Theatre Co.*, 202 Missouri, 699; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 226, 241; *Norwood* v. *Baker*, 172 U. S. 269; *Chicago, B. & Q. R. R.* v. *Illinois*, 200 U. S. 561.

If the drainage plan should fail, there can then be no compensation of the character contemplated by due process of law. Cases *supra* and *Killy* v. *Cranor*, 51 Missouri, 542; 14 Cyc. 1059; *Lipes* v. *Hand*, 104 Indiana, 503; *Kansas City* v. *O'Connor*, 82 Mo. App. 655; *Chicago* v. *Blair*, 149 Illinois, 310; *Insurance Co.* v. *Prest*, 71 Fed. Rep. 817; *Pettit* v. *Duke*, 10 Utah, 311; *Owensboro* v. *Sweeny* (Ky.), 111 S. W. Rep. 364; *Stevens* v. *Port Huron*, 149 Michigan, 536; *Kalamazoo* v. *Crawford* (Mich.), 117 N. W. Rep. 572; *Washington Ice Co.* v. *Chicago*, 147 Illinois, 327; *Kansas City* v. *St. Louis & S. F. R. R.*, 230 Missouri, 369; *Hutt* v. *Chicago*, 132 Illinois, 352; *Waukegan* v. *Burnett*, 234 Illinois, 460; *Chicago* v. *Kemp*, 240 Illinois, 56; *Lindblad* v. *Normal*, 224 Illinois, 362; *Holdom* v. *Chicago*, 169 Illinois, 109; *State* v. *Elizabeth*, 40 N. J. L. 274; *Guaranty Co.* v. *Chicago*, 162 Illinois, 505; *Re Park Ave. Sewers*, 169 Pa. St. 433; *Edwards* v. *Chicago*, 140 Illinois, 440; *Bridgeport* v. *N. Y. & N. H. R. R.*, 36 Connecticut, 255; *Wistar* v. *Philadelphia*, 80 Pa. St. 505; *Re Market St.*, 49 California, 546; *Hanscom* v. *Omaha*, 11 Nebraska, 37; *Chamberlain* v. *Cleveland*, 34 Oh. St. 551; *Hartford* v. *West*, 45 Connecticut, 462; Cooley on Taxation, 416, c. 20, par. 1; *Id.* 2d ed. 606, par. 1; *Hammett* v. *Philadelphia*, 65 Pa. St. 146; *Agens* v. *Mayor*, 37 N. J. L. 416; *Davidson* v. *New Orleans*, 96 U. S. 97; *Loan Ass'n* v. *Topeka*, 20 Wall. 655; *McCormack* v. *Patchin*, 53 Missouri, 36; 2 Dillon, Mun. Corp., 4th ed., p. 934, par. 761; *Mobile* v. *Kimball*, 102 U. S. 691, 703; *Bauman* v. *Ross*, 167 U. S. 548, 589; *Spencer* v. *Merchant*, 125 U. S. 345; *Barber Asphalt Co.* v. *French*, 158 Missouri, 534, 561; *S. C.*, 181 U. S. 324; *Parson* v. *Columbia*, 170 U. S. 54;

Heman v. *Schulte*, 166 Missouri, 409; *Corrigan* v. *Gage*, 68 Missouri, 541.

The state court erred in adjudging that the enforcement of § 5538 will not take plaintiffs' property for public use without compensation—that is to say, without "due process of law."

Even if the drainage plan should succeed, still no compensation can result so far as concerns the large area of plaintiffs' lands necessarily condemned for public use, and which same area is assessed with this tax. *Squaw Creek Drainage District* v. *Turney*, 235 Missouri, 80; *Hanscom* v. *Omaha*, 11 Nebraska, 37; *Chamberlain* v. *Cleveland*, 34 Oh. St. 551; *Hartford* v. *West M. D.*, 45 Connecticut, 462; *Re Park Ave. Sewers*, 169 Pa. St. 433; *Heman* v. *Schulte*, 166 Missouri, 409.

The Missouri Supreme Court erred in adjudging that said § 5538 is not retrospective so as to violate "due process of law." *State ex rel.* v. *Haben*, 22 Wisconsin, 660; *Terrett* v. *Taylor*, 9 Cranch, 50; *Pawlett* v. *Clark*, 9 Cranch, 332; *Charles River Bridge Case*, 11 Pet. 603; *Walla Walla* v. *Water Co.*, 172 U. S. 9; *Bailey* v. *Railroad Co.*, 4 Harr. (Del.) 389; 44 Am. Dec. 593; *Edwards* v. *Kearzy*, 96 U. S. 595; *Muhlker* v. *N. Y. & H. R. R.*, 197 U. S. 544; *St. Louis* v. *Clemens*, 52 Missouri, 144; *Hacussler* v. *Greer*, 78 Missouri, 188; *Fisher* v. *Patton*, 134 Missouri, 53; *In re Pell*, 171 N. Y. 48; *Pittman* v. *Adams*, 44 Missouri, 570; *Dartmouth College Case*, 4 Wheat. 518; *Leete* v. *State Bank*, 115 Missouri, 200; *Westervelt* v. *Gregg*, 12 N. Y. 202; *Norris* v. *Bayea*, 13 N. Y. 273; *Holmes* v. *Holmes*, 4 Barb. 395; *Ryder* v. *Hulse*, 24 N. Y. 372; *Sperry* v. *Haslam*, 57 Georgia, 412; *Dunn* v. *Sargent*, 101 Massachusetts, 336; *Fletcher* v. *Peck*, 6 Cranch, 87; *Davis* v. *Gray*, 16 Wall. 203; *Fisk* v. *Police &c.*, 116 U. S. 131; *State* v. *Police &c.*, 111 U. S. 716; *Hall* v. *Wisconsin*, 103 U. S. 5; *Gordon* v. *App. Tax Court*, 3 How. 343.

The state court erred in adjudging that § 5538 does not violate § 10, of Article 1 of the Federal Constitution pro-

hibiting a State from passing any law impairing the obligation of contracts. See cases *supra*, and *Mulholland* v. *Smith*, 141 Missouri, 1; *Kaukauma Co.* v. *Green Bay Co.*, 142 U. S. 254; *Wilson* v. *Black Bird Co.*, 2 Pet. 245; *Armstrong* v. *Athens County*, 16 Pet. 281; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake Co.* v. *Yuba County*, 116 U. S. 410; *McGrew* v. *Mo. Pac. Ry.*, 230 Missouri, 496; *Ex parte Siebold*, 100 U. S. 371.

Mr. Robert B. Oliver and *Mr. Robert B. Oliver, Jr.*, with whom *Mr. Allen Laws Oliver* was on the brief for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiffs in error, owners of several thousand acres embraced within the Little River Drainage District, of Missouri, brought this suit to restrain the collection of a tax of twenty-five cents per acre levied generally upon the lands within the district for the purpose of paying its preliminary expenses. The district was organized in 1907 under the provisions of article 3, chapter 122, Revised Statutes of Missouri, 1899, as amended by the act of April 8, 1905. Its board of supervisors appointed engineers who made surveys and recommended a plan of drainage. Upon the adoption of this plan, in November, 1909, commissioners were appointed for the purpose of viewing the tracts within the district and assessing benefits and damages. Pending the proceedings of these commissioners, the tax in question was levied under the act of June 1, 1909, now § 5538 of the Revised Statutes of Missouri, 1909, which provides as follows:

"Sec. 5538. Levy of twenty-five cents per acre may be made for preliminary work.—As soon as any drainage district shall have been organized under order of the circuit court, and a board of supervisors are elected and qualified, such board of supervisors shall have the power

and authority to levy upon each acre of land in the district, not to exceed twenty-five cents per acre, as a level rate, to be used for purpose of paying expenses of organization, for topographical and other surveys, for plans of drainage, for expenses of assessing benefits and damages and other incidental expenses which may be necessary, before entering upon the main work of drainage. Any district which may have proceeded without such levy may, if in the opinion of its board of supervisors it be desirable to do so, make such level assessments for such purpose, and if such items of expense have already been paid in whole or in part from other sources, the surplus shall be paid into the general fund of the district, and such levy may be made although the work proposed may have failed or have been found impractical."

The amended petition averred in substance that as to the plaintiffs all the proceedings had been *in invitum;* that the lands in the district varied in value; that no benefits had accrued or would accrue to the plaintiffs' lands either from the expenditure of the moneys sought to be raised by the tax or from the carrying out of the proposed plan; that a large portion of the lands in the district, and those of the plaintiffs in large part, were to be condemned for a right of way for ditches and catch basins; and that the tax had been levied against every acre within the district, as a level tax, without regard either to relative value or to benefits, or to the fact that portions of the lands would be damaged and other portions would be taken by condemnation, or that a large extent of territory, if added to the district as had been proposed, would receive the benefit of the tax without being charged with any part. The levy of the tax, and the act authorizing it, were assailed as being contrary to the constitution of the State of Missouri and also to the provision of the Fourteenth Amendment prohibiting deprivation of property without due process of law.

Upon demurrer to the petition, the parties stipulated that the sole question to be determined was whether § 5538 (*supra*) was constitutional. The trial court held it to be valid and dismissed the petition. After affirmance in the Supreme Court of Missouri, Division One, the cause was transferred (in view of the Federal question) to the court *in banc* where the judgment was finally affirmed, the opinion of Division One being adopted. 248 Missouri, 373.

In considering the contention thus presented under the Fourteenth Amendment, it must be taken to be established that the district had been organized validly for a public purpose. It had been incorporated pursuant to the judgment of the Circuit Court, as in the act provided, and this judgment had been affirmed upon appeal. *Little River Drainage District* v. *Railroad*, 236 Missouri, 94. In the opinion of the court in that proceeding, the tracts were described as forming "a contiguous body of land from one to eleven miles in width, extending in a southerly direction for a distance of about ninety miles from Cape Girardeau on the north, to the boundary line between Missouri and Arkansas. Streams and watercourses heading in the higher adjacent territory carry their waters to these low lands where, because of insufficient channels, the waters overflow and render much of the land uncultivable and uninhabitable." *Id.*, p. 103. The district is, indeed, a conspicuous illustration of the class of enterprises which have been authorized in order to secure the recognized public advantages which will accrue from reclaiming and opening to cultivation large areas of swamp or overflowed lands. *Egyptian Levee Co.* v. *Hardin*, 27 Missouri, 495; *Columbia Co.* v. *Meier*, 39 Missouri, 53; *Morrison* v. *Morey*, 146 Missouri, 543; *State* v. *Drainage District*, 192 Missouri, 517; *Mound City Land & Stock Co.* v. *Miller*, 170 Missouri, 240; *State* v. *Taylor*, 224 Missouri, 393; *Squaw Creek Drainage District* v. *Turney*, 235 Missouri, 80; *Little River Drainage District* v. *Railroad*, *supra*. It

was constituted a political sub-division of the State for the purpose of performing prescribed functions of government. *Mound City Land & Stock Co.* v. *Miller*, *supra*; *State* v. *Taylor*, *supra*. These drainage districts, as the Supreme Court of the State has said, exercise the granted powers within their territorial jurisdiction "as fully, and by the same authority, as the municipal corporations of the State exercise the powers vested by their charters." 248 Missouri, p. 383.

In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the State might have defrayed the entire expense out of state funds raised by general taxation or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *County of Mobile* v. *Kimball*, 102 U. S. 691, 703, 704. It was equally within the power of the State to create tax districts to meet the authorized outlays. The legislature, unless restricted by the state constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the State alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions. *Hagar* v. *Reclamation District*, 111 U. S. 701, 709; *Spencer* v. *Merchant*, 125 U. S. 345, 353, 356; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 167, 168; *Bauman* v. *Ross*, 167 U. S. 548, 590; *Parsons* v. *District of Columbia*, 170 U. S. 45, 52; *Williams*

v. *Eggleston*, 170 U. S. 304, 311; *Norwood* v. *Baker*, 172 U. S. 269, 278; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 343; *Wight* v. *Davidson*, 170 U. S. 371, 379; *Wagner* v. *Baltimore*, decided this day, *ante*, p. 207.

The legislature, in this instance, fixed the object and character of the tax, and prescribed the maximum rate. The authority to levy the tax for preliminary expenses was to follow upon the organization of the district. The plaintiffs in error urge that the determination at the time the district was organized was merely preliminary and tentative with respect to the lands to be included, and that assessments according to ascertained benefits for the purpose of meeting the cost of works and improvements are reserved for subsequent proceedings, upon notice, after surveys have been made and the plan of drainage has been definitely adopted. See Rev. Stat. (Mo.), §§ 5511 to 5519. It is true that the elaborate inquiry which is to follow the organization of the district may show the advisability of bringing in other lands (*Squaw Creek Drainage District* v. *Turney*, *supra*), and the statute undoubtedly does postpone the assessment of the cost of works and improvements until the plan of drainage has been decided upon and benefits have been determined accordingly. But none the less the organization of the district takes effect when it is duly constituted by the judgment of the court. The owners whose lands are embraced in the district as proposed, and who have not signed the articles, are summoned and their objections to the organization and to the inclusion of their lands are heard. As a public corporation, with defined membership, the district when established is empowered to go forward with the expert investigations and surveys which of necessity must precede the adoption of a complete scheme. The outcome of these studies cannot be absolutely predicted; they may even result in the abandonment of the project. But probable feasibility has been shown, and the district, in con-

sequence, organized. The preliminary work must then be done and its cost must be met. It is work undertaken by the district. The owners of the included lands (with one vote for each acre) elect the district officers (supervisors) who are to proceed with the surveys, etc., in the manner detailed. In the present case, the district was created upon an adequate showing of basis (236 Missouri, p. 138) and it is not disputed that the plaintiffs in error received the notice to which they were entitled (Rev. Stat. (Mo.), 1909, § 5497; Laws of Missouri, 1905, § 8252). They were thus apprised of whatever legal consequences attached to the formation of the district with their lands in it. The present question therefore cannot properly be regarded as one of notice. The imposed burden, if it be in its nature a lawful one, is an incident to the organization which they had abundant opportunity to contest. It is apparent that when the district was duly organized it had the same footing as if it had been created by the legislature directly; and if the legislature could have established this district by direct act and then constitutionally imposed upon the lands within the district the ratable tax in question to pay the expenses of organization and for preliminary work, it cannot be doubted that the legislature had power to impose the same tax upon the district as organized under the judgment of the court.

The ultimate contention, then, is that the plaintiffs in error cannot be subjected to this preliminary tax of twenty-five cents an acre because their lands, as they insist, will not be benefited by the plan of drainage. In authorizing the tax, it is said, the legislature has departed from the principle of benefits, and the tax is asserted to be *pro tanto* an uncompensated taking of their property for public use. But the power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles. *County of Mobile* v. *Kimball, supra; Bauman* v. *Ross, supra; Wight* v. *Davidson,*

supra; People v. *Brooklyn*, 4 N. Y. 419, 424; Cooley on Taxation, p. 430; Lewis on Eminent Domain, 3d ed., §§ 4, 5. A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the State, or upon those of a given class or locality, its essential nature is the same. The power of segregation for taxing purposes has every-day illustration in the experiences of local communities, the members of which, by reason of their membership, or the owners of property within the bounds of the political subdivision, are compelled to bear the burdens both of the successes and of the failures of local administration. When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Walston* v. *Nevin*, 128 U. S. 578, 582; *Spencer* v. *Merchant, supra; Bauman* v. *Ross, supra; French* v. *Barber Asphalt Paving Co., supra; Wight* v. *Davidson, supra.* And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the State has exceeded its taxing power. *Wagner* v. *Baltimore, ante*, p. 207. We find no such arbitrary action here. It was not necessary to base the preliminary tax upon special benefits accruing from a completed plan. It cannot be denied that the preliminary work had peculiar relation to the district. The initial inquiry, whatever its result, was for the purpose of securing the reclamation of the lands of which the district was

comprised. In this inquiry, all the owners were interested. Whether the expense of ascertaining the best method of reclamation should subsequently be reimbursed when final assessments were laid according to benefits ascertained to result from the execution of the final plan presents a question of policy and not of power. These outlays for organization and preliminary surveys could as well be considered specially to concern the district, as constituted, as highways or public buildings or plans for the same (whether consummated or abandoned) could be said to concern counties or towns. Further, it would seem to be clear that the State could appropriately provide for meeting the preliminary expense when it was incurred and could determine the manner of apportionment according to the interests deemed to be affected as they existed at the time. And in this view, it is not material to consider whether the area of the district might subsequently be extended, or what particular lands within it would be appropriated for ditches, reservoirs, etc., if a plan of drainage were adopted and carried out. To say that the tax could not be laid except as a result of such an inquiry would be to assert in effect that as a preliminary tax it could not be laid at all. We know of no such limitation upon the state power. And assuming that the lands within the district, as organized, could be taxed for the purpose stated, there was manifestly nothing arbitrary in the fixing of the prescribed rate per acre.

It is further objected that the levy of the tax amounts to a deprivation of property without due process of law because of the retrospective character of the legislation,—the section in question having been passed after the district was organized. As to this, it is sufficient to say that the statute which was in force at the time of the formation of the district contemplated liability to taxation to defray the preliminary expenses as well as the ultimate cost of the improvements if made (Laws of Missouri, 1905,

§ 8252); and these preliminary outlays must be regarded as incident to the organization for which the legislature was competent to provide in the exercise of its taxing power. *Seattle* v. *Kelleher*, 195 U. S. 351, 359; *Wagner* v. *Baltimore*, *ante*, p. 207.

The plaintiffs in error have also urged that § 5538 is invalid under § 10, Art. I, of the Federal Constitution upon the ground that it impairs the obligation of contract. This contention was not presented by the amended petition and was not deemed by the Supreme Court of the State, Division One, to be within the stipulation upon which the case was tried. 248 Missouri, 382, 394. Upon the motion to transfer the case to the court *in banc*, the question under the contract clause was raised, but the court *in banc* simply adopted the opinion of Division One. *Id.* In that opinion, however, after referring to the stipulation, the court proceeded to observe that the charter of the district, as a public corporation, did not constitute a contract with its members that the laws it was created to administer would not be changed. If this can be considered to be a decision of the question, we see no reason to disturb it. *Laramie County* v. *Albany County*, 92 U. S. 307, 310; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 89; *Worcester* v. *Street Railway Co.*, 196 U. S. 539, 551; *Seattle* v. *Kelleher*, *supra*.

Judgment affirmed.

BAILEY, TRUSTEE IN BANKRUPTCY OF GRANT, *v.* BAKER ICE MACHINE COMPANY.

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

No. 42. Argued November 2, 1915.—Decided November 29, 1915.

After reviewing cases on conditional sale of personal property, and sale absolute with chattel mortgage back, *held* that the transaction involved in this case was one of conditional sale.

Requiring a vendee to give notes for deferred instalments of purchase price is not inconsistent with retention of title in the vendor pending payment of the notes. *Wm. W. Bierce, Ltd.* v. *Hutchins*, 205 U. S. 340.

While the exercise of a privilege to the vendor to file a mechanic's lien for property delivered on conditional sale might be inconsistent with retention of title in the vendor, the mere reservation of such a privilege will not nullify express words to the effect that title remains in the vendor until full payment be made.

Under the recording law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens any valid lien upon the property before the contract is filed for record.

To be within the terms of the provisions of § 60 of the Bankruptcy Act making preferential transfers voidable, the transfer must be one made by the bankrupt of his own property and which operates to prefer one creditor over another.

A contract of conditional sale, to the vendor on failure to pay the stipulated price, *held*, in this case, not be to a preferential transfer by the conditional vendee under § 60 of the Bankruptcy Act.

When not otherwise provided, the rights, remedies and powers of the trustee in bankruptcy are determined with reference to the conditions existing when the petition is filed.

A trustee in bankruptcy cannot, under § 47a, cl. 2 of the Bankruptcy Act, assail a contract of conditional sale filed prior to, but within four months, of the petition on the ground that he has the status of a creditor fastening a lien under the provisions of state law on the property prior to the recording of the contract; and this because the trustee acquires that status only from the filing of the petition.

The determination of a proceeding in bankruptcy between the trustee and the vendor of property sold under conditional sale, *held* to be without prejudice to the rights of a third party to whom the vendee had mortgaged the property and who had not been joined in the proceeding.

209 Fed. Rep. 603, affirmed.

By a contract in writing, made at Omaha, Nebraska, October 14, 1911, between the Baker Ice Machine Company and Grant Brothers the former agreed to deliver and install upon the premises of the latter at Horton, Kansas, an ice making and refrigerating machine for the sum of $5,940, to be paid partly in cash and partly in deferred instalments evidenced by interest-bearing notes. It was specially stipulated that the title to the machine should be and remain in the Baker Company until full payment of the purchase price; that the machine should not be deemed a fixture to the realty prior to full payment; that in the meantime Grant Brothers should keep the machine in good order and keep it insured for the benefit of the Baker Company; that if default was made in the payment of the purchase price the Baker Company should have the right to resume possession and take the machine away, and that, in the event this right was exercised, the company should be reimbursed for all expenses incurred under the contract, should be compensated for any damage done to the machine in the meantime and should be allowed a rental for its use equal to six per cent. per annum upon the purchase price from the date of the installation to that of the resumption of possession. And it was further stipulated that the Baker Company should have the right to file a mechanic's lien for the materials and labor furnished under the contract and that no notice of a purpose to file such a lien, other than that afforded by this stipulation, would be required.

The machine was installed in February, 1912, the cash payment was made and notes were given for the balance of the purchase price, all as contemplated by the contract. A partial payment upon two of the notes brought the total payments up to $3,200.14, and nothing more was paid. May 15, 1912, but not before, the contract was filed for record in the county register's office. At that time Grant Brothers were insolvent and if the contract

operated as a transfer of the machine from them to the Baker Company, all the elements of a preferential transfer, in the sense of the Bankruptcy Act, were present.

July 11, 1912, within four months after such filing, Grant Brothers presented to the District Court for the District of Kansas their voluntary petition in bankruptcy and on the next day were adjudged bankrupts. Possession of the machine, which had remained with them up to that time, was then passed to the trustee in bankruptcy. Shortly thereafter, the balance of the purchase price being due and unpaid, the Baker Company intervened in the bankruptcy proceeding, asserted that it owned the machine and was entitled to the possession in virtue of the contract, and applied for an order directing that the possession be surrendered to it. Upon a hearing before the referee the application was denied and upon a petition for review his action was sustained by the District Court. An appeal to the Circuit Court of Appeals resulted in a reversal of the decree with a direction that the machine be delivered to the Baker Company unless, within a time to be named, the trustee pay the balance of the purchase price. 209 Fed. Rep. 603, 844.

During the pendency of the controversy, as now appears, the machine was sold for $2,800 pursuant to an order of the referee, requested by the parties, whereby the proceeds were to take the place of the machine and be disposed of according to the final decision.

Mr. Edwin A. Krauthoff, with whom *Mr. Charles Curtis*, *Mr. W. S. McClintock* and *Mr. A. L. Quant* were on the brief, for appellant.

Mr. H. C. Brome, with whom *Mr. Clinton Brome* was on the brief, for appellee.

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

The referee and the courts below held the contract to be one of conditional sale, that is, one making full payment of the purchase price a condition precedent to the passing of title, and this is criticised by the trustee, who insists that the contract was one of absolute sale with a chattel mortgage back securing the deferred instalments.

In harmony with the prevailing view, the statutes of Kansas and the decisions of the Supreme Court of the State recognize that there is a real distinction between a conditional sale and an absolute sale with a mortgage back, in that under the former the vendor remains the owner, subject to the vendee's right to acquire the title by complying with the stipulated condition, while under the latter the vendee immediately becomes the owner, subject to the lien created by the mortgage. Gen. Stat. 1909, §§ 5224–5226, 5232–5234, 5237; *Sumner* v. *McFarlan*, 15 Kansas, 600; *Hallowell* v. *Milne*, 16 Kansas, 65; *Hall* v. *Draper*, 20 Kansas, 137; *Standard Implement Co.* v. *Parlin & Orendorff Co.*, 51 Kansas, 544; *Moline Plow Co.* v. *Witham*, 52 Kansas, 185; *Big Four Implement Co.* v. *Wright*, 207 Fed. Rep. 535. In *Hall* v. *Draper* the true effect of a contract of conditional sale was drawn in question, and the court said, speaking through Justice Brewer, afterwards a member of this court: "The title, and all the rights of control and possession flowing from title, were theirs [the vendors'] except as in terms restricted by the contract. The only limitations upon their full control of the organ were those created by this instrument; and the only rights Leveridge [the vendee] had were those obtained by it. In this respect such a conditional sale differs from an absolute sale with a mortgage back. In such case the vendee has everything except as limited by the terms of the mortgage. Here he has nothing except as expressed

in his contract." True, in *Christie* v. *Scott*, 77 Kansas, 257, there is general language which, if taken broadly, makes against this distinction. But according to a familiar rule (*Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Pacific Express Co.* v. *Foley*, 46 Kansas, 457, 464) this language should be regarded as restrained by the circumstances in which it was used. The case did not present a controversy over property conditionally sold, but only the question whether the contract there shown entitled the vendor, after reclaiming the property and crediting the proceeds upon the purchase price, to enforce payment of the balance by the vendee. Without criticising or referring to cases like *Hall* v. *Draper*, the court concluded its discussion of the question by saying: "Under the contract attached to these notes, we hold that the plaintiff was authorized to take the property and sell it and apply the proceeds toward the payment of the notes, and that by so doing the law does not imply a revocation of the contract of sale, nor does the law imply that there remains no consideration for the payment of the balance due on the notes." It therefore is plain that we ought not to treat the decision as overruling or qualifying those before mentioned.

In jurisdictions where regard is had for the distinction here indicated between a conditional sale and an absolute sale with a mortgage back, the question whether a particular contract shows one or the other turns upon the ruling intention of the parties as disclosed by the entire contract, and not upon any single provision separately considered. Invoking this test, the trustee contends that this contract was one of absolute sale with a mortgage back, notwithstanding the stipulation that the title should be and remain in the vendor until full payment. The contention does not appear to have support in any decision of the Supreme Court of Kansas, and in our opinion is not tenable. Requiring the vendee to give notes for the deferred instalments of the purchase price was not incon-

sistent with the retention of title in the vendor pending payment of the notes. *Bierce* v. *Hutchins*, 205 U. S. 340, 348. Nor did any inconsistency result from the provisions relating to rent, damage and insurance. Instead of making against the retention of ownership by the vendor, they were in harmony with it, and doubtless were adopted upon the theory that the vendee, who was to have the possession and use of the property, should bear the burden of preserving and insuring it, and, if the purchase price was not paid, should not only return the property but compensate the vendor for its use and any damage to it. In *Harkness* v. *Russell*, 118 U. S. 663, a contract was held to be one of conditional sale, although entitling the vendor to rental and damages if the price was not paid; and in *Bryant* v. *Swofford Bros. Dry Goods Co.*, 214 U. S. 279, there was a like holding, notwithstanding the vendee was required to keep the property insured for the benefit of the vendor, and, if it was destroyed by fire, was to remain liable for the purchase price. In neither case was the retention of ownership by the vendor deemed inconsistent with the other features of the contract. Coming to the provision relating to a mechanic's lien, we think it did no more than reserve to the vendor a privilege or option to file and enforce such a lien. It well may be that the exercise of this privilege would have been inconsistent with a continued assertion of title by the vendor. *Bierce* v. *Hutchins*, *supra*, p. 346. But the privilege was not exercised, and it hardly can be said that its mere reservation nullified the express words of the stipulation concerning the title. That it was not intended to do so seems manifest when the entire contract is considered.

We therefore are of opinion that the contract was rightly held to be one of conditional sale.

The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of § 60b of the Bankruptcy Act, as

amended June 25, 1910, c. 412, 36 Stat. 838, 842, which declares that "a transfer" by a bankrupt "of any of his property" shall be voidable by the trustee, if it be made or recorded (when recording is required) within four months before the petition in bankruptcy is filed, and "the bankrupt be insolvent and the . . . transfer then operate as a preference," etc. The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the Bankruptcy Act, July 1, 1898, 30 Stat. 544, 545, § 1, clause 25 that the word "transfer" shall be taken to include every mode "of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." It therefore is plain that § 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all the creditors. *New York County National Bank* v. *Massey*, 192 U. S. 138, 147. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no diminution of the bankrupts' estate.

Under the recording law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment or like legal process before the contract is filed for record. Gen. Stat. 1909, § 5237; *McVay* v. *English*, 30 Kansas, 368, 371; *Lead Pencil Co.* v. *Champion*, 57 Kansas, 352, 257; *Youngberg* v. *Walsh*, 72 Kansas, 220, 227; *Geiser Mfg. Co.* v. *Murray*, 84 Kansas, 450; *Paul* v. *Lingenfelter*, 89 Kansas, 871; *Geppelt* v. *Middle West Stone Co.*, 90 Kansas, 539, 544; *Dixon* v. *Tyree*, 92 Kansas, 137, 139; *Big Four Implement Co.* v. *Wright*, *supra*. Here the contract was made October 14, 1911, and filed for record May 15, 1912. In the meantime no creditor fastened a lien upon the property by execution, attachment or other legal process. But it is contended that § 47a, clause 2, of the Bankruptcy Act, as amended in 1910, c. 412, 36 Stat. 838, 840, gave the trustee the status of a creditor having such a lien. That section provides that a trustee in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings." Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? When not otherwise specially provided, the rights, remedies and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed and that his estate passes actually or potentially into the control of the bankruptcy court. We have said: "The filing of the petition is an

assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and disposition of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition." *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307. And again: "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition." *Everett* v. *Judson*, 228 U. S. 474, 479. And see *Zavelo* v. *Reeves*, 227 U. S. 625, 631. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in § 47a as amended. As this was not done, we think the better view, and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed. Here the petition was filed almost two months after the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the State.

The record shows that between the date of the contract and the time it was filed for record the bankrupts mortgaged the machine to the First National Bank of Horton and that the bank, although apparently asserting some right under the mortgage, was not brought into the present proceeding. In this situation, our decision and that of the Circuit Court of Appeals must be understood to be without prejudice to further proceedings respecting the rights, if any, existing under that mortgage.

Decree affirmed.

PHOENIX RAILWAY COMPANY *v.* GEARY ET AL., CORPORATION COMMISSION OF ARIZONA.

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

No. 48. Submitted October 29, 1915.—Decided November 29, 1915.

The Federal court has jurisdiction of a suit by a railway company against members of a state railroad commission to enjoin the enforcement of an order made by them which deprives the railway company of its property without due process of law.

A temporary injunction should not be granted under § 266, Jud. Code, in a suit to enjoin the enforcement of an order of a state railroad commission unless the bill of complaint and supporting affidavits, taken in view of the rebutting affidavits filed by defendant, make a clear case of unreasonable, arbitrary or confiscatory action on the part of the commission.

The presumption of reasonableness, existing in favor of action of a governmental agency, not having been overcome by the showing made upon the application therefor, the court below rightly denied the interlocutory injunction in this case.

Where, as is the case with the articles of the constitution and laws of Arizona relating to public utility corporations, the penalty provisions are clearly separable from the order of the commission and the constitutional and statutory authority therefor, this court will not, in advance of an attempt to enforce the penalties, determine whether such penalties are so excessive and severe as to amount to denial of due process of law in violation of the Fourteenth Amendment.

In this case an order denying an interlocutory injunction to restrain an order of the corporation commission of Arizona requiring a railroad company to double track a portion of its line is affirmed without prejudice to the court below dealing with the question of penalties.

THE facts, which involve the constitutionality under the Fourteenth Amendment of certain provisions of the

statute of Arizona creating the Corporation Commission of that State and of an order made by such Commission, are stated in the opinion.

Mr. Louis H. Chalmers, Mr. Edward Kent, Mr. Floyd M. Stahl, Mr. Alexander Britton, Mr. Evans Browne and *Mr. F. W. Clements* for appellant:

The lower court had jurisdiction.

The case presented to the lower court made necessary the issuance of an interlocutory injunction.

Irreparable damage to the appellant was certain to result because of a denial of its application for an interlocutory injunction.

The order of the Arizona Corporation Commission sought to be enjoined was beyond the power of the Commission.

The order of the Arizona Corporation Commission was shown to be unreasonable and unnecessary and therefore violative of the Fourteenth Amendment to the Constitution of the United States.

In view of the relative degree of injury to the respective parties by the granting or refusal of the interlocutory injunction prayed for, the showing of the appellant presented to the lower court required the issuance of the injunction *pendente lite*.

In support of these contentions, see *Atch., Top. & S. F. Ry.* v. *Love*, 174 Fed. Rep. 59; *Atlantic Coast Line* v. *Nor. Car. Corporation*, 206 U. S. 1; *Carpenter* v. *Knowllwood Cemetery*, 188 Fed. Rep. 856, 857; *Chicago & N. W. Ry.* v. *Railway Commission*, 35 Fed. Rep. 866; *Newton* v. *Lewis*, 79 Fed. Rep. 715; *Denver & R. G. Ry.* v. *United States*, 124 Fed. Rep. 156; *Harriman* v. *Northern Security Co.*, 132 Fed. Rep. 464; *Irving* v. *Joint District Council*, 108 Fed. Rep. 896; *Love* v. *Atch., Top. & S. F. Ry.*, 185 Fed. Rep. 321; *Mo. Pac. Ry.* v. *Nebraska*, 217 U. S. 196; *New Memphis Gas Co.* v. *Memphis*, 72 Fed. Rep. 952;

Pacific Tel. Co. v. *Los Angeles*, 192 Fed. Rep. 109; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Russell* v. *Farley*, 135 U. S. 433; *San Fran. Gas Co.* v. *San Francisco*, 164 Fed. Rep. 884; *Sanitary Reduction Works* v. *California Reduction Co.*, 94 Fed. Rep. 693; *San Joaquin Co.* v. *Stanislaus Co.*, 163 Fed. Rep. 567; *Seaboard Air Line* v. *Railroad Commissions*, 155 Fed. Rep. 792; *Smyth* v. *Ames*, 169 U. S. 466; *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510; *Washington P. & C. Co.* v. *Magruder*, 198 Fed. Rep. 218; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Wilmington City Ry.* v. *Taylor*, 198 Fed. Rep. 159; *Ex parte Young*, 209 U. S. 123.

Mr. Wiley E. Jones, Attorney General of the State of Arizona, *Mr. Leslie C. Hardy*, *Mr. George W. Harben* and *Mr. Edward M. Cleary* for appellees.

Mr. Justice Pitney delivered the opinion of the court.

In June, 1913, the Corporation Commission of the State of Arizona made an order directing appellant to double-track its line of street railway on West Washington Street in the City of Phoenix, in that State, between Seventh and Seventeenth Avenues, a distance of ten blocks; the work to be commenced within 30 days from the date of the order and completed on or before September 1. By a subsequent order the time for completion was extended until December 1, 1913. Having unsuccessfully applied to the Commission for a rehearing, appellant filed its present bill of complaint in the United States District Court, praying that the Commission's order be declared null and void as in contravention of the Constitution of the United States, and that the defendants (who include the members of the Corporation Commission, the Attorney General of the State, and the County Attorney), be enjoined from enforcing or attempting to enforce it by

suit, prosecution, or other proceeding, and from instituting any proceeding for the recovery of fines or penalties for any violation of or refusal to obey it; the ground of complaint being that the order was unjust and unreasonable because the service already rendered upon Washington Street by appellant was adequate and efficient; that the construction of a double track was not required by the needs of the public; that appellant's operating expenses exceeded its revenues, and that it was unable to make the additional expenditure of about $14,000 required for the double-tracking; and that compliance with the order would prevent appellant from making an adequate return, or any return at all, upon the value of its property. The bill further set up that under the constitution and statutes of Arizona complainant was required, under severe penalties, to put the order into effect, and to keep it in effect until modified or abrogated, and that while a right to review the reasonableness and lawfulness of the order in a state court was given by statute, the court was prohibited from issuing any injunction or restraining order until after the final determination of the matter, and in the meantime the order would be in full force and effect and must be obeyed, under heavy penalties for each day's continuance of the violation; and it was alleged that these statutory and constitutional provisions were adopted for the purpose of compelling acquiescence in any order made by the Corporation Commission and preventing a resort to the courts to test the reasonableness, justness, and validity thereof, and thus had the effect of depriving complainant of its property without due process of law and denying to it the equal protection of the laws, in violation of the Fourteenth Amendment.

Upon the filing of the bill, with accompanying affidavits, a temporary restraining order was granted, and a hearing of the application for interlocutory injunction was thereafter had before three judges under the provisions of

§ 266, Jud. Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162. The court held (209 Fed. Rep. 694) that complainant's showing as to the alleged unreasonableness of the Commission's order was not sufficiently strong to warrant an injunction to restrain its enforcement *pendente lite*, but the temporary restraining order was continued in force pending the present appeal, taken direct to this court under the cited section of the code.

The jurisdiction of a Federal court of equity over the subject-matter is of course well settled. *Ex parte Young*, 209 U. S. 123, 144; *The Minnesota Rate Cases*, 230 U. S. 352, 380; *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 190; *Louis. & Nash. R. R. Co.* v. *Garrett*, 231 U. S. 298, 303.

The sole question raised is whether the bill of complaint and supporting affidavits, in view of the rebutting affidavits filed by the appellees, made so clear a case of unreasonable, arbitrary, or confiscatory action on the part of the Corporation Commission as to call for an interlocutory injunction. The attempt was to show that there was no reasonable necessity for the Commission's order, in view of the character of the community to be served, the amount of traffic over the line, the financial condition of complainant, the nature and extent of the service already rendered and capable of being rendered with the existing facilities, and the advantage to accrue to the public as compared with the expenditures to be sustained by complainant in complying with the order. But the facts and the inferences were much in dispute. Complainant is not required to open up new territory, but only to give better service upon a street already occupied by it under a public franchise. Its line of railway on Washington Street is already double-tracked for a distance of 14 blocks in the business section of the city. The 10 blocks now required to be double-tracked lie between the business section and the state Capitol, where are

located the offices of the governor, the assembly chambers of the state legislature, the court room of the supreme court of the State and the chambers of the judges, the law library of the State, and the offices of the secretary of state, the attorney general, the corporation commission, and other state officials. On the line is located a public library and a park, both much frequented, while in the vicinity of the state Capitol there is an estimated population of from 1,200 to 1,500, the city as a whole having an estimated population of 25,000. There is abundant evidence of substantial inconvenience to the public owing to the fact that there is but a single track with one turnout between Seventh and Seventeenth Avenues, and some evidence tending to create an inference that the revenues of the company would be materially increased by the double-tracking. The Commission's order appears to have been made after full hearing and investigation respecting these matters. And, upon the whole, we agree with the court below that the presumption of reasonableness existing in favor of the action of the Commission was not overcome in the showing that was made upon the application for an injunction.

The penalty provisions, except as a ground for invoking the jurisdiction of a Federal court in equity, are not relied upon by appellant. They are contained in certain sections of the constitution and statutes of Arizona applicable to public service corporations. Constitution, Art. XV, §§ 16 and 17; Public Service Corporation Act, Laws 1912, ch. 90, §§ 65, 68, 74 a & b, 76, 77, 79, 81; Rev. Stat. 1913, §§ 2341, 2344, 2350 a & b, 2352, 2353, 2355, 2357. They are clearly separable from the order of the Commission and the constitutional and statutory provisions under which it was made. Constitution, Art. XV, § 5; Public Service Corporation Act, Laws 1912, ch. 90, § 36; Rev. Stat. 1913, § 2312.

Therefore, in advance of an attempt to enforce the pen-

alty provisions, we need not pass judgment upon them. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443; *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160, 172; *The Minnesota Rate Cases*, 230 U. S. 352, 380; *Louis. & Nash. R. R.* v. *Garrett*, 231 U. S. 298, 319; *Grand Trunk Ry.* v. *Michigan Ry. Comm.*, 231 U. S. 457, 473; *Ohio Tax Cases*, 232 U. S. 576, 594.

The court below expressed the view that the cause should be retained in order to restrain prosecutions for penalties during such time as would be reasonably required to enable the corporation to comply with the order of the Commission. The court's order, as entered upon complainant's application, contains no provision upon the subject. Our affirmance of that order will be without prejudice to the authority of the District Court to deal with the question of penalties.

Affirmed.

ELZABURU *v.* CHAVES.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 52. Submitted November 1, 1915.—Decided November 29, 1915.

The former practice in regard to appeals from the Supreme Court of Porto Rico provided by § 35 of the Foraker Act of 1900, was superseded by § 244, Jud. Code, subjecting appeals from that court to the same regulations as appeals from the District Courts of the United States thus extending the review of this court to include questions of fact, and § 244 has been repealed by section three of the act of January 28, 1915, with a reservation of cases then pending in this court.

In this case the record discloses no sufficient ground for reversing the court below on questions of fact.

The courts of Porto Rico having held, prior to the decision in this case,

that a judgment in a proceeding under § 395 of the Mortgage Law to establish title was not *res judicata* as between the party instituting the proceeding and a party opposing it, and having also held that § 395 had not been repealed either directly or by implication, *held* that such prior decisions had stood so long unchallenged as to have become a rule of property and should not now be overruled.

A party defeated in a statutory possessory proceeding in an inferior court, which a higher court has already held not to be a proceeding in which the judgment is *res judicata*, may rely upon such decision and refrain from appealing from such adverse judgment and bring suit in the courts to set it aside.

19 Porto Rico, 162, affirmed.

THE facts, which involve the title to land in, and the construction of the Mortgage Law of, Porto Rico, are stated in the opinion.

Mr. J. Texidor for appellant.

There was no appearance, nor was any brief filed, for the appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This suit was commenced by the present appellant in the District Court of San Juan to set aside as null and void certain possessory proceedings instituted by Paula Chaves in the year 1895 with respect to an estate containing 50 cuerdas of land, situate at a place known as Honduras, in the ward of Sabana Llana, in the Municipality of Rio Piedras, Porto Rico, and the resulting entry of possession in the Registry of Property of San Juan, and to require the defendants (the present appellees), who are children and heirs of Paula Chaves, to vacate the property and deliver up possession to the plaintiff as the lawful owner. The District Court rendered judgment in his favor; but the Supreme Court of Porto Rico reversed this judgment and

dismissed the complaint. 19 P. R. Sup. Ct. 162. The present appeal was taken under § 244, Jud. Code (Act of March 3, 1911, 36 Stat. 1087, 1157, c. 231), it appearing that the estate in question exceeds five thousand dollars in value.

The transcript contains, in addition to the evidence, a "statement of facts in the nature of a special verdict," made up for the purposes of the present appeal in the manner contemplated by § 35 of the Foraker Act (of April 12, 1900, ch. 191, 31 Stat. 77, 85). See *Rosaly* v. *Graham*, 227 U. S. 584, 589; *Ochoa* v. *Hernandez*, 230 U. S. 139, 143. But that practice was superseded by § 244, Jud. Code, which subjected appeals taken from the Supreme Court of Porto Rico to the same regulations as appeals from the District Courts of the United States, thus extending our review so as to include questions of fact.[1]

Plaintiff asserted that the 50 cuerdas were part of a tract of 112 cuerdas, and this in turn part of a tract containing between 140 and 150 cuerdas formerly owned by Alonso Hernandez, who acquired it in the year 1854; that Hernandez hypothecated this property to the Spanish Government as security for the faithful performance of his duties as collector of internal revenue; that because of an embezzlement of public funds by him the property was seized by the Government in the year 1875; that about 20 years later, on June 5, 1895, it took possession of the land, and on September 14, in that year, possession was recorded in the Registry in favor of the Government, without prejudice to third parties who might have a better title; and that on October 15, 1897, the tract of 112 cuerdas was sold at auction to one Cuadrado, who transferred his right to plaintiff, and thereafter, by deed of

[1] Section 244, Judicial Code, was repealed by section three of the Act of January 28, 1915, 38 Stat. 803, 804, ch. 22, but with a reservation of cases then pending in this court, as the present case was.

October 17, 1898, the proper public official conveyed the land to plaintiff. As to the source of the title of Hernandez, plaintiff claims to have shown by evidence that prior to the year 1819 the whole tract was inherited by Eugenia de la Cruz and her brother, José, from their grandparents, and the brother conveyed his share to the sister; that in that year Eugenia sold the land without deed to Juana Maria de Otero; and that after the death of Eugenia, and in the year 1836, her son and testamentary executor instituted proceedings to prove the inheritance of the estate by his mother and the sale of it to Mrs. Otero. In these proceedings, which were in evidence, several witnesses testified that Eugenia de la Cruz was the owner of the property then in question for many years prior to the sale of it to Mrs. Otero in 1819, but agreed in saying that at the time of testifying and for some years before one Juan Caneti was in possession of it under some title unknown to them. The testimony having been forwarded to the court of San Juan, it was ordered that the owners of the adjacent properties and the Sindico Procurador be heard. The property owners waived hearing. It does not appear that Caneti was either summoned or heard. The Sindico made no objection to approving the investigation, "for although the witnesses say that said property is possessed by Juan Caneti, this does not annul the ownership had by Eugenia, and Juana may have leased or sold it to Caneti." The investigation was thereupon approved by the court. Hernandez' title was derived in the year 1854 under a public deed made by a brother and four sisters named Otero, in their own name and for two other brothers named, for "an estate in the barrio of Honduras, Rio Piedras, which is bounded by lands belonging to the Marchioness de Leon and to José de la Cruz, and is composed of 140 or 150 cuerdas, the exact number of which will be stated in the deed to be executed for the purpose,

as well as the demarcation thereof, when the same is surveyed."

Defendants (the present appellees) alleged that Juan Caneti was the true owner at least of the tract of 50 cuerdas now in dispute; that from him it passed to his son, Santos Caneti, who in the year 1867 sold it on instalments to Ramon Clemente, the husband of Paula Chaves, from whom it descended to Paula and the defendants, who are her lawful children by Clemente. There was substantial evidence tending to support these allegations. It was also shown quite clearly that Paula Chaves was in continuous possession from the year 1875 until her death in 1899, after which event defendants held continuous possession down to the time of the suit. In the year 1895 Paula instituted proceedings for the recording of her possession, in which the adjoining owners were summoned, testimony was taken, and the proceedings were approved November 7, 1895, and recorded in the Registry of Property in the month of March following.

The Supreme Court of Porto Rico treated the present suit as partaking of the character of an action of ejectment to such extent that it devolved upon plaintiff at the outset to prove that he was the lawful owner of the lands claimed by and in the possession of defendants. The court reviewed the evidence, found that plaintiff's chain of title did not clearly identify the location or boundaries of the land claimed by him, that the evidence of Hernandez' title was dubious, and, while the tract of 50 cuerdas was clearly comprised within the boundaries which the Spanish Government fixed for the properties sold by it to plaintiff, there was so much doubt respecting the question of ownership as to render it impossible to reach the conclusion that plaintiff had proved his title. It was pointed out that in the proceedings instituted in 1836 no description of the property was given, that the witnesses then examined failed to establish the possession of Mrs. Otero, but did

refer to the fact of possession by Juan Caneti, who was neither summoned nor heard; that it was not established in what manner the Oteros who made the deed of sale in 1854 to Hernandez were connected with Mrs. Otero named in the proceedings of 1836; that it was not shown how the seizure of the property by the Spanish Government in 1875 was carried into effect, or the quantity or location of the property seized; that there was no record of the details connected with the act of taking possession of the 112 cuerdas by the Mayor of Rio Piedras in behalf of the Government on June 5, 1895, as alleged by plaintiff, but that even if those 112 cuerdas included the 50 cuerdas in controversy it appeared that Paula Chaves, who at that time was in possession of the 50 cuerdas, not only remained in possession, but for the purposes of the possessory title proceedings, brought by her later in the same year, obtained a certificate from the Mayor, the Secretary, and the Sindico of the Municipality of Rio Piedras stating that according to the records in the municipal archives she was in possession under title of ownership; and that from the whole of the evidence it appeared that the Canetis had held continuous possession in early times, and the Chaves family at least from 1875.

Our examination of the record discloses no sufficient ground for reversing the Supreme Court of Porto Rico upon the questions of fact.

The chief reliance of appellant is upon certain questions of law, the first insistence being that the court erred in denying the force and effect of *res judicata* to a decision rendered by the District Court of San Juan May 31, 1907, in a former action between the present parties. It appears that defendants, as heirs of Paula Chaves, instituted a proceeding in the municipal court of San Juan for the purpose of converting the entry of possession of the 50 cuerdas previously made in her favor into a dominion title; that plaintiff opposed the conversion, upon the trial

decision was rendered in his favor, and on appeal the District Court of San Juan declared that the 50 cuerdas were not in possession of defendants but were part of the estate of 112 cuerdas belonging to plaintiff, that he was in lawful possession, and that the heirs of Chaves had no right to convert their recorded possession into a dominion title.

The Supreme Court held that this decision was not *res judicata*. Appellant cites, to the contrary, § 188 of the local Code of Civil Procedure (Comp. Stat. P. R., § 5172), which declares that "A judgment is a final determination of the rights of the parties in an action or proceeding," and §§ 59 and 101 of the Law of Evidence (Comp. Stat. P. R., §§ 1427, 1469), which are to the effect that, as to parties notified, "a judgment or final order in an action or special proceeding" is conclusive.[1]

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[1] (1427) SEC. 59. The effect of a judgment or final order in an action or special proceeding before a court or judge of Porto Rico . . . having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person;

2. In other cases the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

(1428) SEC. 60. Other judicial orders of a court or judge of Porto Rico . . . create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity. . . .

* * * * * * * *

The question is, whether the decision of May 31, 1907, was "a judgment or final order in an action or special proceeding" within the meaning of the sections cited. The proceeding was instituted under Article 395 of the Mortgage Law (Comp. Stat. P. R., p. 1108), which enables an owner of property having no written title to record his ownership upon proving it before the judge of the court of first instance, or municipal court, under prescribed formalities. Notice is given to the person from whom the property may have been acquired, or his predecessor in interest, and to the representative of the department of public prosecution. The judge is to "receive written pleadings upon the claims and evidence which may have been presented by the representative of the department of public prosecution or by the other persons who may have attended the proceedings," and in view of their allegations he is to decide upon the evidence and declare whether the ownership of the property involved has been established; any person interested may appeal from this decision; and "if said decision is accepted or affirmed, it shall constitute a sufficient title for the record of the ownership."

There seems to be no question that such a decision, as the law stood at the time of the annexation of the Island to the United States, was not conclusive upon the question of ownership, even as between the parties participating in the proceeding, but was subject to be set aside in an ordinary action.

By Article 413 of the Mortgage Law it was declared "None of the articles of which this law consists can be repealed except by virtue of another special law." And by § 8 of the Foraker Act of April 12, 1900, c. 191, 31 Stat.

(1469) SEC. 101. The following presumptions, and no others, are deemed conclusive:

* * * * * * * *

6. The judgment or order of a court, when declared by this code to be conclusive; . . .

77, 79, the law was continued in force until amended or repealed by the legislative assembly or by Act of Congress. The Code of Civil Procedure was enacted by the legislative assembly March 10, 1904. The Law of Evidence was enacted March 9, 1905. As already shown, it refers to "actions and special proceedings." Upon the same day another act was approved, entitled "An Act relating to special legal proceedings." (Comp. Stat. P. R., p. 300.) It contains provisions for the recording of public instruments and wills, for declaration of heirship, administration of decedents' estates, appointment of guardians, the care of the persons and properties of minors, and other matters; and in its final section there is this declaration: "All previous laws in conflict herewith are hereby repealed; but the special proceedings established in the Civil Code, in the mortgage law and its regulations, and in any other law, in so far as not provided for by this act, remain in force."

The effect of these subsequent enactments upon the special proceedings established in the Mortgage Law and Regulations was considered by the Supreme Court of Porto Rico in *Giménez* v. *Brenes* (1906), 10 P. R. Sup. Ct. 124, 131, 133, etc., and again in *Gonzales* v. *The People* (1906), 10 P. R. Sup. Ct. 458, 462. In the former case it was held, with respect to summary proceedings for the collection of a mortgage debt under Article 128, in the latter with respect to a special proceeding under Article 395, that the provisions of the Mortgage Law remained in force notwithstanding the Code of Civil Procedure, and in the latter case it was distinctly held that the proceedings to establish ownership did not produce the effect of *res judicata*. This was reaffirmed by the same court in *Calderon* v. *Garcia* (1908), 14 P. R. Sup. Ct. 407, 416. And see *Ochoa* v. *Hernandez*, 230 U. S. 139, 151. These decisions of the Supreme Court of Porto Rico are based upon reasoning that, while conceding the full authority

of the legislative assembly to repeal or modify the Mortgage Law, in effect invokes Article 413 of that law (continued in force as a part of it by the Foraker Act) as prescribing a rule of interpretation to be applied in testing the intention of the law-making body as expressed in subsequent enactments. No express repeal of Article 395 of the Mortgage Law being found, and the question being one of implied repeal, the court deemed it manifest that the legislative assembly, in adopting the Code of Civil Procedure and the Law of Evidence, did so with full knowledge of Article 413 of the Mortgage Law, and therefore intended no implied repeal. And the Law of Evidence having been enacted contemporaneously with the Act Relating to Special Proceedings, the latter act was looked to in construing § 59 of the former, and the express reservation of the special proceedings established in the Mortgage Law and its Regulations was treated as showing that they were to be left in existence with their former force and effect, and no greater. This view, to say the least, is a reasonable one; and since it is plain that the decisions, having stood so long unchallenged, have established a rule of property, it seems to us that they ought not now to be overruled. It is worthy of remark that *Gonzales* v. *The People*, *supra*, was decided more than a full year before the decision of the District Court of San Juan which appellant insists ought to be treated as conclusive. Defendants may well have refrained from taking an appeal from the decision of the District Court in reliance upon the previous decision of the higher tribunal that it had no conclusive effect.

The remaining questions of law raised by appellant resolve themselves, upon analysis, into a mere criticism of the process of reasoning by which the court reached its conclusions upon the facts. We find them without substantial merit, so far as their effect upon the result is concerned.

Judgment affirmed.

DE VILLANUEVA *v.* VILLANUEVA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 65. Argued November 9, 1915.—Decided December 6, 1915.

The court has jurisdiction to review the judgment of the Supreme Court of the Philippine Islands in an action for divorce, where the affidavits supporting the appeal show, without contradiction, that the value of the community property involved is of the jurisdictional amount. *De la Rama* v. *De la Rama*, 201 U. S. 303.

Even where this court may review findings of fact, as in appeals from the Supreme Court of the Philippine Islands in cases involving the statutory amount in controversy, it will not reverse findings when made by both courts below in the absence of conviction of clear error.

In appeals from the territorial courts this court follows and sustains the application of the local law to the facts as made by the courts below, unless constrained to the contrary by a sense of clear error committed.

A judgment of the Supreme Court of the Philippine Islands, affirming the court of first instance in rejecting complainant's demand for divorce, affirmed by this court in the absence of conviction of clear error of the courts below either in the findings of fact or the application of the local law to the facts as found.

THE facts which involve the jurisdiction of this court of appeals from the Supreme Court of the Philippine Islands and the validity of a judgment of that court rejecting the demand of a wife for divorce from her husband, are stated in the opinion.

Mr. C. W. O'Brien for appellant.

Mr. Howard Thayer Kingsbury, with whom *Mr. Frederic R. Coudert* was on the brief, for appellee.

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

The decree which the appellant seeks to reverse affirmed one rendered by the court of first instance rejecting her demand for a divorce from her husband and for a liquidation and partition of the property belonging to the legal community which existed between them. At the outset we say that we think there is no foundation for the suggestion that we are without jurisdiction because of the inadequacy of the amount involved, since the complaint by which the suit was begun alleged the existence of such an amount of community property as to give jurisdiction, and because the affidavit filed for the purpose of the appeal also so establishes, there being no countervailing affidavit and nothing in the record to demonstrate to the contrary. *De la Rama* v. *De la Rama*, 201 U. S. 303.

The complaint for divorce and liquidation of the community as it was finally amended, which was filed in 1910, alleged the marriage of the parties in 1867 and the birth of ten children, nine of whom were alive and of age and one of whom was dead leaving surviving issue. As a basis for the divorce prayed various acts of adultery by the defendant were charged extending over a period of forty-two years, that is, from 1868, shortly after the marriage, until the bringing of the suit in 1910. The acts thus charged embraced six periods: the first, from 1868 until the filing of the suit with a named person, from which relation it was alleged there had been begotten five children, four of whom were alive and bore their father's surname; the second, with another named person during 1889 and 1890, from which relation there was begotten a daughter who likewise bore her father's surname; the third, with a named person during the year 1891; the fourth, with a named person from 1892 until the time the

suit was commenced, from which relation it was alleged children also were begotten; the fifth, with a named person during the years 1901 and 1902; and the sixth, with a named person during the years 1903 and 1904. The answer set up a general denial, a special defense that if the acts of adultery alleged were found to have been committed, they were done with the knowledge of the complainant who had condoned them, and moreover that the action was prescribed.

After full hearing the court of first instance found that the defendant had been guilty of adultery with the person named in the complaint in the first period during the years from 1868 until 1900, but that there was no proof of any such adultery having been committed by him with the person named for the ten years preceding the suit, that is, from 1900 to 1910. The court also found that it was established that the defendant had adulterous relations with the person named during the second period, that is, from 1889 to 1890, and that from such relations, as alleged, a daughter named Maria was begotten, but that the relations had ceased years before the bringing of the suit since the woman named had died long before at a period fixed approximately as the time of the beginning of the American occupation of the islands. The court also found that it had been proved that acts of adultery had been committed with the person named during the fourth period, that is, in 1892 and some time thereafter, but it also affirmatively found that all relations between the defendant and the person named in this period had ceased prior to 1900. It was moreover expressly found that there was no proof whatever offered concerning any of the other acts of adultery charged in the complaint.

Concerning the first period the court found that the proof left no doubt that the complainant at an early date became aware of the adulterous relations to which that

period related and although she did so, continued her marital relations with her husband and had condoned his infidelity. Indeed, it was found that forgiveness by the wife was clearly established from the fact that during the ten years which had elapsed before the bringing of the suit and after the illicit relations had ceased, the children begotten of such relation were brought into the household with the consent of the wife and lived as part of the common family. Applying the law to this condition it was held that the condonement or forgiveness was a complete bar to the suit based upon the acts which had been thus forgiven. So far as concerned the acts of infidelity committed during the second and fourth periods as stated, although it was found that there was no direct proof that the complainant knew of such wrongs when committed, nevertheless it was held that there was no ground for awarding relief because of such acts irrespective of the question of forgiveness or condonement resulting from the long continuance of the marital relations after such acts had been committed, for the reason that the complainant had expressly declared in testifying that she solely asked relief because of the acts embraced in the first period and none other—a situation which, it was held, brought the case directly within the control of Laws 1 and 2, title 9, Partida 4, expressly confining the right to complain of adultery by one of the parties to a marriage to the injured party. And this conclusion was sustained by pointing out that although the complaint for divorce had been sworn to by the complainant, she had in her testimony admitted that she knew nothing of the particular acts embraced in the periods in question and intended only to sue for those described in the first period, thus as to such other acts giving rise to the implication that their averment was the result of the instigation of some person not authorized to act, probably impelled by some interest direct or indirect in the liquidation of

the community property which would follow if the prayer of the complainant had been granted.

In a careful opinion the court below, reviewing the action of the court of first instance, adopted and reaffirmed in every substantial particular the facts found by that court and also agreed with the legal conclusions which the court had applied to the facts by it found. In applying the law to the facts it was pointed out that the controlling law was to be found not in the civil code, but in the Partidas, and it was held that as by provisions of the Partidas which were cited it was expressly provided that condonement or forgiveness of acts of adultery excluded the subsequent right to relief based upon the fact that they had been committed, it followed from the conclusive proof of forgiveness resulting from the facts found that no error had been committed in rejecting the demand for a divorce. In stating the reasons which led it to this conclusion the mind of the court was principally directed to the acts of infidelity found to have been committed during the first period and the acts by which forgiveness as to them had been indubitably established. But the court, considering the facts found as to the other two periods, without deciding that such acts of infidelity had not been condoned, expressly held that the necessary result of the provisions of the Partidas which had been applied by the lower court exclusively confining the right to relief for acts of infidelity to the injured spouse, plainly justified the court of first instance in its ruling that the disclaimer of all right to relief as to any acts but those which the complaint alleged were committed during the first period excluded all right to recover for any but those acts to which the controversy thus became confined.

The first two of the nine assignments of error question the finding and ruling of the court concerning the acts committed during the first period and their condonement or forgiveness. The third and fourth assail the correct-

ness of the conclusion concerning the second and fourth periods and the ruling of the court relating to them based on the disclaimer made by the complainant in her testimony of any right to relief on account of them; and as cognate to this subject, the fifth complains of the action of the court in analyzing the motives which prompted the inclusion in the suit of causes upon which the complainant asserted she did not rely for relief for the purpose of bringing the case within the rule laid down in Laws 1 and 2, title 9, Partida 4, which both courts applied. The remainder in general terms but assert error committed in the findings and in the law which was applied to them in deciding the cause.

Although the arguments pressed at bar to sustain these assignments apparently enlarge them, in substance they add nothing to them but simply reiterate in changed and more minute forms of statement the grounds of error asserted in the assignments. Under these conditions it is apparent that all the errors relied upon, whether embraced in the assignments or pressed in the argument, considered in their essence only dispute the correctness of the facts found by both the courts below and but challenge the accuracy of the principles of the local law which were applied to the facts for the purpose of deciding the cause. Under these circumstances, without noticing more in detail either the assignments or the arguments supporting them, we content ourselves with saying that we are of the opinion after examining and weighing them all, that they are without merit for the following reasons: (a) Because in so far as they dispute the concurrent findings of fact of both the courts below they entirely fail to give rise to that conviction of clear error which must be entertained in order to authorize a reversal of the findings, *Texas & Pacific Ry.* v. *Louisiana R. R. Commission*, 232 U. S. 338; *Gilson* v. *United States*, 234 U. S. 380, 383–384; and (b) Because in so far as they challenge the correctness of the

application which the courts made of the local law to the facts in deciding the cause, they are totally deficient in that persuasive strength which it is essential they should possess in order to produce the conviction that clear error was committed by the court below, and thus lead us to depart from the principle by which we follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed. *Ker* v. *Couden*, 223 U. S. 268, 279; *Santa Fe Ry.* v. *Friday*, 232 U. S. 694, 700; *Nadal* v. *May*, 233 U. S. 447.

Affirmed.

MACKENZIE *v.* HARE ET AL., BOARD OF ELECTION OF SAN FRANCISCO.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 79. Argued November 11, 12, 1915.—Decided December 6, 1915.

In construing a statute, whatever was said or given prominence in debate gives way to its actual language as passed; all reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words as finally enacted.

Under the Constitution every person born in the United States is a citizen thereof.

The provisions in § 3 of the Citizenship Act of March 2, 1907, that any American woman who marries a foreigner takes the nationality of her husband, is not limited as to place or effect prior to the termination of the marital relation.

Where an act of Congress is explicit and circumstantial, as is § 3 of the Citizenship Act of 1907, it would transcend judicial power to insert limitations or conditions upon disputable considerations.

Whatever may have been the law of England and the original law of this country as to perpetual allegiance of persons to the land of their birth, Congress by the act of 1868, now Rev. Stat. 1999, explicitly declared the right of expatriation to have been the law.

The identity of husband and wife is an ancient principle of our jurisdiction, and is still retained notwithstanding much relaxation thereof;

and while it has purpose, if not necessity, in domestic policy, it has greater purpose, and possibly greater necessity, in international policy.

As a Government, the United States is invested with all the attributes of sovereignty and has the character and powers of nationality, especially those concerning relations and intercourse with foreign powers.

Citizenship is of tangible worth, but the possessor thereof may voluntarily renounce it even though Congress may not be able to arbitrarily impose such renunciation.

Marriage of an American woman with a foreigner may involve national complications of like kind as physical expatriation may involve and is therefore within the control of Congress.

Marriage of an American woman with a foreigner is tantamount to voluntary expatriation; and Congress may, without exceeding its powers, make it so, as it has in fact done, by the act of March 2, 1907.

165 California, 776, affirmed.

THE facts, which involve the construction and constitutionality of the Citizenship Act of March 2, 1907, and the status as to citizenship of a woman born under the jurisdiction of the United States and married to a native of a foreign State but residing in the United States, are stated in the opinion.

Mr. Wilbur T. U'Ren for plaintiff in error:

It was not the intention of Congress to deprive women remaining within jurisdiction of United States of citizenship. *David Levy*, 1 Bart. El. Cas. 41; *In re Wildberger*, 204 Fed. Rep. 508; Report No. 4784, 59th Cong., 1st Sess., contained in House Doc. 326, 59th Cong., 2d Sess., at p. 1.

If the act of March 2, 1907, applies to citizens remaining within jurisdiction of United States, it is null and void. Plaintiff is a citizen of United States by birth. *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99; *United States* v. *Wong Kim Ark*, 169 U. S. 649; 7 Cyc. 137.

Sex is not involved in the question of citizenship. Abbott, Law Dict.; *In re Lockwood*, 154 U. S. 116; *Minor* v. *Happersett*, 21 Wall. 162; *Ritchie* v. *People*, 155 Illinois,

98; *Shanks* v. *Dupont*, 3 Pet. 242; *State* v. *Howard County*, 90 Missouri, 593.

As to loss of citizenship see act of March 3, 1865, 13 Stats. 490; Const. of United States, Art. 8, § 1; *Gotchens* v. *Matthewson*, 61 N. Y. 420; *Huber* v. *Reily*, 53 Pa. St. 112; *In re Look Tin Sing*, 21 Fed. Rep. 905; *Kurtz* v. *Moffitt*, 115 U. S. 501; *Severance* v. *Healy*, 50 N. H. 448; *State* v. *Symonds*, 57 Maine, 148.

For definitions of expatriation, see Black's Law Dict.; Bouvier's Law Dict.; Standard Dict.; Webster's Universal Dict.; Morse on Citizenship, p. 114, § 82.

As to the right of expatriation, see Brannon's Fourteenth Amendment, p. 21; *In re Look Tin Sing*, 21 Fed. Rep. 907; 9 Fed. Stats. Ann., pp. 390, 391; 9 Op. Attys. Gen. 62.

As to the nature of expatriation, see *Brown* v. *Dexter*, 66 California, 39; Rev. Stats., § 1999; 7 Cyc. 144.

Actual removal is a necessary element of expatriation. *Juando* v. *Taylor*, Fed. Cas. No. 7558; *S. C.*, 2 Paine, 652; *Hardy* v. *De Leon*, 5 Texas, 211; House Doc. 326, 59th Cong., 2d Sess., p. 27; 6 Am. & Eng. Ency. of Law, p. 31; 7 Cyc., pp. 145, 146, and cases cited; 9 Op. Attys. Gen. 62; 14 Op., *Id.* 295.

As to nature of allegiance, see *Ainslie* v. *Martin*, 9 Massachusetts, 454; *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99; *Burkett* v. *McCarty*, 73 Kentucky (10 Bush), 758; Standard Dict.

As to power of Congress over citizenship, see *Ainslie* v. *Martin*, 9 Massachusetts, 454; *Brown* v. *Dexter*, 66 California, 39; *Burkett* v. *McCarty*, 73 Kentucky (10 Bush), 758; *Dorr* v. *United States*, 195 U. S. 140; *In re Look Tin Sing*, 21 Fed. Rep. 905; *Jennes* v. *Landes*, 84 Fed. Rep. 73; *Martin* v. *Hunt*, 1 Wheat. 326; *McCulloch* v. *Maryland*, 4 Wheat. 405; *Osborn* v. *Bank of United States*, 9 Wheat. 738; Rev. Stats., § 1999; *Scott* v. *Sanford*, 19 How. 393; Const. United States, Par. 4, § 8, art. 1; *United States* v.

Crook, 5 Dill. 453; *United States* v. *Wong Kim Ark*, 169 U. S. 703.

The plaintiff's consent cannot be implied. Act of Congress, March 6, 1820; *Scott* v. *Sanford*, 19 How. 390.

Marriage in itself is not an act of expatriation. *Comitis* v. *Parkerson*, 56 Fed. Rep. 556; *Beck* v. *Magillis*, 9 Barb. 35; Brannan's Fourteenth Amendment, p. 28; *Pequinot* v. *Detroit*, 16 Fed. Rep. 211; Report of Committee on Citizenship, p. 50; *Ruckgaber* v. *Moore*, 104 Fed. Rep. 947; *Shanks* v. *Dupont*, 3 Pet. 242; *Wollenberg* v. *Mo. Pac. R. R.*, 159 Fed. Rep. 217; 10 Op. Attys. Gen., 321; 15 *Id.* 599.

As to the doctrine of merging of identity, see act of March 2, 1907; *Comitis* v. *Parkerson*, 56 Fed. Rep. 558; *In re Rionda*, 164 Fed. Rep. 368; Note, 22 L. R. A. 150, 152; *Shanks* v. *Dupont*, 3 Pet. 242; *United States* v. *Cohn*, 179 Fed. Rep. 835; *Williamson* v. *Ostenson*, 232 U. S. 619.

Plaintiff's citizenship is not dependent upon international law. Act of March 2, 1907; *Scott* v. *Sanford*, 19 How. 393; *In re Look Tin Sing*, 21 Fed. Rep. 905; *Shanks* v. *Dupont*, 3 Pet. 242; *United States* v. *Wong Kim Ark*, 169 U. S. 660.

The following cases relied on by defendants can be distinguished: *Comitis* v. *Parkerson*, 56 Fed. Rep. 556; *Scott* v. *Sanford*, 19 How. 417; *In re Rionda*, 164 Fed. Rep. 368; *Kelly* v. *Owen*, 7 Wall. 496; *United States* v. *Cohn*, 179 Fed. Rep. 634; *Gendering* v. *Williams*, 184 Fed. Rep. 322; *United States* v. *Wong Kim Ark*, 169 U. S. 703.

The California court failed to pass upon important points.

Mr. Thomas V. Cator, with whom *Mr. Percy V. Long* and *Mr. William McDevitt* were on the brief, for defendant in error:

Congress does not legislate with a view to affect suffrage. Acts of March 2, 1907; February 10, 1855; July 27, 1868; British Statutes of 1844 and 1870; Cockburn on

Nationality, 24; *Comitis* v. *Parkerson*, 56 Fed. Rep. 556; Constitution of California, art. II; *Dorsey* v. *Bingham*, 77 Illinois, 256.

For Department of State instructions, see *Gaum* v. *Hubbard*, 97 Missouri, 321; *Headman* v. *Rose*, 63 Georgia, 458; *Hopkins* v. *Fachant*, 130 Fed. Rep. 829; *Halsey* v. *Beer*, 52 Hun, 366; *In re Rionda*, 164 Fed. Rep. 368; *Kane* v. *McCarthy*, 63 N. Car. 299; *Kelly* v. *Owen*, 7 Wall. 496; *Kirchner* v. *Murray*, 54 Fed. Rep. 621; *Leonard* v. *Grant*, 5 Fed. Rep. 13; 3 Moore, Dig. Int. Law, 453, 454, 456; 14 Op. Atty. 402; *People* v. *Newell*, 38 Hun, 79; *Pequinot* v. *Detroit*, 16 Fed. Rep. 211; Rev. Stats., § 1994; *Ruchgover* v. *Moore*, 104 Fed. Rep. 948; *Shanks* v. *Dupont*, 3 Pet. 242; *Talbor* v. *Jansen*, 3 Dall. 154; *United States* v. *Williams*, 184 Fed. Rep. 322; *United States* v. *Kellar*, 13 Fed. Rep. 82; *United States* v. *Williams*, 173 Fed. Rep. 626; *United States* v. *Cohen*, 179 Fed. Rep. 834; *Wollenberg* v. *Mo. Pac. R. R.*, 159 Fed. Rep. 217; Webster, "Law Citizenship," 298; *Ware* v. *Wisner*, 50 Fed. Rep. 310; *Wong Kim Ark*, 169 U. S. 649; Van Dyne on Naturalization, 229.

For history of the act of March 2, 1907, see act of July 27, 1869; House Doc. No. 326, 59th Cong.; Van Dyne on Naturalization, 256, 336.

As to the Fourteenth Amendment as it bears on this case see Brannan, Fourteenth Amendment, 20; *Comitis* v. *Parkerson*, 56 Fed. Rep. 558, 4 Ency. U. S. Sup. Ct. 135, 311–313; *Ex parte Virginia*, 100 U. S. 313; *In re Look Tin Sing*, 21 Fed. Rep. 910; *Legal Tender Cases*, 12 Wall. 457; *Wong Kim Ark*, 169 U. S. 674.

For expressions of writers and the courts with reference to the power of expatriation see Act of Congress, March 2, 1907; *Comitis* v. *Parkerson*, 56 Fed. Rep. 563; 3 Moore, Dig. Int. Law, 713; *Murray* v. *McCarthy*, 2 Mumford (Va.), 397; President Grant's Message of 1876; *Pequinot* v. *Detroit*, 16 Fed. Rep. 211; *Shanks* v. *Dupont*,

3 Pet. 242; *The Charming Betsey*, 2 Cranch, 120; *Talbot* v. *Jansen*, 3 Dall. 154; Van Dyne, "Citizenship," 272; 2 Wharton, Int. Law Dig. 176.

All writers on the law of citizenship treat marriage as a mode of expatriation. Bouve, "Exclusion of Aliens," 389–90; Brannan's "Fourteenth Amendment," 28; *Burkitt* v. *McCarthy*, 1 Ky. Opinions, 104; Cockburn on Nationality, 24; *Comitis* v. *Parkerson*, 56 Fed. Rep. 558; *Leonard* v. *Grant*, 5 Fed. Rep. 13; 3 Moore, Dig. Int. Law, 448; Van Dyne on Naturalization, 333; Van Dyne, "Citizenship of U. S."; Webster, "Law of Citizenship," 297; 2 Wharton, Int. Law Dig., p. 420.

As to voluntary renunciation, *Kelly* v. *Owen*, 7 Wall. 496; *Leonard* v. *Grant*, 5 Fed. Rep. 11; Rev. Stats. 2172; *United States* v. *Kellar*, 13 Fed. Rep. 84; Van Dyne on Naturalization, 227, 333.

Transfer of allegiance by marriage rests upon international principles, apart from the idea of emigration. Code Napoleon, §§ 12, 19; Law of Holland; House Doc. No. 326, 59th Congress; Ottoman Empire, Law of; *Pequinot* v. *Detroit*, 16 Fed. Rep. 211–217; Russian Civil Code, Art. 1026.

The Act of 1907, as to § 3, was adopted by Congress, for the express purpose of announcing its express confirmation of the doctrine that marriage of a native woman to a foreigner, should operate in the manner, decided in the case of *Pequinot* v. *Detroit*, 16 Fed. Rep. 211, regardless of the residence of the wife; *Comitis* v. *Parkerson*, 56 Fed. Rep. 556; House Doc. No. 326, 59th Congress 33; *In re Rionda*, 164 Fed. Rep. 368; *United States* v. *Cohen*, 179 Fed. Rep. 835.

The transfer of allegiance of a woman marrying a foreigner rests upon international law or comity, and the case of *Shanks* v. *Dupont*, 3 Pet. 242, does not hold that the removal of the wife is necessary; *Pequinot* v. *Detroit*, 16 Fed. Rep. 211.

The claim that at the time of the Statute of 1907, it was the settled law of the United States that an American woman marrying an alien did not lose her citizenship, by reason of said marriage, if she continued to reside within the jurisdiction of the United States, is a misapprehension; *Beck* v. *McGillis*, 9 Barbour, 35; Brannan's "Fourteenth Amendment" 28; *Comitis* v. *Parkerson*, 16 Fed. Rep. 556; *Moore* v. *Tisdale*, 5 B. Mon. (Ky.) 357; 10 Op. Atty. Gen'l, 321; 15 *Id.* 599; *Ruchgover* v. *Moore*, 104 Fed. Rep. 947; *Shanks* v. *Dupont*, 3 Pet. 242.

A woman by marriage to a foreigner, takes the same nationality as the husband in all the countries of the world, and the effect is the same in the country of her nativity as elsewhere, if her former sovereign consents. *Headman* v. *Rose*, 63 Georgia, 458; *Halsey* v. *Beer*, 52 Hun, 366; *Kane* v. *McCarthy*, 63 N. Car. 299; Mrs. Gordon's Case (Instructions to Russia); Mr. Wilson to Mr. Kent, Instructions 1912; 3 Moore, Dig. Int. Law, 457, 461; *People* v. *Newell*, 21 Hun, 79; *Pequinot* v. *Detroit*, 16 Fed. Rep. 211; *United States* v. *Williams*, 173 Fed. Rep. 626; *Ware* v. *Wisner*, 50 Fed. Rep. 310.

The Act of 1907, is in clear and specific terms, and mandatory in its expression, and intended the transfer of allegiance to be immediate upon marriage, and did not contemplate leaving open any question as to the nature of residence abroad. The act has been so interpreted by the State Department at Washington, and also by the Federal courts. House Doc. No. 326, 59th Congress; *In re Rionda*, 164 Fed. Rep. 368; *Kelly* v. *Owen*, 7 Wall. 496; Mr. Wilson to Mr. Kent (1912); *Pequinot* v. *Detroit*, 16 Fed. Rep. 211; *United States* v. *Cohen*, 179 Fed. Rep. 835.

Mr. Justice McKenna delivered the opinion of the court.

Mandamus prosecuted by plaintiff in error as petitioner against defendants in error, respondents, as and composing

the Board of Election Commissioners of the city and county of San Francisco, to compel her registration as a qualified voter of the city and county, in the appropriate precinct therein.

An alternative writ was issued but a permanent writ was denied upon demurrer to the petition.

The facts are not in dispute and are stated by Mr. Justice Shaw, who delivered the opinion of the court, as follows:

"The plaintiff was born and ever since has resided in the State of California. On August 14, 1909, being then a resident and citizen of this State and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the kingdom of Great Britain. He had resided in California prior to that time, still resides here and it is his intention to make this State his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days. Registration was refused to her on the ground that by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States."

Plaintiff in error claims a right as a voter of the State under its constitution and the Constitution of the United States.

The constitution of the State gives the privilege of suffrage to "every native citizen of the United States," and it is contended that under the Constitution of the United States every person born in the United States is a citizen thereof. The latter must be conceded, and if

plaintiff has not lost her citizenship by her marriage she has the qualification of a voter prescribed by the constitution of the State of California. The question then is, Did she cease to be a citizen by her marriage?

On March 2, 1907, c. 2534, 34 Stat. 1228, that is, prior to the marriage of plaintiff in error, Congress enacted a statute the third section of which provides "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registration as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

Plaintiff contends that "such legislation, if intended to apply to her, is beyond the authority of Congress."

Questions of construction and power are, therefore, presented. Upon the construction of the act it is urged that it was not the intention to deprive an American-born woman, remaining within the jurisdiction of the United States, of her citizenship by reason of her marriage to a resident foreigner. The contention is attempted to be based upon the history of the act and upon the report of the committee upon which, it is said, the legislation was enacted. Both history and report show, it is asserted, "that the intention of Congress was solely to legislate concerning the status of citizens *abroad* and the questions arising by reason thereof."

Does the act invite or permit such assistance? Its declaration is general, "that any American woman who marries a foreigner shall take the nationality of her husband." There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume

her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.

Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.

The application of the law thus being determined, we pass to a consideration of its validity.

An earnest argument is presented to demonstrate its invalidity. Its basis is that the citizenship of plaintiff was an incident to her birth in the United States, and, under the Constitution and laws of the United States, it became a right, privilege and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation.

The argument to support the contention and the argument to oppose it take a wide range through the principles of the common law and international law and their development and change. Both plaintiff and defendants agree that under the common law originally allegiance was immutable. They do not agree as to when the rigidity of the principle was relaxed. Plaintiff in error contests the proposition which she attributes to defendants in error

"that the doctrine of perpetual allegiance maintained by England was accepted by the United States," but contends "that the prevalent doctrine of this country always has been that a citizen had a right to expatriate himself," and cites cases to show that expatriation is a natural and inherent right.

Whether this was originally the law of this country or became such by inevitable evolution it is not important to inquire. The first view has certainly high authority for its support. In *Shanks* v. *Dupont*, 3 Pet. 242, 246, Mr. Justice Story, delivering the judgment of the court, said: "The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens." And Kent, in his commentaries, after a historical review of the principle and discussion in the Federal courts, declares that "the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered." 2 Kent, 14th ed. 49. The deduction would seem to have been repelled by the naturalization laws, and it was certainly opposed to executive opinion; and, we may say, popular sentiment, so determined that it sought its vindication by war. Further discussion would lead us far afield, and, besides, would only have historical interest.[1] The condition which Kent suggested has occurred; there is a legislative declaration. In 1868, c. 249, 15 Stat. 223, Congress explicitly declared the right of expatriation to have been and to be the law. And the declaration was in effect said to be the dictate of necessity.

[1] The course of opinion and decision is set forth in Van Dyne's "Citizenship of the United States" and in his "Naturalization in the United States"; Moore's Digest of International Law. See also Cockburn on Nationality.

The act recites that emigrants have been received and invested with citizenship in recognition of the principle of the right of expatriation and that there should be a prompt and final disavowal of the claim "that such American citizens, with their descendants, are subjects of foreign states." Rev. Stat., § 1999.

But plaintiff says, "Expatriation is evidenced only by emigration, coupled with other acts indicating an intention to transfer one's allegiance." And all the acts must be voluntary, "the result of a fixed determination to change the domicile and permanently reside elsewhere, as well as to throw off the former allegiance, and become a citizen or subject of a foreign power."

The right and the condition of its exercise being thus defined, it is said that the authority of Congress is limited to giving its consent. This is variously declared and emphasized. "'No act of the legislature,'" plaintiff says, "'can denationalize a citizen without his concurrence,'" citing *Burkett* v. *McCarty*, 73 Kentucky (10 Bush), 758. "'And the sovereign cannot discharge a subject from his allegiance against his consent except by disfranchisement as a punishment for crime,'" citing *Ainslie* v. *Martin*, 9 Massachusetts, 454. "'The Constitution does not authorize Congress to enlarge or abridge the rights of citizens,'" citing *Osborn* v. *Bank of United States*, 9 Wheat. 737. "'The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away. . . . The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a complete right of citizenship,'" citing *United States* v. *Wong Kim Ark*, 169 U. S. at p. 703.

It will thus be seen that plaintiff's contention is in exact antagonism to the statute. Only voluntary expatriation,

as she defines it, can divest a woman of her citizenship, she declares; the statute provides that by marriage with a foreigner she takes his nationality.

It would make this opinion very voluminous to consider in detail the argument and the cases urged in support of or in attack upon the opposing conditions. Their foundation principles, we may assume, are known. The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?

Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. But monition is not necessary in the present case. There need be no dissent from the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with

a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that this court is without jurisdiction, and that, therefore, this writ of error should be dismissed.

TOWN OF ESSEX *v.* NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

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

No. 56. Argued November 5, 1915.—Decided December 6, 1916.

The contention that an act of Congress as construed and applied by the District Court transcends the power of Congress, if of sufficient substance gives this court jurisdiction of a direct appeal under § 238, Judicial Code.

The Post Road Act of 1866 substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1.

A State has no authority to say that a telegraph company may operate lines constructed over postal routes within its borders. *West Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

A city may not arbitrarily exclude wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations. *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160.

Where a town has given written permission to a telegraph company specifying how posts could be placed and wires run, and the company has complied with such permission, such lines are protected by the Post Road Act of 1866 against subsequent exclusion or other arbitrary action by the town.

A municipality may, under exceptional circumstances, be held to have waived its rights, or to have estopped itself to assert them as by acquiescing for a long period in the maintenance of the system and large expenditures of money in connection therewith by a telegraph company.

The Post Road Act of 1866 must be construed and applied in recognition of the existing conditions and with a view to effectuate the purposes for which it was enacted.

Where rights of a telegraph company under the Post Road Act would be violated by threatened arbitrary action by a municipality, they may be protected by injunction; but the injunction should not prevent the municipality from subjecting the location and operation of the company's lines to reasonable regulations.

THE facts, which involve the rights of telegraph companies under, and the construction of, the Post Road Act of 1866, are stated in the opinion.

Mr. William G. Thompson, Mr. George E. Mears and *Mr. Romney Spring* for appellant, submitted:

On the date of the filing of the petition of June 1, 1905, this plaintiff was occupying the streets of the Town of Essex without any right whatever, either under the laws of the Commonwealth or of the United States.

The plaintiff had acquired no right to occupy said streets by complying with the statutes of the Commonwealth of Massachusetts.

The plaintiff had acquired no right to occupy said streets by lapse of time or by the acquiescence of any officials.

The plaintiff had acquired no right to occupy said streets under the act of Congress of July 24, 1866.

The selectmen's denial of the petition of June 1, 1905, did not impair any Federal right of the plaintiff under the act of Congress of July 24, 1866.

The only action of the selectmen that could have impaired the plaintiff's rights is a formal vote evidenced solely by the record required by the statute.

These propositions being sound, the denial by the selectmen of the petition of June 1, 1905, could not possibly impair any right of the plaintiff, for that petition was not the plaintiff's petition.

Even if the petition of June 1, 1905, is regarded as the petition of this plaintiff, then under the statute from which the selectmen derived their powers to act, they had no jurisdiction to grant it.

If the selectmen's denial of the petition (assumed for the purposes of argument to be the petition of the plaintiff) was required by a state statute, which was reasonable on any view of the meaning of the act of July 24, 1866,

then that denial could not possibly impair any right of the plaintiff under the act of Congress.

Even if the action of the selectmen may be ascertained from declarations and explanations outside their record, still no impairment of any Federal right of the plaintiff is shown.

The threats of the selectmen furnish the company no ground whatever for equitable relief in a Federal court, either against the town, or against the selectmen themselves.

The plaintiff, an open and persistent violator of the law, cannot invoke the assistance of a court of equity.

Even if the language of the selectmen most favorable to the plaintiff be adopted, the District Court had no right to make this a ground for an injunction, either against the town or against the selectmen.

Even if the preceding three main propositions were all unsound, the final decree should be modified.

The terms of the injunction, if granted, would deprive the Commonwealth of Massachusetts of all power in the future to impose any regulations at all upon the lines of the plaintiff.

Even if such an injunction were not a violation of the eleventh amendment to the Constitution, it is far in excess of anything necessary to protect the rights of the plaintiff under the act of Congress of July 24, 1866.

The injunction plainly and unwarrantably deprives the town of a remedy conferred upon it by the laws of the Commonwealth, viz.: R. L., c. 25, § 54.

The decree also nullifies the provisions of R. L., c. 122, §§ 16–23.

The decree also unwarrantably hampers the town in protecting itself by proceedings in the state courts under R. L., c. 51, § 18.

The limitation of the decree by the language suggested is the least that is required to render the decree valid on

any theory of the scope of the act of Congress of July 24, 1866.

Numerous authorities are cited in support of these contentions of appellants.

Mr. G. Philip Wardner for appellee.

Mr. Justice McReynolds delivered the opinion of the court.

Appellant was enjoined by the decree below from interfering with the operation of lines owned by the appellee company. The controversy arose under the act of Congress approved July 24, 1866 (14 Stat. 221, c. 230, Rev. Stat., § 5263, *et seq.*), which declares that companies accepting its provisions "shall have the right to construct, maintain, and operate lines of telegraph . . . over and along any of the military or post roads of the United States," provided they do not interfere with ordinary travel. Appellant insists that, as construed and applied below, the statute transcends the powers granted to Congress by the Constitution; and there is sufficient substance in the claim to give us jurisdiction.

The appellee was incorporated under the laws of Massachusetts, April 7, 1884. Immediately thereafter it filed with the Postmaster General a written acceptance of the restrictions and obligations prescribed by the act of July 24, 1866, and constructed lines of wires strung upon poles across the Commonwealth of Massachusetts and particularly along certain streets and roads in the Town of Essex. These have been continuously operated in connection, on the east, with cables reaching foreign countries, and, on the west, with wires leading to all parts of the Union; for a long time they have constituted an important part of the Postal Telegraph and Cable system; and over them pass great numbers of interstate and foreign

messages, many being transmitted for the United States under official regulations.

The especially pertinent provisions of the Massachusetts laws relating to companies incorporated for transmitting intelligence by electricity, in force during 1884 and long thereafter, appear in Public Statutes, chapter 109, §§ 2, 3, 15, and chapter 27, § 49, and are as follows:

"Each company may under the provisions of the following section construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the Commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters."

"The Mayor and Aldermen or Selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts and the height at which, and the places where, the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

"No enjoyment by a person or corporation for any length of time of the privileges of having or maintaining telegraph posts, wires or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easements or raise any presumption of a grant thereof."

"The Selectmen of the town may empower citizens of Massachusetts to establish and maintain in such town posts, wires and other apparatus for telegraphic and tele-

phonic communication in conformity with the provisions of Chapter 109."

In *Pierce* v. *Drew*, 136 Massachusetts, 75, 76–77 (1883), the Supreme Court said of chapter 109:

"That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws, for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads upon the locations assigned to them by the officers of the municipality wherein such ways are situate, cannot be doubted. . . .

"No right is given these companies to use the highways at their own pleasure, or to compel in all cases, as the plaintiff suggests, locations therein to be given them by the municipal authorities. The second section of the statute is to be construed with the third section, and shows an intention that a legally constituted board shall determine not only where, but whether, there can be a location which shall not incommode the ordinary public ways, with full power to revise its own doings, and to correct any errors which the practical working of the arrangement may reveal."

The evidence warrants the conclusion that in 1884 appellee made written application to the Essex Selectmen for a right of way, but their records disclose nothing concerning the matter. Directly thereafter, without opposition, the existing lines were constructed along four miles of the town's highways. During many succeeding years no objection appears to have been made to their operation, and, until a short time before this suit was begun, their presence was acquiesced in. Certainly no sort of affirmative action was taken to interfere with them; and there is evidence indicating that half the poles were relocated under direction of a selectman, about 1895, when the electric railway was laid down.

In 1902, repairs being needed, the selectmen were peti-

tioned to locate the poles and license their future maintenance. This request was not granted. In 1905, repairs having become imperative, another petition for a location was presented. This was refused; officers of the town then denied appellee's right to use the highways, and threatened to prevent repairs, by force if necessary, and to take action against future operation of the lines within its limits. Thereupon, July 31, 1905 (twenty-one years after original construction), the telegraph company, relying on the act of 1866, commenced this proceeding in the District Court, seeking an injunction against threatened interference. By a temporary order granted September 5, 1905, the town, its officers, agents and employés, were "enjoined and restrained, until the further order of this court, from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the re-setting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant."

Answering, September 26, 1905, appellant claimed the lines were constructed without any authority whatsoever and denied the company's right, under the act of 1866 or otherwise, to maintain or operate them. A cross bill was also presented, alleging unlawful use of the ways and praying that the company be restrained therefrom until a franchise shall be obtained as provided by state laws.

No motion was ever made to dissolve the temporary injunction. The cause coming on for final hearing upon pleadings and proofs in 1913 (twenty-nine years subse-

quent to construction), the court held that the act of 1866 protected the lines from interference, and rendered a decree dismissing the cross bill, sustaining the original bill, and awarding a perpetual injunction substantially in the language of the preliminary order dated September 5, 1905.

Appellant now maintains that the court below erroneously construed and applied the act of 1866 and undertook to bestow upon the telegraph company rights in its highways beyond the power of Congress to grant; that its ways are occupied without lawful authority, either state or Federal; that such occupation constitutes a continuing nuisance; and that the original bill should have been dismissed, leaving the town free to act as seemed advisable.

Many opinions of this court establish beyond question the validity and point out the general purposes of the act of 1866. "It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed." *Pensacola Telegraph Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1, 11. A State has no authority to say that a telegraph company may not operate lines constructed over postal routes within its borders. *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 554. A City may not arbitrarily exclude the wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations. *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92, 105; *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160, 170. See also *West. Un. Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540; *United States* v. *Union Pacific Ry.*, 160 U. S. 1, 44; *Postal Tel. Co.* v. *Chicopee*, 207 Massachusetts, 341, 343.

If the official records of the selectmen disclosed that,

responding to the petition of 1884, they gave a writing "specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run," and if thereafter the telegraph company had placed poles and strung wires accordingly, plainly, we think, under the opinions cited above, such lines would be protected by the act of 1866 against exclusion or other arbitrary action by the town.

With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment (*Roberts* v. *Northern Pacific R. R. Co.*, 158 U. S. 1, 11; *Northern Pacific R. R. Co.* v. *Smith*, 171 U. S. 260, 271, 275); and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. *Randolph County* v. *Post*, 93 U. S. 502, 513; *Boone County* v. *Burlington &c. R. R.*, 139 U. S. 684, 693; *City Railway* v. *Citizens' Railroad*, 166 U. S. 557, 566; *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 662; Dillon, Municipal Corporations, 5th ed., §§ 1194, 1227.

The streets and highways of Essex are undoubtedly post roads within the meaning of the act of 1866. *West. Un. Tel. Co.* v. *Richmond, supra;* act of March 1, 1884, c. 9, 23 Stat. 3. What rights—if any—in respect of them

were immediately secured by the telegraph company through acceptance of that act, we need not consider. It entered upon those now occupied notoriously, peacefully and without objection, and has developed there a necessary means of communication. The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted. Among the latter, as stated in *Pensacola Tel. Co.* v. *West. Un. Tel. Co.* and *West. Un. Tel. Co.* v. *Massachusetts*, *supra*, are the extension and protection of instrumentalities essential to commercial intercourse and the efficient conduct of governmental affairs. In the circumstances, appellee has acquired the same Federal right to maintain and operate its poles and wires along the ways in question that would have attached had the selectmen granted a formal antecedent permit. Commercial transactions and the orderly conduct of governmental business have come to depend on the daily use of these lines and certainly would be as seriously hindered by their severance as if they had been constructed after an official location. There is no suggestion that ordinary travel is being interfered with; and, having long acquiesced in appellee's peaceful possession, the town may not now rely upon the claim that this was obtained without compliance with prescribed regulations and treat the company as a naked trespasser. Its rights under the Federal law would be violated by the threatened arbitrary interference.

The further claim is here made for the first time that, in any event, the injunction is too broad. In *West. Un. Tel. Co.* v. *Richmond*, *supra*, it was pointed out that the act of 1866 does not deprive a municipality of the right to subject telegraph companies occupying its streets to reasonable regulations. The injunction as granted might interfere with action altogether proper and the decree below will be modified by the addition of the words,

"Provided, that nothing herein shall be so construed as to prevent the Board of Selectmen or the Town of Essex from subjecting the location and operation of the company's lines to reasonable regulations." With this modification, it is affirmed. The costs will be charged to appellant.

Modified and affirmed.

PROVO BENCH CANAL AND IRRIGATION COMPANY *v.* TANNER.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 72. Argued November 11, 1915.—Decided December 6, 1915.

In eminent domain proceedings, an award of one dollar for property taken for an easement does not deprive the owner of his property without due process of law if the state court recognized the right to recover for any substantial damage, but found as matter of fact that no damage whatever had been shown.

40 Utah, 105, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of a statute of Utah, and judgment of the Supreme Court of that State, regarding rights to flow waters and construct irrigation ditches, are stated in the opinion.

Mr. J. W. N. Whitecotton for plaintiffs in error.

Mr. Charles S. Varian for defendant in error submitted.

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

Plaintiffs in error, having acquired easements and rights of way over certain lands in the State of Utah, con-

structed thereon connecting canals to convey water intended for irrigation purposes. Relying upon the provisions of a statute of that State (Compiled Laws, 1907, § 1288 x 22) copied in the margin,[1] the validity of which is not contested (*Clark* v. *Nash*, 198 U. S. 361), defendant in error, Tanner, instituted the original proceeding, praying for permission to increase the carrying capacity of the canals, that the character of the enlargement and resulting damages be determined, and that, upon payment of the sum assessed and completion of the enlargement, he be decreed the right to flow water therein. Answers were filed, proof taken, and, the cause having been duly heard by the court without a jury, a decree was entered granting the relief prayed under carefully specified conditions, among them being a perpetual bond to protect against future injuries. Each of the owners was awarded one dollar as damages. Upon appeal the action of the trial court was approved by the Supreme Court. 40 Utah, 105.

Counsel for plaintiffs in error asserts here that, "after all, the whole question is, was there a taking of the property of the canal owners;" and, answering this in the affirmative, he maintains that the judgment below deprives them thereof without due process of law. But the state court, expressly recognizing the right of recovery for

[1] When any person, corporation, or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation, or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; *provided*, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch.

any substantial damage, found, as matter of fact, that none had been shown by the proof and consequently only a nominal sum could be recovered. It declared that "nothing is made to appear upon which a finding or judgment for substantial damage can rest"—"there is no direct evidence upon this point whatever," and cited *Chicago, Burl. & Quincy R. R.* v. *Chicago*, 166 U. S. 226, in support of the award.

The record discloses no error which we can consider (*Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 89), and the judgment is

Affirmed.

WEBER *v.* FREED, DEPUTY COLLECTOR OF UNITED STATES CUSTOMS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 644. Argued December 1, 1915.—Decided December 13, 1915.

That the power of Congress over foreign commerce is complete has been so thoroughly settled by former decisions of this court, that to question it is frivolous.

Congress has power to prohibit importation of foreign articles from abroad, including pictorial representations of prize fights designed for public exhibition; and so *held* that the act of July 31, 1912, prohibiting such importation is not unconstitutional.

The fact that exhibitions of pictures are under state, and not Federal, control does not affect the power of Congress to prohibit importation of articles from foreign countries to be exhibited.

The motive of Congress in exerting its plenary power cannot be considered for the purpose of refusing to give effect to such power when exercised.

224 Fed. Rep. 355.

THE facts, which involve the constitutionality of the act of July 31, 1912, prohibiting the importation of pictorial representations of prize fights, are stated in the opinion.

Mr. Benjamin F. Spellman, with whom *Mr. Charles A. Towne* was on the brief, for the appellant:

The act of July 31, 1912, c. 263, §§ 1, 2, and 3, is unconstitutional and void because in violation of Amendments IX and X to the Constitution of the United States.

Section one is unconstitutional and void and beyond the power of Congress to enact under par. 3 of § 8, Art. I, of the Constitution, commonly called the Commerce Clause, as applied to the exclusion from entry into the United States of photographic-film positives by the owner designed to be used for purposes of public exhibition in the United States under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce.

Photographic-film positives, imported by the owner, designed to be used for purposes of public exhibition by him and not for purposes of traffic, sale or commerce, are not articles of commerce.

The public exhibition of motion pictures is not commerce; and hence the photographic-film positives referred to in this case, being "designed to be used" for purposes of such exhibitions, are not instrumentalities of commerce.

In support of these contentions see *Adair* v. *United States*, 208 U. S. 161; *Almy* v. *California*, 24 How. 169; *Athanasaw* v. *United States*, 227 U. S. 326; *Bacon* v. *Walker*, 204 U. S. 311; *Boland* v. *United States*, 236 U. S. 216; *Bowman* v. *Chicago &c. Ry.*, 125 U. S. 465; *Brown* v. *Maryland*, 12 Wheat. 419; *Buttfield* v. *Stranahan*, 192 U. S. 470; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Diamond Glue Co.* v. *United States*, 187 U. S. 611; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Engel* v. *O'Malley*, 219 U. S. 128; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gloucester Ferry Co.* v.

Pennsylvania, 114 U. S. 196; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Hoke* v. *United States*, 227 U. S. 308; *Hooper* v. *California*, 155 U. S. 648; *Hopkins* v. *United States*, 171 U. S. 578; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Keller* v. *United States*, 213 U. S. 139; *Kidd* v. *Pearson*, 128 U. S. 1; *License Cases*, 5 How. 504; *Lottery Cases*, 188 U. S. 321; *Metropolitan Opera Co.* v. *Hammerstein*, 162 App. Div. 691; *Nathan* v. *Louisiana*, 8 How. 73; *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389; *Passenger Cases*, 7 How. 283; *Paul* v. *Virginia*, 8 Wall. 168; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *People* v. *Klaw*, 55 Misc. (N. Y.) 72; *Pickard* v. *Pullman*, 117 U. S. 34; *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 577; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Second Employers' Liability Cases*, 223 U. S. 1; *Thorpe* v. *R. Co.*, 27 Vermont, 149; *United States* v. *Addyston Pipe Co.*, 85 Fed. Rep. 271; *S. C.*, 175 U. S. 211; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *Popper*, 98 Fed. Rep. 423; *U. S. Fidelity Co.* v. *Kentucky*, 231 U. S. 394; *Weber* v. *Freed*, 224 Fed. Rep. 355; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Williams* v. *Fears*, 179 U. S. 270.

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

The contention that Congress cannot prohibit the importation of motion-picture films intended for purposes of exhibition is frivolous, and the court should, therefore, decline jurisdiction.

The power of Congress to regulate commerce with foreign nations includes the prohibition of the introduction, importation, or transportation from abroad of any tangible object which may be used for any gainful purpose, regardless of the use which the importer himself intends to make of it. Prize-fight films are articles of commerce; and their importation for public exhibition is commercial intercourse.

In support of these contentions, see *Brolan* v. *United States*, 236 U. S. 216; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204; *In re Debs*, 158 U. S. 564; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Hoke* v. *United States*, 227 U. S. 308; *Int. Comm. Comm.* v. *Brimson*, 154 U. S. 447; *Lottery Case*, 188 U. S. 321; *Mutual Film Corp.* v. *Kansas*, 236 U. S. 248; *Mutual Film Corp.* v. *Ohio Commission*, 236 U. S. 230; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Pipe Line Cases*, 234 U. S. 548; *The Abby Dodge*, 223 U. S. 166; *United States* v. *Marigold*, 9 How. 560; *United States* v. *Motion Picture Co.*, 225 Fed. Rep. 800; Edward B. Whitney, Development of Interstate Commerce Power, Michigan Law Review, vol. I, p. 614.

Mr Chief Justice White delivered the opinion of the court.

The act of July 31, 1912, § 1, c. 263, 37 Stat. 240, makes it unlawful "to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition." With this provision in force, in April, 1915, the appellant brought to the port of entry of the City of Newark in the State of New Jersey photographic films of a pugilistic encounter or prize fight which had taken place at Havana and demanded of the deputy collector of customs in charge the right to enter the films. On refusal of the official to permit the entry appellant filed his bill of complaint to enforce the right to enter by a mandatory injunction and by other appropriate relief to accomplish the purpose in view. The ground relied on for the relief was the averment that the prohibition of the act of Con-

gress in question was repugnant to the Constitution because in enacting the same "Congress exceeded its designated powers under the Constitution of the United States and attempted, under the guise of its powers under the Commerce Clause, to exercise police power expressly reserved in the States." The collector moved to dismiss on the ground that the bill stated no cause of action because the assailed provision of the act of Congress was constitutional and therefore on the face of the bill there was no jurisdiction to award the relief sought.

The motion was sustained and a decree of dismissal was rendered, and it is this decree which it is sought to reverse by the appeal which is before us, the propositions relied upon to accomplish that result but reiterating in various forms of statement the contention as to the repugnancy to the Constitution of the provision of the act of Congress. But in view of the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous. *Buttfield* v. *Stranahan*, 192 U. S. 470; *The Abby Dodge*, 223 U. S. 166, 176; *Brolan* v. *United States*, 236 U. S. 216.

It is true that it is sought to take this case out of the long-recognized rule by the proposition that it has no application because the assailed provision was enacted to regulate the exhibition of photographic films of prize fights in the United States and hence it must be treated not as prohibiting the introduction of the films, but as forbidding the public exhibition of the films after they are brought in—a subject to which, it is insisted, the power of Congress does not extend. But aside from the fictitious assumption on which the proposition is based, it is obviously only another form of denying the power of Congress to prohibit, since if the imaginary premise and proposition based on it were acceded to, the contention

would inevitably result in denying the power in Congress to prohibit importation as to every article which after importation would be subject to any use whatever. Moreover, the proposition plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 541; *McCray* v. *United States*, 195 U. S. 27, 53–59; *Calder* v. *Michigan*, 218 U. S. 591, 598.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* BIGGER.

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

No. 342. Submitted November 30, 1915.—Decided December 13, 1915.

Where the case was tried to a jury and there was a verdict for plaintiff, disputed questions of fact must be considered by the appellate court as determined against defendant.

On appeal from a judgment of the Circuit Court of Appeals affirming a judgment of the trial court based on a verdict, this court is confined to considering questions of law arising on the rulings of the court.

A defendant removing the case from the state court, and not reserving any exception to the jurisdiction of the state court, cannot after pleading in, and submitting to the jurisdiction of, the Federal court raise the question of the original jurisdiction of the state court.

A general contention that the trial court should have directed a verdict for defendant involves the whole case, and facts and law may, as in this case, be so intermingled as to make the latter dependent upon the former.

A carrier which has accepted a passenger to a definite point does not discharge its duty by delivering him in an unsuitable place without protection from the inclemency of the weather.

There having been conflicting testimony whether plaintiff's intestate

was or was not necessarily compelled through the negligence of the defendant carrier to submit to conditions resulting in his sickness and death, and the court having charged that if the jury believed the defendant's testimony in that respect, plaintiff could not recover at all, and if plaintiff's evidence was true it appears that defendant did not exercise even ordinary care, a verdict for plaintiff should not be set aside because of statements in the charge in regard to different degrees of care owed by the defendant under varying circumstances to its passengers.

218 Fed. Rep. 990.

THE facts, which involve the validity of a judgment of the Circuit Court of Appeals in an action for injuries sustained by a passenger against a carrier, are stated in the opinion.

Mr. George Thompson and *Mr. T. D. Cobbs* for plaintiff in error.

Mr. H. C. Carter and *Mr. Perry J. Lewis* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for personal injuries brought by J. T. Bigger against plaintiff in error and the International & Great Northern Railway Company and the St. Louis, Iron Mountain & Southern Railway Company in the state district court of Bexar County, Texas.

The case made by Bigger's pleading was this:

Bigger was a passenger upon the Texas & Pacific Railway Company's train on a ticket from San Antonio, Texas, to Owensboro, Kentucky, and return, having purchased the ticket from the International & Great Northern Railway Company, at San Antonio, Texas. A partnership was alleged between the companies.

Bigger was returning from Owensboro to San Antonio and was compelled and required to leave the train at

Longview during a very severe downpour of rain at a place where there was no protection. His clothes became thoroughly drenched with rain, and he was required to ride in them so drenched until he reached San Antonio at about 10 o'clock at night. As a result of such exposure and wetting he became seriously ill.

At the time the Texas & Pacific reached the station at Longview there was in the train a car destined to San Antonio, on the line of the International & Great Northern Railway, of which the employés of the Texas & Pacific knew but they neglected to inform Bigger of the fact and give him an opportunity to transfer to such car.

It was charged in his complaint that such facts constituted negligence on the part of the company and its employés.

In accordance with a petition by the Texas & Pacific Company the case was removed to the United States district court for the western district of Texas. There an amended petition or complaint was filed suggesting Bigger's death and his wife and six children were made parties plaintiff.

The St. Louis, Iron Mountain & Southern Railway Company filed a separate demurrer and answer.

The International & Great Northern Railway Company and the Texas & Pacific Railway Company joined in a general demurrer and in an answer to the merits. Subsequently both of the latter companies were given leave to amend and availed themselves of it. The answer of the Texas & Pacific Railway Company contained a general demurrer, a general denial of the allegations, and set up special matters in defense. It contained no plea or exception to the jurisdiction of the court, state or Federal.

The case was continued and set for trial upon motion of defendants, and the Texas & Pacific Railway Company then filed a second amended answer in which it set up that it was incorporated under an act of Congress, had

its domicile in Dallas, Texas, that no part of its road was in Bexar County, and therefore the action was improperly brought in the latter county and the court was without jurisdiction to try it, it being "one arising under and involving damages for personal injury." Insufficiency of the petition in law was also alleged and that the petition showed on its face that the company was a common carrier without any elements of partnership existing between it and the other defendants. The answer also contained general denials of the allegations of the petition and averred besides that Bigger had ample opportunity to transfer from one coach to another and that had he used ordinary care he would have got into the proper coach either when he first boarded the train or at some time during passage. That the railway company complied with its duty when it safely transported Bigger to Longview and at that station its relation to him, so far as he was a passenger, terminated, as he was entitled to ride to such point and no farther.

That it stopped its train at the usual place and the station building and shelter from rain was in close proximity to such point. That other passengers alighted and proceeded to such station building, that there was no reason why Bigger should not have done so and that his exposure was due to his own negligence.

That his ill health and subsequent death were not caused by nor were they the result of any negligence of the company but that he was in an extremely poor state of health, having been the victim for a long time of a tubercular infection which had so far progressed that he had been compelled to give up his work and return to San Antonio, with hope practically abandoned, and that his death was the proximate and direct result of such infection.

Upon the issues thus joined the case was tried to a jury. The court directed a verdict for all of the companies

except the Texas & Pacific, against which company a verdict was returned in the aggregate amount of $15,250.00, the amounts awarded to the wife and children being respectively specified. Judgment was entered accordingly and affirmed by the Circuit Court of Appeals.

A motion is made to dismiss or, alternatively, to affirm.

The motion to dismiss is overruled. The railway company is a Federal corporation and the questions raised are not frivolous.[1] We pass, therefore, to the merits.

The questions of fact must be considered as determined against the company by the verdict of the jury, that is, that Bigger was required to get off the train at Longview in a drenching rain, that the accommodations there were insufficient for the protection of passengers, that he could have been transferred to a coach attached to the train but was not, nor was he told of it, and that the exposure resulted in his death. And, further, the verdict is conclusive as to the condition of his health and as to the expectancy from his life.

Our consideration, therefore, must be confined to the questions of law arising on giving or refusing instructions, or on some other ruling of the court. There is such other ruling. The company in its second amended answer in the district court excepted to plaintiff's petition on the ground that it showed on its face that the suit was improperly brought in Bexar County. The exception was overruled and this is assigned as error. It was not error. The petition for removal contained no reservation of a question of the jurisdiction of the state court and after the case reached the district court there were pleadings to the

[1] This case was pending in this court before and at the time of the passage of the act of January 28, 1915, 38 Stat. 804, c. 22, §§ 5 and 6, which takes away from courts of the United States jurisdiction in suits by or against any railroad company on the ground that such company was incorporated under an act of Congress. The act excepts actions or suits pending at the time of the passage of the act.

merits and other action submitting to the jurisdiction. *Tex. & Pac. Ry* v. *Hill,* 237 U. S. 208.

There is the general contention that a verdict should have been directed for the company. The contention involves the whole case, and facts and law are so intermingled as to make the latter inseparably dependent upon the former. For instance, it is urged that Bigger did not exercise care when he boarded the train at Little Rock. He could have known, it is said, that there was an International & Great Northern coach attached to the train and that he should have heard the announcement to passengers to transfer to that coach; and "should at some time during the route have looked and listened." The announcement is disputed, and whether he should have known of the International & Great Northern coach, was for the jury to decide.

There is testimony to the effect that Bigger was required to get out at Longview during a rain of such severity as to amount to a cloudburst and which had covered the ground with water. Against this, it is said that where he descended from the train was a suitable place to walk and that there were sheds and depots and other buildings near at hand to protect him from the rain. And it is urged that he should not have continued his journey in wet clothes; that he could have changed clothes at a hotel in Longview or sought the accommodations of a Pullman sleeper. Finally it is said that the Texas & Pacific owed him no further duty when he left its train. The latter contention can be immediately rejected. The company accepted him as a passenger for a destination beyond Longview and its duty was not discharged by delivering him to a storm, protected from its inclemency only by the shelter afforded by a "switch shanty," so-called by an employé of the road. We may remark that to that shanty a lady passenger was also conducted by the porter of the train, he apparently not having knowledge of the existence

of other buildings which the company alleged were available to Bigger. The lady testified that the water was "three inches deep on the ground" and came to her ankles and that "it was raining just like a cloud-burst." Nor was it a condition suddenly occurring. It rained before the train reached Longview, "and the tracks looked," the witness said, "like they were covered with water." And, we may say, as indicating the severity of the storm, the train was compelled to return to Longview on account of washouts. Such conditions of discomfort and peril to health she, Bigger, and, it appears, two other passengers, were required to pass to and endure in order to take a car which was attached to the train and which could have been reached by merely passing through other cars. And these were the conditions a jury had the right to believe existed, although there was contradiction of them. The other contentions involved considerations for the judgment of the jury.

There is an objection to the charge of the court that it gave too much emphasis to the duty of the company and not enough to the duty of Bigger as a passenger. The objection involves the charge as a whole, and, as it would be inconvenient to quote it, we simply say that the objection is not justified. The court expressed the elements of liability of the company, and it expressed as well the conditions of recovery on the part of plaintiffs, and it is hypercritical to say that the emphasis was more on one than on the other, as presently will be shown.

The most important contention of the company is based on the charge of the court as to the degree of care required of the company. The court said that if Bigger's "illness and subsequent death did not result directly from the negligence of the defendant, they [plaintiffs] would not be entitled to recover." And, it was added, "What then is negligence? It is the failure to do what a reasonable person would ordinarily have done under the circumstances of

the situation, or the doing what such person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or in commission. The duty is dictated and measured by the exigencies of the occasion."

The court recited the evidence and the contentions of the parties and said that it was the duty of the company "to provide adequate and safe accommodations for passengers where they could alight to change cars and where they could be protected." And, further, that if this was done the company had fulfilled its duty and no recovery could be had against it. If it had not done so, and, "if the employés of the defendant required the deceased to get off the train in a severe rain, and his illness resulted therefrom without any fault or negligence on his part, the plaintiffs would be entitled to recover." And it was said: "In this connection you are further instructed that the deceased was required to look out for his own comfort and safety; and if he was in any respect guilty of negligence contributing to his illness and death, then no recovery can be had by the plaintiffs in this proceeding."

The court, at the request of the company, further instructed the jury that if Bigger at the time he entered the car was sick with lung trouble and knew there were chances of injury by exposure and he neglected to use ordinary care and prudence to protect himself against any contingency which might arise during the journey, and if he changed cars when by the use of ordinary care he could have avoided doing so or if there was a safer way for him to have gone, which he might have ascertained by ordinary care, the company would not be responsible for the injury which resulted, if any resulted. And further that "all these facts and circumstances in connection with his [Bigger's] condition" should be considered in determining "whether or not he used that ordinary care and prudence which an ordinarily prudent person would have exercised

under similar circumstances." To these instructions there was no objection except to that part which extended the duty of the company to the protection of passengers after they had alighted from the train.

But the court instructed the jury, at the request of plaintiffs, that the railway company "owed its passengers the duty to exercise that high degree of care that would be exercised by every prudent person under the same or similar circumstances, and a failure to exercise such degree of care would be negligence." This instruction is attacked as error only because it imposed a high degree of care on the company after Bigger had left the train "and was therefore in a position to use care in taking care of himself." The ground of the objection seems to be that the duty of the company ceased upon the arrival of its train at Longview. To this, as we have already said, we cannot assent. The same care was necessary to be observed for Bigger's protection at that place, under the circumstances presented by the record, as was necessary to be observed in his transportation, and the charge of the court correctly expressed it. *Penn. Co.* v. *Roy*, 102 U. S. 451; *Indianapolis &c. R. R.* v. *Horst*, 93 U. S. 291.

But even if the railway company could plead a lesser degree of care than that declared to be its duty in the charge of the court, it is very disputable if error was committed to the prejudice of the company. Between the plaintiffs' ground of action and the company's ground of defense there was a clear line of distinction. The testimony of plaintiffs was to the effect that Bigger was compelled to descend from the train in the midst of a severe storm to the inadequate protection of a mere shanty to await the car for San Antonio, such car being attached to the train he was on and to which he could have gone by simply passing through other cars had he been told that it was part of the train. The company asserts that he was told and that he disregarded the information. If the latter

was true the company was not liable, and the court so instructed the jury. If the testimony of plaintiffs was true the company did not observe even ordinary care; and which was the fact it was for the jury to decide, and their judgment in deciding could not have been embarrassed by a consideration of degrees of negligence or care.

The other contentions of the company we think do not require special comment. They are directed to the proposition, many times repeated, that the company owed no duty to Bigger or else had observed it, and that Bigger had not used care either in avoiding exposure or in preventing an injurious effect from it. They attack the sufficiency of the evidence and assert, in effect, that its conflicts should be resolved against plaintiffs. The propositions of law involved are those which we have considered.

Judgment affirmed.

The CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent, because they are of opinion that some of the instructions complained of laid upon the carrier a heavier duty than the law recognizes.

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

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

No. 74. Argued November 11, 1915.—Decided December 13, 1915.

Under the Employers' Liability Act of 1908, a breach of the Hours of Service Act on the part of the carrier does not operate to deprive it of the defenses of contributory negligence and assumption of risk unless the breach contributed to the injury.

THE facts, which involve the construction and application of the Hours of Service Act, are stated in the opinion.

Mr. Robert Dunlap, with whom *Mr. Gardiner Lathrop*, *Mr. J. W. Terry* and *Mr. A. H. Culwell* were on the brief, for plaintiff in error:

Violation of the Hours of Service Act is not negligence *per se* destroying defenses of assumed risk and contributory negligence regardless of whether or not it was the proximate cause. *St. Louis &c. Ry.* v. *McWhirter*, 229 U. S. 265; *Nitro-Glycerine Case*, 15 Wall. on p. 537.

A party charging negligence as a ground of action must prove it. Such fact is not to be solved by indulging in surmise or conjecture, or resorting to imaginary possibilities. *Puget Sound Co.* v. *Hunt*, 223 Fed. Rep. 952, 955; 29 Cyc. 600; *Missouri &c. Ry.* v. *Foreman*, 174 Fed. Rep. 377.

To enable plaintiff to recover there must be proof that the cause which operated to produce the death had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable. See *Midland R. R.* v. *Fulgham*, 181 Fed. Rep. 91, 95; *Felt* v. *Boston & M. R. R.*, 161 Massachusetts, 311; 37 N. E. Rep. 375; *Hannigan* v. *Lehigh R. R.*, 157 N. Y. 244.

The special charge requested by plaintiff in error as to the Hours of Service Act as foundation for recovery should have been given to the jury, as the charge of the court did not comprehend all of relieving clauses contained in the proviso of the act and on which evidence was offered. *Southern Pacific Co.* v. *Pool*, 160 U. S. 438; *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 369; *United States* v. *New York, O. & W. Ry.*, 216 Fed. Rep. 702; *C., St. L. & N. O.* v. *Pullman*, 139 U. S. 79, 86; *United States* v. *Great Northern Ry.*, 220 Fed. Rep. 630, 633; *M., K. & T. Ry.* v. *United States*, 231 U. S. 112; *United States* v. *Lehigh Valley R. R.*, 219 Fed. Rep. 532; *Pennell* v. *P. & R. Ry.*, 231 U. S. 675.

It was not the intent of Congress to make railway companies insurers nor to exact from them practical impossibilities. *Northern Pac. Ry.* v. *United States*, 213 Fed. Rep. 163; *United States* v. *Mo. Pac. Ry.*, 213 Fed. Rep. 170.

The court erred in directing the jury that plaintiff might recover in any one of five contingencies mentioned ignoring the question whether in any such case the alleged negligence was the proximate cause of the accident or injury, and moreover the evidence was insufficient to justify the submission of certain alleged grounds of recovery to the jury. *Chambers* v. *Everding*, 71 Oregon, 521; 143 Pac. Rep. 616; *Tex. & Pac. Ry.* v. *Bigham*, 90 Texas, 223; *M. & St. P. Ry.* v. *Kellogg*, 94 U. S. 469; *Wolosek* v. *Chicago & M. Electric Ry.*, 158 Wisconsin, 475; *Kreigh* v. *Westinghouse Co.*, 152 Fed. Rep. 120; *Cole* v. *German Savings Society*, 124 Fed. Rep. 113; *Stefanowski* v. *Chain Belt Co.*, 129 Wisconsin, 484; *Missouri Pacific Ry.* v. *Columbia*, 65 Kansas, 390; 69 Pac. Rep. 338; *Cleghorn* v. *Thompson*, 62 Kansas, 727; 1 Sutherland on Damages, 3d ed., § 16; 1 Shear. & Red. on Negligence, 4th ed., § 28; *Fleming* v. *Beck*, 48 Pa. St. 309, 313; *Hoag* v. *L. S. & M. S. Railway*, 85 Pa. St. 293; *Morrison* v. *Davis*, 20 Pa. St. 171, 175; *Railroad Co.* v. *Reeves*, 10 Wall, 176; see also *C., St. P. M. & O. Ry.* v. *Elliott*, 55 Fed. Rep. 949, 952; *Scheffer* v. *Railroad Co.*, 105 U. S. 249; *Glassey* v. *Worcester Con. St. Ry.*, 185 Massachusetts, 315; *Stone* v. *B. & A. R. R.*, 171 Massachusetts, 536.

The evidence was conclusive that plaintiff assumed the risk of the position of the engine and position and size of the sill step. *Seaboard Air Line* v. *Horton*, 233 U. S. 504; *Kohn* v. *McNulta*, 147 U. S. 238; *So. Pac. Co.* v. *Seley*, 152 U. S. 145.

The evidence was wholly insufficient to submit certain grounds of alleged negligence to the jury and as to burden of proof. *Griffin* v. *Springfield Street Ry.*, 219 Massachusetts, 55; Beach on Cont. Neg., 3d ed., §§ 427, 428.

Mr. Perry J. Lewis, *Mr. C. P. Johnson* and *Mr. S. Elgelking*, for defendant in error submitted:

The sixteen-hour law was enacted for the safety of employés; if its violation contributes to the injury, the railroad is liable, and the defenses of contributory negligence and assumed risk are not available. The general law and the Employers' Liability Act forbid all argument on this proposition. The *McWhirter Case*, 229 U. S. 265, fails to support the contention of plaintiff in error; but does support the decision of the court below.

Plaintiff had been on duty nearly eighteen hours when he was injured; the testimony shows he was more dead than alive: he was sleepy and tired after being on duty from 7.00 P. M. to 1.25 P. M. the next day; in fact, he was thrown from the pilot because he was not in a physical condition to stay on.

The trial court did not make liability depend merely on the working overtime. Throughout the charge negligence causing or contributing to the injury is made the basis of recovery. *Grand Trunk Ry.* v. *Ives*, 144 U. S. 408.

No stronger case of proximate cause arising from the evidence could be presented than in this case. *Del., L. & W. Ry.* v. *Converse*, 139 U. S. 469, 472.

In support of contention of defendant in error as to proximate cause and assumption of risk, see also *Hartford Life Ins. Co.* v. *Unsell*, 144 U. S. 439, 447; *Erie R. R.* v. *Winter*, 143 U. S. 60, 70; *Robinson* v. *Belt*, 187 U. S. 41; *I. & St. L. R. R.* v. *Horst*, 93 U. S. 291, 298; *Washington & G. R. R.* v. *Harmon*, 147 U. S. 571, 580.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit for personal injuries suffered by the plaintiff (defendant in error,) while acting as fireman upon and in charge of a defective engine that had been picked up by a train. He had been kept on duty for more than

sixteen hours, and, as we take it for present purposes, contrary to the act of March 4, 1907, c. 2939, § 2, 34 Stat. 1415, 1416, without the justifications or excuses allowed in § 3. While about to do some oiling according to directions, he fell from the running board of the pilot and his leg was cut off. There was evidence of negligence on the part of the Railroad but the defendant set up that the plaintiff was guilty of contributory negligence and assumed the risk. The only matter that we have to consider here is an instruction given to the jury touching the effect of keeping the plaintiff on duty overtime upon these matters alleged by the defence.

The delay that led to keeping the plaintiff on duty too long was caused by the breaking of a valve yoke, and a part of the charge was as follows: "If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt."

The last half of this instruction was excepted to in the presence of the jury, but the charge was not modified. It was the one instruction specifically directed to the mat-

ter of overtime. The natural understanding of it by people untrained in the law, if not by everybody, would be that the unjustified retention of the plaintiff at his work for more than sixteen hours would make the defendant liable whether the retention contributed to the injury or not. The statute that excludes the defences of contributory negligence and assumption of risk in such a case is not the Hours of Labor Act itself but the subsequent Employers' Liability Act of April 22, 1908, c. 149, §§ 3, 4; 35 Stat. 65, 66. The latter has that operation only when the breach of the law contributes to the injury. *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 265, 279, 280. We do not think it possible to read the absolute language of the instruction as implicitly limited to such a case.

Judgment reversed.

MR. JUSTICE DAY and MR. JUSTICE PITNEY dissent.

UNITED STATES *v.* NORMILE.

NORMILE *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 83, 84. Argued December 3, 1915.—Decided December 13, 1915.

A contract to produce a result does not bring the means employed to provide it into the contract. *United States* v. *O'Brien*, 220 U. S. 321.

In this case, a contractor was not allowed the expense of erecting temporary dams because the Government engineer suggested that it be placed in a certain location that proved impracticable, necessitating relocation and rebuilding, as the contract only called for the location of the permanent structure by the engineer.

An extension of time requested by claimant, without any suggestion that it was made necessary by fault of the Government or by the violence of the elements, *held*, in view of the warning given on granting the extension, not to absolve claimant from the extra expenses specified in the contract in case such extension were allowed.

A Government contractor in this case *held* not to be entitled to extra compensation by reason of advanced prices in labor and material due to outbreak of war, it appearing that the increased expense was not due to any breach on the part of the United States.
49 Ct. Cl. 73, reversed.

THE facts, which involve the construction of, and the amounts due on, contracts for public works with the United States, are stated in the opinion.

Mr. Frank Carter Pope and *Mr. Benjamin Carter* for Normile:

A liability is imposed on the United States by contracts for public improvement.

There is inseparability of the government's plan from action of engineer thereunder.

The administrative expense was wrongfully imposed on the contractors; and there was a liability of United States for the increased cost of work caused by the delay.

The United States, not the claimants, is estopped.

In support of the claimants' contentions, see *District of Columbia* v. *Gallaher*, 124 U. S. 505; *Insurance Co.* v. *Dutcher*, 95 U. S. 269; *Old Colony Trust Co.* v. *Omaha*, 200 U. S. 100; *Simpson* v. *United States*, 172 U. S. 372; *Topliff* v. *Topliff*, 122 U. S. 121; *Christie* v. *United States*, 237 U. S. 234; *United States* v. *Gibbons*, 109 U. S. 200; *Maryland Steel Co.* v. *United States*, 235 U. S. 451; *United States* v. *United Engineering Co.*, 234 U. S. 236; *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S. 264; *Phila., Wil. & Balt. R. R.* v. *Howard*, 13 How. 307; *Moore, Receiver*, v. *United States*, 46 Ct. Cls. 139; *Spearin* v. *United States*, Ct. Cls. (not reported); *Kelly* v. *United States*, 31 Ct. Cls. 361; *Fitzgerald* v. *First National Bank*, 114 Fed. Rep. 474; *Wyandotte* v. *King Bridge Co.*, 100 Fed. Rep. 196.

Mr. Assistant Attorney General Huston Thompson, with whom *Mr. Philip M. Ashford* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for extra expenses incurred in performing a contract to build a dam and certain accessories on the Yamhill River, Oregon. The contract was made on March 11, 1898, and required the claimants to begin work as prescribed by paragraph 41 of the specifications, to complete the keeper's dwelling, &c. within sixty days from notification, and the whole work before December 31, 1898. Paragraph 41 of the specifications stated that the sites for the construction had not yet been purchased and that no work would be begun until they were secured. It then provided that within ten days after notification that the sites had been secured and the contract had been approved, the contractor 'must proceed with the work in a vigorous manner; he must complete the keeper's dwelling, woodshed, walks, fences, etc., within sixty days from date of notification, and the whole contract on or before December 31, 1898.' It added that because of the spring rise of the Willamette, &c., it was probable that work on the lock and dam could not be begun before June at the earliest; and that the date of completion had been set because it was desired that all work should be finished during one low water season—the meaning of which was known by the claimants. Authority to purchase was asked by telegraph on March 10 and granted on March 15. The abstract of title and deeds were sent to the Chief of Engineers on April 9 and 14, and the contractors, who had given notice of their readiness to begin, were told on April 9 that the deeds had been sent on. On April 29 a telegram was received showing encumbrances to be removed before the deeds were accepted. On May 13 the attorney for the United States approved the title. On May 12 the contractors began work on the keeper's dwelling, &c. and on June 14 were given the notification to proceed.

Before June 14, 1898, considerable work had been done, material had been assembled and labor employed. The war with Spain began on April 21, 1898, raising the price of labor and materials. The increased cost is found, but it is found also that this increase was not shown to be due to any breach of contract by the United States and that the claimants did not have room and facilities for storing large consignments of materials. The claimants, however, insist upon this item being allowed, and make it the ground of their cross appeal.

In 1899 after a lock wall had been built at right angles with the line of the wing dam and parallel to the line of the stream it became necessary to divert the water from the line of the wing dam in order that the latter might be built. This had to be done by sending the water through the lock chamber and to that end it was necessary to build a temporary dam. The claimants had no civil engineer, although they commanded some experience. They asked the local engineer in charge for the United States where the temporary dam should be placed. He indicated a site near the head of the lock, where the river was narrow, as the only suitable place, and the claimants started upon the dam in June. The up stream end of the lock chamber was closed with a lift-wall, and to turn the water through the chamber it had to be raised sixteen feet. The bottom of the river was inclined to disintegrate and when the water was raised to twelve feet the dam broke. Two more attempts were made with the same result. Early in 1900 the claimants applied to the local engineer for leave to change the place and to cut a hole through the lift-wall, which was granted and the dam was built. The bottom of the river at the new site was similar to that at the old and it would not have been possible to construct the dam there without the relief afforded by the hole. The Court of Claims allowed the cost of the last two temporary dams and the United States appeals.

The specifications provided that if the time for performance should be extended all expenses for inspection and superintendence should be deducted. The claimants requested an extension of time, not suggesting violence of the elements, contemplated in the contract as a ground, or fault of the United States. The extension was granted with a warning that it would not absolve them from the above expenses. The Court of Claims allowed the claimants the expenses accrued during the time of building the second and third temporary dams, from which allowance also the United States appeals.

Taking up first the allowance for the unsuccessful temporary dams and charges for superintendence during the time consumed in constructing them we are of opinion that the United States is entitled to prevail in its appeal. The contract was silent as to them, and did not embrace them. A contract to produce a result does not bring the means employed to provide it into the contract. *Bacon* v. *Parker*, 137 Massachusetts, 309, 311. *United States* v. *O'Brien*, 220 U. S. 321, 327. They remain under the control of the contractors alone. The claimants rely upon specification 40: "The lines and levels for this work will be established on the ground by the engineers, and the contractor must conform and keep thereto." But this refers to the work, the permanent structure, not to the transitory instrumentality used in building it. While the engineer in answer to the claimants pointed out a place for the temporary dam, it does not appear to have been ordered to be placed there. Moreover the site seems to have been as good as any other, the final success having been achieved by cutting a hole in the lift-wall of the lock chamber, not by the change of the place. There is nothing to show that the claimants could not have left this opening, or have obtained leave to make it earlier. Leave was granted as soon as asked. The mode of constructing the temporary dam was wholly the claimants' affair.

Upon the cross appeal also we are of opinion that the Government is in the right. If it had attempted to hold the claimants to the time originally mentioned in the contract the question might be different, but we see no ground for a claim on their part to hold the United States liable for delay. Specification 41, the substance of which has been stated, is inconsistent with the implication of an undertaking that the claimants shall be notified to begin within any particular time. The findings hardly warrant the statement in the opinion that the delay from May 13 to June 14 was chargeable to the defendant's neglect. It simply is left unexplained. The notice was given in time to begin work on the lock and dam as early as was contemplated by specification 41. But further, as is pointed out by the court below, the prices had advanced before the supposed neglect began—not to speak of the finding that the claimants had not the facilities to accumulate material even if they had been notified at an earlier date.

Judgment reversed. Petition dismissed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.

GREAT NORTHERN RAILWAY COMPANY *v.* OTOS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 429. Argued November 30, 1915.—Decided December 13, 1915.

A car, coming from another State, which is merely delayed in the State of destination before reaching, and which does finally reach, its destination, is not, by reason of such delay, withdrawn from interstate commerce and the operation of the Safety Appliance Act.

While the supplementary Safety Appliance Act of 1910 relieves the

carrier from statutory penalties while hauling the defective car to the nearest available point for repair, it does not relieve the carrier from liability for injury to an employé in connection with such hauling.

Under the circumstances involved in this action under the Employers' Liability Act, the trial court did not err in charging that if the injuries were directly due to defective condition under the Safety Appliance Act of couplers of a car which had come from without the State to the point where the accident occurred, and which was destined to another point within the State, the defendant carrier would be liable.

128 Minnesota, 283, affirmed.

THE facts, which involve the construction and application of the Safety Appliance Act in cases for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. E. C. Lindley, with whom *Mr. M. L. Countryman* and *Mr. A. L. Janes* were on the brief, for plaintiff in error.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the Safety Appliance Act and Employers' Liability Act. The plaintiff (defendant in error,) was a switch foreman and was breaking up a train that had come into his State from the west. At the moment when he was hurt he had three cars attached to a switching engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The automatic coupler on the Minneapolis car was out of order, the pin-lifter was missing, other repairs were needed, and there was evidence that it had been marked for repairs and was to be switched to the repair track before going further. In the switching operation the plaintiff, being unable to uncouple the Duluth car from the side where the pin-lifter was missing without going between the cars, did so while the cars were moving and was badly hurt. The jury was instructed that

if the injuries 'were due directly to the absence and imperfect working condition of the coupler in question' the defendant would be liable. The plaintiff got a verdict and judgment was ordered for $30,000, which order was affirmed by the Supreme Court of the State. *Otos* v. *Gt. Northern Ry.*, 128 Minnesota, 283. 150 N. W. Rep. 922.

The defendant argues that the car had been withdrawn from interstate commerce, and that therefore the Act of March 2, 1893, c. 196, § 2, 27 Stat. 531, does not apply; that if it does apply the defendant was required by that act and the supplementary Act of April 14, 1910, c. 160, 36 Stat. 298, to remove the car for repairs and that its effort to comply with the statutes could not constitute a tort; and that the plaintiff was the person entrusted by it with the details of the removal and could not make it responsible for the mode in which its duty was carried out; that he might have detached the car while it was at rest. But we are of opinion that the argument cannot prevail.

The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress. *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580. As the Safety Appliance Act governed the case, it imposed an absolute liability upon the carrier. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281. *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559. The supplementary Act of April 14, 1910, c. 160, § 4, relieves the carrier from the statutory penalties while the car is being hauled to the nearest available point where it can be repaired, but expressly provides that it shall not be construed to relieve from liability for injury to an employé in connection with the hauling of the car. The

next section recites that under § 4 the movement of a car with defective equipment may be made within the limits there specified without incurring the penalties, 'but shall in all other respects be unlawful.' Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, the Act of 1910 imports with unmistakable iteration, that the liability exists. Under the instructions of the court the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover. If so, the fact that the plaintiff's conduct contributed to the result was not a defense. Act of April 22, 1908, c. 149, §§ 3, 4; 35 Stat. 65, 66. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42. In view of the statutes it is unnecessary to consider the limits to the plaintiff's authority by his instructions from above. In any view of the evidence he was not withdrawn from the protection of the Acts.

Judgment affirmed.

SEABOARD AIR LINE RAILWAY *v.* KOENNECKE.

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

No. 491. Argued November 30, 1915.—Decided December 13, 1915.

The allowance by the trial court after the testimony was in, and over defendant's objection, of an amendment to bring the case specifically under the Employers' Liability Act, *held* not to have exceeded the discretionary power of the court, or to have been so arbitrary as to amount to denial of due process of law.

In actions under the Employers' Liability Act, when questions of negligence and the like are brought here only because arising in actions under the statute and involving no new principles, this court confines itself to a summary statement of results.

In this case, as deceased was engaged in distributing cars from an interstate train and clearing the track for another interstate train, he was engaged in interstate commerce.

The possibility that a local train might before arrival at final destination where the accident occurred have dropped all interstate cars and taken up only local cars is too remote to warrant withdrawal of a case under the Employers' Liability Act from the jury.

On the record in this case, it would not have been proper for the trial court to have withdrawn the case from jury on questions of defendant's negligence or plaintiff's assumption of risk.

101 S. Car. 86, affirmed.

THE facts, which involve the construction of the Employers' Liability Act and the validity of a verdict of the state court in a suit for death of an employé, are stated in the opinion.

Mr. Jo Berry S. Lyles for plaintiff in error.

Mr. Frank G. Tompkins, with whom *Mr. C. S. Monteith* and *Mr. W. H. Cobb* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by the defendant in error for causing the death of her intestate, J. T. Koennecke. The latter was run over by a train of the plaintiff in error (the defendant,) while acting as switchman in the defendant's yard at Cayce, South Carolina. The declaration alleged reckless negligence, and set out that the wife and four children named were the only heirs and distributees of the deceased, that they were dependent upon him for support, and that they had suffered damage to the amount of $75,000. There was a statute in South Carolina similar to Lord Campbell's Act and allowing exemplary damages in the case alleged. In view of testimony brought out on cross-examination of the plaintiff's witnesses the plaintiff

asked leave to amend so as specifically to bring the case under the Employers' Liability Act of Congress, of April 22, 1908, c. 149; 35 Stat. 65, the declaration as it stood not disclosing in terms under which statute the action was brought. If it were read as manifestly demanding exemplary damages, that would point to the state law, but the allegation of dependence was relevant only under the Act of Congress. The amendment was allowed over a denial of the power of the court to allow it, which, however, is not argued here. *Central Vermont Ry.* v. *White*, 238 U. S. 507. *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576. The defendant then objected to the trial going on. The court left it to the counsel to say whether he was taken by surprise, and, the counsel not being willing to say so although saying that he was not prepared on the question of dependency, ordered the trial to proceed. It was alleged as an error that the requirement was contrary to the Fourteenth Amendment. The other errors alleged concerned the sufficiency of the evidence said to bring the case within the Act of Congress and also the evidence touching the questions of negligence and assumption of risk. The plaintiff got a verdict for $22,500, and the Supreme Court of the State sustained the judgment. 101 S. Car. 86; 85 S. E. Rep. 374.

There is nothing to show that the trial court exceeded its discretionary power in allowing the trial to go on—still less that there was such an arbitrary requirement as to amount to a denial of due process of law within the Fourteenth Amendment. The court well may have considered that the defendant was endeavoring to get a technical advantage, as it had a right to, but that it would suffer no wrong. The cause of action arose under a different law by the amendment, but the facts constituting the tort were the same, whichever law gave them that effect, and the court was warranted in thinking that on the matter of dependency there was no surprise.

Next it is urged that there was no evidence that the deceased was employed in interstate commerce. Upon such matters, as upon questions of negligence and the like, brought here only because arising in actions on the statute and involving no new principle, we confine ourselves to a summary statement of results. The deceased was engaged in distributing the cars from an interstate train and clearing the track for another interstate train. We see no ground for dispute upon this point. *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473, 478. The suggestion that, the train that had come in being a local train, it might have dropped all the cars that came from outside the State and taken up others appears to us to present too remote a possibility to warrant withdrawing the case from the jury. See *N. Y. Cent. & Hudson R. R. R.* v. *Carr*, 238 U. S. 260.

We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track and that there was no lookout on the end of the train and no warning of its approach. In short the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz* v. *Humphreys*, 145 U. S. 418, but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk. Upon a consideration of all the objections urged by the plaintiff in error in its argument and in its briefs, we are of opinion that the judgment should be affirmed.

Judgment affirmed.

CHRISTIANSON *v.* KING COUNTY.

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

No. 67. Argued November 9, 10, 1915.—Decided December 13, 1915.

Where it sufficiently appears from the bill that jurisdiction does not depend solely on diverse citizenship, but the controversy involves the construction of an act of Congress, the decision of the Circuit Court of Appeals is not final, but an appeal lies to this court under § 241, Judicial Code.

As an organized political division of the United States, a Territory possesses only such powers as Congress confers upon it, and the legislature of a Territory cannot provide for escheat unless such provision is within the grant of authority.

A statutory authority to a Territory to legislate upon all rightful subjects of legislation includes the right to provide by legislation for escheat for failure of heirs; and so *held* as to authority given by the Organic Act of Washington Territory.

The prohibition in the Organic Act of Washington of 1853 against interference with the primary disposal of the soil had reference to the disposition of public lands of the United States, and did not limit the right of the Territory to legislate in regard to the escheat of private property for failure of heirs.

Subject to the general scheme of local Government, defined by the Organic Act and the special provisions it contains, and the right of Congress to revise, alter and revoke, the territorial legislatures have generally been entrusted with the enactment of the entire systems of municipal law of the respective Territories of the United States.

Escheat for failure of heirs has always been a familiar subject of legislation in the American commonwealths.

In determining the extent of the power to legislate delegated by Congress to a Territory under the Organic Acts, and the validity of a series of acts of the territorial legislature, it is significant if none of such acts asserting legislative power during the entire period until Statehood were ever disapproved by Congress.

Provisions for escheat for failure of heirs have proper relation to matters embraced in a law establishing probate courts and defining their jurisdiction; and so *held* that such provisions in the statutes of

Washington Territory are not invalid because the title of the probate act was not broad enough to cover escheats.

After reviewing the statutes of Washington Territory in regard to jurisdiction of probate courts, *held* that the decree of the probate court involved in this case decreeing that the property of the intestate escheat to the county for failure of heirs was within its jurisdiction and the decree properly disposed of the property.

Where the legislature has authority to establish its rule as to escheat, it also has power to suitably provide for the tribunals having jurisdiction, and the procedure for determining whether the rule is applicable in particular cases; and if other proceedings are established, office found is not necessary to effect an escheat.

Under the law of the Territory of Washington the property involved in this case escheated to the county in which it was situated.

The proceedings in the Probate Court terminating in a decree that the property of the intestate escheat to the county for failure of heirs being in accord with valid laws of the Territory even though informal, the decree was not void or subject to collateral attack.

The decree of the Probate Court attacked in this case having been entered in a proceeding *in rem* properly conducted with notice and opportunity to parties interested to appear, there was no deprivation of property without due process of law.

Where a court of competent jurisdiction in a proceeding *in rem* under a valid statute determines that there are no heirs to an intestate, the decree binds all the world, including heirs who failed to appear.

203 Fed. Rep. 894.

THIS is a suit, brought in 1911, to recover lands in the City of Seattle, County of King, State of Washington and to quiet title. (See R. & B. Code, Washington, § 785.) The plaintiff claimed title as heir, and grantee of other heirs, of Lars Torgerson Grotnes who died intestate in the County of King, Territory of Washington, in March, 1865. The defendant, the County of King, succeeded the County of King of the Territory which had control of the property pursuant to a decree of escheat which was passed by the Probate Court in May, 1869. The legislature of the Territory had provided that in case of the death of an intestate leaving no kindred his estate should escheat to the county in which it was situated. Washington Laws,

1862–3, p. 262. Demurrer was filed to the amended complaint on the grounds (among others) that the complaint did not state facts sufficient to constitute a cause of action and that the action had not been commenced within the time limited by law. The demurrer was sustained and judgment dismissing the complaint was affirmed by the Circuit Court of Appeals. 203 Fed. Rep. 894.

After alleging title in fee in Lars Torgerson Grotnes, and the fact that he had acquired the land under the name of John Thompson (having changed his name to conceal his identity) through certain mesne conveyances from a grantee of the United States, the amended complaint set forth in detail the proceedings in the Probate Court, which may be summarized as follows: That on March 26, 1865, the Probate Court, upon an informal request of H. L. Yesler and J. Williamson, assumed to appoint Daniel Bagley administrator of the estate of John Thompson, deceased, the order reciting that the decedent had died in the county, intestate, leaving property subject to administration; that after certain intermediate proceedings the administrator presented his petition on February 12, 1869, stating that no heirs at law had been found after diligent search, and praying that the administrator might be discharged and that after due notice the estate might be turned over to the county or such further order made as might be meet; and that on May 26, 1869, after publication of notice for four weeks in a local newspaper, a final decree of distribution was entered which recited the proceedings and continued as follows:

"That said decedent died intestate in the County of King, Washington Territory, on the — day of March, A. D. 1865, leaving no heirs surviving him;

* * * * * * * *

"There being no heirs of said decedent, that the entire estate escheat to the County of King, in Washington Territory.

"Now on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise;

"It is hereby ordered, adjudged and decreed: that all the acts and proceedings of said administrator, as reported by this Court and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting said estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the County of King, in Washington Territory.

* * * * * * * *

"The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, to-wit:

"1st. Cash, to-wit: $343.83 gold coin.

"2nd. And real estate, to-wit: One hundred and sixty acres of land on Duwamish River, in King County, W. T., more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson, dated January 19th, A. D. 1865, and recorded in Volume 1 of the records of King County, W. T., on pages 458, 459 and 460.

"Third. A lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid.

"Dated May 26th, 1869."

It was alleged that this decree was null and void, that the Probate Court was wholly without jurisdiction to pass

upon the title to the land described or to declare it escheated; that all claims to the land by defendant, and all its acts relating thereto, had been under this assailed decree, and that the defendant had no instrument or judgment purporting to evidence any title in it; that neither the defendant nor any other authority had instituted any suit or proceeding before any tribunal for the purpose of having an escheat declared or its claim of title confirmed. The acts of the county in relation to the land were set forth, the tracts involved being described as the 'King County Farm,' 'King County Hospital Grounds,' 'King County Addition to the City of Seattle,' and 'King County 2nd Addition to the City of Seattle.' The plaintiff did not seek to recover the lands which had been appropriated for railroad rights of way or highways, or that portion which had been sold to innocent purchasers, and it was also conceded that the county might retain the buildings and tangible betterments which it had placed upon the land, as stated.

At the outset, after alleging that the plaintiff was a subject of the King of Norway and that the matter in dispute exceeded in value the sum of $300,000, the amended complaint set forth that the controversy involved the construction of Amendments V and XIV of the Constitution of the United States, and of §§ 1851, 1907 and 1924 of the Revised Statutes of the United States relating to the Territory of Washington.

It was further stated that the heirs of the decedent had no knowledge of his whereabouts or death until three years prior to the beginning of the action, and that the heirs, and particularly the plaintiff, had been diligent since receiving this information in searching for the proofs of the decedent's identity and of their relationship.

Mr. Edward Judd, with whom *Mr. Livingston B.*

Stedman and *Mr. S. S. Langland* were on the brief, for plaintiff in error:

No estoppel or laches were shown.

The county never acquired title by escheat.

The Territory was not a sovereign.

The organic law conveyed no property rights of United States to the Territory.

The territorial escheat act trenched upon the primary disposal of the soil by the United States and the act did not fit its title.

There was never any office found.

The territorial probate court proceedings were void; the organic law did not give jurisdiction to the Probate Court.

The organic law forbade interference with the primary disposal of the soil.

The territorial probate act did not cover escheats.

The probate proceedings were informal and insufficient.

The probate proceedings were not due process of law.

The statute of limitations does not apply.

The county took the property for public use without making compensation.

The county's possession was *ultra vires*.

The county's possession recognized the title of the heirs.

The county had no claim of right nor color of title.

Mr. Robert H. Evans, with whom *Mr. Alfred H. Lundin* and *Mr. John F. Murphy* were on the brief, for defendant in error.

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

The motion to dismiss must be denied. It sufficiently appears from the amended bill that jurisdiction did not depend solely upon the citizenship of the respective

parties but that the controversy involved, with other questions, the construction of the act of Congress prescribing the authority of the territorial legislature. In this view, the decision of the Circuit Court of Appeals is not final. *Vicksburg* v. *Henson*, 231 U. S. 259, 267.

The plaintiff in error contends that the land in question did not escheat to the County of King, Territory of Washington, for the reasons (1) that the Territory was not a sovereign, but a municipal corporation, (2) that the organic law of the Territory conveyed to it no property rights of the United States, (3) that the act of the territorial legislature providing for escheat to counties was forbidden by the organic law, (4) that this legislative act was invalid because its title was not broad enough to cover the subject-matter, and (5) that there was never any office found.

There is, of course, no dispute as to the sovereignty of the United States over the Territory of Washington or as to the consequent control of Congress. As an organized political division, the Territory possessed only the powers which Congress had conferred and hence the territorial legislature could not provide for escheat unless such provision was within the granted authority. *Sere* v. *Pitot*, 6 Cranch, 332, 337; *American Ins. Co.* v. *Canter*, 1 Pet. 511, 543; *National Bank* v. *Yankton County*, 101 U. S. 129, 133. The Organic Act (March 2, 1853; 10 Stat. 172, 175; see Rev. Stat., §§ 1851, 1924) provided as follows:

"SEC. 6. . . . That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the

laws passed by the Legislative Assembly shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect: *Provided,* That nothing in this act shall be construed to give power to incorporate a bank or any institution with banking powers, or to borrow money in the name of the Territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank-notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting any other banking powers or privileges, shall be passed by the Legislative Assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said Territory; nor shall said Legislative Assembly authorize the issue of any obligation, scrip, or evidence of debt, by said Territory, in any mode or manner whatever, except certificates for service to said Territory. And all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

This manifestly was not a grant of the property of the United States, but it was an authority which extended to "all rightful subjects" of legislation save as it was limited by the essential requirement of conformity to the Constitution and laws of the United States and by the restrictions imposed. The prohibition against interference "with the primary disposal of the soil" defined a limitation which had been established from the beginning in organizing

territorial governments. This provision was found in the Ordinance passed by the Congress of the Confederation, April 23, 1784, for the government of the Western Territory (Amer. Cong., Pub. Journals, Vol. 4, 1782–1788, p. 379) and it was reënacted in the superseding Ordinance of 1787 (Art. IV, 1 Stat. 52, note). It was incorporated either by appropriate reference [1] or by express statement [2] in the organic acts of the Territories, and it was continued in substantially the same words in many of the enabling acts under which States were admitted to the Union.[3] For example, when Wisconsin was admitted, it was stipulated as a condition (9 Stat. 58) that the State should "never interfere with the primary disposal of the soil within the same by the United States," a condition which had its exact equivalent in the provision of other enabling acts that the States should "never interfere with the primary disposal of the public lands" lying within them. (Arkansas, 5 Stat. 51; Iowa, Florida, *Id.* 743; California, 9 Stat. 452.) The restriction had reference to the disposition of the public lands of the United States, and, neither as to State nor as to Territory did these words purport to limit the legislative power, otherwise duly exercised, where property had passed into private ownership and there was no interference with the exclusive authority of Congress in dealing with the public domain. *Carroll* v. *Safford*, 3 How. 441, 461; *Witherspoon* v. *Duncan*, 4 Wall. 210, 218; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 164,

[1] Territory south of the Ohio, 1 Stat. 123; Mississippi, *Id.* 549; Indiana, 2 Stat. 58; Michigan, *Id.* 309; Illinois, *Id.* 514; Alabama, 3 Stat. 371.

[2] E. g., Territory of Orleans, 2 Stat. 284; Missouri, *Id.* 747; Florida, 3 Stat. 655; Wisconsin, 5 Stat. 13; Iowa, *Id.* 237; Oregon, 9 Stat. 325; Minnesota, *Id.* 405; New Mexico, *Id.* 449; Utah, *Id.* 454.

[3] E. g., Missouri, 3 Stat. 547; Arkansas, 5 Stat. 51; Iowa, Florida, *Id.* 743; California, 9 Stat. 452; Wisconsin, 9 Stat. 58; Kansas, 12 Stat. 127.

165; *Crane* v. *Reeder*, 21 Michigan, 24, 74; *Oury* v. *Goodwin*, 3 Arizona, 255, 260; *Topeka Co.* v. *McPherson*, 7 Oklahoma, 332, 338–340. So far as 'the primary disposal of the soil' was concerned, provision for escheat on the death of an owner in fee without heirs could not be deemed to be an interference, whether the provision was enacted by a Territory or by a State.

The scope of the authority conferred upon territorial governments has frequently been described. Subject to the general scheme of local government defined by the organic act, and the special provisions it contains, and subject also to the right of Congress 'to revise, alter and revoke at its discretion,' the local legislature has generally been entrusted 'with the enactment of the entire system of municipal law.' *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655. 'Rightful subjects' of legislation, except as otherwise provided, included all those subjects upon which legislatures had been accustomed to act. *Maynard* v. *Hill*, 125 U. S. 190, 204; *Clinton* v. *Englebrecht*, 13 Wall. 434, 442; *Cope* v. *Cope*, 137 U. S. 682, 684; *Walker* v. *Southern Pacific R. R.*, 165 U. S. 593, 604. Unquestionably, authority was granted to the Territory to legislate with respect to the devolution of real property on the death of the owner. Thus in *Cope* v. *Cope*, *supra*, where the validity of an act of the territorial legislature of Utah permitting inheritance by illegitimate children was sustained, it was said by the court, after referring to the restrictions of the Organic Act: "With the exceptions noted in this section, the power of the territorial legislature was apparently as plenary as that of the Legislature of a State. *Maynard* v. *Hill*, 125 U. S. 204. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress." Escheat on failure

of heirs was a familiar subject of legislation in the American Commonwealths. The rule of the common law in this respect, as in others, was subject to modification, and adaptation to local conditions was essentially a matter of legislative policy. In the case of the Territories, Congress could have dealt with this subject if it chose, but it did not see fit to establish a rule of its own. The matter, however, remained a 'rightful subject' of legislation and Congress did not except it from the broad grant of legislative power. Assuming that it had authority, the Legislative Assembly of the Territory of Washington at its first session provided in its article on "Descent of Real Estate" that "if the intestate shall leave no kindred, his estate shall escheat to the Territory." Statutes of Washington Territory, 1854, p. 306. Similar provision was made in the case of personalty. *Id.*, p. 308. In 1860, it was enacted that if the intestate should leave no kindred his real estate should escheat to the county in which it was situated and his personal estate to the county in which the administration was had. Washington Laws, 1859–60, pp. 222, 224. These provisions were reënacted in the "Probate Practice Act" of 1863. Washington Laws, 1862–3, pp. 262, 265. By the Code of 1881, the estate on failure of heirs was to escheat to the Territory "for the support of the common schools" in the county in which the decedent resided or where the estate was situated. Section 3302, Eighth. It is significant that these acts, thus asserting the legislative power from the time of the organization of the Territory until it became a State, were never disapproved by Congress.

It is urged that to sustain the legislative authority to enact legislation of this character would be contrary to the principles declared in the case of the *Mormon Church* v. *United States*, 136 U. S. 1. But this contention is without basis. In that case, the suit was brought pursuant to an act of Congress and it was pointed out that Congress had expressly declared in the earlier act of 1862 that all real

estate acquired by the corporation contrary to its provisions should "be forfeited and escheat to the United States." *Id.*, p. 47. Our attention is also directed to statements in the opinions in *Williams* v. *Wilson*, 1 Martin & Yerger, 248, 252, and *Etheridge* v. *Doe*, 18 Alabama, 565, 574, but neither of these cases involved the question of the validity of territorial legislation for escheat. In *Lee* v. *Territory*, 2 Montana, 124, the act of the Territory by which it was attempted to forfeit placer mines held by aliens was declared to be invalid, but the controlling consideration was that its provisions were repugnant to the authority and action of Congress with respect to the disposition of the public lands. See also *King* v. *Ware*, 4 Northwestern, 858, 860. On the other hand, in *Crane* v. *Reeder*, 21 Michigan, 24, 76, the legislation of the Territory of Michigan providing for escheat on failure of lawful heirs was found not to be in conflict with the Ordinance of 1787 or with any act of Congress. And, so far as the question has been considered with regard to the Territory of Washington, the authority of the legislature has been upheld. *Pacific Bank* v. *Hannah*, 90 Fed. Rep. 72, 79; see *Territory* v. *Klee*, 1 Washington, 183, 188.

It is also objected that the title of the act here involved was not sufficient under the last provision of § 6 of the Organic Act above quoted. (Rev. Stat., § 1924.) The statute under which the proceeding was had was entitled "An Act defining the Jurisdiction and Practice in the Probate Courts of Washington Territory." Washington Laws, 1862–3, p. 198. It covered the whole subject of probate practice, of wills, of descent, and of distribution. We are of the opinion that the matter of escheat for failure of heirs did have "proper relation" to the other matters embraced in the statute, and that the object was adequately expressed in the title within the meaning of the organic law. The objection that there was no 'office found' is not substantial, save as it may be deemed to

raise the question whether there was compliance with the territorial legislation which we shall presently consider. If the legislature had authority to establish its rule as to escheat, it was also competent for it suitably to provide as to the tribunal which should have jurisdiction and the procedure for determining whether the rule was applicable in a particular case. *Hamilton* v. *Brown*, 161 U. S. 256, 263.

Concluding that escheat in the case of death of an owner without heirs was a rightful subject of legislation within the meaning of the Organic Act—not inconsistent with the Constitution and laws of the United States and not embraced within the stated exceptions—and that the provision in the Probate Practice Act was a valid exercise of the authority thus granted, we are brought to the question as to the jurisdiction of the Probate Court to enter the decree set forth in the amended complaint, and as to the effect of that decree.

Section 9 of the Organic Act (10 Stat. 175; see Rev. Stat., § 1907) provided that the 'judicial power' of the Territory should be vested 'in a supreme court, district courts, probate courts, and in justices of the peace,' and that the jurisdiction of these courts, including the probate courts, should be 'as limited by law.' The territorial legislature, having the power to define the jurisdiction of the probate courts, provided in the act which was in force at the time of the proceedings in question that these courts should have original jurisdiction within their respective counties over probate proceedings, the granting of letters testamentary and of administration, and the settlement of accounts of executors and administrators (Probate Practice Act of January 16, 1863, § 3; Washington Laws, 1862–3, p. 199). On qualification, an administrator was entitled to the immediate possession of the real estate as well as of the personal estate of the deceased, and to receive the rents and profits until the estate was settled

or delivered over by order of the Probate Court to the heirs or devisees (*Id.*, § 165, p. 228). At any time subsequent to the second term of the Probate Court after the issue of letters, any heir might present his petition to the court asking for his share of the estate (*Id.*, § 309, p. 256); and the act contained the following express provisions for distribution, which related to both real and personal property:

"Sec. 317. Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled.

"Sec. 318. In the decree the court shall name the person and the portion, or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

Those 'by law entitled' to the real estate were described in § 340 [1] (*Id.*, pp. 261, 262) which gave the order of taking

[1] This section provided:

"Sec. 340. When any person shall die seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, as follows:

"1st. In equal shares to his children, and to the issue of any deceased child, by right of representation, and if there be no child of the intestate living at the time of his death, his estate shall descend to all his other lineal descendants; and if all the same descendants are in the same degree of kindred to the intestate, they shall have the estate equally, otherwise they shall take according to representation.

"2d. If he shall leave no issue, his estate shall descend to his father."

(Then follow paragraphs 3d, 4th, 5th, 6th and 7th with respect to kindred of different degrees.)

"8th. If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

according to relationship and in the last paragraph provided for escheat to the county if there were no kindred. It does not seem to be disputed, that under this act, if proceedings in a probate court were properly initiated, that court would have jurisdiction to enter a decree determining the interests of heirs and distributing the real estate to those of the kindred, if any, who were found to be entitled to take as provided in this section. This jurisdiction formerly exercised by the probate courts of the Territory has been continued in the superior courts of the State, sitting in probate. R. & B. Code, Washington, § 1587 *et seq.* See *Stewart* v. *Lohr*, 1 Washington, 341, 342; *Balch* v. *Smith*, 4 Washington, 497, 500, 502; *Hazelton* v. *Bogardus*, 8 Washington, 102, 103; *In re Sullivan's Estate*, 48 Washington, 631; *In re Ostlund's Estate*, 57 Washington, 359, 364, 366. Speaking of the essential nature of this proceeding for distribution and describing the decree if rendered upon due process of law as final and conclusive, the court said in the case of *Ostlund's Estate, supra:* "Its very object and purpose is to judicially determine who takes the property left by the deceased." See also *Alaska Banking Co.* v. *Noyes*, 64 Washington, 672, 676; *McDowell* v. *Beckham*, 72 Washington, 224, 227; *Krohn* v. *Hirsch*, 81 Washington, 222, 226. But it is contended that the County, asserting escheat, did not claim as successor to the decedent; that the jurisdiction of the Probate Court ceased as soon as it ascertained that there were no heirs, and that it had no power to declare the escheat and decree distribution to the County. We cannot accede to this view. It is not the case, in a proper sense, of an attempt to determine the title of third persons, that is, of adverse claimants. *Stewart* v. *Lohr, supra.* The provision for escheat to the county in case the intestate left no kindred was a part of the scheme of distribution defined by the act and we cannot doubt that not only had the court the power to determine the interests of the

heirs in the real estate to be distributed, but it likewise had the power to determine whether there were heirs and if it was found that there were none to decree distribution according to the statute.

It is insisted that § 480 of the Civil Practice Act of 1854 (p. 218) prescribed the procedure in relation to escheats; that is, it provided for the filing of an information by the prosecuting attorney in the District Court and for proceedings like those in civil action for the recovery of property. This section applied whenever property should "escheat or be forfeited to the territory," but in 1860, the Civil Practice Act of 1854 was repealed (§ 500, Washington Laws, 1859–60, p. 103), and in the provision which corresponded to § 480 of the former act the word 'escheat' was struck out (§ 472, p. 98). In the Civil Practice Act of 1863, this provision, without the reference to escheat, was continued (§ 519, Washington Laws, 1862–3, p. 192) and it is found in the same form in the Code of 1881 (§ 713). It appears that from 1863 to the year 1907 (see R. & B. Code, § 1356) there was no provision in the laws of either the Territory or the State in relation to escheat, save those found in the Probate Practice Acts; and the act of 1907 did not disturb the jurisdiction of the court which had the administration of the estate. Referring to this, it is stated by the district judge that "the probate courts of the Territory and the superior courts of the State have uniformly assumed jurisdiction in this class of cases, and the right of the State or county to appear in the probate proceeding and contest the rights of other claimants has been recognized by the highest court of the State." 196 Fed. Rep., p. 799, citing *In re Sullivan's Estate*, 48 Washington, 631. See also *Helm* v. *Johnson*, 40 Washington, 420, 421.

Deeming it to be clear that the Probate Court had jurisdiction to declare an escheat and to distribute the real property to the county when it was found that the intestate had left no kindred (Probate Practice Act, 1863,

§§ 317, 318, 340, 8th, p. 262), we pass to the remaining question with respect to the proceedings that were actually taken in that court in connection with the property in controversy. It is objected that the petition for the appointment of an administrator was informal; that it did not set forth the jurisdictional facts; that it was signed by persons not shown to have any interest in the estate, and asked for the appointment of another 'stranger'; and that hence the court never acquired jurisdiction and that its appointment of the administrator and its subsequent proceedings were null and void. But it is not disputed that the real property was within the county. The owner, a resident of that county, had died. The order of appointment recited that he had died intestate. As a court of record (*Id.*, § 5, p. 200) having capacity to administer, its jurisdiction over the subject—as has been said by the Supreme Court of the State of Washington with reference to the Probate Court of the Territory [1]—"carries with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction." *Magee* v. *Big Ben Land Co.*, 51 Washington, 406, 409, 410. Despite the informality of the petition, the appointment of the administrator was not void, and not being void it is not subject to collateral attack. *Magee* v. *Big Ben Land Co., supra; Grignon's Lessee* v. *Astor*, 2 How. 319, 339; *Florentine* v. *Barton*, 2 Wall. 210, 216; *Comstock* v. *Crawford*, 3 Wall. 396, 403; *McNitt* v. *Turner*, 16 Wall. 352, 366; *Veach* v. *Rice*, 131 U. S. 293, 314; *Simmons* v. *Saul*, 138 U. S. 439, 457; 4 Bac. Abr. 96; *Pick* v. *Strong*, 26 Minnesota, 303; *Morgan* v. *Locke*, 28 La. Ann. 806; *Riley's Admr.* v. *McCord's Admr.*, 24 Missouri, 265. It appears that subsequently the Probate Court, after opportunity had been afforded to discover

[1] The reference is to the Probate Court of the Territory as it existed under the Code of 1881, but its jurisdiction was not essentially different from that of the Probate Court under the earlier Probate Practice Act.

heirs, entertained a petition of the administrator for final account and distribution. The statutory notice (Probate Practice Act, 1863, § 319) was published and on the return day the proceeding was duly continued and, on hearing, the decree was entered settling the account, finding that there were no heirs, and directing distribution of the real property, as described, to the County of King. This proceeding was essentially *in rem*. *In re Ostlund's Estate, supra; Alaska Banking & Safe Deposit Co.* v. *Noyes, supra; McDowell* v. *Beckham, supra; Krohn* v. *Hirsch, supra.* It was competent for the court to inquire whether there were heirs, and if there were such to determine who were entitled to take according to the order prescribed by the statute, and also, if it was found that there were no heirs, to make the distribution to the County as the statute required. It is apparent that there was no deprivation of property without due process of law. The court, after appropriate notice, did determine that there were no heirs and its decree being the act of a court of competent jurisdiction under a valid statute bound all the world including the plaintiff in error. It cannot be regarded as open to attack in this action. *Grignon's Lessee* v. *Astor, supra; Florentine* v. *Barton, supra; Caujolle* v. *Ferrié,* 13 Wall. 465, 474; *Broderick's Will,* 21 Wall. 503; *Simmons* v. *Saul, supra; Goodrich* v. *Ferris,* 214 U. S. 71, 80, 81.

As, in this view, the judgment of the court below must be affirmed, we do not find it necessary to consider the questions that have been argued with respect to the application of the Statute of Limitations.

Judgment affirmed.

ROBERT MOODY & SON *v.* CENTURY SAVINGS BANK.

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

No. 70. Argued November 10, 11, 1915.—Decided December 13, 1915.

A petition filed by a trustee in bankruptcy in the bankruptcy proceeding, asserting title to lands of the bankrupt reciting encumbrances thereon and asking that they be sold, the assets marshaled, and all persons claiming liens be made parties, gives rise to a controversy in bankruptcy proceedings, the decision in which may be reviewed by the Circuit Court of Appeals under § 24a of the Bankruptcy Act and § 128, Judicial Code.

Although such a proceeding is commenced by the trustee, the appearance of holders of mortgage liens asserting their rights and seeking to have them enforced conformably to their contentions, is equivalent to affirmative intervention and brings a controversy quite apart from ordinary steps in bankruptcy.

Homestead rights in land are creations of the States in which the lands are situated, and the validity and operation of mortgages thereon are determined by the statutes of the State in which the homestead is situated, as construed and applied by the courts of that State.

Under the laws of Iowa, as construed by the courts of that State, a homestead, even when validly mortgaged, may be sold only for a deficiency remaining after exhausting all other property covered by the same mortgage.

The right to insist on the exemption of a homestead in Iowa from sale except for deficiency is not personal to the mortgagor, but may be asserted by anyone to whom the homestead owners may have transferred an interest; nor can they after such transfer prejudice the transferee in the exercise of this right.

204 Fed. Rep. 963.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals, in a bankruptcy proceeding and the marshaling of proceeds of sale of homestead property in Iowa, are stated in the opinion.

Mr. S. F. Prouty, with whom *Mr. George F. Haid* and *Mr. Newton P. Willis* were on the brief, for appellants.

Mr. W. G. Harvison, with whom *Mr. Horatio F. Dale* was on the brief, for appellee.

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

The facts bearing upon the questions presented by this appeal are these: On his voluntary petition Oscar M. Hartzell, a resident of Madison County, Iowa, was adjudged a bankrupt. He owned 960 acres of land in that county, 40 acres of which he and his family had been and were occupying as a homestead. Three mortgages in terms covering all the land had been given by him—the first to Emma Johnson, the second to Moody & Son, and the third to the Century Savings Bank. His wife had joined in the first and third, but not in the second. After he was adjudged a bankrupt, he and his wife executed an instrument waiving and surrendering their right in the homestead and authorizing the trustees in bankruptcy to take possession and dispose of the same for the benefit of all the creditors. At a later date the trustees filed in the bankruptcy proceeding a petition asserting title to all the land, reciting the existence of the mortgages and other asserted liens, and praying that the 960 acres be sold free of all liens, that the proceeds be held by the trustees subject to the further order of the court, that all persons asserting liens on any part of the land be required to set them up by answer, that certain of the asserted liens be declared void and that as to the others the assets be marshaled. Acting upon this petition the court, with the assent of the parties in interest, directed that the land be sold as prayed, that all liens thereon be transferred to the proceeds and that the latter be held by the trustees for the payment of whatever liens or claims might be established against the same. The lands were sold, all liens found to be superior to the three mortgages were paid out of the proceeds and there remained a balance of $54,264.77,

which, although $13,683.94 in excess of what was required to pay the first mortgage, was insufficient to pay it and either of the others. Of this balance, $8,000 arose from the sale of the homestead. Moody & Son and the Century Savings Bank, both appearing in response to notice of the trustees' petition, asserted conflicting rights under their respective mortgages to a part of the proceeds. Although conceding that the first mortgage—that to Johnson—should be fully paid, they differed widely respecting the disposition of the proceeds of the homestead, Moody & Son asserting a right to have the same applied on the first mortgage and to receive on their mortgage whatever remained of the proceeds of the other land, and the bank asserting a right to have the first mortgage satisfied from the proceeds of the other land and to receive on its mortgage the proceeds of the homestead. Under the first contention Moody & Son would receive $13,683.94 and the bank nothing, while under the other Moody & Son would receive $5,683.94 and the bank $8,000. The bankruptcy court rejected both contentions and held that the proceeds of the homestead and those of the other land should be proportionally applied in paying the first mortgage, that the balance then remaining from the sale of the homestead, being $2,947.22, should be paid on the bank's mortgage and that the balance from the sale of the other land, being $10,736.67, should be paid on Moody & Son's mortgage. A decree was entered accordingly and the bank appealed to the Circuit Court of Appeals, which after overruling a motion challenging its jurisdiction, sustained the bank's contention and reversed the decree with instructions which were equivalent (see *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 240; *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519, 523) to directing a decree giving full effect to that contention. 204 Fed. Rep. 963; 209 Fed. Rep. 775. Moody & Son then appealed to this court.

Whether the Circuit Court of Appeals rightly sustained its jurisdiction turns upon whether this is one of those "controversies arising in bankruptcy proceedings" over which the circuit courts of appeals are invested, by § 24a of the Bankruptcy Act, with the same appellate jurisdiction that they possess in other cases under the Judicial Code, § 128, or is a mere step in bankruptcy proceedings the appellate review of which is regulated by other provisions of the Bankruptcy Act. If it is a controversy arising in bankruptcy proceedings the jurisdiction of that court was properly invoked, as is also that of this court. We entertain no doubt that it is such a controversy. It has every attribute of a suit in equity for the marshaling of assets, the sale of the encumbered property and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree. True it was begun by the trustees and not by an adverse claimant, but this is immaterial, for the mortgagees, who claimed adversely to the trustees, not only appeared in response to notice of the trustees' petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was the equivalent of an affirmative intervention and, when taken in connection with the trustees' petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings and well within the letter and spirit of § 24a. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 553; *Teft* v. *Munsuri*, 222 U. S. 114, 118; *Houghton* v. *Burden*, 228 U. S. 161, 165; *Globe Bank* v. *Martin*, 236 U. S. 288, 295.

Coming to the merits, the matter for decision is the proper application or disposition of the proceeds of the 40 acres which the bankrupt and his family occupied as a homestead when the mortgages were given and up to the time of the waiver before mentioned. The homestead

right in this land was a creation of the statutes of the State, and therefore to determine what bearing this right had upon the validity and operation of the mortgages we must turn to those statutes and the decisions of the Supreme Court of the State construing and applying them. The statutes are found in the Code of 1897, and are as follows:

"Sec. 2972. The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary.

"Sec. 2974. No conveyance or incumbrance of or contract to convey or incumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer.

"Sec. 2976. The homestead may be sold on execution for debts contracted prior to its acquisition, but in such case it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution. It may also be sold for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.

"Sec. 2981. The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or vacate it, but such changes shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her

rights, or those of the children. The new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been."

Counsel are agreed that under these statutes the mortgages to Johnson and the bank, in which the wife joined, became valid liens on the homestead as well as on the other land; that the intervening mortgage to Moody & Son, in which the wife did not join, was void as to the homestead and became a valid lien only on the other land; that this mortgage remained void as to the homestead notwithstanding the subsequent waiver of the homestead right, and that its invalidity in that respect could be asserted by the bank as a subsequent mortgagee. We therefore come to the provision in § 2976 that the homestead, even where validly mortgaged, may be sold "only for a deficiency remaining after exhausting all other property" covered by the same mortgage. Whether only the mortgagors may claim the benefit of this provision, and they only while they retain the homestead, is the real point in dispute. Moody & Son insist that it merely confers on the mortgagors a personal privilege which they may exercise or waive as they choose, that in this instance the privilege was surrendered or terminated when the homestead right was waived and that in consequence the provision has no bearing on the proper application or disposition of the proceeds of either the homestead or the other land. The bank, on the other hand, insists that the right to have this provision followed is not strictly personal to the mortgagors but may be asserted by one to whom they transfer an interest in the homestead, such as a subsequent vendee or mortgagee, and that no act of theirs done after the transfer can prejudice the transferee in the exercise of this right. The solution of the question is not free from difficulty, but we are persuaded, as was the Circuit Court of Appeals, that in view of the decision of the Supreme

Court of the State in *Linscott* v. *Lamart*, 46 Iowa, 312, the bank's contention must be sustained.

The facts in that case, so far as now material, were these: One Ash owned 71 acres of land, 40 of which were his homestead. He and his wife mortgaged the entire tract to Lamart. Linscott subsequently obtained a judgment against Ash and purchased one-half of the tract at a sale under the judgment. Later Ash and his wife sold and conveyed the entire tract to Lamart, it being understood that this should not extinguish the mortgage. Lamart went into possession and Linscott brought a suit to determine the rights of the parties in the land. Lamart prevailed and the Supreme Court affirmed the decree, saying: "Ash and his wife had the right to sell and convey the homestead to Lamart, and he has the right to hold it exempt from judicial sale on plaintiff's judgment." And, after holding the sale under the judgment void because it included part of the homestead, the court further said: "What then are the rights of the parties? If Ash had not conveyed to Lamart, upon foreclosure of the mortgage, the homestead could only 'be sold to supply the deficiency remaining after exhausting the other property' included in the mortgage. Lamart paid Ash some $1,400 for the whole tract, being more than twice the amount of the mortgage. No fraud is charged or shown, and as he had the right to purchase the homestead and hold it as against plaintiff's judgment, he should now have the right to have the proceeds of the land, aside from the homestead, applied in payment of his mortgage, to the exclusion of junior liens. In other words, it would be inequitable to put him in a worse position than he would be if he had not taken the title from Ash. The plaintiff, by this rule, is left in precisely the same position he would now occupy if Ash were still holding his homestead, and Lamart his mortgage." Thus, under the influence of the provision in § 2976, it was ruled

that the mortgage, which embraced the homestead and other land, could be satisfied out of the latter to the exclusion of a junior judgment lien embracing the other land but not the homestead, and this although the mortgagors had sold the homestead and no longer had any right therein. This decision is more nearly in point than any other and we think it shows that the right to invoke the provision in § 2976 is neither strictly personal to the mortgagors nor wholly terminated by their waiver of the homestead right. Moody & Son place some reliance upon *Barker* v. *Rollins*, 30 Iowa, 412, and *Dilger* v. *Palmer*, 60 *Id.* 117, although conceding that the cases are not closely in point. We think they are without present bearing. In the former a purchaser of a mortgaged homestead, who thereafter made the land his homestead, claimed that this entitled him to have the mortgage satisfied from other unmortgaged property of the mortgagor, and the claim was denied, the court observing, 30 Iowa, p. 413: "*His* homestead was not within the contemplation of the parties to the contract sued on. The creditor might well be held to have contracted with reference to all the phases of homestead claimed by his debtor; but not as to any such claim by third parties, who should voluntarily purchase the property with full knowledge of the incumbrance upon it. They cannot intrude their rights upon the property to the prejudice of the creditor." In the other case a homestead was mortgaged with other land and the mortgagors thereafter sold the latter to a third person but retained the former. When it was sought to foreclose the mortgage, the mortgagors claimed that § 2976 entitled them to have the mortgage satisfied from the non-homestead property, which they had sold, and the claim was rejected, the court holding that by their sale of the non-homestead land they were estopped from insisting that it constituted the primary fund for the payment of the mortgage.

Concluding, as we do, that the Circuit Court of Appeals rightly applied the local statutes as construed by the Supreme Court of the State, its decree is

Affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* CONCANNON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 87. Argued December 3, 1915.—Decided December 20, 1915.

The Act of April 28, 1904, c. 1782, 33 Stat. 538, validating conveyances of land within the lines of the right of way of the Northern Pacific Railway related only to conveyances theretofore made, and did not confer on the Railway Company power in the future to dispose of the right of way nor on others the power to obtain possession of any part thereof by adverse possession. *Northern Pacific Rwy.* v. *Ely*, 197 U. S. 1, distinguished.

While title by adverse possession might have been obtained to portions of the right of way of the Northern Pacific Railway under the Act of April 28, 1904, if the adverse possession had ripened into title prior to the passage of the act, title cannot be obtained thereunder if any part of the period of adverse possession is subsequent thereto.

While a remedial statute should be construed so as to embrace remedies which it was intended to afford, its words should not be so extended as to destroy express limitations and cause it to accomplish purposes which its text shows it was not intended to reach.

In this case the judgment of the state court cannot be sustained as resting on a ground independent of the construction of the Federal statute involved.

While an issue remaining open on the remanding of the case may be one arising under state law which should primarily be disposed of by the state court, this court has the ultimate authority to review the decision on such question to the extent essential to the enforcement of Federal rights involved.

75 Washington 591, reversed.

THE facts, which involve the construction of acts of Congress relating to the right of way of the Northern Pacific Railway, are stated in the opinion.

Mr. Charles W. Bunn for plaintiff in error.

Mr. William H. Hayden for defendants in error submitted.

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

As the successor to the rights of the Northern Pacific Railroad Company the Railway Company, plaintiff in error, sued to recover a piece of land alleged to be within the strip 400 feet wide granted by the act of Congress of July 2, 1864, to the former company as a right of way. (13 Stat. 365, c. 217.) The asserted right to a reversal of the decree which awarded the land to the defendant is based upon an error which it is asserted the court committed in interpreting an act of Congress. (April 28, 1904, 33 Stat. 538, c. 1782.)

To at once recur to a previous ruling concerning the power of the company to dispose of land embraced in the grant of right of way which undoubtedly led to the adoption of the act of Congress referred to, and additionally to refer to a decision concerning the significance of that act rendered before this case arose, will make clear the question to be decided.

In *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, it became necessary to determine whether title by adverse possession under a state law, could be acquired to any portion of the Railroad's right of way. Applying the principles announced in *Northern Pacific Ry.* v. *Smith*, 171 U. S. 261, it was held that as the Railroad Company to which the right of way was originally granted was in-

capable of conveying any part of the 400 feet strip composing its right of way, it followed that no possession adverse to the company could confer title, any state law to the contrary notwithstanding. About a year after this decision the act to which we have previously referred was adopted, the title and first section reading as follows, 33 Stat. 538:

"An Act Validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company.

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any Act of Congress, are hereby legalized, validated, and confirmed: *Provided,* That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained."

The second and last section made the act operative only upon acceptance of its terms by the Northern Pacific Railway Company.

There was presented in *Northern Pacific Ry.* v. *Ely,* 197 U. S. 1, the question whether this statute gave validity to a title by adverse possession to a piece of land outside of the 200, but within the 400 feet of the right of way where the possession relied upon was completed before the act was adopted and therefore was adequate at that time under the state law to bar the title of the company. Although the statute only expressly embraced "conveyances heretofore made," it was decided that in view of its remedial purposes its provisions were applicable to the case in hand; that is, it was held that the word conveyance included also a sufficient adverse possession completed when the act was passed.

As the land in controversy in this case is within the 400 but outside the 200 feet, the court below was right in concluding that it was within the provisions of the act if they were otherwise applicable. In determining such applicability as it was found that at the time the act was passed the possession of the defendant had not existed for a sufficient length of time to bar the right of the railroad, the court came to consider whether the statute authorized the taking into view of adverse possession enjoyed after the passage of the act. Answering this inquiry from a consideration not only of the text of the act, but of the ruling in *Northern Pacific Ry.* v. *Ely*, *supra*, it was decided that the statute intended to permit the consideration of such subsequent possession and therefore the title by possession of the defendant which was inadequate considering the state of things existing at the time of the passage of the statute, was decided to be valid as against the Railway Company, in consequence of the effect given to the possession after the passage of the statute. 75 Washington, 591.

We are of opinion that this interpretation of the act is inconsistent with its text and was erroneously supposed to be supported by the ruling in *Northern Pacific Ry.* v. *Ely*. We say it is inconsistent with its text, because in express terms the validating power which the act exerted was made applicable only to "all conveyances heretofore made" and nothing in the context lends itself to the conclusion that Congress contemplated conferring on the Railway Company unlimited power in the future to dispose of its right of way or to give the right to others to divest the railroad of the title to such right of way by future adverse possession. And this meaning of the act is aptly illustrated by its title since it treats its provisions as only confirming conveyances theretofore made and not as conferring power on the Railway Company to make conveyances of its right of way for the future.

But the argument is that although this interpretation may as an original question be well founded, it is not open to adopt it consistently with the ruling in the *Ely Case*. The reasoning is this: The statute, it is said, if literally interpreted, only relates to conveyances and not to adverse possession, but as adverse possession complete at the time of the passage of the act was brought within its scope by the ruling in the *Ely Case*, therefore the statute was in that case interpreted in a broad and not a literal sense. Giving to the statute this significance, the argument is that it is inconsistent to now hold that the statute does not include all conveyances and all possession without regard to whether they were made or perfected before or after the passage of the act. But this fails to consider that the ruling in the *Ely Case* related exclusively to a possession which had completely ripened at the time of the passage of the act, and therefore that case was concerned only with the subject with which the statute dealt, that is, rights hitherto acquired, and which were in a generic sense within the remedy which the statute was intended to afford—the curing of infirmities in title which had become complete prior to the passage of the act. Indeed the opinion in the *Ely Case* shows that the reasoning by which it came to pass that the word conveyances in the statute also embraced title by possession perfected before the passage of the act was but an application of the familiar rule that a remedial statute, where it is reasonably possible to do so, must be interpreted so as to embrace the remedies which it was obviously intended to afford. The difference then between that case and this is that which exists between on the one hand interpreting the words of the statute so as to cause them to include things which are within its contemplation and on the other hand adopting of an interpretation which would destroy the express limitations of the statute and cause it to accomplish a purpose which its text plainly demonstrates it was not intended to reach.

It is urged that even if it be found that error was committed in interpreting the statute, nevertheless the judgment below should be affirmed because it rests not alone upon the mistaken interpretation of the statute, but also upon an independent state ground adequate to sustain it, that is, a finding that there had been possession adequate to bar the right of the Railway Company completed before the adoption of the act. We are of opinion, however, that there is no ground upon which this proposition can rest since the court below after finding that the defendant's possession before the act had not been for a sufficient time to bar the right of the Railway Company, and then considering whether an adequate lapse of time would not result from joining to the possession of the defendant the prior possession of other persons asserted to be predecessors in title of the defendant, did not pass upon that question. On the contrary the court after pointing out difficulties arising from what it considered to be infirmities in the proof concerning the nature and character of the possession of the alleged predecessors and their privity with the defendant, held that it was unnecessary to solve such difficulties because under the statute the defendant could complete the time necessary to bar the right of the Railway Company by resorting to possession enjoyed by him after the passage of the act.

Although from these considerations it results that our duty is to reverse because of the erroneous construction given to the act of Congress and which was the sole basis of the decision below, we are of opinion that the order of reversal should not preclude the right in the court below to consider and pass upon, in the light of the statute as correctly construed, the question of adverse possession asserted to have been completed prior to the passage of the act which as we have seen the court did not dispose of because of the erroneous opinion which it entertained concerning the meaning of the act of Congress and our decree

therefore will leave that question open. The issue thus left open involves a question arising under the state law which should be passed upon primarily by the state court. In saying this however we must not be considered as holding that ultimate authority to review such question when passed upon would not exist in this court to the extent that such power to review may be essential to the enforcement of the provisions of the act of Congress in question. *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 251; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S. 605, 609–610. See *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 470–471. It follows subject to the reservation stated that the judgment below must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* GLENN.

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

No. 91. Argued December 6, 1915.—Decided December 20, 1915.

Although the trial court may have charged the jury that there was a presumption, rebuttable by proof, that the damage occurred on the line of the delivering carrier, if the court also excluded testimony offered by defendant to show that the damage, if any, did not occur on its line on the ground that a state statute made the delivering carrier liable, the judgment does not rest on the independent state ground of defendant's negligence but rests on the validity of the statute; and if defendant properly saved the Federal question, this court has jurisdiction to review under § 237, Judicial Code.

This court having held that Congress, under its power to regulate interstate commerce, can make an initial carrier liable to the holder of a bill of lading for a through interstate shipment over its own and connecting lines, even if the loss occurred while the goods were under control of the connecting carrier, the same reasoning applies to upholding a state statute making the delivering carrier of a through intrastate shipment liable to the consignee even if the loss occurred while the goods were under the control of another carrier. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

The statute of South Carolina making the delivering carrier responsible for damage to goods on through bills of lading in intrastate shipments is not unconstitutional under the Fourteenth Amendment as depriving a delivering carrier who voluntarily received the goods from a connecting carrier of its property without due process of law.

The statute of South Carolina having been construed by the courts of that State as not requiring a carrier to accept intrastate shipments on through bills from connecting carriers, this court does not in this case determine the liability of a carrier receiving from a connecting carrier goods in a damaged condition or the constitutionality of a state statute making such receiving carrier liable for damage in such event.

96 So. Car. 357, affirmed.

THE facts, which involve the liability of connecting carriers under a statute of South Carolina, are stated in the opinion.

Mr. P. A. Willcox with whom *Mr. F. L. Willcox* was on the brief, for plaintiff in error.

Mr. Joe P. Lane, Mr. L. B. Haselden and *Mr. Frederick S. Tyler* for defendant in error.

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

Sections 2574 and 2575 of the Civil Code of South Carolina (1912) provide in part as follows:

"All common carriers over whose transportation lines,

or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this State, with respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; . . .

"For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this State therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit."

In November, 1911, these provisions being in force, Glenn, the defendant in error, through an agent delivered to the Southern Railway Company at Chester, South Carolina, a carload of cattle for through shipment to Latta, South Carolina, on the Atlantic Coast Line Railroad. The Southern Railway accepted the cattle, issued

a bill of lading for their shipment to Latta over its own and its connecting lines, and transported them over its own line to Columbia, South Carolina, where they were by it delivered to and accepted by the Atlantic Coast Line Railroad Company, by which company they were carried under the original bill of lading to Latta and there delivered to Glenn, the consignee. There was delay in the transit and to recover damages on account of resulting injury to the cattle Glenn brought this suit against the Atlantic Coast Line, alleging, conformably to the statute above quoted, that the Southern Railway in so far as the shipment involved was concerned, was the agent of the defendant, and consequently asserting a right to recover from the defendant damages resulting from the negligence of the Southern Railway or of the defendant or both. The defendant denied this right and sought to escape all liability by establishing that it had promptly transported and delivered the cattle after receiving them from the Southern Railway, that the delay, if any, had not occurred on its line, and that by virtue of the following provision of the contract of shipment defendant was not responsible for any delay occurring on the line of the Southern Railway:

"That the responsibility, either as common carrier or warehouseman, of each carrier over whose line the property shipped hereunder shall be transported shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several and not joint; neither of the said carriers shall be responsible or liable for any act, omission or negligence of the other carriers over whose lines said property is or is to be transported."

This defense was on motion of the plaintiff stricken by the court from the answer on the ground that the provision of the contract was void because in conflict with the statute which we have quoted, and rulings to the same effect were

made during the course of the trial in excluding evidence offered by the defendant, in refusing instructions by it requested, and in charging the jury that the provisions of the statute were applicable to the case and that the defendant was liable for damage resulting from its own or the negligence of the Southern Railway. A judgment in favor of the plaintiff rendered on the verdict of the jury was affirmed by the court below which held that the statute was rightly applied to the case and was not repugnant to the due process clause of the Fourteenth Amendment (96 So. Car. 357), and the correctness of that conclusion is the question for decision on this writ of error.

We first dispose of a motion to dismiss. It is based on the proposition that since the court instructed the jury that there was a presumption, which might be rebutted, that the damage to the cattle, if any, occurred on the line of the delivering carrier, that is, the defendant company, the jury might have found for the plaintiff wholly irrespective of the statute, and therefore the judgment rests upon an independent state ground broad enough to sustain it. But the want of foundation for the proposition is manifest when it is considered that evidence offered by the defendant which would have a tendency to show that no damage and no delay occurred on its line and hence tended to rebut the presumption was excluded from the consideration of the jury by the ruling of the court that the statute imposed upon the defendant the duty to respond to the plaintiff for the negligence of the Southern Railway. The motion is therefore denied.

Coming to the merits we are of the opinion that the case is controlled by *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186. In that case the constitutionality of the act of Congress known as the Carmack Amendment to the Act to Regulate Commerce was considered, the question presented being whether Congress under its power to regulate commerce could make an initial carrier liable to

the holder of a bill of lading issued by it for a through interstate shipment of property over its own and connecting lines for a loss occurring after the property had been delivered by it to a connecting carrier and while in the control of such carrier. It was decided that the act was a valid regulation of interstate commerce and hence that no rights of the initial carrier secured by the Fifth Amendment had been violated. It is true that case involved the power of Congress over interstate, while this concerns the power of a State over intrastate, commerce, but the reasoning by which the conclusion as to the existence of the power was sustained in that case compels a like conclusion with reference to the power of a State over commerce wholly within its borders. Indeed, in argument the controlling force in a general sense of the *Riverside Case* is conceded, but it is insisted that it can here have no application because liability is imposed by the state statute upon the terminal and intermediate carriers as well as the initial or receiving carrier while in the *Riverside Case* the liability alone of the latter was under consideration. But it is obvious that this proposition challenges not the power but the wisdom of exerting it, since in the nature of things the power to constitute an initial carrier the agent of the terminal carrier is not different from the power to make the terminal carrier the agent of the initial carrier. Of course we confine ourselves to the case before us and therefore do not decide what would be the rights of the terminal carrier if against its will it had been compelled to accept the cattle from the initial carrier in a damaged condition or if they had never been delivered to it. These questions are not presented by the record since it is not contended that the acceptance of the cattle by the Atlantic Coast Line was not voluntary. In fact, it is stated in the argument of the plaintiff in error that long prior to the shipment in question the statute had been construed by the court below to permit the connecting carrier upon

accepting a shipment from an initial carrier to repudiate the original bill of lading and issue a new one. (*Venning* v. *Atlantic Coast Line*, 78 S. Car. 42.)

Affirmed.

HADACHECK *v.* SEBASTIAN, CHIEF OF POLICE OF THE CITY OF LOS ANGELES.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 32. Submitted October 22, 1915.—Decided December 20, 1915.

While the police power of the State cannot be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them equal protection of the law, it is one of the most essential powers of Government and one of the least limitable—in fact, the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised.

A vested interest cannot because of conditions once obtaining be asserted against the proper exercise of the police power—to so hold would preclude development. *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67.

There must be progress, and in its march private interests must yield to the good of the community.

The police power may be exerted under some conditions to declare that under particular circumstances and in particular localities specified businesses which are not nuisances *per se* (such as livery stables, as in *Reinman* v. *Little Rock*, 237 U. S. 171, and brick yards, as in this case) are to be deemed nuisances in fact and law.

While an ordinance prohibiting the manufacturing of bricks within a specified section of a municipality may be a constitutional exercise of the police power—*quære* whether prohibiting of digging the clay and moving it from that section would not amount to an unconstitutional deprivation of property without due process of law.

This court cannot consider the contention of one attacking a municipal ordinance that it denies him equal protection of the laws when based upon disputable considerations of classification and on a comparison

of conditions of which there is no means of judicial determination.

In this case, the charges of plaintiff in error that the ordinance attacked and alleged to be ruining his business was adopted in order to foster a monopoly and suppress his competition with others in the same business, is too illusive for this court to consider, the state courts having also refuted it.

The fact that a particular business is not prohibited in all sections of a municipality, does not for that reason, make the ordinance unconstitutional as denying equal protection of the law to those carrying on that business in the prohibited section—conditions may justify the distinction and classification.

In determining whether a municipal ordinance goes further than necessary to remedy the evil to be cured, this court must, in the absence of clear showing to the contrary, accord good faith to the municipality.

Whether an ordinance is within the charter power of the city or valid under the state constitution are questions of state law.

An ordinance of Los Angeles prohibiting the manufacturing of bricks within specified limits of the city, *held*, in an action brought by the owner of brick clay deposits and a brick factory, not to be unconstitutional as depriving him of his property without due process of law, or as denying him equal protection of the laws.

165 California, 416, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection provisions of the Fourteenth Amendment of an ordinance of Los Angeles prohibiting brick yards within certain limits of the city, are stated in the opinion.

Mr. Emmett H. Wilson and *Mr. G. C. DeGarmo* for plaintiff in error:

Although an ordinance is purported to have been enacted to protect the public health, morals or safety if it has no substantial relation to those objects, constitutional rights have been invaded and it is the duty of the court so to adjudge. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Lochner* v. *New York*, 198 U. S. 45; *Lawton* v. *Steele*, 152 U. S. 133.

The State, or any political subdivision thereof, when

legislating for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of Federal Constitution of the United States, and is not permitted to violate rights secured or guaranteed thereby. *Henderson* v. *Wickham*, 92 U. S. 259; *Hannibal Co.* v. *Husen*, 95 U. S. 465; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Walling* v. *Michigan*, 116 U. S. 446; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The business of operating brick yards and manufacturing brick is a useful, necessary and lawful occupation and is not a nuisance *per se*. *Huckenstine's Appeal*, 70 Pa. St. 102; *State* v. *Board of Health*, 16 Mo. App. 8; *Phillips* v. *Lawrence V. B. & T. Co.*, 72 Kansas, 643; *Denver* v. *Rogers*, 46 Colorado, 479; *Windfall Mfg. Co.* v. *Patterson*, 148 Indiana, 414; *Belmont* v. *New England Brick Co.*, 190 Massachusetts, 442.

A city cannot prohibit the maintenance of a brick yard unless, by reason of the manner of its operation, it becomes a nuisance in fact. *Yates* v. *Milwaukee*, 10 Wall. 497; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Ex parte Sing Lee*, 96 California, 354; *In re Sam Kee*, 31 Fed. Rep. 680; *In re Hong Wah*, 82 Fed. Rep. 623; *Ex parte Whitwell*, 98 California, 73; *Stockton Laundry Case*, 26 Fed. Rep. 611; *Denver* v. *Rogers*, 46 Colorado, 479; *Denver* v. *Mullin*, 7 Colorado, 345; *Phillips* v. *Denver*, 19 Colorado, 179, 184.

A city council is not empowered to pass an ordinance making that a nuisance which is not a nuisance *per se*. The legislative declaration cannot alter the character of a business so as to make a nuisance of that which is not such in fact. Nor will the mere legislative declaration of the existence of a nuisance be accepted as a fact by the courts. Cases *supra* and *Los Angeles* v. *Hollywood Cemetery*, 124 California, 344; *Grossman* v. *Oakland*, 30 Oregon, 478.

The power possessed by the city to abate nuisances does

not include power to prevent unless the business is a nuisance *per se*. *Lake View* v. *Letz*, 44 Illinois, 81; *In re Smith*, 143 California, 371; *Hume* v. *Laurel Hill Cemetery*, 142 Fed. Rep. 552, 563; *Laurel Hill Cemetery* v. *City*, 152 California, 464, 472; Freund, Police Power, §§ 63, 144; Dillon, Mun. Corp. (5th ed.), § 666; *In re Kelso*, 147 California, 611; *Covington & L. P. R. Co.* v. *Sandford*, 164 U. S. 578, 592; *Ruhstrat* v. *People*, 185 Illinois, 133.

In cases of this kind the court must scrutinize the objects and purposes sought to be accomplished by the ordinance in question for the purpose of determining its validity. In so doing they are not limited to matters that appear upon the face of the ordinance, but may consider all the circumstances in the light of existing conditions. Cases *supra* and *Lake View* v. *Tate*, 130 Illinois, 247; *Ex parte Patterson*, 42 Tex. Crim. Rep. 256; *People* v. *Armstrong*, 73 Michigan, 288; *Oxanna* v. *Allen*, 90 Alabama, 468; *Tugman* v. *Chicago*, 78 Illinois, 405; *Cleveland Co.* v. *Connorsville*, 147 Indiana, 277; *State* v. *Boardman*, 93 Maine, 73; *Kosciusko* v. *Slomberg*, 68 Mississippi, 469; *Crowley* v. *West*, 52 La. Ann. 526; *Odd Fellows' Cemetery* v. *San Francisco*, 140 California, 226; *Pieri* v. *Mayor*, 42 Mississippi, 493; *Corregan* v. *Gage*, 68 Missouri, 541; *Chicago* v. *Rumpf*, 45 Illinois, 90.

The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or the suppression of a lawful business, cases *supra*, nor can discriminatory legislation be sustained even though enacted under color of sanitary power. Freund, Police Power, § 138.

A law is not general or constitutional if it imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a person selected from the general body of those who stand in precisely the same relation to the subject of the law. *Pasadena* v. *Stimson*, 91 California, 238; *Bruch* v. *Colombet*, 104 California, 347; *Darcy* v. *Mayor*, 104 California, 642; *People* v. *Cent. Pac.*

R. R., 105 California, 576, 584; *Cullen* v. *Glendora Water Co.*, 113 California, 503; *Ex parte Clancy*, 90 California, 553; *Krause* v. *Durbrow*, 127 California, 681.

The imposition of dissimilar regulations upon different persons engaged in the same business must be founded upon differences that will rationally justify the diversity of legislation. *Ex parte Jentzsch*, 112 California, 474; *Darcy* v. *Mayor*, 104 California, 642; *Ex parte Bowen*, 115 California, 372; *Ex parte Dickey*, 144 California, 237; *People ex rel. Wineburgh Adv. Co.* v. *Murphy*, 195 N. Y. 126; *Phillips* v. *Denver*, 19 Colorado, 179; *Belmont* v. *New England Brick Co.*, 190 Massachusetts, 442; *Commonwealth* v. *Mahalsky*, 203 Massachusetts, 241; *Chicago* v. *Netcher*, 183 Illinois, 104; *Braceville Coal Co.* v. *People*, 147 Illinois, 66.

The ordinance in question deprives the plaintiff in error of his property without due process of law and is therefore void. *Frorer* v. *People*, 141 Illinois, 171; *Ramsey* v. *People*, 142 Illinois, 380; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 224; *Chicago* v. *Netcher*, 183 Illinois, 104; *Braceville Coal Co.* v. *People*, 147 Illinois, 66.

In order to sustain the validity of a municipal ordinance it is necessary for the court to determine that its provisions are reasonable. *Chicago* v. *Rumpf*, 45 Illinois, 90; *Toledo W. & W. Ry.* v. *Jacksonville*, 67 Illinois, 37; *Tugman* v. *Chicago*, 78 Illinois, 405; *Lake View* v. *Tate*, 130 Illinois, 247; *Oxanna* v. *Allen*, 90 Alabama, 468.

The ordinance is unreasonable because the severe measures adopted were not reasonably necessary for the prevention of the acts complained of in reference to the brickyard. Remedies other than confiscation of the property would have been effective. Cases *supra* and *Judson* v. *Los Angeles Suburban Gas Co.*, 157 California, 168.

The ordinance is unreasonable because if any nuisance has existed the same may be abated by regulatory rather

than by suppressive and confiscatory measures. The business should be allowed to continue upon eliminating such features, if any, as constituted a nuisance. Cases *supra* and *Green* v. *Lake*, 54 Mississippi, 540; *Chamberlain* v. *Douglas*, 48 N. Y. Supp. 710; *Pach* v. *Geoffrey*, 22 N. Y. Supp. 275; *Yocum* v. *Hotel St. George*, 18 Abb. N. C. (N. Y.) 340; *Miller* v. *Webster*, 94 Iowa, 162.

The ordinance is unreasonable because it is not limited with reference to conditions and measures. The danger may be slight and remote while the remedy—entire suppression—could not be more drastic. Cases *supra* and Freund, Police Power, § 143.

The ordinance is unreasonable because the means adopted are out of proportion to the danger involved. The restraint should not be disproportionate to the danger. Cases *supra* and Freund, Police Power, §§ 150, 158.

The ordinance is unreasonable because the law will not take cognizance of petty inconveniences and slight grievances. Cases *supra* and Freund, Police Power, § 178; Joyce on Nuisances, §§ 93, 96; *Van de Veer* v. *Kansas City*, 107 Missouri, 83; *Susquehanna Co.* v. *Spangler*, 86 Maryland, 562; *Tuttle* v. *Church*, 53 Fed. Rep. 422; *Gilbert* v. *Showerman*, 23 Michigan, 448; *McGuire* v. *Bloomingdale*, 29 N. Y. Supp. 580; *Gallagher* v. *Flury*, 99 Maryland, 181.

The ordinance is discriminatory and unreasonable because the district was unreasonably and irrationally created. Cases *supra* and Freund, Police Power, § 179.

The police power cannot be used for the purpose of protecting property values. Cases *supra* and *Chicago* v. *Gunning System*, 214 Illinois, 62; Const. California, Art. 11, § 11; Cooley, Const. Lim. (7th ed.), 837.

The provision of the city charter (§ 2, sub. 22), giving the city general power to make and enforce peace and sanitary regulations is modified and limited by the specific power given (§ 2, sub. 13) to "restrain, suppress and pro-

hibit" certain named occupations. *Rodgers* v. *United States*, 185 U. S. 83; *In re Rouse*, 91 Fed. Rep. 96; *Crane* v. *Reeder*, 22 Michigan, 322; *Phillips* v. *Christian County*, 87 Ill. App. 481; *Felt* v. *Felt*, 19 Wisconsin, 193; *Nance* v. *Southern Ry.*, 149 N. Car. 366; *Hoey* v. *Gilroy*, 129 N. Y. 132; *Stockett* v. *Bird*, 18 Maryland, 484; *Nichols* v. *State*, 127 Indiana, 406; *State* v. *Hobe*, 106 Wisconsin, 411; *State* v. *Dinnesse*, 109 Missouri, 434; *Frandzen* v. *San Diego*, 101 California, 317.

The city having adopted the special and limited power set forth in the charter (§ 2, sub. 13), did not accept in its entirety the right to enforce the police power of the State as granted by § 11, art. XI of the constitution. *Rapp* v. *Kiel*, 159 California, 702, 709; *In re Pfahler*, 150 California, 71, 81; *People* v. *Newman*, 96 California, 605; *State* v. *Ferguson*, 33 N. H. 424; *Northwestern Tel. Co.* v. *St. Charles*, 154 Fed. Rep. 386; *Louis* v. *West. Un. Tel. Co.*, 149 U. S. 465.

The legislative body of a city having freeholders' charter may be limited by charter provision in the exercise of the police power conferred upon the city by the constitution of the State. Cases *supra*.

Mr. Albert Lee Stephens, *Mr. Charles S. Burnell* and *Mr. Warren L. Williams* for defendant in error:

For other ordinances prohibiting the maintenance of certain classes of business in residence districts see *Ex parte Quong Wo*, 161 California, 220; *Grumbach* v. *Lelande*, 154 California, 679; *In re Montgomery*, 163 California, 457; *In re Linehan*, 72 California, 114.

The police power extends to all the great public needs. *Canfield* v. *United States*, 167 U. S. 518; *Bacon* v. *Walker*, 204 U. S. 311, 317; *C., B. & Q. R. R.* v. *Drainage Commrs.*, 200 U. S. 592; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Lake Shore Rwy.* v. *Ohio*, 173 U. S. 285; *Thorpe* v. *Railway*, 27 Vermont, 140; *Pound* v. *Turck*, 96 U. S. 464; *Railroad*

v. *Husen*, 96 U. S. 470; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Bracey* v. *Darst*, 218 Fed. Rep. 98.

Under what circumstances the police power should be exercised to prohibit the conduct of certain classes of business within a certain district is a matter of police regulation for the municipal authorities. *New Orleans* v. *Murat*, 119 Louisiana, 1093; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703.

It is primarily for the legislative body clothed with the proper power, to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances and of the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation. Cases *supra* and *Krittenbrink* v. *Withnell*, 135 N. W. Rep. 376; *Odd Fellows Cemetery* v. *San Francisco*, 140 California, 226; *Laurel Hill Cemetery* v. *San Francisco*, 152 California, 464; *In re Smith*, 143 California, 370; *Ex parte Tuttle*, 91 California, 589, 591; *Mo. Pac. R. R.* v. *Omaha*, 235 U. S. 121.

The reasons actuating the legislative body in enacting the regulation need not necessarily appear from a reading of the ordinance itself. *Grumbach* v. *Lelande*, 154 California, 685; *In re Zhizhuzza*, 147 California, 328, 334.

The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil, and the exercise of the police power may and should have reference to the particular situation and needs of the community. *Ohio Co.* v. *Indiana*, 177 U. S. 190; *Clark* v. *Nash*, 198 U. S. 361; *Strickly* v. *Highland Co.*, 200 U. S. 527; *Offield* v. *N. Y. Co.*, 203 U. S. 372; *McLean* v. *Denver*, 203 U. S. 38; *Brown* v. *Walling*, 204 U. S. 320; *Bacon* v. *Walker*, 204 U. S. 311;

Plessy v. *Ferguson*, 163 U. S. 537; *Welch* v. *Sweney*, 23 L. R. A. (N. S.) 1160.

It is not necessary that a business be a nuisance *per se* to be regulated. *Ex parte Lacey*, 108 California, 326; *Moses* v. *United States*, 16 App. Cas. D. C. 428; *Rhodes* v. *Dunbar*, 57 Pa. St. 275; *Breadman* v. *Tredwell*, 31 Law Journal (N. S.), 873; *Bassham* v. *Hall*, 22 Law Times, 116; *Bumford* v. *Tumley*, 2 B. & S. (Q. B.) 62; *Campbell* v. *Seaman*, 63 N. Y. 568.

The question whether the classification of subjects for the exercise of police power is proper is not to be determined upon hard and fast rules, but must be answered after a consideration of the particular subject of litigation. *Ex parte Stoltenberg*, 134 Pac. Rep. 971.

The length of time during which a business has existed in a certain locality does not make its prohibition for the future unconstitutional. Tiedeman's Stat. and Fed. Control; *Russell* v. *Beatty*, 16 Mo. App. 131; Sedgwick's Stat. and Const. Law, 434; *C., B. & Q. R. R.* v. *Drainage Commrs.*, 200 U. S. 592; Freund on Police Power, § 529; *Case of Morskettle*, 16 Mo. App. 8; *Powell* v. *Brookfield Brick Co.*, 78 S. W. Rep. 648; *Bushnell* v. *Robinson*, 62 Iowa, 542; *Baltimore* v. *Fairfield*, 87 Maryland, 352; *Harmison* v. *Lewiston*, 46 Ill. App. 164; *Commonwealth* v. *Upton*, 6 Gray, 473; *Rhodes* v. *Dunbar*, 57 Pa. St. 257; *People* v. *Detroit Lead Works*, 82 Michigan, 471.

Where the police power restricts constitutional rights, particularly as to property, the value of that property is not material to the issue. *Mugler* v. *Kansas*, 123 U. S. 623; *Grumbach* v. *Lelande*, 145 California, 684; *Western Indemnity Co.* v. *Pillsbury*, 50 (No. 2654) Cal. Dec. 291; *Erie R. R.* v. *Williams*, 233 U. S. 685, 700.

The size of the territory affected by the ordinance is no criterion by which to be guided in judging of its discriminatory qualities. Cases *supra*.

That a statute will result in injury to some private

interest does not deprive the legislature of power to enact it, although a statute may be invalid where its purpose is primarily the destruction of property. *Enos* v. *Hanff*, 152 N. W. Rep. 397.

The character and value of property contiguous to the business of plaintiff in error is very much to be considered. *Krittenbrink* v. *Withnell*, 135 N. W. Rep. 376.

That similar conditions exist in other localities is no reason why an ordinance regulating and equally affecting every one in a given locality should be declared unconstitutional.

A statute enacted within the police power will not be adjudged invalid merely because omitted cases might have been properly included in the statute. *People* v. *Schweinler*, 214 N. Y. 395; *Krohn* v. *Warden*, 152 N. Y. Supp. 1136; *State* v. *Olson*, 26 N. Dak. 304.

Every holder of property holds it under the implied liability that its use may be so regulated that it shall not encroach injuriously on the enjoyment of property by others or be injurious to the community. *Pittsburg Ry.* v. *Chappell*, 106 N. E. Rep. (Ind.) 403.

People residing in cities are entitled to enjoy their homes free from the damaging results of smoke, soot, and cinders, if sufficient to depreciate the value of their property and render its occupancy uncomfortable. *King* v. *Vicksburg Rwy.*, 88 Mississippi, 456; *Rochester* v. *Macauley-Fien Co.*, 199 N. Y. 207.

Brick yards and brick manufacturing plants, as well as all businesses which require the generation of smoke, soot, and gas, have universally been held to be objectionable and may be enjoined or regulated. Cases *supra* and *Booth* v. *Nome R. R.*, 37 Am. St. Rep. 552, 558; *McMorran* v. *Fitzgerald*, 106 Michigan, 649; *King* v. *Vicksburg Ry.*, 117 Am. St. Rep. 749; *Rochester* v. *Macauley-Fien Co.*, 199 N. Y. 207.

It is immaterial whether injury from gases emitted from

brick kilns is only occasional. Cases *supra* and *Kirchgraber* v. *Lloyd*, 59 Mo. App. 59.

The presumption is in favor of the validity of the ordinance and this presumption has not been rebutted by any evidence produced by plaintiff in error.

Prohibition of industries in certain sections of cities is but a regulation, and is always so treated. *Ex parte Byrd*, 54 Alabama, 17; *In re Wilson*, 32 Minnesota, 145; *Shea* v. *Muncie*, 148 Indiana, 14; *Cronin* v. *People*, 82 N. Y. 318; *Newton* v. *Joyce*, 166 Massachusetts, 83; *Little Rock* v. *Rineman*, 155 S. W. Rep. 105; *St. Louis* v. *Russell*, 116 Missouri, 248; *Ex parte Botts*, 154 S. W. Rep. 221.

The city has the right to regulate an occupation by confining the conducting thereof within prescribed limits. Cases *supra; Grumbach* v. *Lelande*, 154 California, 679; *In re Linehan*, 72 California, 114; *White* v. *Bracelin*, 144 Michigan, 332; 107 N. W. Rep. 1055; *Stram* v. *Galesburg*, 203 Illinois, 234; 67 N. E. Rep. 836; *New Orleans* v. *Murat*, 119 Louisiana, 1093; 44 So. Rep. 898; *Ex parte Botts*, 154 S. W. Rep. 221.

Mr. Justice McKenna delivered the opinion of the court.

Habeas corpus prosecuted in the Supreme Court of the State of California for the discharge of plaintiff in error from the custody of defendant in error, Chief of Police of the City of Los Angeles.

Plaintiff in error, to whom we shall refer as petitioner, was convicted of a misdemeanor for the violation of an ordinance of the City of Los Angeles which makes it unlawful for any person to establish or operate a brick yard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick within described limits in the city. Sentence was pronounced against him

and he was committed to the custody of defendant in error as Chief of Police of the City of Los Angeles.

Being so in custody he filed a petition in the Supreme Court of the State for a writ of *habeas corpus*. The writ was issued. Subsequently defendant in error made a return thereto supported by affidavits, to which petitioner made sworn reply. The court rendered judgment discharging the writ and remanding petitioner to custody. The Chief Justice of the court then granted this writ of error.

The petition sets forth the reason for resorting to *habeas corpus* and that petitioner is the owner of a tract of land within the limits described in the ordinance upon which tract of land there is a very valuable bed of clay, of great value for the manufacture of brick of a fine quality, worth to him not less than $100,000 per acre or about $800,000 for the entire tract for brick-making purposes, and not exceeding $60,000 for residential purposes or for any purpose other than the manufacture of brick. That he has made excavations of considerable depth and covering a very large area of the property and that on account thereof the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was at the time of purchase outside of the limits of the city and distant from dwellings and other habitations and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.

That if the ordinance be declared valid he will be compelled to entirely abandon his business and will be deprived of the use of his property.

That the manufacture of brick must necessarily be carried on where suitable clay is found and the clay cannot be transported to some other location, and, besides, the clay upon his property is particularly fine and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is one other brick yard besides that of plaintiff in error.

That there is no reason for the prohibition of the business; that its maintenance cannot be and is not in the nature of a nuisance as defined in § 3479 of the Civil Code of the State, and cannot be dangerous or detrimental to health or the morals or safety or peace or welfare or convenience of the people of the district or city.

That the business is so conducted as not to be in any way or degree a nuisance; no noises arise therefrom, and no noxious odors, and that by the use of certain means (which are described) provided and the situation of the brick yard an extremely small amount of smoke is emitted from any kiln and what is emitted is so dissipated that it is not a nuisance nor in any manner detrimental to health or comfort. That during the seven years which the brick yard has been conducted no complaint has been made of it, and no attempt has ever been made to regulate it.

That the city embraces 107.62 square miles in area and 75% of it is devoted to residential purposes; that the district described in the ordinance includes only about three square miles, is sparsely settled and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brick yard.

That there are and were at the time of the adoption of the ordinance in other districts of the city thickly built up with residences brick yards maintained more detrimental to the inhabitants of the city. That a petition was filed,

signed by several hundred persons, representing such brick yards to be a nuisance and no ordinance or regulation was passed in regard to such petition and the brick yards are operated without hindrance or molestation. That other brick yards are permitted to be maintained without prohibition or regulation.

That no ordinance or regulation of any kind has been passed at any time regulating or attempting to regulate brick yards or inquiry made whether they could be maintained without being a nuisance or detrimental to health.

That the ordinance does not state a public offense and is in violation of the constitution of the State and the Fourteenth Amendment to the Constitution of the United States.

That the business of petitioner is a lawful one, none of the materials used in it are combustible, the machinery is of the most approved pattern and its conduct will not create a nuisance.

There is an allegation that the ordinance if enforced fosters and will foster a monopoly and protects and will protect other persons engaged in the manufacture of brick in the city, and discriminates and will discriminate against petitioner in favor of such other persons who are his competitors, and will prevent him from entering into competition with them.

The petition, after almost every paragraph, charges a deprivation of property, the taking of property without compensation, and that the ordinance is in consequence invalid.

We have given this outline of the petition as it presents petitioner's contentions, with the circumstances (which we deem most material) that give color and emphasis to them.

But there are substantial traverses made by the return to the writ, among others, a denial of the charge that the ordinance was arbitrarily directed against the business of

petitioner, and it is alleged that there is another district in which brick yards are prohibited.

There was a denial of the allegations that the brick yard was conducted or could be conducted sanitarily or was not offensive to health. And there were affidavits supporting the denials. In these it was alleged that the fumes, gases, smoke, soot, steam and dust arising from petitioner's brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity.

There was no specific denial of the value of the property or that it contained deposits of clay or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would "entirely deprive petitioner of his property and the use thereof."

How the Supreme Court dealt with the allegations, denials and affidavits we can gather from its opinion. The court said, through Mr. Justice Sloss, 165 California, p. 416: "The district to which the prohibition was applied contains about three square miles. The petitioner is the owner of a tract of land, containing eight acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was directed had been annexed to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period of his ownership, used the land for brickmaking, and has erected thereon kilns, machinery and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose."

The court considered the business one which could be regulated and that regulation was not precluded by the fact "that the value of investments made in the business prior to any legislative action will be greatly diminished," and that no complaint could be based upon the fact that

petitioner had been carrying on the trade in that locality for a long period.

And, considering the allegations of the petition, the denials of the return and the evidence of the affidavits, the court said that the latter tended to show that the district created had become primarily a residential section and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner; and that such evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination, overcame the contention that the prohibition of the ordinance was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business was so detrimental to the interests of others as to require suppression."

The court, on the evidence, rejected the contention that the ordinance was not in good faith enacted as a police measure and that it was intended to discriminate against petitioner or that it was actuated by any motive of injuring him as an individual.

The charge of discrimination between localities was not sustained. The court expressed the view that the determination of prohibition was for the legislature and that the court, without regard to the fact shown in the return that there was another district in which brick-making was prohibited, could not sustain the claim that the ordinance was not enacted in good faith but was designed to discriminate against petitioner and the other brick yard within the district. "The facts before us," the court finally said, "would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what it purported to be, viz., a legitimate regulation, operating alike upon all who came within its terms."

We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many

cases cited by petitioner in which it is decided that the police power of a state cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

The police power and to what extent it may be exerted we have recently illustrated in *Reinman* v. *Little Rock*, 237 U. S. 171. The circumstances of the case were very much like those of the case at bar and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance *per se* cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in

particulars, but they are alike in that which cause and justify prohibition in defined localities—that is, the effect upon the health and comfort of the community.

The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: granting that the business was not a nuisance *per se*, it was clearly within the police power of the State to regulate it, "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." And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination. There was a citation of cases. We think the present case is within the ruling thus declared.

There is a distinction between *Reinman* v. *Little Rock* and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found and that the clay on petitioner's property cannot be transported to some other locality. This is not urged as a physical impossibility but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive "from a financial standpoint." But upon the evidence the Supreme Court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brick yard and not from the deprivation of the deposits of clay, and distinguished *Ex parte Kelso*, 147 California, 609, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco.

The court there said that the effect of the ordinance was "to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership,—viz., the right to extract therefrom such rock and stone as they might find it to their advantage to dispose of." The court expressed the view that the removal could be regulated but that "an absolute prohibition of such removal under the circumstances," could not be upheld.

In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.

Petitioner invokes the equal protection clause of the Constitution and charges that it is violated in that the ordinance (1) "prohibits him from manufacturing brick upon his property while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of plaintiff in error"; and (2) that it "prohibits the conduct of his business while it permits the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted."

If we should grant that the first specification shows a violation of classification, that is, a distinction between businesses which was not within the legislative power, petitioner's contention encounters the objection that it depends upon an inquiry of fact which the record does not enable us to determine. It is alleged in the return to the petition that brickmaking is prohibited in one other district and an ordinance is referred to regulating business in other districts. To this plaintiff in error replied that the ordinance attempts to prohibit the operation of certain

businesses having mechanical power and does not prohibit the maintenance of any business or the operation of any machine that is operated by animal power. In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action exercised upon matters of which the city has control.

To a certain extent the latter comment may be applied to other contentions, and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other brickmakers. The charge and argument are too illusive. It is part of the charge that the ordinance was directed against him. The charge, we have seen, was rejected by the Supreme Court, and we find nothing to justify it.

It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the Supreme Court of the State, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.

There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does

not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.

We do not notice the contention that the ordinance is not within the city's charter powers nor that it is in violation of the state constitution, such contentions raising only local questions which must be deemed to have been decided adversely to petitioner by the Supreme Court of the State.

Judgment affirmed.

WILLIAMS *v.* JOHNSON.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 110. Submitted December 6, 1915.—Decided December 20, 1915.

Indians are wards of the Nation; Congress has plenary control over tribal relations and property and this power continues after the Indians are made citizens and may be exercised as to restrictions on alienation of allotments. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Choate* v. *Trapp*, 224 U. S. 665, distinguished.

The provision in the Act of April 21, 1904, c. 33, Stat. 204, removing certain restrictions on alienation of allotments to Choctaw Indians imposed by the Act of July 1, 1902, was within the power of Congress and was not, under the Fifth Amendment, an unconstitutional deprivation of property of Indians to whom allotments had been made; nor did it impair the obligation of the contract theretofore made between the United States and the Choctaw and Chickasaw Nations in regard to allotments.

Quære whether the grantee of an Indian can avail of the right, if any, of the Indian to assert the unconstitutionality of an act of Congress af-

fecting the rights of the Indian, or whether such grantee can be heard to urge rights of the tribe to which his grantor belonged.
32 Oklahoma, 247, affirmed.

THE facts, which involve the title to allotted lands conveyed by a Choctaw Indian and the construction, application and constitutionality of Acts of Congress relating to the allotment of lands to Choctaw Indians and restriction of alienation thereon, are stated in the opinion.

Mr. Eli P. Williams, Mr. Elmer Williams and *Mr. Charles H. Williams* for plaintiffs in error *pro se:*

Private property rights are protected by the Federal Constitution.

The land involved herein is not alienable.

The Choctaw and Chickasaw nations were owners of land, and grantors in the patent that conveyed same.

When Taylor accepted the patent he was bound and so was the tribe and government.

The act of Congress of April 21, 1904, was unconstitutional so far as applied to the restriction upon Taylor.

The restrictions attached to land were not repealable. The private property rights of Taylor were secured and enforced to same extent and in same way as other residents or citizens.

The statutes of Arkansas were in force in Indian Territory and applied to the Indians.

In support of these contentions, see *Carondelet Canal Co.*, 233 U. S. 362; *Choate* v. *Trapp*, 224 U. S. 665; *Fleming* v. *McCurtain*, 215 U. S. 56; *Jones* v. *Mehan*, 175 U. S. 1; *Mallett* v. *North Carolina*, 181 U. S. 589; *Mullen* v. *United States*, 224 U. S. 448; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Ward* v. *Racehorse*, 163 U. S. 503.

Mr. Reford Bond, Mr. Alger Melton and *Mr. Adrian Melton* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to quiet title brought by Johnson, defendant in error, in the district court of Grady County, State of Oklahoma, against plaintiffs in error.

The contention of defendant in error is that the land was an allotment to one Selin Taylor, a member of the Choctaw Tribe of Indians by blood; that on November 22, 1904, a patent was duly issued to him executed by the proper officers of that Nation and the Chickasaw Nation, and the United States, and that at the time of the allotment the land was inalienable.

On February 9, 1906, the United States Indian agent issued to Taylor a certificate (No. 2458) removing Taylor's disabilities respecting the alienation of the land and on February 16 Taylor conveyed the land by warranty deed to C. B. Campbell, and the latter and his wife, on March 13 following, conveyed the land by like deed to Johnson. The deeds were duly recorded.

On November 15, 1906, Taylor and his wife conveyed the land by warranty deed to James E. Whithead, and on October 22, 1909, Whitehead conveyed the land to one McNeill, who, on the 25th of that month, conveyed to Johnson.

Johnson's petition alleged that the claim of title of the defendants (plaintiffs in error here) was based upon a power of attorney covering the land executed by Taylor on March 11, 1907, and charged that the power of attorney constituted a cloud upon his (Johnson's) title.

The answer of the defendants admitted the allotment to Taylor and the execution of the various instruments of conveyance from him and his grantees to Johnson, and alleged that Taylor received his allotment under an act of Congress of July 1, 1902, c. 1362, 32 Stat. 641, known as an "Act to Ratify and Confirm an Agreement with the

Choctaw and Chickasaw Tribes of Indians, and for Other Purposes" and that the act was called an "agreement" and was ratified by Congress and the voters of those tribes, and was a binding contract upon the United States and the Indians of those tribes and particularly Taylor. That Taylor is not a ward of the United States and was not at the time the land was allotted, and that by an act of Congress of March 3, 1901, c. 68, 31 Stat. 1447, Taylor was made a citizen of the United States, with the rights, privileges and immunities of such.

That the Choctaw and Chickasaw Nations and not the United States are the grantors in the patent to Taylor and imposed restrictions upon him against the alienation of the land and have not consented to the removal of those restrictions. That the deeds executed by Taylor under which Johnson claimed title were in violation of such restrictions and therefore void. That the patent to Taylor was issued by authority of § 29 of the act of Congress of June 28, 1898, c. 517, 30 Stat. 495, 505, and contained the following clause: "Subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat. 641)."

That Taylor and the defendants claim title to the land under that agreement and patent; that the restrictions imposed upon the alienation of the land were for the protection and benefit of the members of the tribes; that Taylor was a full-blood Choctaw Indian and a member of the Choctaw tribe, did not understand the English language, was wholly ignorant of land values, was in need of and entitled to the protection and benefit of the restrictions so imposed; and that such "protection was of great value and was to him property as much as the land itself."

That the deeds executed by Taylor to Campbell and Whitehead were in open violation of the restrictions against alienation in the act of Congress of July 1, 1902, *supra*, under which Taylor was allotted the land, and also in

violation of the restrictions upon alienation contained in the patent from the Choctaw and Chickasaw Nations to him and were executed under an unconstitutional act of Congress approved April 21, 1904, c. 1402, 33 Stat. 189, 204. That the object of that act of Congress and of the certificate to Taylor was to remove the restrictions upon the alienation of the land and that they impair the obligation of the contract or binding agreement "upon the United States and upon the Choctaw and Chickasaw Nations and upon all Choctaws and Chickasaws," and especially Selin Taylor, and are repugnant to the act of Congress under which Taylor was allotted the land, and also to the Constitution of the United States and the clause in the Fifth Amendment thereof which provides that no person shall be deprived of his property without due process of law. A cancellation of the deeds was prayed, the annulment of the interest of Johnson in the land and the rents thereof, and judgment for the possession of the land.

A demurrer to the answer was sustained and, defendants (plaintiffs in error) declining to plead further, a decree was entered quieting Johnson's title to the land. Upon appeal the judgment was sustained by the Supreme Court of the State and error was prosecuted from this court.

The record presents the general question, Was the land alienable by Taylor? This depends upon the validity of certificate No. 2458 issued to Taylor and that again on the validity of the act of Congress of April 21, 1904 (33 Stat. 204). This act removed the restrictions imposed by the act of July 1, 1902, upon allottees of either of the Five Civilized Tribes who were not of Indian blood and provided for the removal by the Secretary of the Interior of all restrictions upon the alienation of all other allottees of said tribes (with certain exceptions) upon application to the Indian agent in charge of such tribes, if the agent was satisfied upon full investigation of each individual

case that the removal of restrictions was for the interest of the allottee.

The certificate shows that the application was made by Taylor, and yet plaintiffs in error assert the invalidity of both certificate and act because they are, it is contended, repugnant to the act of Congress of July 1, 1902 (32 Stat. 641), which, it is contended, constituted a contract between the United States and the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws; that the restriction upon alienation was a protection to Taylor "against his own improvident acts," that it was "not a personal privilege and repealable," but was "an incident attached to the land itself," and "was to him property as much as the land itself."

The act of July 1, 1902, is entitled "An Act to Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians, and for Other Purposes." It recites that "in consideration of the mutual undertakings here contained, it is agreed" that (§ 16, p. 643) all land shall be alienable after issue of patent in certain quantities and at certain times "provided that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value;" that (§ 68, p. 656) "no act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations," and, further (§ 73, p. 657), that "this agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all the Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw Tribes in the manner following: . . ."

It is conceded by plaintiffs in error that an act of Congress can supersede a prior treaty, but they insist that it is

well settled "that Congress is without power to change a contract or agreement for a valuable consideration with an individual Indian allottee." *Choate* v. *Trapp*, 224 U. S. 665, and *Jones* v. *Meehan*, 175 U. S. 1, are cited, and incidentally *Tiger* v. *Western Investment Co.*, 221 U. S. 286, and *Mullen* v. *United States*, 224 U. S. 448.

The cases do not apply. It has often been decided that the Indians are wards of the Nation and that Congress has plenary control over tribal relations and property and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation. *Tiger* v. *Western Investment Co.*, *supra.* Against this ruling *Choate* v. *Trapp* does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an act of Congress containing a provision "that the land should be non-taxable" for a limited time; and, excluding the application of the *Tiger Case*, it was said, p. 673, that exemption from taxation "and non-alienability were two separate and distinct objects." And further, "One conveyed a right and the other imposed a limitation." The power to do the latter was declared, and it was said "the right to remove the restriction [limitation upon alienation] was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma."

Jones v. *Meehan*, *supra*, is an instance of the same principle and is not opposed to the power of Congress to remove restrictions upon alienation. And there is nothing antagonistic to the cited cases in *Mullen* v. *United States*, *supra.*

A question was intimated in the *Tiger Case* whether a

grantee of an Indian could avail himself of the Indian's right, if he had any, to assert the unconstitutionality of an act of Congress, and it is still more questionable whether plaintiff in error can be heard to urge the rights of the Choctaw and Chickasaw Nations. However, we may reserve opinion. Those nations are not parties to this suit and no contract rights of Taylor have been violated.

Judgment affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* WHITEAKER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 111. Submitted December 6, 1915.—Decided December 20, 1915.

In the absence of bad faith, the motive of the plaintiff in making defendants parties who are jointly liable does not affect the right to remove the case.

Whether the complaint states a cause of action against the resident defendant joined with a non-resident defendant, is a matter of state law.

Where, as in this case, the injured plaintiff had under the law of the State a right of action against a non-resident railroad company and also against one of its employés who is a resident, he has the right to join them both as defendants; and the non-resident cannot, in the absence of showing fraud on the part of the plaintiff, remove the case as to it into the Federal court.

Merely to traverse the plaintiff's allegations upon which the liability of resident defendant rests or to apply the epithet fraudulent to the joinder is not sufficient—the showing of fraud must compel the conclusion that the joinder was so absolutely without reasonable basis as to be made in bad faith.

252 Missouri, 439, affirmed.

THE facts, which involve the validity of the removal from the state to the Federal court of a case against joint

tort feasors one of which was a railroad company not a resident, and the other an individual resident, of plaintiff's State, are stated in the opinion.

Mr. Paul E. Walker and *Mr. M. L. Bell* for plaintiff in error:

The question for determination in this case is whether the removal of the suit to the Federal court should not have been allowed.

The allegations of fact, which the state court was obliged to accept as true, entitled the petitioning defendant to remove the suit to the United States court for the determination of their truth.

In support of contentions of plaintiff in error see *Ala. & Southern Ry.* v. *Thompson*, 200 U. S. 206; *American Car Co.* v. *Kettelhake*, 236 U. S. 311; Black's Dillon on Removal, §§ 76, 191; *Burlington, C. R. & N. Ry.* v. *Dunn*, 122 U. S. 513; *Boatmen's Bank* v. *Fritzlen*, 75 Kansas, 479; *Boatmen's Bank* v. *Fritzlen*, 135 Fed. Rep. 650; *S. C.*, 212 U. S. 364; *Chicago, R. I. & P. Ry.* v. *Schwyhart*, 227 U. S. 184; *Chicago, R. I. & P. Ry.* v. *Dowell*, 229 U. S. 102; *Carson* v. *Hyatt*, 118 U. S. 279; *Chesa. & Ohio Ry.* v. *McCabe*, 213 U. S. 207; *Chesa. & Ohio Ry.* v. *Cockrell*, 232 U. S. 146; *Dishon* v. *Cin. & Tex. Pac. Ry.*, 133 Fed. Rep. 471; *Donovan* v. *Wells, Fargo & Co.*, 169 Fed. Rep. 363; Foster, Fed. Prac., 5th ed., § 554; *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364; *Gibson* v. *Chesa. & Ohio Ry.*, 215 Fed. Rep. 24; *Hunter* v. *Ill. Cent. R. R.*, 188 Fed. Rep. 645; *Iowa Cent. Ry.* v. *Bacon*, 236 U. S. 305; *Ill. Cent. R. R.* v. *Sheegog*, 215 U. S. 308; *Ill. Cent. R. R.* v. *Outland*, 170 S. W. Rep. 48; *Kentucky* v. *Powers*, 201 U. S. 1; *Little York Water Co.* v. *Keyes*, 96 U. S. 199; *Lathrop* v. *Const. Co.*, 215 U. S. 246; Moon, Removal of Causes, § 177; *Rea* v. *Mirror Co.*, 73 S. E. Rep. 116; *Stone* v. *South Carolina*, 117 U. S. 430; *Sears* v. *Atch. &c. Ry.*, 147 S. W. Rep. 860; *Tex. & Pac. Ry.* v. *Eastern*, 214 U. S. 153; *Whit-*

comb v. *Smithson*, 175 U. S. 635; *Wecker* v. *Enameling Co.*, 204 U. S. 176.

Mr. Pross T. Cross and *Mr. James P. Gilmore* for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Action for damages brought against the Chiçago, Rock Island & Pacific Railway Company and Frank Drake as defendants in the Circuit Court of Clinton County, State of Missouri.

The action was for personal injuries inflicted upon defendant in error by Drake, who was a conductor on a train of the railway company. It is alleged that Drake, "while acting in the line of his duties to defendant railway company, as such conductor and agent and in the course of his employment, approached plaintiff (who was then sitting on the top of one of the cars in said train) . . . and wrongfully and unlawfully" kicked him from the train while it was running at a high rate of speed, plaintiff being without fault. The injuries received were detailed, and judgment was prayed for $15,000.

The railway company filed a petition for removal of the case to the United States Circuit Court for the western district of Missouri in which it was alleged that the controversy was between citizens of different States, the plaintiff in the action being a citizen of Missouri and the railway company a citizen of Illinois. That the alleged cause of action was a separable controversy capable of determination between the plaintiff and the railway company; that Drake was joined as defendant for the sole and fraudulent purpose of preventing the company from removing the action from the state court, and thereby defeating the jurisdiction of the United States Circuit Court.

That plaintiff did not have and could not have had any cause of action against Drake or upon which to base a recovery against him, all which was known to plaintiff at the time of the institution of the action; that Drake was a man of small means, having but little property from which a judgment could be recovered, while the railway company had property more than sufficient to pay the amount sued for. That any act of negligence on the part of Drake was an act of the railway company and it was accordingly responsible and liable for the same. That plaintiff, when he instituted the action, had no reasonable hope, intention or expectation of recovering any judgment against Drake.

A bond was duly tendered and the petition was accompanied by two affidavits which in effect contradicted the allegations of the petition as to Drake by showing that he was not on top of the train and could not have attempted nor have done the acts charged against him.

The petition for removal was denied and the case subsequently tried to a jury which returned a verdict for plaintiff in the sum of $8,500, upon which judgment was entered. It was affirmed by the Supreme Court of the State.

There is but one question presented: the correctness of the ruling upon the petition for removal to the United States Circuit Court. The railway company assails the ruling in an elaborate argument and by an industrious review of cases. In reply recent decisions of this court need only be considered.

The Supreme Court of the State decided that the petition stated a cause of action against Drake and the railway company, and whether it did, we said in *Chicago, Rock Island & Pacific Ry.* v. *Schwyhart*, 227 U. S. 184, was a matter of state law. We held further that "the motive of plaintiff, taken by itself, does not affect the right to remove" and that "if there is a joint liability he has an

absolute right to enforce it, whatever the reason that makes him wish to assert the right." In that case as in this there was a petition for removal on the ground of fraudulent joinder of defendants to defeat Federal jurisdiction. The cases are substantially parallel.

In *Chesa. & Ohio Ry.* v. *Cockrell*, 232 U. S. 146, 152, it was decided that it is not enough to assert that there was a fraudulent joinder of defendants but there must be "a statement of facts rightly engendering that conclusion," and that "merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith." And "it was not such," it was said, "unless it was without any reasonable basis."

There is nothing more than a traverse of the cause of action in the present case. The attempt was made to show that Drake could not have been guilty as charged because he was elsewhere on the train. The language of the cited case is again applicable—"As no negligent act or omission personal to the railway company was charged and its liability, like that" of its employé, "was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants."

We conclude here as we concluded there that the plaintiff had a right of action under the law of the State and to insist upon Drake's presence as a real defendant "as upon that of the railway company." There was no error, therefore, in the ruling of the Supreme Court, and its judgment is

Affirmed.

MILLER *v.* STRAHL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 458. Argued November 29, 1915.—Decided December 20, 1915.

Whether a state statute contravenes the constitution of the State does not concern this court.

When a person engages in a business that is subject to regulation by the State, such as hotel keeping, he undertakes to fulfil the obligations imposed on such business.

A State may prescribe the duties of hotel-keepers in regard to taking precautions against fire and to giving notice to guests in case of fire.

Rules of conduct must necessarily be expressed in general terms and depend upon varying circumstances—and a police statute requiring keepers of hotels to give notice to guests in case of fire is not lacking in due process of law because it does not prescribe fixed rules of conduct. *Nash* v. *United States*, 229 U. S. 373, followed, and *International Harvester Co.* v. *Missouri*, 234 U. S. 199, distinguished.

A police statute otherwise valid is not unconstitutional as denying equal protection of the law because applicable only to hotels having more than fifty rooms. There is a reasonable basis for classification of hotels based on number of rooms.

The statute of Nebraska of 1913, requiring keepers of hotels having over fifty rooms to keep night watchmen to guard against fire and to awaken guests in case of fire is not unconstitutional as depriving the keepers of hotels having fifty rooms or more of their property without due process of law or as denying them equal protection of the law because the act does not apply to keepers of hotels having less than fifty rooms; nor for denying due process of law because it does not prescribe an exact rule of conduct in case of fire.

97 Nebraska, 820, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Nebraska relative to duties and liabilities of hotel keepers in case of fire, are stated in the opinion.

Mr. Edgar M. Morsman, Jr., for plaintiff in error:

The trial court placed upon the statute an interpretation

which permitted the jury to hold plaintiff in error liable if they should find from the evidence that either he, as proprietor of the hotel, or any of his employés, had failed to do all in their power to save defendant in error unharmed from the fire.

The statute, or this interpretation thereof by the instructions of the court, is so indefinite that it fails to prescribe any fixed rule of conduct by which the inn-keeper can guide his actions and, therefore, the taking of life, liberty or property based upon an alleged violation of such a statute, to-wit: to do all in one's power, does not constitute due process of law. *Collins* v. *Kentucky*, 234 U. S. 634; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *State* v. *Mann*, 2 Oregon, 238; *Cook* v. *State*, 26 Ind. App. 278; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Brown* v. *State*, 137 Wisconsin, 543; *Tozer* v. *United States*, 52 Fed. Rep. 917; *R. R. Com.* v. *Grand Trunk*, 100 N. E. Rep. 852; *United States* v. *Reese*, 92 U. S. 214; *American School* v. *McAnnulty*, 187 U. S. 94; *Czana* v. *Board of Medical Sup.*, 25 App. D. C. 443.

The due process clause of the Federal Constitution prevents not only the taking of life and liberty, but also the taking of property without due process of law. The statute cannot be held unconstitutional as to the criminal penalty and be held valid so far as the civil liability is concerned. If the statute through its criminal liability deprives a person of life and liberty without due process of law, it must necessarily through the civil liability deprive a person of property without due process of law. The statute, so far as the Federal question involved is concerned, cannot be constitutional for the purpose of taking one's property and unconstitutional for the purpose of depriving one of life and liberty.

Among other things, the statute provides that the watchman, in case of fire, shall instantly awaken each guest and inform him of the fire. It further provides that

the proprietor, in case of fire, shall give notice thereof to all guests and inmates thereof at once. In order that the watchman could awaken defendant in error and notify him of the fire it was necessary for the watchman to place himself in a position of as great danger as was defendant in error. The statute thus interpreted required of the watchman, of the proprietor and of every other employé, that they must risk their life in order to awaken and notify a guest, and plaintiff in error contends that to deprive a man of his life and liberty (imprisonment), or of his property (fine or liability in damages), because he fails to risk his life to save the lives of others, does not constitute due process of law. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Gastineau* v. *Commonwealth of Kentucky*, 108 Kentucky, 473.

At common law the inn-keeper owed no duty to protect his guests from fire. *Hare* v. *Henderson*, 43 Upper Canada Queen's Bench, 571; *Clancey* v. *Barker*, 66 C. C. A. 469.

An inn-keeper has never been an insurer of the safety of his guest and such is the express statement made by the state court in this case.

Mr. H. C. Brome, with whom *Mr. Clinton Brome* and *Mr. H. S. Daniel* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Action for the recovery of $15,000 on account of injuries sustained by defendant in error while a guest at the hotel of plaintiff in error, caused by the negligence of the latter and in violation of a law of the State of Nebraska.

Plaintiff in the case, defendant in error here, alleges that the plaintiff in error was the proprietor and operator of what is known as the Millard Hotel, located in Omaha, Nebraska, and that, as such, he received and entertained

defendant in error as a guest for hire; that on the night of January 22, 1911, and during the morning of January 23, defendant in error occupied a room on the fourth floor of the hotel; that the hotel had more than fifty rooms and was four or more stories high; that between midnight and dawn, January 23, 1911, a "hostile fire" broke out in the hotel which, it is alleged, by reason of the negligence of plaintiff in error, was not properly discovered or controlled and a portion of the hotel was burned, the halls thereof filled with smoke and gases, endangering the lives of the guests and inmates; that plaintiff in error and his servants failed and neglected to awaken the guests or give them notice of the fire, and that by reason thereof defendant in error was injured by the smoke and gases in attempting to escape from the hotel.

The specifications of negligence are as follows:

(1) Failure to maintain a competent night watchman; that the hotel was not properly patrolled, examined or inspected, and that its employés negligently failed to be at their posts of duty to respond to the warnings given them.

(2) Plaintiff in error did not maintain an efficient or sufficient system of fire gongs for arousing guests, that he did not as soon as the fire was discovered ring or cause to be rung a fire gong on the fourth floor or ring or cause to be rung a telephone in the room of defendant in error, or in any other way awaken, arouse, or notify him of the existence of the fire.

(3) Plaintiff in error did not notify defendant in error of the location of the stairway leading from the fourth floor; that the hotel did not have a sufficient number of stairways; that plaintiff in error failed to operate the elevator, failed to respond to defendant in error's demand to be removed, and failed to have any light, sign or notice indicating the location of the elevator.

(4) Defendant in error's room was furnished with a

rope which plaintiff in error represented could be used for the purpose of a fire escape, but that it was too small and insufficient for such purpose, and that proper directions were not given for its use as a means of escape. Defendant in error attempted to escape by means of this rope and in doing so suffered bodily injuries.

There were general denials of these allegations and averments of negligence on the part of defendant in error which directly, it is averred, contributed to and caused his injuries and without which, it is further averred, he would not have received them. A knowledge of or means of knowledge of the plans of the hotel and means of ingress and egress were averred and also the equipment of the hotel with lights in its halls, notices and fire escapes.

The case was tried to a jury which returned a verdict for defendant in error in the sum of $6,500, upon which judgment was entered. It was affirmed by the Supreme Court of the State.

The Supreme Court in its opinion says, 97 Nebraska, p. 823: "It is undisputed that the smell of smoke was detected by one of the employés in the hotel about 1:30 A. M., and that later a guest called the attention of the night clerk to the smell of smoke; that the clerk did nothing further than to look into the cuspidor to see if paper, or some like combustible matter, might be burning there. And this was two hours before the appellee awoke to find the halls filled with smoke. These facts, together with the testimony relating to the fire gongs, fire escapes and the general conduct of appellant's agents, were all properly submitted to the jury."

The court decided that there was a common law liability upon a hotel keeper "to protect his guests from danger when it is reasonably within his power to do so," and cited, besides, § 3104 of the Revised Statutes of the State, 1913, which reads as follows:

"In hotels or lodging houses containing more than fifty

rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates."

The statute is attacked on the ground that it contravenes the constitution of the State (with which we have no concern) and the Constitution of the United States. As a foundation for the contention plaintiff in error asserts that the trial court, whose action was affirmed by the Supreme Court of the State, specifically instructed the jury that plaintiff in error "and all his employés and the night watchman at the hotel owed" to defendant in error "the *active duty after the fire had broken out*, [italics counsel's] as follows: (a) To notify him (Strahl) of the existence of the fire so that he might escape unharmed. (b) To do all in their power to save him (Strahl) from the fire, and that failure to perform either of these duties made Rome Miller [plaintiff in error] liable in damages. In other words, the trial court construed the act of 1883, above mentioned, so as to make Rome Miller liable for the penalty mentioned in the act (fine, imprisonment and liable for damages) in the event (1) either he or the watchman or any employé in the hotel *failed to do all in their power* to save Emil J. Strahl [guest in the hotel] from the fire

free of injury or (2) either the proprietor of the Hotel (Miller), the watchman, or any other employé, failed to awaken and notify Strahl of the existence of the fire."

Plaintiff in error admits that the State of Nebraska may "without limit" prescribe "regulations having reference to the performance of acts and the taking of precaution prior to the time when a fire breaks out." But counsel says, "After the fire breaks out we deny that the legislature, under its police power, can compel the inn-keeper or the watchman, or any employé, to do any act which involves a risk to the life and liberty of such person." Such limitation of the police power is expressed in various ways, and that it is not within such power to compel a watchman or other employé to remain in a burning building "for the purpose of doing all in their power to save the lives of the guests and for the purpose of awakening the guests and notifying them of the fire," such lives being, it is added, "just as precious and valuable to the State as is the life of the guest."

We need not pause to consider differences between the value of lives to the State or whether one life is more precious than another to the State or of more concern to the State to preserve than the other. It is quite certain that he who assumes duties may be required to perform them. When plaintiff in error engaged in the business of hotel keeper he undertook its obligations, and we need not consider whether the statute exacts from him and his employés heroic conduct, and not much more need be said in answer to the contentions of plaintiff in error.

The command of the statute is that in case of a fire the keepers of hotels must give "notice of the same to all guests and inmates thereof at once, and to do all in their power to save such guests and inmates." Could the statute exact less? It is the dictate of humanity, and gets nothing from its expression as a legal obligation except a penalty for its violation, and the facts of the case re-

ject any charge that it was enforced to the extent of risk of the life of anybody or to the injury of anybody.

Plaintiff in error was charged with certain acts of omission, the jury found that he was guilty as charged, and the finding was sustained by the trial and supreme courts. We may say without particular review that they were plain violations of duty required by the statute. There was an especially significant fact: the fire was detected by one of the employés of the hotel about 1:30 A. M., and later a guest called the attention of the clerk to the smell of smoke. The clerk was moved by this warning to look into a cuspidor, and no further; and this was two hours before defendant in error awoke to find the halls filled with smoke. The neglect cannot be magnified by comment. If the action of a clerk under such circumstances would be a discharge of duty to one guest it would be a discharge of duty to many guests; if to men, then to women and children, and the tragedy which might result appalls the imagination. But to one or many the duty to investigate when the existence of a fire is indicated or suspected is clear. It is to be remembered that in the case at bar there were indications of fire at 1:30 A. M., and that at 3:30 defendant in error awoke to find the halls filled with smoke. He could get no response to his calls by telephone; he sought the elevator, but it was not running, and, not knowing the location of the stairway, he returned to his room and attempted to escape by means of a rope fire escape. These facts and others referred to by the court justified the jury in concluding that plaintiff in error did not do all in his power to save defendant in error.

It is entirely aside from the questions in the case and the requirements of the statute to consider the dismays and perils of an extreme situation, and what then might be expected of courage or excused to timidity. It was one of the purposes of the statute to preclude such extremity.

It requires careful inspection of conditions especially through the night to detect the existence of fire and prompt action if it is detected. Had these requirements been observed in the present case, defendant in error would not have been permitted to sleep in a burning hotel for two hours until means of escape were cut off by the density of the smoke and the absence of the employés of the hotel from their posts—except by a rope, which proved too weak to sustain his weight.

Plaintiff in error contends further that the statute "is lacking in due process of law" because "it fails to prescribe any fixed rule of conduct." The argument is that the requirement "to do all in one's power" fails to inform a man of ordinary intelligence what he must or must not do under given circumstances.

Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that "men are differently constituted," some being "abject cowards, and few only are real heroes;" that the brains of some people work "rapidly and normally in the face of danger while other people lose all control over their actions." It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised than the doing of "all in one's power" as determined by the circumstances?

The case falls, therefore, under the rule of *Nash* v. *United States*, 229 U. S. 373, and not under the rule of *International Harvester Co.* v. *Missouri*, 234 U. S. 199.

It is objected that as the statute is directed to keepers of hotels having more than fifty rooms and does not apply to keepers of hotels having less, it therefore discriminates against the former and deprives them of the equal protection of the laws. The contention is untenable. *McLean* v. *Arkansas*, 211 U. S. 539; *Williams* v. *Arkansas*,

217 U. S. 79; *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Booth* v. *Indiana*, 237 U. S. 391.

Judgment affirmed.

EX PARTE UPPERCU, PETITIONER.

PETITION FOR MANDAMUS.

No. 14, Original. Argued December 6, 1915.—Decided December 20, 1915.

The right of a litigant to have material evidence from an existing object does not depend upon having an interest in it, or upon the right or want of right of the public to examine that object.

Although it may be perfectly proper for a judge to order evidence and documents in a litigation to be sealed, his order should be modified so as to admit any of the sealed matter to be produced as evidence at the instance of any litigant in whose behalf it is material.

The application of a litigant to have a document, which is material evidence in his cause, produced should not be rejected because the court in whose custody it is had made an order in a suit to which he was not a party that the testimony including the desired document be sealed subject to inspection only of the parties to that action.

Where a judge of a Federal court refuses to allow documents which are included in evidence in a case in that court which has been ordered to be sealed to be produced for evidence, mandamus from this court is the proper remedy to require him to make an order for the production of such document.

THE facts, which involve the right of an interested party to have documents in the custody of the court produced as evidence, notwithstanding a previous order placing them under seal, are stated in the opinion.

Mr. Alvin Cushing Cass for petitioner.

Mr. Frank W. Knowlton, with whom *Mr. Charles F.*

Choate, Jr., and *Mr. James Garfield* were on the brief, for respondent:

Mandamus is not the proper remedy.

A writ of mandamus will never be granted where there is another adequate legal remedy open to the petitioner. It cannot be used to perform the functions of an appeal or a writ of error. *Ex parte Roe*, 234 U. S. 70; *Ex parte Harding*, 219 U. S. 363; *In re Pollitz*, 206 U. S. 323; *Chandler* v. *Circuit Judge*, 97 Michigan, 621.

In this case the petitioner had another adequate legal remedy in the form of an appeal or a writ of error from the denial of his motion. *Sloan Filter Co.* v. *El Paso Reduction Co.*, 117 Fed. Rep. 504, distinguished.

A writ of mandamus can never be used to control the judicial discretion of a subordinate court. *Ex parte Roe (supra); In re Winn*, 213 U. S. 458, 468. Though mandamus may be used under appropriate circumstances, to compel a court to decide an issue, it cannot be used to dictate how such issue shall be decided. Consequently, it cannot compel the reviewing or vacating of a judgment, decree or order already made, on the ground that the issue was wrongly decided. *Ex parte Morgan*, 114 U. S. 174; *Ex parte Schwab*, 8 Otto, 240; *Ex parte Loring*, 4 Otto, 418; *Chiera* v. *Circuit Judge*, 97 Michigan, 638.

The act of a court suppressing or refusing to suppress a deposition, being judicial, will not be controlled by mandamus. 26 Cyc. 205; *Ex parte Elson*, 25 Alabama, 72.

The making of the order ensealing the depositions in the case of *United States* v. *Dwight* was an act within the discretion of the court.

A writ of mandamus will never be granted unless the petitioner has a clear and specific right to be enforced by it. *In re Key*, 189 U. S. 84; *Ex parte Cutting*, 4 Otto, 14.

Petitioner has no absolute or clear right to examine the depositions as he was not a party to the original suit, nor to the agreement for ensealing them.

His interest in the subject-matter of the original suit was confined to his claim against the United States for a contingent remuneration if the suit was successful. Having received such remuneration he ceased to have any interest whatever in the subject-matter of the original suit.

Any right which petitioner may have had to examine the records in question, short of an absolute right, was suspended by the ensealing order.

Depositions differ from other public documents which are required to be open to the inspection of all.

A deposition is no part of the record, but is a separate statement by a person not a party to the cause. Wigmore on Evidence, § 2111 (3); *Myers* v. *Roberts*, 35 Florida, 255; Rev. Stat., § 865; *Re McLean*, Fed. Cas. No. 2719.

The custody of depositions is given to the clerk, not because they are part of the record of the case, but simply to insure the safeguarding of the documents and to preserve their integrity until offered as evidence in the case.

Where a deposition is opened out of court contrary to this provision, it becomes inadmissible as evidence. *Beale* v. *Thompson*, 8 Cranch, 70.

A deposition, if suppressed or excluded, loses all evidential value. Its existence as an instrument of evidence is conditional upon its being admitted in evidence. *Gross* v. *Coffey*, 111 Alabama, 468, 474; *House* v. *Camp*, 32 Alabama, 541, 549; *Moore* v. *McCullough*, 6 Missouri, 444; Weeks, Law of Depositions, § 365.

The public has no absolute right to inspect a deposition which has been filed in court, whether it has been opened or not. Depositions, within the limits of their statutory existence, are entirely within the control of the court.

A court has power and discretion to suppress depositions for irregularities in the taking or return, as in *Dunkle* v. *Worcester*, 8 Fed. Cas. No. 4162; or containing scandalous matter, as in *In re Caswell*, 29 Atl. Rep. 259.

A court can exclude a deposition, or parts thereof, when offered as evidence at a trial.

In addition to the possibility of its exclusion under the ordinary rules of evidence, a deposition may be shown to be invalid by extrinsic evidence offered at the trial.

Even after opening, a deposition may be suppressed, excluded, or temporarily withdrawn from the files.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a writ of mandamus to direct the judges and clerk of the District Court for the District of Massachusetts to allow the petitioner access to depositions and exhibits on file in a certain case but now sealed by order of the court. The facts alleged shortly stated are as follows. The case referred to was an action by the Government against the Dwight Manufacturing Company for penalties under the Immigration Act of February 20, 1907, c. 1134. On June 22, 1914, it was compromised by the payment of $50,000 and the action was discontinued. In pursuance of a previous agreement with the Secretary of Commerce and Labor the petitioner was paid $25,000 for services rendered in the suit. He now is sued by one Pachinakis for forty-five per cent. of that sum upon an allegation of title to the amount. It is alleged that the testimony of Pachinakis in one of the depositions will show that he swore that he had 'no interest or right in or expectation to those monies,' that Pachinakis was the principal violator of the law and that his present claim is an attempt to profit by his own wrong and against public policy. The petitioner also is sued by an employé of Henry C. Quinby, the attorney in both suits, upon an assigned claim of William H. Garland for $3,750, in respect of services of Garland in the former action, Garland having been a salaried Assistant United States Attorney until January, 1914, and thereafter until the end of the action special

counsel for the Government, and as the petitioner believes, having been fully paid by the Government. The petitioner expects to prove from the papers on file that Garland's services were rendered to the Government alone and not to him; that Garland's claim for additional compensation is against public policy, and that it is exorbitant as well as unjust. Quinby is Garland's lawyer and is employed by Pachinakis upon Garland's advice by an arrangement between the two.

When the former action was compromised, Judge Dodge, the respondent, made an order, "both parties consenting, that all depositions herein be sealed by the clerk and retained in the files of his office, subject to the right of either party to inspect the same, and that all exhibits be impounded with the clerk, subject to the same right of either party to inspect them." After the first presentation of the claim of Pachinakis, the petitioner's counsel made a motion in the former action for leave to inspect the above-mentioned depositions. The United States assented, although Garland, when referred to as the Assistant Attorney last in charge of the matter, advised against it. The former defendant opposed the motion and it was denied, seemingly and as was understood by the petitioner's counsel, on the ground that the petitioner was not a party to the cause. Subsequently the United States District Attorney made a motion that the order be vacated or modified so as to allow the depositions to be used, and after a denial renewed the motion with a fuller statement of grounds, suggesting a misapprehension at the former hearing. This motion also was denied and exceptions were taken that have not yet been heard by the Circuit Court of Appeals.

It appears from what we have said that there are documents present within the jurisdiction that furnish evidence material to the petitioner's case. The general principle is that he has a right to have them produced.

It does not matter whether they have been used in the original cause or not, or to whom they belong. The right to evidence to be obtained from an existing object does not depend upon having an interest in it, or, in a case like this, upon having an interest in the original cause, or upon the object being admissible or inadmissible in the cause for which it was prepared, or upon the right or want of right of the public to examine the thing. The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule. We discover none here. Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it, however proper and effective the sealing may have been as against the public at large. But as the custodian could not obey the summons of a magistrate to produce the documents without encountering the command of his immediate superior, the orderly course is to obtain a remission of that command from the source from which it came—a remission which in our opinion it is the duty of the judge to grant.

The only other question is whether there is any technical difficulty in the way of this court ordering what in its opinion justice requires and what otherwise the petitioner may not be able to obtain. The previous proceedings do not stand in his way. The rejection of his motion on the narrow ground that it was made in the former action and that he was not a party to it did not require to be followed up, and that of the Government, although in his interest by reason of his being particularly concerned in a general act of justice being done, does not confine him to a proceedings in which he is not master of the cause.

The assertion of his rights requires no particular formality. It would have been enough if on the attention of the court being called to the matter it had directed that the order should not be construed as affecting those who otherwise had a right to copies of the papers. It is enough for this court that it has been intimated with sufficient clearness that the order has a wider scope and is to be applied as against him. As against the petitioner the order has no judicial character but is simply an unauthorized exclusion of him by virtue of *de facto* power. The proceeding is not for delivery of the papers upon a claim of title but simply to remove the unauthorized impediment and to correct an act in excess of the jurisdiction of the lower court. We are of opinion that the authority of this court should be exercised in this case.

Rule absolute.

BI-METALLIC INVESTMENT COMPANY *v.* STATE BOARD OF EQUALIZATION OF COLORADO.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 116. Argued December 7, 8, 1915.—Decided December 20, 1915.

The allowance of equitable relief is a question of state policy; and, if the state court treated the merits of a suit in which equitable relief is sought as legitimately before it, this court will not attempt to determine whether it might or might not have thrown out the suit upon the preliminary ground.

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption; nor does the Federal Constitution require all public acts to be done in town meeting or in an assembly of the whole.

There must be a limit to individual argument in regard to matters affecting communities if government is to go on.

An order of the State Board of Equalization of Colorado increasing the valuation of all taxable property in the City of Denver forty per cent. which was sustained by the Supreme Court of that State, *held* not to be in violation of the due process provision of the Fourteenth Amendment because no opportunity was given to the taxpayers or assessing officers of Denver to be heard before the order was made.

56 Colorado, 343, affirmed.

THE facts, which involve the constitutionality under the due provision of the Fourteenth Amendment of an order of the Tax Boards of Colorado, increasing proportionately the valuation of all property in the City of Denver, are stated in the opinion.

Mr. Horace Phelps for plaintiff in error:

The construction put upon the revenue laws of Colorado by the Supreme Court of that State brings those laws into conflict with the due process provision of the Fourteenth Amendment.

In matters of taxation the proceedings for assessment of property are necessarily summary in their nature, but where the tax is laid against the property according to value, there must be provision for such notice and hearing as are appropriate in such cases. *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; *Weyerhauser* v. *Minnesota*, 176 U. S. 550.

It is essential to "due process" that notice and a hearing be demandable as a matter of right, not granted as a mere matter of favor or grace, and that the hearing be before an officer or board or tribunal having jurisdiction to hear and determine the matter and to give appropriate relief. *Roller* v. *Holly*, 176 U. S. 398, 409; *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333; *Londoner* v. *Denver*, 210 U. S. 373; *Stuart* v. *Palmer*, 74 N. Y. 183.

The action of the Colorado Tax Commission and the State Board of Equalization complained of here constituted a reassessment of all property affected thereby. Gray on Taxing Power, § 1295, p. 639; *Kuntz* v. *Sumption*,

117 Indiana, 1; *Carney* v. *People*, 210 Illinois, 434; *People* v. *Insurance Co.*, 246 Illinois, 442, 448; *Overing* v. *Foote*, 65 N. Y. 263, 269, 277; *Douglass* v. *Westchester Co.*, 172 N. Y. 309; *Tolman* v. *Salomon*, 191 Illinois, 202, 204.

Even if the power of reassessment or revaluation were vested in and could lawfully be exercised by either or both of those boards, the reassessment or raise in valuation could only be made upon notice and hearing or opportunity to be heard. Gray, Taxing Power, § 1295; *Bellingham Co.* v. *New Whatcom*, 172 U. S. 314; *Davidson* v. *New Orleans*, 96 U. S. 97, 135; *Gale* v. *Statler*, 47 Colorado, 72; *State Revenue Agent* v. *Tonella*, 70 Mississippi, 701, 714; *Kuntz* v. *Sumption*, 117 Indiana, 1; *Barnard* v. *Wemple*, 117 N. Y. 77; *Myers* v. *Shields*, 61 Fed. Rep. 713.

There was no hearing; there was no notice; the rights of the property owner were ignored, and the decision of the Supreme Court of the State sustaining the order of the boards was state action depriving the taxpayer of property without due process of law, in violation of the provisions of the Fourteenth Amendment. *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127.

Mr. Fred Farrar, Attorney General of the State of Colorado, and *Mr. Norton Montgomery* for defendant State Board of Equalization.

Mr. James A. Marsh, with whom *Mr. George Q. Richmond* was on the brief, for defendant in error Pitcher.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit to enjoin the State Board of Equalization and the Colorado Tax Commission from putting in force, and the defendant Pitcher as assessor of Denver from obeying, an order of the boards increasing the valuation of all taxable property in Denver forty per cent. The order

was sustained and the suit directed to be dismissed by the Supreme Court of the State. 56 Colorado, 512. See 56 Colorado, 343. The plaintiff is the owner of real estate in Denver and brings the case here on the ground that it was given no opportunity to be heard and that therefore its property will be taken without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States. That is the only question with which we have to deal. There are suggestions on the one side that the construction of the state constitution and laws was an unwarranted surprise and on the other that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy and that as the Supreme Court of the State treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground.

For the purposes of decision we assume that the constitutional question is presented in the baldest way—that neither the plaintiff nor the assessor of Denver, who presents a brief on the plaintiff's side, nor any representative of the city and county, was given an opportunity to be heard, other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law. On this assumption it is obvious that injustice may be suffered if some property in the county already has been valued at its full worth. But if certain property has been valued at a rate different from that generally prevailing in the county the owner has had his opportunity to protest and appeal as usual in our system of taxation, *Hagar* v. *Reclamation District*, 111 U. S. 701, 709, 710, so that it must be assumed that the property

owners in the county all stand alike. The question then is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned—here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county, as notoriously often has been the case. The answer of this court in the *State Railroad Tax Cases*, 92 U. S. 575, at least as to any further notice, was that it was hard to believe that the proposition was seriously made.

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state constitution had declared that Denver had been undervalued as compared with the rest of the State and had decreed that for the current year the valuation should be forty per cent. higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on. In *Londoner* v. *Denver*, 210 U. S. 373,

385, a local board had to determine 'whether, in what amount, and upon whom' a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Judgment affirmed.

DAYTON COAL AND IRON COMPANY, LIMITED, *v.* CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 81. Argued November 12, 1915.—Decided December 20, 1915.

The highest court of the State is the ultimate judge of the extent of its jurisdiction; and, unless a denial of Federal rights is involved, its decision upon that subject is final and conclusive.

Where a carrier files a through joint rate with the Interstate Commerce Commission to take effect on a specified date thereafter and prior to that date the tariff is received and stamped by the connecting carrier, which thereafter receives freight under the schedule of the filed tariff, the rate becomes a joint one and there can be no departure therefrom.

Permitting a shipper to make freight payments on the basis of a rate less than that specified in the filed tariff does not modify the right of the parties to insist upon the legal rate as filed and published.

Prior to the order of the Interstate Commerce Commission of May, 1907, requiring connecting carriers to accept joint rates specifically, formal acceptance was not necessary, and the receipt of the tariff and acceptance of freight thereunder was sufficient to put the joint rate into effect.

THE facts, which involve the validity of tariffs of rates filed with the Interstate Commerce Commission by carriers and of charges made by such carriers, are stated in the opinion.

Mr. G. H. West, with whom *Mr. W. B. Miller* was on the brief, for plaintiff in error.

Mr. Joseph E. Brown, and *Mr. M. M. Allison,* with whom *Mr. Foster V. Brown, Mr. Frank Spurlock* and *Mr. Claude Waller* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The Dayton Coal and Iron Company, Limited, hereinafter called the Dayton Company, filed its bill in the Chancery Court at Chattanooga, Tennessee, seeking to enjoin the Cincinnati, New Orleans & Texas Pacific Railway Company, generally known as, and hereinafter called, the Southern Railway, from prosecuting a certain suit in the United States Circuit Court for the Southern District of Ohio, brought by the Southern Railway against the Dayton Company to recover upon certain shipments of iron ore which it was alleged had been shipped, at a tariff of 70 cents per ton, being 10 cents more per ton than the Dayton Company contended was the true rate on such shipments. The difference amounted to $4,933.08, for which sum the Federal suit was brought.

The shipments of iron ore were made from Cartersville, and other points in Georgia, to Dayton, Tennessee, the Nashville, Chattanooga and St. Louis Railway Company, operating the Western and Atlantic Railroad Company, being the initial carrier. The bill averred that the Dayton Company had a defense against the action in the Federal Court, partly legal and partly equitable, and that the

Nashville, Chattanooga & St. Louis Railway Company and the Western and Atlantic Railroad Company were necessary and proper parties to the determination of the controversy and were not within the jurisdiction of the Federal court. It was further charged that the freight contract was binding upon all the parties for 60 cents per ton, and that each and all of the defendants were bound by that rate.

The Southern Railway answered, setting up, among other things, that, according to the requirements of the Federal Act to Regulate Commerce, as amended in 1906, the Nashville, Chattanooga & St. Louis Railway duly filed and published a schedule known as "Tariff I. C. C. # 1351A," showing the joint rate for the transportation of iron ore from Cartersville, Georgia, and nearby points, to Dayton, Tennessee, to be 70 cents a ton, and that that tariff became effective on March 5, 1907; that the Southern Railway was named as one of the parties to this joint tariff, and it and the other defendants were bound by it and prohibited by law from charging more or less than the tariff named and filed; that after the tariff went into effect on March 5, 1907, the Southern Railway billed to the Dayton Company iron ore shipped from Cartersville, Georgia, and from Emerson and Rogers, Georgia, to Dayton, Tennessee, covered by the through tariff rate, filed as aforesaid, at the rate of 70 cents per ton, and insisted and still insists upon the payment of that rate; that the Dayton Company, insisting that the rate was 10 cents over the legal rate, had settled its freight bills monthly, making a deduction of 10 cents by an arrangement with the Southern Company; that the Dayton Company refused to pay this difference, and therefore the suit was brought in the United States Circuit Court for the Southern District of Ohio, and that before answering in that suit complainant had filed the present bill, though the suit in the United States Court was still pending and

undetermined. The other railroad companies defendants also filed an answer, making like allegations as to the making and filing of the 70-cent rate, effective March 5, 1907.

The Southern Railway filed a cross-bill, in which it again set up the alleged legal effect of the filing of the 70-cent rate to take effect on March 5, 1907, averring that it had paid the Nashville, Chattanooga & St. Louis Railway Company its proportion of said rate, and that the difference between the 60- and 70-cent rate was due to it from the Dayton Company, and asked that it be given judgment upon its cross-bill against that company on that account for the sum of $4,933.08, or, if it should be determined that it was not entitled thereto, because of the illegality of the published rate, made and insisted upon by the Nashville, Chattanooga & St. Louis Railway Company, that it have judgment for that amount against its co-defendant, the Nashville, Chattanooga & St. Louis Railway Company. Answers were filed to this cross-bill.

Upon hearing, the Chancery Court determined the case in favor of the complainant, holding that the 70-cent rate was illegal, inequitable, and unenforceable, and that the complainant was entitled to the 60-cent rate, as contended for by it; and enjoined the Southern Railway from prosecuting its suit in the Federal court except for certain items not included in the controversy about the rates, and held that upon the cross-bill the Southern Railway was entitled to recover from the Nashville, Chattanooga & St. Louis Railway Company the 10 cents per ton which the latter company had received because of ore shipped by complainant from Cartersville and other southern points to Dayton, Tennessee, under color and by reason of the 70-cent rate. Upon appeal the Supreme Court of Tennessee reversed the decree of the Chancery Court, and held that the 70-cent rate was

the legal rate in force from and after March 5, 1907, and that if it had jurisdiction to determine the case it would so decide. For reasons set forth in its opinion, however, it reached the conclusion that, because of the acts of Congress concerning the Interstate Commerce Commission, there was no jurisdiction to entertain the original bill, and that it and the cross-bill must be dismissed. It is to reverse this decision that the writ of error in this case was sued out.

The Supreme Court of Tennessee is, of course, the ultimate judge of the extent of its jurisdiction, and unless a denial of Federal rights is involved, its decision upon that subject is final and conclusive. From what we have already said, however, it is apparent that the real Federal question involved in this controversy concerns the right of the Southern Railway to enforce the 70-cent rate on the shipments of iron ore from Cartersville and other points in Georgia to Dayton, Tennessee. Upon this point the Supreme Court reached the conclusion that the 70-cent rate was the only legal rate in force at the time of the shipments; that it was filed with the Interstate Commerce Commission on February 2, 1907, to take effect on March 5, 1907; that it was thus filed by the Nashville, Chattanooga & St. Louis Railway Company and duly received and stamped by the Southern Railway as the connecting carrier; and that the last-named railroad concurred in the tariff by receiving freight under that schedule and making settlements under it. This made the rate a joint one, in accordance with the rulings of the Interstate Commerce Commission at that time, and under the Interstate Commerce Act there could be no departure from this published rate.

Our examination of the record satisfies us, *Kansas Southern Ry.* v. *Albers*, 223 U. S. 573, that upon this question of the legal effect of the filed tariffs and the consequent establishment of the 70-cent rate the Supreme

Court of Tennessee was clearly right. It appears that the 70-cent rate was duly filed by the Nashville, Chattanooga & St. Louis Railway with the Commerce Commission; that it became effective upon March 5, 1907; that the connecting carrier, the Southern Railway, received the tariff and stamped and filed it, and acted upon it, insisting that 70 cents was the legal rate, although permitting the Dayton Company to make payments at the rate of 60 cents per ton. Such payments could not have the effect to modify the right of the parties to insist upon the legal rate as filed and published. True, the Southern Railway did not formally inform the initial carrier of its acceptance of this tariff; nor was this necessary. *United States* v. *N. Y. Central R. R.*, 212 U. S. 509. This practice of acceptance without formal notice was recognized by the Interstate Commerce Commission, as appears by its orders set out in the record, until the order of the Commission in May, 1907, requiring acceptance to be specifically given and certified to the Commission, thus avoiding the confusion and misunderstandings which arose under the former practice.

That it is essential to the maintenance of uniform rates and the avoidance of rebates and preferential treatment that the tariff rates filed with the Commission according to the Interstate Commerce Act, while in force, shall be the only rates which the carrier may lawfully receive or the shipper properly pay is too thoroughly settled by the former decisions of this court to require further discussion. The principle is stated and many previous cases in this court cited in a case decided at the last term, *Louis. & Nash. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97, 98.

It follows that the Supreme Court of Tennessee did not err, in so far as any Federal right is involved, in the judgment rendered dismissing the bill.

Affirmed.

CHICAGO & ALTON RAILROAD COMPANY *v.* WAGNER.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 375. Submitted November 29, 1915.—Decided December 20, 1915.

Section 5 of the Employers' Liability Act has no application to releases given to those who are not employers. *Robinson* v. *Balt. & Ohio R. R.*, 237 U. S. 84.

Where one of two carriers, joint tort feasors, is the employer and obtains from an employé who was injured in interstate commerce a release which is invalid under § 5 of the Employers' Liability Act, there is no denial of Federal right by a state court in holding that such release is also invalid as against the other joint tort feasor and does not operate to release the latter from liability beyond the right to set off the amount contributed by the employing carrier to the amount recovered by the plaintiff.

265 Illinois, 245, affirmed.

THE facts, which involve the construction and application of § 5 of the Employers' Liability Act of 1908, and the validity of a judgment for damages for injuries of a railroad employé, are stated in the opinion.

Mr. Silas H. Strawn, Mr. Edward W. Everett and *Mr. T. Sidney Condit* for plaintiff in error:

Section 5 of the Employers' Liability Act is inapplicable in this case because plaintiff was not an employé of defendant. Nor does that section invalidate a release, resultant to a joint tort feasor from the acceptance of relief benefits under a relief contract. *Robinson* v. *Balt. & Ohio R. R.*, 237 U. S. 84; *Mo., Kan. & Tex. Ry.* v. *West*, 232 U. S. 682.

The misapplication of § 5 of the Employers' Liability Act and the denial of plaintiff's asserted construction thereof, present a Federal question giving this court juris-

diction. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 499; *St. Louis, I. M. & So. Ry.* v. *McWhirter*, 229 U. S. 265; *St. Louis & I. M. Ry.* v. *Taylor*, 210 U. S. 281, 292; *Seaboard Air Line* v. *Tilghman*, 237 U. S. 487; *Toledo, St. L. & West. R. R.* v. *Slavin*, 236 U. S. 454; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668; *Southern Ry.* v. *Crockett*, 234 U. S. 725; *M., K. & T. Ry.* v. *West*, 232 U. S. 682; *Nutt* v. *Knut*, 200 U. S. 12, 19; *McCormick* v. *Market Bank*, 165 U. S. 538; *El Paso N. E. Ry.* v. *Gutierrez*, 215 U. S. 87; *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 22; *Houston & Tex. Cent. R. R.* v. *Texas*, 177 U. S. 66, 77; *Buel* v. *Van Ness*, 8 Wheat. 311, 321; *Mathews* v. *Zane*, 4 Cranch, 381.

Where the highest court of the State assumes that the record sufficiently presents for its decision, a question of Federal right, this court will take jurisdiction. *Mallinckrodt Chemical Works* v. *Missouri*, 238 U. S. 41; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142, 148; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Haire* v. *Rice*, 204 U. S. 291; *Home for Incurables* v. *New York*, 187 U. S. 157; *Mo., Kan. & Tex. Ry.* v. *Elliott*, 184 U. S. 530.

Mr. James C. McShane for defendant in error:

The state court's holding that plaintiff's acceptance of benefits from the Burlington relief department did not operate as a release, or satisfaction, to defendant, does not present a Federal question.

The release in question was void under § 5, as between plaintiff and the C., B. & Q., and the real question is as to whether, being void as between the parties to it, it could operate as a valid release to defendant.

This is a common-law question, which depends upon the application, or non-application, of the common-law rule, that a release to one joint tort feasor operates as a release to all joint tort feasors, and hence, is not a Federal question.

Assuming, for sake of argument, that the question is a Federal question, and that it was especially set up or claimed, etc., it was not erroneously decided.

The release was void as between the parties to it, and, consequently, it could not operate as a valid release to defendant. *McMullen* v. *Hoffman*, 174 U. S. 654; 6 Ruling Case Law, § 215, p. 819.

MR. JUSTICE HUGHES delivered the opinion of the court.

Joseph M. Wagner brought this action in the Superior Court of Cook County, Illinois, against the Chicago & Alton Railroad Company to recover damages for injuries alleged to have been sustained through its negligence. At the time of the accident, he was employed by the Chicago, Burlington & Quincy Railroad Company as a conductor in charge of a switching crew and was engaged in moving cars over a track of the Chicago & Alton Railroad Company in Chicago,—the track being used by the Burlington company under an arrangement with the Alton company. He was injured by striking a semaphore post which, as he alleged, was in dangerous proximity to the track. The Burlington company was not a party to the suit. In defense, the Alton company proved that Wagner was a member of the relief department of the Burlington company, to which the employés of that company made monthly contributions, and that in his agreement with that company it was provided that his acceptance "of benefits for injury" should operate "as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury." The Alton company was not thus associated with the Burlington company, and the release by its terms did not run to it. But it was insisted that the Burlington company was a

joint tort feasor with the Alton company and hence that release to the former would operate to discharge the latter. It was found by the state court that after the injury Wagner had accepted from the relief fund of the Burlington company the sum of $1,231 as benefits, and that there had been paid in his behalf for hospital bills, etc., $1,349.59; and it was further found that the contribution of the Burlington company did not exceed fifteen per cent. of this amount, or $387.09. In rebuttal (and over the defendant's exception) Wagner introduced evidence that at the time of the accident he was engaged as the employé of the Burlington company in interstate commerce, and he contended that the agreement for the release of that company through acceptance of benefits from the relief fund was invalid under § 5 of the Employers' Liability Act. The trial court refused to give a peremptory instruction in favor of the Alton company and also denied a request to instruct the jury, in substance, that if it found that Wagner had accepted payment from the Burlington company in satisfaction of his claim against that company arising from the injury, such acceptance would be a bar to this action against the Alton company. The court did charge that if the Alton company was found guilty, it should not be credited with any sum which the Burlington company had paid. To these rulings the Alton company excepted. A verdict was rendered against it for $15,000, and judgment was entered accordingly. The Appellate Court, First District, required a remittitur of $387.09, the amount found to have been contributed by the Burlington company to the benefits received, and affirmed the judgment for the remainder. 180 Ill. App. 196. And the judgment for the reduced amount was affirmed by the Supreme Court of the State. 265 Illinois, 245.

The jurisdiction of this court is invoked upon the ground that, in refusing to give effect to the release, the state court miscontrued § 5 of the Employers' Liability

Act.[1] *St. Louis & Iron Mountain Rwy.* v. *Taylor*, 210 U. S. 281, 293; *St. Louis & Iron Mountain Rwy.* v. *McWhirter*, 229 U. S. 265, 275.

The action was not brought under that act. There were allegations in the original declaration to the effect that Wagner at the time of the injury was engaged in interstate commerce as an employé of the Burlington company, but it seems to have been agreed upon the trial that the action was not governed by the Federal statute; and this indeed was manifest, as the Burlington company was not a party to the action and the Alton company was not the plaintiff's employer. *Robinson* v. *Balt. & Ohio R. R.*, 237 U. S. 84, 91. It was tried as a common-law action on the case.

It was also undisputed that the Alton company was not a party to the contract for release or associated in the Burlington's relief department. Section 5 of the Federal act has plainly no application to releases given to those who are not employers (*Robinson* v. *Balt. & Ohio R. R.*, *supra*) and we do not understand that there was any contention or ruling to the contrary in the state court. The Alton company simply claimed the benefit of the release to the Burlington company upon the ground that the Burlington company was a joint tort feasor. But the rule invoked, that the release of one joint tort feasor is a release of all, is a rule of the common law,—in this case of the

[1] This section is as follows, Act of April 22, 1908, c. 149, 35 Stat. 65, 66:

"SEC. 5. That any contract, rule, regulation, or device whatsoever, 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: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought."

common law of Illinois. *Chicago* v. *Babcock*, 143 Illinois, 358, 366. That is, assuming that the Burlington company was the employer and that the contract for its discharge from liability for this injury through the acceptance of benefits from its relief department was invalid under § 5 of the Employers' Liability Act, the question whether that release, thus invalid as against the Burlington company, would operate to discharge the Alton company as a joint tort feasor from its common-law liability was not, and we do not find that it was held to be, a matter of Federal law. The Supreme Court of the State said upon this point, after stating that there was no valid release to the plaintiff's employer: "If it" (the release) "was not valid so far as the Burlington company was concerned, it was clearly invalid as to the plaintiff in error and constituted no defense to this action." This, as we view it, was but to say that the release could not aid the Alton company for the very plain reason that the alleged joint tort feasor had not been discharged. The state law did not recognize the discharge of the defendant by virtue of a release of a joint tort feasor which, under the law applicable thereto, was found to be without validity.

The only Federal question which it can be said was decided was with respect to the validity of the release as between Wagner and the Burlington company. It is urged that § 5 was wholly inapplicable in an action brought against a third person to enforce a liability not created by the Federal act. The argument is, in substance, that in this action against the Alton company, inasmuch as it is not brought to enforce the liability imposed by the Federal statute, § 5 cannot be considered for any purpose; that is, that under § 5 the release can be deemed to be invalid only so far as it is actually used to protect the Burlington company from liability in a suit against it under the act. This involves, we think, a fundamental misconception. It is, of course, impossible to determine

whether a joint tort feasor is discharged except by asking what would happen if he were sued. The liability created by the act arose when the injury was received, and it is clear that if it was received while Wagner was engaged in interstate commerce, his acceptance of benefits under the relief contract would not bar an action against his employer. *Phila., Balt. & Wash. R. R.* v. *Schubert,* 224 U. S. 603, 613. When, therefore, the Alton company sought to escape from liability, otherwise existing under the state law, by reason of a release to the Burlington company, it was entirely competent for the plaintiff to show the nature of his employment and that the asserted release was within the Federal statute and could not operate as a discharge of the Burlington company with respect to the injury sustained. And the state court found upon abundant evidence that Wagner was engaged as an employé of that company in interstate commerce when he was hurt.

There was thus no misconstruction of the Federal act in holding that the contract between Wagner and the Burlington company, and his acceptance of benefits thereunder, did not release the latter from liability for the injury and that under § 5 that company, assuming it to be a joint tort feasor, would merely have the right to set off any sum which it had contributed to the benefits received; and there was no denial by the state court of any Federal right in declining to treat the relief contract, and the acceptance of benefits, as a discharge of the Alton company.

Judgment affirmed.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, *v.* BYRNE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 288. Submitted November 29, 1915.—Decided December 20, 1915.

Subsequent legislation excluded seamen engaged in the coastwise trade from the exemption from attachment of wages provided by § 4536, Rev. Stat.
22 Hawaii, 60, affirmed.

THE facts, which involve the construction and application of the various statutes relating to seamen's wages and garnishment of the same, are stated in the opinion.

Mr. Charles R. Hemenway for plaintiff in error.

Mr. Frank E. Thompson and *Mr. John W. Cathcart* for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendant in error Byrne brought suit against Kaleiki in the District Court of Honolulu and served the navigation company with a garnishee summons in accordance with the local statute. Answering, the company set up that Kaleiki was hired directly by it (not through a shipping commissioner) as a mate on the "Claudine," plying only in the inter-island coast trade, and asked a discharge because of the exemption from attachment of seamen's wages by § 4536, Rev. Stat. The trial court held that subsequent legislation excluded seamen engaged in such coast-

wise trade from the exemption, and rendered judgment against both Kaleiki and the company. This action was affirmed by the Supreme Court of the Territory of Hawaii (22 Hawaii, 60), and the cause is here upon writ of error.

By a comprehensive act containing sixty-eight sections, approved June 7, 1872, c. 322, 17 Stat. 262, and entitled "An Act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen," Congress prescribed regulations concerning the employment, wages, treatment and protection of seamen. Section 61 reads as follows, p. 276: "That no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or of any attachment, incumbrance, or arrestment thereon; and no assignment or sale of such wages, or of salvage made prior to the accruing thereof, shall bind the party making the same, except such advanced securities as are provided for in this act." Without material modification in language, this became § 4536 of the Revised Statutes enacted into law June 22, 1874, with the following limitation—§ 5601: "The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

The Act of June 9, 1874, c. 260, 18 Stat. 64, "in reference to the operations of the shipping commissioners' act, ap-

proved June seventh, eighteen hundred and seventy-two," provided: "That none of the provisions of an act entitled 'An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

The understanding of Congress concerning the effect of the repealing act of 1874 is indicated by subsequent legislation referred to below.

Section 2 of an act approved June 19, 1886, c. 421, 24 Stat. 79, specified that "shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade . . . at the request of the master or owner of such vessel," etc.

"An Act to amend the laws relative to shipping commissioners," approved August 19, 1890, c. 801, 26 Stat. 320, declared that when a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade . . . as authorized by § 2, act of 1886 above, . . . an agreement shall be made with each seaman in the same manner as provided by §§ 4511 and 4512, Rev. Stat. (both from the act of 1872); and it further provided that other sections of the Revised Statutes (not including § 4536) also originally in the act of 1872, shall extend to and embrace such vessel to the same extent as if mentioned therein.

By an act approved February 18, 1895, c. 97, 28 Stat.

667, the act of 1890, *supra*, was so amended as to render applicable to seamen in the coastwise trade when shipped by a shipping commissioner, certain other sections of the Revised Statutes, including § 4536, from the act of 1872; and it further provided "but in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner: *Provided*, That the clothing of any seaman shall be exempt from attachment."

The Act of March 3, 1897, c. 389, 29 Stat. 687, 689, amends the foregoing act of 1895 by adding another section of the Revised Statutes to those therein enumerated.

Plaintiff in error maintains: "The words in the act of 1874 'none of the provisions . . . shall apply to sail or steam vessels engaged in the coastwise trade' are apt in their application to many of the sections in the act of 1872, as, for example, §§ 4511 to 4519, inclusive. These words are not such as would be expected if § 4536 was intended to be referred to, for there is nothing in that section which applies to vessels or the duties of masters and owners under the Shipping Commissioners' Act. As we view it, § 4536 remained unaffected by the act of 1874, neither specifically nor by reasonable implication repealed as to seamen in the coastwise trade."

The fundamental purpose of the act of 1872 was to afford protection to seamen in respect of their treatment and wages. The act of 1874 by its express terms rendered the provisions of the earlier act inapplicable to vessels in the ordinary coastwise trade (*United States* v. *The Grace Lothrop*, 95 U. S. 527, 532), and the suggested narrow construction would tend to defeat the particular end in view—the relief of vessels making relatively short

voyages, with frequent opportunities for reaching ports, from burdensome requirements not then deemed essential to the welfare of seamen employed thereon. Certainly, we think, the provisions in the act of 1872 having direct reference to wages (including those in § 4536, Rev. Stat.), because of their intimate connection with the navigation of vessels, must be considered as applicable thereto and therefore included within the scope of the amendment of 1874. Subsequent legislation clearly indicates that Congress entertained this view. It would be difficult to account for the acts of 1886, 1890, 1895, and 1897, *supra*, upon any other theory.

The particular point now presented was reserved in *Wilder* v. *Inter-Island Navigation Co.*, 211 U. S. 239, 245. It has become of less importance since the act of March 4, 1915, c. 153, 38 Stat. 1164, 1169, wherein the provisions of § 61 of the act of 1872 were reënacted.

The judgment of the court below is

Affirmed.

REESE, ADMINISTRATRIX, *v.* PHILADELPHIA AND READING RAILWAY COMPANY.

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

No. 608. Argued December 1, 1915.—Decided December 20, 1915.

A railroad is not to be held as guaranteeing or warranting absolute safety to its employés under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures.

Failure to exercise such care constitutes negligence; but the mere existence of a great number of tracks close to each other in a ter-

minal where public streets are necessarily utilized is not enough to support an inference of negligence.

In this case, brought under the Employers' Liability Act, the trial court did not err in entering a non-suit for lack of evidence showing failure of the carrier to provide a safe place for the employé to work although the latter was killed by striking an obstruction while leaning out from the engine which he was on.

225 Fed. Rep. 518, affirmed.

THE facts, which involve the validity of a judgment of non-suit in a suit for death of a railroad employé under the Employers' Liability Act, are stated in the opinion.

Mr. George Demming for plaintiff in error.

Mr. William Clarke Mason, with whom *Mr. Charles Heebner* was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Relying upon the Federal Employers' Liability Act, plaintiff in error brought suit against the railway company in the District Court to recover damages for her husband's death, alleged to have resulted from the negligent and improper construction and maintenance of its tracks in too close proximity to each other.

At the conclusion of plaintiff's testimony, the trial court, finding "no evidence of negligence or neglect to provide him [the employé] with a safe place to work as to the act he was performing at that time," entered a non-suit and afterwards refused to take it off. This was affirmed by the Circuit Court of Appeals (225 Fed. Rep. 518) upon the ground that the railroad "did not fail in its duty to provide the deceased with a reasonably safe place to work;" and the sole question for our consideration is whether any other conclusion could be legitimately drawn from the facts disclosed.

For use in shifting freight cars and making up trains, the defendant maintains, as a part of its Noble Street Yard, two parallel tracks running north and south along Front Street, Philadelphia, from which other tracks, curves and turnouts lead into different freight sheds, warehouses, etc. These were located and are maintained under an ordinance of the city according to plans duly approved by its officials. At and near the place of the accident the street is almost entirely occupied by them. The distance between such north and south tracks is much less than the general standard adopted by the company, and box cars moving thereon have barely enough room to pass. These conditions are obvious and have existed for fifteen years or more.

Deceased was a capable, experienced fireman in a night switching crew operating in the yard, which was properly lighted, and acquainted with the general conditions described. The cause was tried upon the theory that about midnight, November 18, 1912, while his engine was moving five miles per hour along one of the parallel tracks, he attempted to procure drinking water at a tap in the side, near the bottom, and three feet from the front of the tender; that in doing so his body was extended outside the line of both tender and engine and crushed by contact with a freight car standing on the other parallel track; and that the railway negligently constructed and maintained these tracks too near each other.

The rule is well settled that a railroad company is not to be held as guaranteeing or warranting absolute safety to its employés under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures. A failure to exercise such care constitutes negligence. *Union Pacific Ry.* v. *O'Brien*, 161 U. S. 451, 457; *Choctaw, Okla. &c. R. R.* v. *McDade*, 191 U. S. 64, 67; *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 191. A railroad yard

where trains are made up necessarily has a great number of tracks and switches close to one another (*Randall* v. *Balti. & Ohio R. R.*, 109 U. S. 478, 482); and certainly the mere existence of such conditions is not enough to support an inference of negligence where, as here, it is necessary to utilize a public street. Both the District Court and the Circuit Court of Appeals felt constrained to hold the evidence insufficient to carry the question of negligence to the jury, and, having examined the record, we are unable to say that they reached a wrong result. The judgment is

Affirmed.

MR. JUSTICE HUGHES and MR. JUSTICE PITNEY are of the opinion that upon the question of the defendant's negligence,—the only question upon which the court below ruled—there was sufficient evidence to go to the jury, and therefore dissent.

UNITED STATES OF AMERICA *v.* HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN GESELLSCHAFT.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN GESELLSCHAFT, APPELLANTS, *v.* UNITED STATES OF AMERICA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 289, 332. Argued November 3, 4, 1915.—Decided January 10, 1916.

This court cannot pass upon questions which have, as an inevitable legal consequence of the European War now flagrant, become moot. This court takes judicial notice of the European War and that its in-

evitable consequence has been to interrupt the steamship business between this country and Europe.

It is a rule of this court based on fundamental principles of public policy not to establish a rule for controlling predicted future conduct; and it will not decide a case, involving a combination alleged to be in violation of the Anti-Trust Act, which has become moot as a legal consequence of war, because of probability of its being recreated on the cessation of war. *California* v. *San Pablo R. R.*, 149 U. S. 308.

The power of this court cannot be enlarged or its duty affected in regard to the decision of a moot case by stipulation of parties or counsel.

Where a case to dissolve a combination alleged to be illegal under the Anti-Trust Act has become moot and this court has thus been prevented from deciding it upon the merits, and the court below decided against the Government, the course most consonant with justice is to reverse, with directions to dismiss the bill without prejudice to the Government in the future to assail any actual contract or combination deemed to offend the Anti-Trust Act.

216 Fed. Rep. 971, reversed.

THE facts, which involve the construction and application of the Sherman Anti-Trust Act of July 2, 1890 and the practice of this court in regard to cases which have become moot, and the effect of the legal consequence of war, are stated in the opinion.

Mr. G. Carroll Todd, Assistant to the Attorney General, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief for the United States.

Mr. Charles P. Spooner, with whom *Mr. John C. Spooner* and *Mr. James L. Bishop* were on the brief for Hamburg American Steamship Company.

Mr. Lucius H. Beers, with whom *Mr. Allan B. A. Bradley* was on the brief for Cunard Steamship Company and others.

Mr. Charles C. Burlingham, with whom *Mr. Roscoe H. Hupper* was on the brief for American Line and others.

Mr. Joseph Larocque, with whom *Mr. William G. Choate* and *Mr. Nelson Shipman* were on the brief, for North German Lloyd and others.

Mr. Ralph James M. Bullowa for defendants Johnson and Straus, agents of Russian East Asiatic Steamship Company, Ltd., submitted.

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

The United States on January 4, 1911, commenced this suit to prevent the further execution of an agreement to which the defendants were parties and which it was charged constituted the foundation of an illegal combination in violation of the Anti-Trust Act of July 2, 1890, (26 Stat. 209, c. 647). The relief asked moreover in the nature of things embraced certain subsidiary agreements made during the course of the execution of the main contract in furtherance of its alleged prohibited result. The principal agreement was made in 1908 to last until February 28, 1911, but was to continue in force thereafter from year to year unless not later than December 1st of each year a notice of the intention not to continue was given. On December 3, 1910, however, just a month before this suit was filed, the agreement in question was renewed for a period of five years.

We give from the argument on behalf of the United States a statement of the corporate defendants to the bill, some of whom had become parties to the alleged illegal combination by subsidiary agreement or agreements made at a later date than the original contract.

1. "The Allan Line Steamship Company, Limited, hereafter called the 'Allan Line,' a British corporation, operating from Portland, Boston, and Philadelphia to London, Liverpool, and Glasgow and return.

2. "International Mercantile Marine Company, a New Jersey corporation, operating from New York and Philadelphia to Liverpool and Southampton and return.

3. "Its ships, together with those of its subsidiary company, defendant International Navigation Company, Limited, also operating from New York and Philadelphia to Liverpool and Southampton, . . . are referred to as the 'American Line.' Besides International Navigation Company, Limited, it also controls through stock ownership the defendants British and North Atlantic Steam Navigation Company, Limited, Societe Anonyme de Navigation Belge Americaine, and Oceanic Steam Navigation Company, Limited.

4. "British and North Atlantic Steam Navigation Company, Limited, a British corporation, hereafter called the 'Dominion Line,' operating from Portland to Liverpool and return.

5. "Societe Anonyme de Navigation Belge Americaine, a Belgian corporation, hereafter called the 'Red Star Line,' operating from New York and Philadelphia to Antwerp and return.

6. "Oceanic Steam Navigation Company, Limited, a British corporation, hereafter called the 'White Star Line,' operating from New York and Boston to Liverpool and Southampton and return.

7. "The Anchor Line (Henderson Brothers), Limited, a British corporation, hereafter called the 'Anchor Line,' operating from New York to Glasgow and return.

8. "Canadian Pacific Railway Company, a Canadian corporation, operating a regular line of steamships, hereafter called the 'Canadian Pacific Line,' from Montreal, Quebec, and St. John in the Dominion of Canada to Liverpool, England, and return. It also owns and operates a transcontinental railroad which, partly through branches running into the United States and partly through connections with the Wabash and other American railroads,

transports a substantial proportion (12%) of its steamship passengers to and from points in this country.

9. "The Cunard Steamship Company, Limited, a British corporation, hereafter called the 'Cunard Line,' operating from New York and Boston to Liverpool in England, Fiume in Hungary, and Trieste in Austria, and return.

10. "Hamburg-Americkanische Packetfahrt-Actien Gesellschaft, a German corporation, hereafter called the 'Hamburg-American Line,' operating from New York to Hamburg and return.

11. "Nord Deutscher Lloyd, a German corporation, hereafter called the 'North German Lloyd Line,' operating from New York, Baltimore, and Galveston to Bremen and return.

12. "Nederlandsh-Amerikaansche Stoomvaart Maatschapij (Holland-Amerika Lijn), a Netherlands corporation, hereafter called the 'Holland-American Line,' operating between New York and Rotterdam and return.

13. "Russian East Asiatic Steamship Company, a Russian corporation, hereafter called the 'Russian-America Line,' operating between New York and Libau, Russia, and return."

The individuals named as defendants were the principal officers and agents in this country of the corporate defendants. We extract from the argument on behalf of the Government the following statement of the main provisions of the principal agreement.

"(1) The parties guarantee to each other certain definite percentages of the entire steerage traffic carried by them both eastbound and westbound between European ports and the United States and Canada, except Mediterranean passengers.

"(2) Any line exceeding its allotment must pay into the pool a compensation price of £4 for each excess passenger, which sum is to be paid proportionately to the line or lines

which have not carried their full quota. It is expressly stated that this provision 'forms one of the main features of the entire contract.'

"(3) Each line must make a weekly report of the number of steerage passengers carried, and from these the secretary of the pool compiles weekly statements showing the pool position of each line. He also prepares each month provisional accounts of the compensation due from lines which have exceeded their quota. This must be paid immediately on pain of heavy penalties. Final settlements are made at the end of each year.

"(4) Each line undertakes to arrange its rates and service in such manner that the number of steerage passengers it actually carries shall correspond as nearly as possible with the number allotted to it by the contract. If any line exceeds its proportion it is in duty bound to adopt measures calculated to bring about a correct adjustment. The other lines may either await the action of the individual line or a majority of the lines representing 75 per cent. of the pool shares can immediately order rates on a plus line to be raised or rates on a minus line to be lowered, and from this order there is no appeal. It is expressly stated, however, that 'all parties were unanimously of the opinion that the adjustment is, whenever practicable, to be effected not by reducing the rates of one Line but on the contrary by *raising* the rates of one or several of the Lines.

"(5) No line has the right to alter its steerage rates without having previously informed the secretary; i. e., all lines are bound to maintain existing rates until the other pool members are notified.

"(6) No circulars or publications shall be issued by any line reflecting upon or instituting comparisons with any other conference line unfavorable to the latter, and no party shall support (advertise in) any newspaper which shall systematically attack any conference line.

"(7) To insure the faithful performance of the agree-

ment, each line deposits with the secretary a promissory note in the amount of £1,000 for each per cent. of traffic allotted to it in the pool. From this amount penalties may be collected ranging from £250 for smaller infractions to the forfeiture of the entire deposit if the line withdraws from the agreement before its expiration, refuses to pay compensation money, or assists directly or indirectly any opposition line.

"(8) New lines may be admitted or the terms of the agreement altered only by unanimous vote, unless otherwise provided in the contract.

"(9) To assist in the carrying out of the agreement a Secretary was appointed.

"(10) Regular meetings are to be held alternately at London and Cologne for the purpose of carrying out this agreement and agreements collateral thereto. These meetings constitute what is called The Atlantic Conference.

"Representatives of the Atlantic Conference Lines likewise meet in New York in what is called the American Atlantic Conference or New York Conference."

It is to be observed in addition that the agreement expressly provided that the withdrawal of any one of the lines from the contract should release all others from all future obligation unless the others agreed among themselves to continue.

To the elucidation of the view we take of the case it suffices to say that as the result of the answers of the defendants the issues which arose for decision were twofold in character: Did the Anti-Trust Act relate to the business of ocean transportation with which the assailed agreement and those subsidiary to it were concerned; and if so, did the agreements and the conduct of the defendants under them, constitute a violation of the provisions of the Anti-Trust Act?

The court below, although deciding that the ocean

transportation covered by the main agreement was under the control of the Anti-Trust Act, yet held that the assailed contract and the action of the parties under it were not within the terms of the act and therefore that the complaint of the Government on that subject was without foundation. The court, however, concluded that a certain subsidiary agreement which had been entered into in the process of the execution of the original agreement had given rise to a practice which was reprobated by the Anti-Trust Act and the further execution of such agreement and the carrying out of the practice under it were by the decree forbidden. The court reached these conclusions upon opinions formed concerning the nature and character of ocean transportation with which the agreement was concerned, the evils which had existed in the traffic and which it was the purpose of the agreement to remedy, the practice of the commercial world in dealing with such transportation in the past, the benefit which had resulted to commerce from the execution of the agreement, the reflex light thrown upon its intent and object by the reasonable rates which had been applied in its execution and many other conditions which had come to pass as a result of the agreement tending to the amelioration of the conditions of steerage travel and the resulting benefaction to the safety, comfort and health of the millions of human beings traveling by steerage, to which class of traffic alone the contract related. (216 Fed. Rep. 971.)

The contentions which presumably were urged in the court below and which it is deemed by the parties here arise for decision will at once appear by giving a brief statement concerning those made on this appeal by the United States and by the defendants as appellees or on a cross appeal. On behalf of the United States it is insisted that the provisions of the Anti-Trust Act govern the subject, that the terms of the agreement constitute a plain violation of that act, that the conduct of the parties under

it add additional force to the considerations arising from the text of the contract since it demonstrates that the purpose of the agreement was to destroy competition, to acquire dominion over rates and to fix them as the result of monopoly, and that it is wholly irrelevant to inquire whether in executing the wrongful powers which were acquired by the contract the parties were beneficent in their action, since what the act forbids is the monopoly and the combination for the purpose of obtaining monopoly and there is no distinction in the act between a good monopoly and a bad one. On the other hand, the contentions of the defendants are as follows: First, that conceding the power, it is not to be assumed, in the absence of express declaration to that effect, that the purpose of Congress in the Anti-Trust Act was to extend its authority into foreign countries to prevent the execution in such countries, of contracts which were there legal and which were intended, in view of the conditions there prevailing, to better enable the discharge by ocean carriers of their duty. Second, that it appears from subsequent legislation of Congress that it was not its intention to deal with ocean transportation from and to foreign countries by the Anti-Trust Act, since such transportation was dealt with in subsequent legislation in a manner which persuasively leads to such conclusion. Tariff Act of August 27, 1894, c. 349, §§ 73–77, 28 Stat. 509, 570; Tariff Act of July 24, 1897, c. 11, § 34, 30 Stat. 151, 213; Joint Resolution, September 19, 1914, No. 43, 38 Stat. 779. Third, that in fully investigating and considering the question whether ocean transportation to and from foreign countries was included in the Anti-Trust Act, in an elaborate report a committee of the House of Representatives had expressed conclusions in conflict with the view that the act did apply and had recommended the adoption of legislation to guard against evils in such traffic, if any, and which legislation, if adopted, would be in a large sense incompati-

ble with the conclusion that the Anti-Trust Act was applicable to such transportation.

While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality, that is, because of their now moot character as an inevitable legal consequence springing from the European war which is now flagrant—a matter of which we take judicial notice. *Montgomery* v. *United States*, 15 Wall. 395; *United States* v. *Lapène*, 17 Wall. 601; 7 Moore's International Law Digest, 244, 250. The legal proposition is not in substance controverted, but it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308, 314: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue

in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

See also *Lord* v. *Veazie*, 8 How. 251; *Cheong Ah Moy* v. *United States*, 113 U. S. 216; *Little* v. *Bowers*, 134 U. S. 547; *Jones* v. *Montague*, 194 U. S. 147; *Security Life Insurance Co.* v. *Prewitt*, 200 U. S. 446; *Richardson* v. *McChesney*, 218 U. S. 487; *Stearns* v. *Wood*, 236 U. S. 75.

Our attention has indeed been directed to a recent decision in *United States* v. *Prince Line, Limited*, 220 Fed. Rep. 230, where although it was recognized that "The combination against which this proceeding is directed, composed of two British and two German steamship companies, has been practically dissolved as a result of the European War," and the questions presented "have become largely academic," the court nevertheless proceeded to consider and dispose of the case on the merits, observing in conclusion, however: "In view of the fact that the logic of events has turned this investigation into an autopsy, instead of a determination of live issues it seems unnecessary to discuss the persuasiveness of the proofs," etc. But we cannot give our implied sanction to what was thus done or accept the persuasiveness of the reasoning upon which the action was based in view of the settled decisions of this court to the contrary and the fundamental principles of public policy upon which they are based. In fact at this term, although we were pressed to take jurisdiction of a cause in a capital case after the death penalty had been inflicted on the accused, we declined to do so and dismissed for want of jurisdiction because the case had become a moot one. *Director of Prisons* v. *Court of First Instance of the Province of Cavite*, *post*, p. 633.

Nor is there anything in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S.

498, which conflicts with this fundamental doctrine. In the first, the *Trans-Missouri Case*, a combination between railroads charged to be illegal was by consent dissolved and it was held that in view of the continued operation of the railroads and the relations between them their mere consent did not relieve of the duty to pass upon the pending charge of illegality under the statute of their previous conduct, since by the mere volition of the parties the combination could come into existence at any moment. Leaving aside some immaterial differences, in terms the ruling in the *Southern Pacific Case* was based upon the decision in the *Trans-Missouri Case*. Here on the contrary the business in which the parties to the combination were engaged has by force of events beyond their control ceased and by the same power any continued relation concerning it between them has become unlawful and impossible. The difference between this and the *Trans-Missouri Case* was clearly laid down in *Mills* v. *Green*, 159 U. S. 651, where after announcing the general rule as to the absence of authority to consider a mere moot question and referring to possible exceptions resulting from the fact that the want of actuality had arisen either from the consent of the parties or the action of a defendant, it was declared (p. 654): "But if the intervening event is owing to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand."

Although it thus follows that there are no issues on the merits before us which we have a right to decide, it yet remains to be determined what our order should be with reference to the decree below rendered, which as we have seen was against the Government and in favor of the assailed combination because it was found not to be within the prohibitions of the Anti-Trust Act. As established by the ruling in *South Spring Hill Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, our conclusion on such subject must be reached without at all considering the merits of the cause

and must be based solely upon determining what will be "most consonant to justice" in view of the conditions and circumstances of the particular case. Coming to consider the question in that light and in view of the nature and character of the conditions which have caused the case to become moot, we are of opinion that the ends of justice exact that the judgment below should not be permitted to stand when without any fault of the Government there is no power to review it upon the merits, but that it should be reversed and the case be remanded to the court below with directions to dismiss the bill without prejudice to the right of the Government in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act.

And it is so ordered.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.

MYLES SALT COMPANY, LIMITED, *v.* BOARD OF COMMISSIONERS OF THE IBERIA AND ST. MARY DRAINAGE DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 141. Argued December 16, 1915.—Decided January 10, 1916.

The legislature of a State may constitute drainage districts and define their boundaries, or may delegate such authority to local administrative bodies; and such action, unless palpably arbitrary and a plain abuse, does not violate the due process provision of the Fourteenth Amendment. *Houck* v. *Little River District*, *ante*, p. 254.

Action of the local administrative body in including land within a drainage district which is palpably arbitrary, such inclusion not being for the purpose of benefiting such land directly but for the purpose of obtaining revenue therefrom, amounts to deprivation of property without due process of law under the Fourteenth Amendment.

Although under the law of Louisiana the action of the police jury in determining, in the exercise of its discretion, what property shall be included in a drainage district can not be inquired into except upon a special averment of fraud, one not charging fraud or attacking the statute of the State, may attack the law as administered as depriving him of his property without due process of law by the inclusion within a drainage district of property in no wise benefited by the proposed system, and thus raise a Federal question, giving this court the right under § 237, Jud. Code, to review an adverse decision.

Power arbitrarily exerted, imposing a burden without a compensating advantage of any kind, amounts to confiscation and violates the due process provision of the Fourteenth Amendment.

THE facts, which involve the validity, under the due process provision of the Fourteenth Amendment of the action of a Police Jury in Louisiana establishing a drainage district and including property therein not benefited by the drainage system, are stated in the opinion.

Mr. Edgar H. Farrar for plaintiff in error.

Mr. L. T. Dulany for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to restrain the sale of plaintiff in error's land about to be made, it is alleged, by defendants in error to collect a tax of five mills for four years aggregating the sum of $2,000 and penalties. (We shall refer to the parties as plaintiff and defendants, respectively, that being their relation in the state courts.)

There is no dispute about the state laws. It is stated in plaintiff's brief that it is a matter of ordinary geographic knowledge that large portions of the flat lands in Louisiana adjacent to the Gulf Coast are subject to fluvial or tidal overflow and must be leveed and drained by systems of general and special public levees and drains. To this end

legislation has been enacted, beginning in 1888 and receiving constitutional sanction in 1898 (article 281). By an act passed in 1900 (acts of 1900, p. 12) previous statutes were consolidated and it was provided that when the drainage of any locality was such that in the opinion of the Police Juries of the respective parishes it should become necessary to organize or create a drainage district composed partly of land situated in adjoining parishes, then such drainage district should be created by joint action of the Police Juries of the respective parishes.

The districts were authorized to issue bonds for drainage purposes and levy a five-mill tax on all property subject to taxation situated in them. The statute was amended in details and reënacted in 1902 and 1910 (acts of 1902, p. 293; acts of 1910, p. 542).

Acting under these statutes the Police Juries of the adjoining parishes of Iberia and St. Mary organized the drainage district with which the case at bar is concerned and the organization of which is attacked.

The ground of the attack is that the district for the construction and maintenance of which the tax was levied was of no benefit to plaintiff's land and was formed only for the benefit of the other lands, was an unconstitutional usurpation of authority and was and is an effort to take plaintiff's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The case was heard upon the petition in the case and an exception by defendants of no cause of action. The court dissolved the injunction that had been theretofore granted and dismissed the suit with an award of costs and attorneys' fees. Judgment was entered accordingly and sustained by the Supreme Court of the State.

The trial court held that the gist of plaintiff's demand was to the effect that no benefit was or would be derived by its property by the general drainage system and the levy

and collection of the tax on its property. The court said the question presented by the demand was no longer an open one. The principle laid down by the courts, it was declared, is that the creation and determination of drainage districts being a legitimate and lawful exercise of discretionary powers, the courts are without power to impugn or inquire into motives "where no fraud is pleaded." The Supreme Court affirmed the action of the district court and the principle upon which it was based, saying that that court accepted the view as correct "that the decisions heretofore rendered settle the question forever that the local authorities as to drainage have the absolute right to organize drainage districts and give them shape and boundary lines as they choose." And it was further said: "it is upon that theory that the case is before us for decision; . . . Without an element of fraud alleged, the court properly dismissed the suit. . . . Here no fraud has been alleged, nor its equivalent." Prior cases were cited.

Is this a correct view of the petition? The principle of law involved in the answer to the question is well known. There is no doubt that the legislature of a State may constitute drainage districts and define their boundaries or may delegate such authority to local administrative bodies, as, in the present case, to the Police Juries of the parishes of the State, and that their action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. *Houck* v. *Little River Drainage District,* decided November 29, 1915, *ante,* p. 254. Does the district under review come within the principle or its limitation? Was it formed in an arbitrary manner and in plain abuse of power? The answer depends upon the allegations of the petition which, being excepted to for insufficiency in law, must be taken as true.

We condense them narratively as follows: Weeks Is-

land, the property which is the subject of the controversy, is one of several islands, being the highest uniform elevation above sea level in southwest Louisiana. It rises abruptly 175 feet or more, is surrounded on two sides by bayous, on the rear by a salt-water marsh and on the front by a bay (Vermillion Bay), with a small strip of salt-water marsh intervening.

Its topography is high and rolling, the drainage excessive, and washing and erosion are serious problems. The country around it outside of the sea marsh is thickly settled and presents the character of low lands as distinguished from high lands or uplands, reaching a maximum elevation of about 15 feet as against a maximum elevation of Weeks Island of 175 feet.

In lieu of needing drainage the problem the Island is confronted with "is to guard against washing and erosion, and that the drainage of all of the territory between it and Bayou Teche on all sides and to all extents leads to the marshes subject to tidal overflow between it and the mainland."

Some years ago a drainage district, known as the Iberia & St. Mary Drainage District, was organized at the instigation of interested individuals for the purpose of drainage into the bayous and marshes surrounding Weeks Island of certain lands lying between Bayou Teche and the marshes.

Solely with the view of deriving revenues from the assessment of Weeks Island and the salt deposit therein and only for the benefit of the other properties and not upon the theory that a general scheme of drainage would inure to the benefit of all of the property therein, even indirectly, and not through an exercise of sound and legal legislative discretion, the Island was included within the confines of the district. In pursuance of such scheme and plan an election was held for the imposition of an *ad valorem* tax of five mills for a period of forty years

upon which to predicate an issue of bonds. The election resulted in the imposition of the tax.

It was not intended nor has it ever been intended, nor was it possible nor is it possible, to give any of the benefits of the drainage scheme to Weeks Island or to the salt deposit therein, directly or indirectly, its inclusion in the district being solely and only for the purpose of deriving revenue therefrom for the special benefit of the other lands subject to be improved by drainage, without any benefit to plaintiff or its property whatever. The island is the highest assessed piece of property in the district and has never received one single cent of benefit from the drainage system constructed and maintained in such district, and never can or will in the future receive any benefit whatever from the system.

Plaintiff has uniformly for the reasons detailed refused to pay the tax, and at no time prior to this year has an effort been made to collect the same, plaintiff having based its refusal to pay on its constitutional rights. But at the instance of the commissioners of the district the sheriff and ex-officio tax collector of Iberia Parish has demanded the tax on the island and its salt mine and is about to advertise the property as delinquent for the period of four years, aggregating $2,000 with the addition of the penalties provided by law.

The inclusion of the island within the district is charged to be an unconstitutional usurpation of authority and an effort to take plaintiff's property without due process of law. A like charge is made as to the assessment of the tax and its collection.

There is no doubt that a Federal right was asserted. Indeed, plaintiff was at pains, it says, "not to invoke for its protection any provision of the Constitution and laws of the State of Louisiana; not to make any attack upon any law of the State of Louisiana or of any of its subdivisions." And, further, the pleadings "were deliber-

ately cast in this form so as to exclude every question of local or state law and to compel the consideration and decision of the Federal question only."

But notwithstanding the studied effort so made and declared, defendants contend that plaintiff missed its purpose and that a Federal question was neither presented to the courts below nor decided by them, and a motion is made to dismiss. It is said that "under the law of Louisiana the action of the Legislative body (the Police Jury), in the exercise of its discretion as to what property shall be included in a Drainage District, will not be inquired into by the Court, except upon a special averment of fraud which is not pleaded." And such decision, it is further contended, was a decision upon the state law and presents no Federal question, the statute of the State not being attacked.

We cannot concur in the contention. It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question.

The charge is that plaintiff's property was included in the district not in the exercise of "legal legislative discretion," not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined "purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit" to plaintiff "or its property whatever," present or prospective.

Nothing could be more arbitrary if drainage alone be regarded. But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be indirect, such as might

accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks Island could be a receptacle for stagnant water or would be otherwise a menace to health if not included within the district or would defeat the purpose of the law, which seems to have been the ground of decision in *George* v. *Sheriff*, 45 La. An. 1232.

The case, therefore, is within the limitation of the power of the State as laid down in *Houck* v. *Little River Drainage District*, *ante*, p. 254, which cites *Norwood* v. *Baker*, 172 U. S. 269, and retains its principle. It has not the features which determined *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, and the cases which have followed that case, and *Wagner* v. *Baltimore*, *ante*, p. 207, decided coincidently with *Houck* v. *Drainage District*, and cited in the latter.

It is to be remembered that a drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Wagner* v. *Baltimore*, *ante*, p. 207. We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind.

Therefore, the judgment of the Supreme Court of Louisiana is reversed and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

NORTHWESTERN LAUNDRY *v.* CITY OF DES MOINES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 121. Argued December 9, 1915.—Decided January 10, 1916.

Where the decree of the District Court is a general one, and there is no attempt to make separate issue on the question of jurisdiction, but the constitutional question is the basis of appeal to this court, the appeal brings up the whole case.

Where no state statute is shown giving an adequate remedy at law to one endeavoring to enjoin enforcement of an ordinance, this court must deal with the questions both state and Federal as they appear on the face of the bill.

A State may, by direct legislation or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and restrain it; and regulations to that effect, if not arbitrary, are not unconstitutional under the due process clause of the Fourteenth Amendment even though they affect the use of property or subject the owner to expense in complying with their terms.

Whether a statute, which repeals a former statute but reënacts the identical matter, affects the validity of ordinances established under the earlier statute, is a state matter.

The state courts not having passed upon the question of whether the ordinance involved in this case is in excess of the legislative grant, this court finds that it is not, and also finds that the Smoke Abatement Ordinance of Des Moines, Iowa, is not invalid under the state statute.

An ordinance, otherwise valid, which applies equally to all coming within its terms is not unconstitutional as denying equal protection of the law if there is reasonable basis for the classification, even though other businesses not affected might have been included within its scope.

The fact that a state police statute includes certain municipalities and omits others does not render it unconstitutional as denying equal protection of the law.

The Des Moines Smoke Abatement Ordinance is not unconstitutional

under the due process or equal protection provision of the Fourteenth Amendment; nor is it in excess of the powers of the city under the existing statutes of the State of Iowa.

THE facts, which involve the constitutionality, under the due process and equal protection provisions of the Fourteenth Amendment, and also the validity under the state laws and Constitution, of the Smoke Abatement Ordinance of the City of Des Moines, Iowa, are stated in the opinion.

Mr. O. M. Brockett, for appellant, submitted:

Injunction lies to restrain enforcement of invalid municipal ordinances, the execution of which injuriously affects private rights. *Deems* v. *Baltimore*, 80 Maryland, 164; *Mobile* v. *Louisville R. R.*, 84 Alabama, 115; *Stevens* v. *St. Mary's School*, 143 Illinois, 336; *Austin* v. *Cemetery Assn.*, 87 Texas, 330; *Bear* v. *Cedar Rapids*, 147 Iowa, 341.

It is a violation of the Fourteenth Amendment to vest in any officer or body of officers wholly arbitrary and unregulated discretion to grant or withhold licenses to hold and enjoy the natural and lawful rights of property and occupation, as is attempted by provisions of the ordinance complained of. *Yick Wo.* v. *Hopkins*, 118 U. S. 359; *Richmond* v. *Dudley*, 129 Indiana, 112; *Grainger* v. *Douglass Jockey Club*, 148 Fed. Rep. 513.

Prior to the enactment of Chap. 37, cities had no power to declare what should constitute nuisances, or prescribe punishment for their maintenance, nor to bring actions in court for their abatement. *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Cole* v. *Kegler*, 64 Iowa, 59; *Nevada* v. *Hutchins*, 59 Iowa, 506; *Knoxville* v. *C. B. & Q. R. R. Co.*, 83 Iowa, 636; *Chariton* v. *Barber*, 54 Iowa, 306; *City of Ottumwa* v. *Chinn*, 75 Iowa, 407.

If the repealing clause, found in § 3 of the act of the thirty-fifth general assembly, in fact repealed the act of the thirty-fourth general assembly, the only authority

claimed for the offensive ordinance was thereby withdrawn and said ordinance was nullified. *Martin* v. *Oskaloosa*, 99 N. W. Rep. 557; *Pritchard* v. *Savannah Street Ry.*, (Ga.) 14 L. R. A. 712; *St. Louis* v. *Kellman*, 139 S. W. Rep. 433.

As to whether the act of the thirty-fourth general assembly was repealed by the act of the thirty-fifth general assembly see *United States* v. *Musgrave*, 160 Fed. Rep. 700; *United States* v. *Ninety-nine Diamonds*, 139 Fed. Rep. 961; *Kunkalman* v. *Gibson*, (Ind.) 84 N. E. Rep. 985.

As to its construction and the legislative intent, see *Elmer* v. *United States*, 45 Ct. Cl. 90; *Freeman* v. *People*, (Ill.) 89 N. E. Rep. 667; *People* v. *McCullough*, 143 Ill. App. 112; *Rockingham County* v. *Chase*, (N. H.) 71 Atl. Rep. 634; *Hampton* v. *Hickey*, (Ark.) 114 S. W. Rep. 707; *Thorton* v. *State*, 63 S. E. Rep. 301; *Buffalo* v. *Lewis*, (N. Y.) 84 N. E. Rep. 809; *Milligan* v. *Arnold*, (Ind.) 98 N. E. Rep. 822; *Pettiti* v. *State*, 121 Pac. Rep. 278.

As to repeal by reënactment, see *Murphy* v. *Utter*, 186 U. S. 95; *United States* v. *Tynen*, 11 Wall. 88; 36 Cyc. 1077; *Child* v. *Shower*, 18 Iowa, 272; *Allen* v. *Davenport*, 107 Iowa, 90; *Ogden* v. *Witherspoon*, 18 Fed. Cas. No. 19461.

The provisions of the ordinance which are the basis for the prosecutions complained of are in excess of the authority delegated by the acts of the thirty-fourth and thirty-fifth general assemblies in question. *Clark* v. *Davenport*, 14 Iowa, 500; *Tuttle* v. *Church*, 53 Fed. Rep. 425.

The features of the ordinance here involved are void for unreasonableness. *Davis* v. *Anita*, 73 Iowa, 325; *State Center* v. *Barenstien*, 66 Iowa, 249; *Meyers* v. *Chicago R. R. Co.*, 57 Iowa, 555; *Munsell* v. *Carthage*, 105 Ill. App. 119; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Bush* v. *Dubuque*, 69 Iowa, 233; *Centerville* v. *Miller*, 57 Iowa, 56; *St. Louis* v. *Heitzberg Packing Co.*, 141 Missouri, 375.

The second section of the acts of the thirty-fourth and thirty-fifth general assemblies, if construed to delegate authority to enact ordinances containing the provisions in question, are void because repugnant to both the state and Federal Constitutions. *Neola* v. *Reichart*, 131 Iowa, 492; *Iowa City* v. *McInnery*, 114 Iowa, 586; *Bloomfield* v. *Trimble*, 54 Iowa, 399; *Bear* v. *Cedar Rapids*, 141 Iowa, 341; *State* v. *Benke*, 9 Iowa, 203; *Geebrick* v. *State*, 52 Iowa, 401; *State* v. *Weir*, 33 Iowa, 134; *Weir* v. *Cram*, 37 Iowa, 649; *Court* v. *Des Moines*, 80 Iowa, 626; *State* v. *Des Moines*, 108 Iowa, 36; *Dowling* v. *Lancashire Ins. Co.*, (Wis.), 31 L. R. A. 112; *State* v. *King*, 37 Iowa, 649; *Des Moines* v. *Hillis*, 55 Iowa, 643; *Boyd Paving Co.* v. *Ward*, 85 Fed. Rep. 27; *State* v. *Copeland*, 69 N. W. Rep. 27; *State* v. *Tower*, 84 S. W. Rep. 10; *State* v. *Orange*, (N. J.), 36 Atl. Rep. 706.

Mr. Eskil C. Carlson, with whom *Mr. H. W. Byers*, and *Mr. Earl M. Steer*, were on the brief, for appellees.

Mr. Justice Day delivered the opinion of the court.

The Northwestern Laundry and T. R. Hazard, its president, filed a bill in the District Court of the United States for the Southern District of Iowa, against the City of Des Moines, Iowa; James R. Hanna, Mayor; W. A. Needham, Commissioner; Zell G. Roe, Commissioner; F. T. Van Liew, Commissioner; J. I. Myerly, Commissioner; W. H. Byers, Commerce Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Assistant City Solicitor; Harry McNutt, Smoke Inspector; and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker and Geo. France, Members Smoke Abatement Commission. The purpose of the bill was to enjoin the enforcement of an ordinance of the City of Des Moines, effective September 6, 1911, which provided that the emission of dense smoke in por-

tions of that city should be a public nuisance and prohibited the same. To that end the ordinance authorized the appointment of a Smoke Inspector, and otherwise dealt with the subject with a view to effecting the prohibitive purpose declared. The case was heard upon the bill and a motion practically amounting to a demurrer.

The bill and amended bill are very lengthy. For our purposes, their allegations and the requirements of the ordinance, sufficiently appear in what is said in the discussion and disposition of the case.

The protection of the due process and equal protection clauses of the Fourteenth Amendment is invoked. It is insisted that the ordinance is void because its standard of efficiency requires the remodeling of practically all furnaces which were in existence at the time of its adoption; it forbids remodeling or substituted equipment without a prescribed license; it forbids new construction without such license; it fails to specify approved equipment, and instead delegates, first to the inspector, and second, to the smoke abatement commission, the unregulated discretion to arbitrarily prescribe the requirements in each case, without reference to any other as to the required character of smoke prevention device, thus making the right of complainants and their class to own and operate such furnaces subject to the pleasure of the inspector and commission. It is averred that the ordinance exceeds the authority delegated to the city by the legislature; that it attempts to substitute its own definition of the crime and nuisance committed by the emission of dense smoke for that enacted by the legislature in the act under the pretended authority of which the ordinance is adopted; that it is unreasonable and tyrannical and exceeds the authority delegated for want of uniformity as to the whole city and because the exceptions specified are not natural and just. It is alleged that the ordinance prescribes arbitrary tests of degrees of density, and enables the inspector to present irrebutta-

ble proof of violation; that it provides for unlimited prosecutions and successive fines, constituting excessive punishment in the aggregate, without adequate remedy or relief, and undertakes to deprive the courts of power to determine whether the nuisances have in fact been committed or maintained.

A motion to dismiss the bill covered three grounds: First, that the bill did not state any matter of equity entitling complainants to the relief prayed, nor were the facts, as stated in the bill, sufficient to entitle complainants to any relief against defendants; Second, that the bill showed upon its face that the complainants have a plain, speedy, and adequate remedy at law; and Third, as it appeared on the face of the bill that the complainants were all residents of the State of Iowa, and the relief demanded was against an ordinance of the defendant city, the court was without jurisdiction. The court sustained the motion, and entered a final decree dismissing the bill with prejudice. There was no attempt to make a separate issue on the question of jurisdiction, or to take an appeal upon that question alone to this court. Judicial Code, § 238, of March 3, 1911, c. 231, 36 Stat. 1087, 1157.

The decree was a general one on the merits, and, as the bill charged a violation of the Fourteenth Amendment not so frivolous as to fail to give original jurisdiction, the appeal to this court from the final decree brings the whole case here. *Holder* v. *Aultman*, 169 U. S. 81, 88; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 620; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 91.

We are not furnished with any reference to an Iowa statute giving an adequate remedy at law, and we find none such. We have therefore to deal with the questions, Federal and state made upon the face of the bill.

So far as the Federal Constitution is concerned, we have no doubt the State may by itself or through authorized municipalities declare the emission of dense smoke in

cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance. Recent cases in this court are *Reinman* v. *Little Rock*, 237 U. S. 171; *Chicago & Alton R. R.* v. *Tranberger*, 238 U. S. 67; *Hadacheck* v. *Sebastian, Chief of Police*, decided December 20, 1915, *ante*, p. 394.

That such emission of smoke is within the regulatory power of the State, has been often affirmed by state courts. *Harmon* v. *Chicago*, 110 Illinois, 400; *Bowers* v. *Indianapolis*, 169 Indiana, 105; *People* v. *Lewis*, 86 Michigan, 273; *St. Paul* v. *Haugbro*, 93 Minnesota, 59; *State* v. *Tower*, 185 Missouri, 79; *Rochester* v. *Macauley-Fien Milling Co.*, 199 N. Y. 207. And such appears to be the law in Iowa, *McGill* v. *Pintsch Compressing Co.*, 140 Iowa, 429.

It is contended that the ordinance is in excess of the legislative authority conferred by the State of Iowa upon the City of Des Moines. This question does not seem to have been directly passed upon by the Supreme Court of Iowa.

The statute of Iowa enacted April 15th, 1911, before the passage of this ordinance, is as follows:

"An Act declaring the emission of smoke within the corporate limits of certain cities to be a public nuisance, and conferring upon such cities additional powers for the abatement of such nuisances. . . .

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. Declared a nuisance. The emission of dense smoke within the corporate limits of any of the

cities of this state now or hereafter having a population of sixty-five thousand (65,000) inhabitants or over, including cities acting under the commission plan of government is hereby declared to be a public nuisance.

"Section 2. Abatement. Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located, or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance." Laws of Iowa, V. 34, chap. 37, p. 27. Approved April 15, 1911.

The ordinance in question was passed on September 6, 1911, and became effective, as we have said, on that date. The City of Des Moines is within the terms of this act. On March 20, 1913, the legislature passed another law, as follows:

"An Act declaring the emission of smoke within the corporate limits of certain cities, including cities acting under special charter, to be a public nuisance, and conferring upon such cities additional powers for the abatement of such nuisances and repealing chapter thirty-seven of the laws of the thirty-fourth general assembly. . . .

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. Declared a Nuisance. The emission of dense smoke within the corporate limits of the cities of the state, including cities acting under commission form of government, now or hereafter having a population of thirty thousand or over and in cities acting under special charter or hereafter having a population of sixteen thousand or over, is hereby declared a nuisance.

"Section 2. Abatement. Every such city is hereby empowered to provide by ordinance for the abatement of

such nuisance either by fine or imprisonment, or by action in the district court of the county in which such city is located, or by both; such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection, and the abatement and prevention of the smoke nuisance.

"Section 3. Repeal. That chapter thirty-seven (37) of the laws of the thirty-fourth general assembly be and the same is hereby repealed." Laws of Iowa, V. 35, p. 43.

This statute likewise includes the City of Des Moines.

The former statute was repealed by the new one. The effect of this repeal upon the validity of the ordinance is a state question, and as we understand the Iowa decisions, the authority of the ordinance here in question remained unimpaired. The statutory change did not have the effect to annul the ordinance passed under the former identical grant of authority. *Allen* v. *Davenport*, 107 Iowa, 90; *State* v. *Prouty*, 115 Iowa, 657.

It is further contended that conceding the statutory authority the ordinance is in excess of the legislative grant. This question does not seem to have been passed upon specifically in any Iowa case called to our attention. The statute, after declaring the emission of dense smoke within the corporate limits of such cities as Des Moines, to be a nuisance, authorizes the city to provide by ordinance for the abatement of such nuisance by fine or imprisonment or by action in the District Court of the county, or both, such action to be prosecuted in the name of the city; and, furthermore, municipalities are authorized to provide by ordinance all necessary rules and regulations for smoke inspection and the abatement or prevention of the smoke nuisance. The Smoke Inspector must be qualified by training and experience to understand the theory and practice of smoke inspection. He has the benefit of counsel of the Smoke Abatement Commis-

sion, consisting of five members to be appointed by the City Council, at least one of whom must have had experience in the installation and conduct of power and heating plants. From the Smoke Inspector there is an appeal to the Smoke Abatement Commission in case of disagreement over plans for newly constructed plants or reconstruction of old ones. This grant of authority would seem to be sufficient to authorize the passage of an ordinance of a reasonable nature, such as we believe the one now under consideration to be. It delegates authority to carry out details to boards of local commissioners. That such rules and regulations are valid, subject as they are to final consideration in the courts, to determine whether they are reasonably adapted to accomplish the purpose of a statute, has been frequently held. 2 Dillon Munic. Corps. 5th Ed. § 574. We find nothing in the Iowa cases to indicate that the Supreme Court of that State has laid down any different rule upon this question. That the courts of Iowa may be resorted to in case of an abuse of the powers vested in the Inspector and Commission seems to follow from the decision of the Supreme Court of the State in *Hubbell* v. *Higgins,* 138 Iowa, 136.

As to the attack upon the ordinance because of arbitrary classification, this question has been so often discussed that nothing further need be said. The ordinance applies equally to all coming within its terms, and the fact that other businesses might have been included, does not make such arbitrary classification as annuls the lgislation. Nor does it make classification illegal because certain cities are included and others omitted in the statute. *Eckerson* v. *Des Moines*, 137 Iowa, 452.

We think the District Court was right in dismissing the bill upon its merits.

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* LLOYD.

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

No. 296. Argued November 29, 1915.—Decided January 10, 1916.

The Employers' Liability Act as amended in 1910 expressly provides that the state court has jurisdiction of actions thereunder and no case brought in the state court thereunder is removable to the Federal court merely because of diversity of citizenship.

The right of removal cannot be established by a petition which simply traverses the facts alleged in the complaint; the state court is only required to surrender its jurisdiction over a non-resident defendant joined with a resident when the facts alleged fairly raise the issue of fraud in the joinder.

An order of non-suit in the trial court as to the resident defendant from which plaintiff availed of a right of review by appeal to the higher court, does not make the case removable as to the non resident defendant. *American Car Co.* v. *Kettelhake*, 236 U. S. 311.

There having been testimony supporting plaintiff's allegations that he was engaged in interstate commerce, and the court having charged that the burden was on plaintiff to prove such allegation, the issue was properly left to the jury.

The conclusion of the state court, fully supported by the record that no issue was made or submitted to the trial court as to assumption of risk and therefore, under state practice no question concerning that subject is presented on appeal, denies no right of Federal character.

166 North Carolina, 24, affirmed.

THE facts, which involve the validity of the refusal of the state court to remove an action to the Federal Court and of its judgment in an action brought under the Employers' Liability Act, are stated in the opinion.

Mr. John M. Wilson with whom *Mr. L. E. Jeffries* and *Mr. H. O'B. Cooper* were on the brief for plaintiff in error.

Mr. Aubrey L. Brooks for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

W. L. Lloyd, herein called the plaintiff, brought his action in the Superior Court of Guilford County, North Carolina, against the defendant, the Southern Railway Company, joined with its lessor, the North Carolina Railroad Company. The action was brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291.

The North Carolina Railroad Company is a corporation of the State of North Carolina, owning a railroad line extending from Goldsboro, North Carolina, to Charlotte, in the same State. The Southern Railway Company is organized under the laws of the State of Virginia, and is a common carrier engaged in interstate commerce, transporting freight and passengers from the city of Washington, District of Columbia, through Greensboro, and over the tracks of the North Carolina Railroad Company through Spencer, Salisbury and Charlotte.

The petition charges that the Southern Railway Company was, at the time of the injuries complained of, operating as lessee of the North Carolina Railroad Company the roads and side tracks at Spencer; that on January 12, 1911, plaintiff was employed as an engineer by the defendant, Southern Railway Company, upon its freight trains running over said line of road from Spencer, North Carolina, to Monroe, Virginia, and was engaged in interstate traffic; that upon said date he was directed as engineer to take charge of a certain engine at Spencer, to ascertain whether the same was in serviceable condition, as it had just come from the repair shops; that while he was operating the engine on one of the side tracks of the North Carolina Railroad Company's main line at Spencer, and was oiling and inspecting the same, in stooping over the engine to ascertain if the ash-pan and other equipments were in proper condition, a lever about two

feet long, located at the rear of the driving wheel and the lower side of the engine, used for the purpose of operating the damper to the ash-pan, tripped and violently struck the plaintiff in the forehead, causing serious harm and injury; that the defective condition was known to the Southern Railway Company, and unknown to the plaintiff; that the plaintiff, at the time of the injury, was employed by the Southern Railway Company for the purpose of transporting interstate commerce running to and from Spencer, North Carolina, along the main line of the Southern Railway Company, part of which said line included the portion of said North Carolina Railroad Company's line leased by the Southern Railway Company from Greensboro, North Carolina, to Spencer, North Carolina; that the engine upon which the plaintiff was hurt was, and had been, exclusively used by the Southern Railway Company in the transportation of interstate commerce over the line of said road between Spencer and Monroe, Virginia, and that the plaintiff, at the time of his injury, was in charge of said engine. Negligence of the Southern Railway Company is charged in furnishing the plaintiff with an unsafe and dangerous engine, knowing the same to be such, and thereby rendering the plaintiff's employment hazardous and dangerous, and unnecessarily exposing him to peril.

The Southern Railway Company in due season filed its petition for removal of the case to the District Court of the United States for the Western District of North Carolina, because of its diversity of citizenship with the plaintiff, and alleging that the joinder of the North Carolina Railroad Company, the local defendant, was fraudulently made to avoid Federal jurisdiction; that the plaintiff was not engaged in interstate commerce at the time of the accident; that the engine upon which he was injured was not engaged in any kind of commerce at the time of the accident; and that these allegations in the petition were

fraudulent and false, which the plaintiff knew, or could have ascertained by the exercise of the slightest diligence upon his part. The court refused to remove the case, to which refusal the Southern Railway Company excepted.

Upon issue joined, the case came on for trial at the February Term, 1913, of the Superior Court of Guilford County. At the close of plaintiff's testimony, the court intimated that there was no cause of action against the North Carolina Railroad Company; upon this intimation a non-suit was taken as to that company. Thereupon the Southern Railway Company filed a second petition for removal which the court, after argument, granted, and an order was made, removing the case to the District Court of the United States for the Western District of North Carolina. The plaintiff excepted to this order of removal, and to the non-suit as to the North Carolina Railroad Company, and upon appeal to the Supreme Court of North Carolina that court held that the case should not have been removed, and remanded it to the Superior Court of Guilford County for trial. 162 Nor. Car. 485.

The case coming on again for trial in the Superior Court, the Southern Railway company renewed its objections to the jurisdiction by a plea, and set up that the case had been docketed in the District Court of the United States for the Western District of North Carolina, that no motion had been made to remand the same, that the order removing it had not been revoked, and that the case was then pending for trial in the District Court as aforesaid. The North Carolina Railroad Company also filed a plea to the jurisdiction. These pleas were overruled, and upon trial a verdict and judgment was rendered in favor of the plaintiff. Upon appeal to the Supreme Court of North Carolina, that judgment was affirmed. 166 Nor. Car. 24.

From the statement of the case already made, it is apparent that the plaintiff sought to recover under the

Federal Employers' Liability Act, joining both railroad companies upon the theory that the lessor company remained liable under the law of North Carolina upon the cause of action asserted by the plaintiff. See *North Carolina R. R.* v. *Zachary*, 232 U. S. 248. On the face of the petition a case was made invoking the jurisdiction of the state court to recover under the Federal act, because of the negligence charged. That the state court had jurisdiction of such an action is expressly provided by the Federal statute. Act of April 5, 1910, c. 143, 36 Stat. 291.

In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action, good upon its face. *Chesa. & Ohio Rwy.* v. *Cockrell*, 232 U. S. 146. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud that the state court is required to surrender its jurisdiction. The order of non-suit in the trial court as to the North Carolina Railroad Company, appealed from by plaintiff with the right of review in the Supreme Court of the State, did not make the case removable as to the Southern Railway Company. *American Car Co.* v. *Kettelhake*, 236 U. S. 311. Moreover, as we shall see later, under the Employers' Liability Act, no case is removable merely because of diversity of citizenship.

The act of 1910, *supra*, expressly gives jurisdiction to the state court, and provides that no case arising under its provisions brought in a state court of competent jurisdiction shall be removed to any court of the United States. Section 28 of the Judicial Code, 36 Stat. 1087, 1094, contains a like provision, and expressly provides that no case arising under the Employers' Liability Act or any amendment thereto, brought in a state court of competent jurisdiction, shall be removed to any court of the United States. The question of the effect of this provision upon the right

to remove a case because of diversity of citizenship, since the passage of the act referred to, was before this court and passed upon in *Kansas City Southern Rwy.* v. *Leslie*, 238 U. S. 599. It was therein held that there was no authority to remove such action from the state court to the Federal court because of diversity of citizenship. Nor did the alleged fraudulent joinder of the local defendant in the state court give such right. *North Carolina R. R.* v. *Zachary, supra.* And see *Chicago, Rock Island & Pacific Ry.* v. *Whiteaker*, decided in this court, December 20, 1915, *ante*, p. 421. Such right did not arise from the allegation of the removal of the petition that the injury did not happen in interstate commerce. *Chesa. & Ohio R. R.* v. *Cockrell, supra.* It follows that the state court did not err in its judgment as to the right of removal upon the facts presented in this case.

As to other questions of a Federal character, they may be briefly disposed of. It is insisted that the trial court should have given the instruction requested by the railroad company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect. *North Carolina R. R.* v. *Zachary, supra; Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; *New York Central R. R.* v. *Carr*, 238 U. S. 260; *Pennsylvania Co.* v. *Donat*, decided by this court November 1, 1915, *ante*, p. 50.

The court properly refused the request as to contributory negligence and gave the rule laid down in the Em-

ployers' Liability Act. As to assumption of risk, the Supreme Court held that no such issue was made or submitted to the trial court, (a conclusion fully supported by the record,) and therefore under the state practice no question concerning that subject was presented on appeal. This conclusion denied no right of a Federal character.

Judgment affirmed.

HAPAI *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 120. Argued December 17, 1915.—Decided January 10, 1916.

Where there is no doubt that the import of the decree pleaded as *res judicata* to a bill to quiet title was to the effect that plaintiff in the former action had no title to the property, the inquiry in the subsequent action is narrowed to the question of jurisdiction of the court rendering the decree pleaded.

This court will not presume that the highest court of the Hawaiian Islands did not know its own powers or did not decide in accordance with law of the Kingdom. *John Ii Estate* v. *Brown*, 235 U. S. 342.

This court affirms the decision of the Supreme Court of the Territory of Hawaii holding that the determination of the Supreme Court of the Hawaiian Islands in a suit for partition made without any objection by any of the parties and not appealed from is valid and binding upon, and *res judicata* as to, the same parties and their privies in a subsequent suit involving the same land.

Even though the party making a motion to dismiss for want of jurisdiction does not press it, this court is not at liberty to disregard it.

When, owing to confusion in the statutes, there is doubt as to whether appeal or writ of error is the proper course, this court will, if possible, save a party's rights from being lost by mistake in technicalities, and so *held* that, under § 246, Judicial Code, writ of error was the proper course to review the judgment of the Supreme Court of Hawaii in a case involving over $5000 in which trial by jury was waived.

21 Hawaii, 756, affirmed.

THE facts, which involve the validity of a judgment of the courts of the Territory of Hawaii in an action affecting title to a tract of land in that Territory, are stated in the opinion.

Mr. Lorrin Andrews for plaintiff in error.

Mr. A. A. Wilder, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. F. W. Clements* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to quiet title to an undivided 29/36 of the ahupuaa of Koanoulu, a large tract of land in the Island of Maui, Territory of Hawaii. The plaintiffs claim through the children of one Keaka other than one daughter, Paakuku, through whom the defendants claim the whole tract.

One of the defences was *res judicata*. The proceeding relied upon as having decided the relative rights of the parties was a bill brought in November, 1871, by the plaintiffs' predecessors against Paakuku and others, alleging title in Keaka during her life; a devise by her to her heirs, followed by joint possession on the part of the plaintiffs and of Paakuku as quasi-trustee; and waste, a wrongful sale and a wrongful lease by Paakuku. The bill prayed for an account from Paakuku, that the sale and lease be ordered to be cancelled as against the plaintiffs, and that a partition be decreed. Paakuku's answer set up a conveyance of the premises by Keaka to her in fee and continuous possession by her since the date of the same. It also alleged that Keaka's will, if not overriden by the subsequent deed, devised the land to Paakuku in fee, subject to some merely personal and revocable rights in some of the plaintiffs.

The case was tried in the Supreme Court before the Chief Justice. On October 1, 1874, a Minute was entered: "The opinion of the Court is that the Petitioners have no title to the lands of Kaonoulu and Kaluapulu and so adjudge. There is no controversy about the title of the land at Wailuku and the petition for partition of that land is hereby granted and decreed accordingly." An opinion filed two days later discusses the title, decides that the deed alleged by Paakuku is freed from every suspicion, and repeats the language of the Minute. On October 12 it was decreed that the plaintiffs take nothing by their bill. The Supreme Court in the present case expressed the opinion which, apart from the deference due to it upon a local matter, does not require argument to support it, that the intention and meaning of the decree of October 12 was to dismiss the bill on the ground that the plaintiffs had not the title alleged. It therefore affirmed a judgment for the defendants holding that the plaintiffs were concluded by the former decree. The only point, if any, that can be argued, is that in general a bill for partition cannot be made a means of trying a disputed title, *Clark* v. *Roller*, 199 U. S. 541, 545, and that therefore the decree should be taken to be a dismissal for want of jurisdiction, or at least allowed no greater effect than if it had gone on that ground.

But, as we cannot doubt the import of the decree when rendered, we are narrowed in our inquiry to the question of jurisdiction in an accurate sense. Unless we are prepared to pronounce the decree void for want of power to pass it and open to collateral attack, the decision in this case must stand. But there was no inherent difficulty, no impossibility in the nature of things or for want of physical power, in the attempt to decide title in the suit of 1871. And as was observed at the last term, it would seem surprising to suggest that the highest Court in the Hawaiian Islands did not know its own powers, or decide in accord-

ance with the requirements of the law of which that Court was the final mouthpiece. *John Ii Estate* v. *Brown*, 235 U. S. 342, 349. The plaintiffs in the former case in no way protested against the trial of their title, but on the contrary sought relief distinct from partition, that made the trial necessary. Even if we were disposed to go behind the decisions of the Chief Justice of the Kingdom and of the highest Court of the Territory upon a matter like this it would seem to us as unreasonable to hold the adjudication of title void because partition was prayed as to hold it void because the decree was made upon a multifarious bill. The cases where objections to the jurisdiction, though taken in the cause, have been held to have been waived go farther than we have to go here. We will not speculate as to how extreme a case must be to produce a different result; it is enough that this is far from the line.

The defendants in error filed a motion to dismiss, which, in view of our opinion upon the merits they probably would not care to press but which we are not at liberty to disregard. The case is brought here by writ of error, whereas, it is said, it should have been brought up by appeal. By § 246 of the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087, 1158, writs of error and appeals from the final judgments and decrees of the Supreme Court of Hawaii may be taken 'in the same manner, under the same regulations, and in the same classes of cases, in which' they may be taken from the final judgments and decrees of the court of a State, 'and also in all cases wherein the amount involved, exclusive of costs, . . . exceeds the sum or value of five thousand dollars.' The present suit comes here under the last clause, at the trial a jury was waived, and the proposition is that the earlier provisions of the section do not govern this clause but that, except when there is a trial by jury, the cases there mentioned must be brought to this Court by appeal under the Act of April 7, 1874, c. 80, § 2, 18 Stat. 27. It is said that

this has been the practice. See, e. g. *Wm. W. Bierce, Ltd.*, v. *Hutchins*, 205 U. S. 340. Whether or not the incidental assumption in that decision that an appeal would lie was correct, we are of opinion that the proceeding by writ of error was justified by the plain meaning of § 246. So far as the policy of Congress might permit, (see Act of March 3, 1915, c. 90, § 274b, 38 Stat. 956,) we should be disposed to be a little astute to save a party's rights from being lost through mistakes upon a technical matter in the somewhat confused condition of the statutes. But we cannot doubt that the path adopted was right.

Judgment affirmed.

HALLOWELL *v.* COMMONS, ACTING INDIAN AGENT.

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

No. 135. Submitted December 15, 1915.—Decided January 10, 1916.

Under the act of June 25, 1910, the Secretary of the Interior has power to ascertain the legal heirs of an allottee Omaha Indian dying during the period in which an allotment made to him under the act of August 7, 1882, was held in trust, and the decision of the Secretary is final and conclusive.

Congress, by the act of June 25, 1910, restored to the Secretary of the Interior the power taken from him by the Acts of 1894 and 1901 to determine the heirs of allottee Indians dying during the trust period, making his jurisdiction exclusive with no exceptions for pending litigation.

The rule that the repeal of a statute does not extinguish liability incurred thereunder *held*, not applicable to the statute in this case which simply changes the tribunal to hear the case and takes away no substantive rights.

Congress in its plenary control of Indians has power to pass the act

of June 25, 1910, vesting in the Secretary of the Interior the determination of heirs of allottee Indians dying within the trust period; the act evinces a change of policy on the part of Congress, and its opinion as to the better manner in which the rights of the Indians can be preserved.

Even though the District Court may have had jurisdiction of a suit to determine the heirs of an allottee Omaha Indian who died during the trust period when this suit was commenced, it has no jurisdiction since the passage of the act of June 25, 1910, vesting exclusive jurisdiction in the Secretary of the Interior to ascertain such heirs.

210 Fed. Rep. 793, affirmed.

THE facts, which involve the jurisdiction of the District Court of the United States of a suit affecting title to an allotment made under the Act of August 7, 1882, to a member of the Omaha Tribe of Indians, are stated in the opinion.

Mr. Assistant Attorney General Knaebel for appellant.

Mr. Hiram Chase and *Mr. William Ross King* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to establish the equitable title of the plaintiff to an allotment made to Jacob Hallowell, deceased, a member of the Omaha Tribe, in accordance with §§ 5, 6, of the act of August 7, 1882, c. 434, 22 Stat. 341. The patent to Jacob Hallowell followed the language of § 6 and declared that the United States would hold his land for the period of 25 years in trust for the sole use of the allottee, 'or in case of his decease, of his heirs according to the laws of the State of Nebraska.' The plaintiff says that he is the sole heir as against various other claims set forth in the bill. We do not go into further particulars as we are of opinion that the Circuit Court of Appeals was right in holding that the District Court had no

jurisdiction of the case. 210 Fed. Rep. 793. 127 C. C. A. 343.

It is unnecessary to consider whether there was jurisdiction when the suit was begun. By the act of June 25, 1910, c. 431, 36 Stat. 855, it was provided that in a case like this of the death of the allottee intestate during the trust period the Secretary of the Interior should ascertain the legal heirs of the decedent and his decision should be final and conclusive; with considerable discretion as to details. This act restored to the Secretary the power that had been taken from him by acts of 1894 and February 6, 1901, c. 217, 31 Stat. 760. *McKay* v. *Kalyton*, 204 U. S. 458, 468. It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. The appellee contends for a different construction on the strength of Rev. Stats., § 13, that the repeal of any statute shall not extinguish any liability incurred under it, *Hertz* v. *Woodman*, 218 U. S. 205, 216, and refers to the decisions upon the statutes concerning suits upon certain bonds given to the United States. *United States Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306. But apart from a question that we have passed, whether the plaintiff even attempted to rely upon the statutes giving jurisdiction to the courts in allotment cases, the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs. The consideration applies with the same force to all cases and was embodied in a statute that no doubt was intended to apply to all, so far as construction is concerned.

There is equally little doubt as to the power of Congress to pass the act so construed. We presume that no one would question it if the suit had not been begun. It is a strong proposition that bringing this bill intensified, strengthened or enlarged the plaintiff's rights, as suggested in *De Lima* v. *Bidwell*, 182 U. S. 1, 199, 200. See *Simmons* v. *Hanover*, 40 Pick. 188, 193, 194. *Hepburn* v. *Curts*, 7 Watts, 300. *Welch* v. *Wadsworth*, 30 Connecticut, 149, 154. *Atwood* v. *Buckingham*, 78 Connecticut, 423. The difficulty in applying such a proposition to the control of Congress over the jurisdiction of courts of its own creation is especially obvious. See *Bird* v. *United States*, 187 U. S. 118, 124. In any event the rights of the Indians in this matter remained subject to such control on principles that have been illustrated in many ways. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Hallowell* v. *United States*, 221 U. S. 317.

The decision of the Circuit Court of Appeals in this case is in accord with such earlier decisions as we have seen. *Bond* v. *United States*, 181 Fed. Rep. 613; *Pel-ata-yakot* v. *United States*, 188 Fed. Rep. 387; *Parr* v. *Colfax*, 197 Fed. Rep. 302.

Decree dismissing the bill for want of jurisdiction affirmed.

SEVEN CASES OF ECKMAN'S ALTERATIVE *v.* UNITED STATES OF AMERICA.

SIX CASES OF ECKMAN'S ALTERATIVE *v.* UNITED STATES OF AMERICA.

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

Nos. 50, 51. Argued December 2, 1915.—Decided January 10, 1916.

Congress is not to be denied the exercise of its constitutional authority over interstate commerce and of its power to adopt means necessary and convenient to such exercise merely because those means have the quality of police regulations. *Hoke* v. *United States*, 227 U. S. 308.

The Sherley Amendment of August 23, 1912, to the Food & Drugs Act under which misbranding includes false and fraudulent statements regarding curative effects of drugs is within the power of Congress to regulate interstate and foreign commerce.

Such regulation of interstate commerce is within the power of Congress whether the statement be contained in the original package or on the containers of the article. See *McDermott* v. *Wisconsin*, 228 U. S. 115.

The legislative history of the Sherley Amendment shows why the word "contain" was inserted therein.

The Sherley Amendment to the Food & Drugs Act does not by reason of uncertainty operate as a deprivation of property without due process of law under the Fifth Amendment, nor does it prevent the laying of definite charge of violating it under the Sixth Amendment, as it in terms requires that the statements to fall within its prohibition must be false and fraudulent.

The phrase "false and fraudulent" as used in the Sherley Amendment to the Food & Drugs Act must be taken with its accepted legal meaning, and to condemn under the amendment it must be found that the statements were put with the package with actual intent to deceive.

An intent to deceive may be derived from facts and circumstances, but it must be established, and can be established, by proof of their falsity as to statements accompanying drugs, such as to the effect

that they have preventive and curative power over such diseases as pneumonia and tuberculosis.

Averments in a libel under § 8 of the Food & Drugs Act should receive a sensible construction. They must definitely charge the statutory offense of misbranding but if there is enough to apprise those interested in the goods that they were charged with misbranding because statements as to curative power accompanying the articles in interstate commerce were false and fraudulent, as stating they would cure diseases which they could not cure, and were made with intent to deceive, they are sufficient to sustain the libel.

THE facts, which involve the constitutionality, construction and application, of provisions of § 8 of the Food and Drugs Act as amended in 1912 in regard to misbranding of drugs, are stated in the opinion.

Mr. Daniel W. Baker, with whom *Mr. Francis D. Weaver* was on the brief, for plaintiffs in error:

The statute is a penal statute and must be strictly construed.

These libels do not state, or properly state, any violation of the Pure Food Law, as amended. They contain no proper statement of contents of the circular; there is no statement, nor is it contended, that the alleged statements mentioned in the libels anywhere appear on the original packages, or on the bottles themselves; there is no statement that the statements alleged to be in the circular are false.

Not only is there no statement of facts anywhere in the libels showing that the alleged statements contained in said circulars are fraudulent, but the statements in the libels negative that fact.

Numerous authorities in the state and Federal courts sustain these contentions.

Mr. Assistant Attorney General Underwood for the United States:

The Sherley amendment applies to statements in a circular contained within the original unbroken package.

The Sherley amendment is a constitutional regulation of interstate commerce.

The power of Congress over interstate commerce is complete.

Similar regulations of interstate commerce have been upheld by this court.

The Sherley amendment is not a regulation of matters of opinion. It condemns only fraudulent statements.

Such statements do not constitute matters of opinion.

The question here presented is not one of common-law interpretation, but of power of Congress.

The act is not violative of the Fifth or Sixth Amendment.

Congress may regulate interstate commerce for the protection of the public. This is a proper subject of regulation.

The Sixth Amendment does not apply to these proceedings *in rem*. This law satisfies the Sixth Amendment.

The allegations of the libel are sufficient.

Reasonable certainty is what the law requires.

The libel avers all material facts with certainty.

Numerous authorities sustain these contentions.

MR. JUSTICE HUGHES delivered the opinion of the court.

Libels were filed by the United States, in December, 1912, to condemn certain articles of drugs (known as 'Eckman's Alterative') as misbranded in violation of § 8 of the Food & Drugs Act. The articles had been shipped in interstate commerce, from Chicago to Omaha, and remained at the latter place unsold and in the unbroken original packages. The two cases present the same questions, the libels being identical save with respect to quantities and the persons in possession. In each case demurrers were filed by the shipper, the Eckman Manufacturing Company, which challenged both the sufficiency of the libels under the applicable provision of the statute and the constitutionality of that provision.

The demurrers were overruled and, the Eckman Company having elected to stand on the demurrers, judgments of condemnation were entered.

Section 8 of the Food & Drugs Act, as amended by the act of August 23, 1912, c. 352, 37 Stat. 416, provides, with respect to the misbranding of drugs, as follows:

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

"That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

* * * * * * * *

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

The amendment of 1912 consisted in the addition of paragraph "Third," which is the provision here involved.

It is alleged in each libel that every one of the cases of drugs sought to be condemned contained twelve bottles, each of which was labeled as follows:

"Eckman's Alterative,—contains twelve per cent. of alcohol by weight, or fourteen per cent. by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowels, and Tuberculosis (Consumption) . . . Two dollars a bottle. Prepaid only by Eckman Mfg. Co. Laboratory Philadelphia, Penna., U. S. A."

And in every package, containing one of the bottles, there was contained a circular with this statement:

"Effective as a preventative for Pneumonia." "We know it has cured and that it has and will cure Tuberculosis."

The libel charges that the statement "effective as a preventative for pneumonia" is "false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drugs could not be so used"; and that the statement, "we know it has cured" and that it "will cure tuberculosis" is "false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption."

The principal question presented on this writ of error is with respect to the validity of the amendment of 1912.

So far it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the States, the objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act, c. 395, June 25, 1910, 36 Stat. 825. *Hoke* v. *United States*, 227 U. S. 308. There, after stating that 'if the facility of interstate transportation' can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from 'the systematic enticement of and the enslavement in prostitution and debauchery of women,' the court concluded with the reassertion of

the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations. 227 U. S., pp. 322, 323. See *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 57; *Lottery Case*, 188 U. S. 321.

It is urged that the amendment of 1912 does not embrace circulars contained in the package, but only applies to those statements which appear on the package or on the bottles themselves; that is, it is said that the word 'contain' in the amendment must have the same meaning in the case of both 'package' and 'label.' Reference is made to the original provision in the first sentence of § 8 with respect to the statements, etc., which the package or label shall 'bear.' And it is insisted that if the amendment of 1912 covers statements in circulars which are contained in the package it is unconstitutional. Such statements, it is said, are not so related to the commodity as to form part of the commerce which is within the regulating power of Congress.

But it appears from the legislative history of the act that the word 'contain' was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package, and we think that is the fair import of the provision. Cong. Rec., 62d Cong., 2d Sess., Vol. 48, Part 11, p. 11,322. And the power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is *on* or *in* the package, which is transported in interstate commerce. The further contention that Congress may not deal with the package, thus transported, in the sense of the immediate container of the article as it is intended for consumption is met by *McDermott* v. *Wisconsin*, 228 U. S. 115, 130. There the

court said: "That the word 'package' or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act," (Food & Drugs Act) "clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. . . . Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed." And, after stating that the requirements of the act thus construed were clearly within the power of Congress over the facilities of interstate commerce, the court added that the doctrine of original packages set forth in repeated decisions, which protected the importer in the right to sell the imported goods, was not "intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end." *Id.*, pp. 130, 131, 137.

Referring to the nature of the statements which are within the purview of the amendment, it is said that a distinction should be taken between articles that are illicit, immoral or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as 'illicit' and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous sufferers and make such preparations, accompanied by false and fraudulent statements,

illicit with respect to interstate commerce, as well as, for example, lottery tickets. The fact that the amendment is not limited, as was the original statute, to statements regarding identity or composition (*United States* v. *Johnson*, 221 U. S. 488) does not mark a constitutional distinction. The false and fraudulent statement, which the amendment describes, accompanies the article in the package, and thus gives to the article its character in interstate commerce.

Finally, the statute is attacked upon the ground that it enters the domain of speculation (*American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94) and by virtue of consequent uncertainty operates as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution, and does not permit of the laying of a definite charge as required by the Sixth Amendment. We think that this objection proceeds upon a misconstruction of the provision. Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec., 62d Cong., 2d Sess., Vol. 48, Part 12, App., p. 675. It was, plainly, to leave no doubt upon this point that the words 'false *and fraudulent*' were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established. *Id.* 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions,

alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements. *Russell* v. *Clark's Executors*, 7 Cranch, 69, 92; *Durland* v. *United States*, 161 U. S. 306, 313; *Stebbins* v. *Eddy*, 4 Mason, 414, 423; *Kohler Mfg. Co.* v. *Beeshore*, 59 Fed. Rep. 572, 574; *Missouri Drug Co.* v. *Wyman*, 129 Fed. Rep. 623, 628; *McDonald* v. *Smith*, 139 Michigan, 211; *Hedin* v. *Minneapolis Medical Institute*, 62 Minnesota, 146, 149; *Hickey* v. *Morrell*, 102 N. Y. 454, 463; *Regina* v. *Giles*, 10 Cox, C. C. 44; *Smith* v. *Land & House Corporation*, L. R., 28 Ch. Div. 7, 15. It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.

With respect to the sufficiency of the averments of the libels, it is enough to say that these averments should receive a sensible construction. There must be a definite charge of the statutory offense, but we are not at liberty to indulge in hypercriticism in order to escape the plain import of the words used. There is no question as to the adequacy of the description of the article, or of the shipments, or of the packages. It is said that there was no proper statement of the contents of the circular. But the libels give the words of the circular and we think that the allegations were sufficient to show the manner in which they were used. The objection that it was not alleged that the statements in question appeared on the original packages or on the bottles themselves, as already pointed

out, is based on a misconstruction of the statutory provision. The remaining and most important criticism is that the libels did not sufficiently show that the statements were false and fraudulent. But it was alleged that they were false and fraudulent, and with respect to tuberculosis it was averred that the statement was that the article 'has cured' and 'will cure,' whereas 'in truth and in fact' it would 'not cure,' and that there was no 'medicinal substance nor mixture of substances known at present' which could be relied upon to effect a cure. We think that this was enough to apprise those interested in the goods of the charge which they must meet. It was, in substance, a charge that, contrary to the statute, the article had been made the subject of interstate transportation with a statement contained in the package that the article had cured and would cure tuberculosis, and that this statement was contrary to the fact and was made with actual intent to deceive.

Judgments affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.

COMMERCIAL NATIONAL BANK OF NEW ORLEANS *v.* CANAL–LOUISIANA BANK & TRUST COMPANY.

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

No. 117. Argued December 8, 1915.—Decided January 10, 1916.

One who has no title to chattels cannot transfer title unless the owner has given authority or is estopped, nor can he, in the absence of such authority or estoppel, transfer title by warehousing the goods and endorsing the receipts. If, however, the owner of chattels clothes another with apparent ownership through the possession of warehouse receipts negotiable in form, a *bona fide* purchaser for value to whom the receipts are negotiated can be protected.

The clear import of the applicable provisions of the Uniform Warehouse Receipts Act enacted in Louisiana in 1908, is that if the owner of goods permits another to have possession or custody of negotiable warehouse receipts running to the latter or to bearer, it is a representation of title upon which *bona fide* purchasers for value may rely, notwithstanding breaches of trust or violations of agreement on the part of the apparent owner.

The provision in § 57 of the Uniform Warehouse Act as enacted in Louisiana in 1908, and as the same has been enacted in other States, that the Act is to be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it, is a rule of construction that prevents the Act from being regarded as an offshoot of local law to be construed in the light of decisions under former statutes of the enacting State, and requires the statute to be construed in the light of the cardinal principle of the Act itself.

The Uniform Acts relating to commercial affairs have been enacted in various States for the beneficent object of unifying so far as possible under one dual system of government the commercial law of the country, and to give effect, within prescribed limits, to the mercantile view of documents of title, and this principle should be recognized in construing the acts to the exclusion of any inconsistent doctrine previously obtaining in any of the enacting States.

Where the holder of warehouse receipts clothes another with such

indicia of ownership of the goods that a *bona fide* purchaser for value is enabled to take title thereto, the rule that the earlier of equal equities should prevail does not apply, as the later equities are based upon the action of the holder of the earlier equity who is estopped thereby.

In a controversy between claimants of goods, *held* that giving to another negotiable bills of lading under trust receipts which authorized the taker to receive the avails of the goods or the documents therefor, so clothes the latter with indicia of ownership of the goods that the equities of a *bona fide* purchaser for value of warehouse receipts obtained for the goods on the bills of lading surrendered in exchange therefor are superior to those of the original owner of the bills of lading who had endorsed and delivered them under trust receipts which had been violated by the party transferring to the later purchaser.

211 Fed. Rep. 337, reversed.

THE facts, which involve the determination in a bankruptcy proceeding of conflicting rights of pledgees of the same goods represented by warehouse receipts therefor, and the construction and application of provisions of the Uniform Warehouse Receipts Acts of Louisiana, are stated in the opinion.

Mr. Edwin T. Merrick for appellant.

Mr. Henry Mooney for appellee:

The Negotiable Warehouse Receipts Act of Louisiana does not change fundamental principles, and one who takes by trespass, or a finder, is not included within the description of those who may negotiate.

The title of the cotton was vested in first pledgee.

Where titles are equal the more ancient prevails and when equities are equal the first in point of time prevails.

The debtor cannot confer on the creditor by the pledge any further right than he himself has.

Cases in other jurisdictions based upon statutes which differ from the provisions of Louisiana's Code have no bearing on this case.

Numerous authorities sustain these contentions.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a controversy arising in a bankruptcy proceeding. The Commercial National Bank of New Orleans petitioned the District Court for the recovery from the trustee in bankruptcy of certain bales of cotton alleged to have been held by the bankrupts, Dreuil & Company, for the account of the petitioner under trust receipts. The Canal-Louisiana Bank & Trust Company defended, presenting its reconventional demand based upon a claim of superior title. The District Court entered a decree in favor of the Canal-Louisiana Bank & Trust Company (205 Fed. Rep. 568), which was affirmed by the Circuit Court of Appeals. 211 Fed. Rep. 337.

The controversy arises from the following transactions which were had prior to the bankruptcy. On December 9, 1912, Dreuil & Company holding inland bills of lading for two lots of cotton (forty bales and sixty bales respectively) pledged the bills of lading with the Canal-Louisiana Bank to secure certain promissory notes for moneys advanced. On December 13, 1912, the bills of lading were withdrawn from the Canal-Louisiana Bank on trust receipts, as follows:

"Received of Canal Bank & Trust Company the bills of lading or other documents or securities as enumerated below, held by the said bank as collateral pledged to secure advances made to the undersigned, and in consideration thereof, the undersigned hereby agrees to pay over to the said bank or its assignees, and to specifically apply against the very same advances the proceeds of the sale of the property mentioned in the said documents; or to deliver to the said bank or its assignees the shipping documents or warehouse receipts representing the undermentioned goods within one day from the receipt thereof, this delivery being temporarily made the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title thereto, except as

trustee for the said bank, and except to receive the avails thereof or the documents therefor for account of the said bank."

Dreuil & Company, surrendering the bills of lading to the railroad company, obtained delivery of the cotton and sent it to a 'pickery,' where the lot of forty bales was remade into sixty, and the lot of sixty bales into ninety. Dreuil & Company then stored the cotton with a warehouseman, the Planters' Press, receiving two negotiable warehouse receipts which, on December 17, 1912, they pledged to the Commercial Bank as security for their notes. On December 20, 1912, and December 28, 1912, these warehouse receipts, respectively, were withdrawn by Dreuil & Company from the Commercial Bank on trust receipts similar in tenor to those which had been given, as above stated, to the Canal-Louisiana Bank. Dreuil & Company then obtained a delivery of the cotton from the Planters' Press; on December 31, 1912, they were adjudicated bankrupts and temporary receivers were appointed. It appears that sixty of the bales had been disposed of, but the remainder of the cotton, which had been sent by Dreuil & Company to a steamer for shipment, was recovered by the receivers and placed by them in the Planters' Press, warehouse receipts being issued therefor which passed into the possession of the trustee. Despite the changes mentioned, and remarkings (which we need not consider), the District Court found the identity of the cotton to be established, and there is no further controversy upon that point. Nor is it controverted that the Commercial Bank was a purchaser in good faith for value of the warehouse receipts negotiated to it.

We assume that under the jurisprudence of Louisiana the transaction between Dreuil & Company and the Canal-Louisiana Bank (described by the bank as a pledge) created rights in the bank in the nature of ownership for the purpose of securing its advances (Rev. Stat. of Louis-

iana, 2482; Civil Code, Arts. 3157, 3158, 3170, 3173; *Fidelity & Deposit Co.* v. *Johnston*, 117 Louisiana, 880, 889; Act 94 of 1912 (Uniform Bills of Lading Act), § 32; and that when the Canal-Louisiana Bank entrusted the bills of lading to Dreuil & Company for the purposes described in the trust receipts, given to that bank, it could still assert its title as against Dreuil & Company and their trustees in bankruptcy. See *Clark* v. *Iselin*, 21 Wall. 360, 368; *In re E. Reboulin Fils & Co.*, 165 Fed. Rep. 245; *Charavay* v. *York Silk Mfg. Co.*, 170 Fed. Rep. 819; *In re Cattus*, 183 Fed. Rep. 733; *Century Throwing Co.* v. *Muller*, 197 Fed. Rep. 252; *In re Dunlap Carpet Co.*, 206 Fed. Rep. 726; *Assets Realization Co.* v. *Sovereign Bank*, 210 Fed. Rep. 156; *Moors* v. *Kidder*, 106 N. Y. 32; *Drexel* v. *Pease*, 133 N. Y. 129; *Moors* v. *Wyman*, 146 Massachusetts, 60; *Moors* v. *Drury*, 186 Massachusetts, 424; *Brown* v. *Billington*, 163 Pa. St. 76; Williston on Sales, § 437. No question is presented as to the effect, in the light of the Uniform Bills of Lading Act passed in Louisiana in 1912 (Act 94), of an attempted negotiation by Dreuil & Company of the bills of lading contrary to the terms of the trust receipts. See *Roland M. Baker Co.* v. *Brown*, 214 Massachusetts, 196, 203. The bills of lading were not negotiated; they served their purpose, being surrendered to the railroad company on the delivery of the goods to Dreuil & Company. The transactions with the 'pickery' are not material to the question to be decided. Dreuil & Company having obtained possession of the cotton, as was contemplated, placed it in store and the question is as to the effect of the negotiation of the warehouse receipts to the Commercial Bank.

It is a familiar rule that one who has no title to chattels cannot transfer title unless he has the owner's authority or the owner is estopped. See Civil Code (La.), Arts. 2452, 3142, 3145, 3146. It follows that, in the absence of circumstances creating an estoppel, one without title can-

not transfer it by the simple device of warehousing the goods and endorsing the receipts. But if the owner of the goods has permitted another to be clothed with the apparent ownership through the possession of warehouse receipts, negotiable in form, there is abundant ground for protecting a *bona fide* purchaser for value to whom the receipts have been negotiated. *Pollard* v. *Reardon*, 65 Fed. Rep. 848, 852; Williston on Sales, § 421. The effect of the negotiation of warehouse receipts is defined in the Uniform Warehouse Receipts Act, enacted in Louisiana by Act 221 of 1908. This act provides:

"SEC. 40. *Who May Negotiate a Receipt*—A negotiable receipt may be negotiated—

"(a). By the owner thereof; or

"(b). By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery."

"SEC. 41. *Rights of Person to Whom a Receipt Has Been Negotiated*—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

"(a). Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

"(b). The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him."

* * * * * * * *

"SEC. 47. *When Negotiation Not Impaired by Fraud, Mistake, or Duress*—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress."

It will be observed that 'one who takes by trespass or a finder is not included within the description of those who may negotiate.' (Report of Commissioners on Uniform State Laws, January 1, 1910, p. 204.) Aside from this, the intention is plain to facilitate the use of warehouse receipts as documents of title. Under § 40, the person who may negotiate the receipt is either the 'owner thereof,' or a 'person to whom the possession or custody of the receipt has been entrusted by the owner' if the receipt is in the form described. The warehouse receipt represents the goods, but the entrusting of the receipt, as stated, is more than the mere delivery of the goods; it is a representation that the one to whom the possession of the receipt has been so entrusted has the title to the goods. By § 47, the negotiation of the receipt to a purchaser for value without notice is not impaired by the fact that it is a breach of duty or that the owner of the receipt was induced 'by fraud, mistake or duress' to entrust the receipt to the person who negotiated it. And, under § 41, one to whom the negotiable receipt has been duly negotiated acquires such title to the goods as the person negotiating the receipt to him, or the depositor or person to whose order the goods were deliverable by the terms of the receipt, either had or 'had ability to convey to a purchaser in good faith for value.' The

clear import of these provisions is that if the owner of the goods permits another to have the possession or custody of negotiable warehouse receipts running to the order of the latter, or to bearer, it is a representation of title upon which *bona fide* purchasers for value are entitled to rely, despite breaches of trust or violations of agreement on the part of the apparent owner.

It cannot be doubted that if Dreuil & Company had pledged to the Commercial Bank the bills of lading which they withdrew from the Canal-Louisiana Bank under the trust receipts, the former paying value in good faith would have had the superior right. This would have been directly within the terms of the Uniform Bills of Lading Act (La. Act 94, 1912, §§ 31, 32, 38, 39). *Roland M. Baker Co.* v. *Brown, supra.* See *Hardie* v. *Vicksburg S. & P. Ry.*, 118 Louisiana, 254. It seems to be contended that the case is different with the warehouse receipts. But it cannot be said that it was not within the contemplation of the parties that Dreuil & Company, on obtaining the goods from the railroad company, should put them in warehouse and take the usual receipts. As we have stated, we are not concerned with what happened at the 'pickery,' as the case is precisely the same, so far as the Commercial Bank is concerned, as if the original bales had been warehoused (without remaking) as soon as received. It was not the placing of the cotton in warehouse in the usual course of business, but the negotiation of the receipts, that constituted the violation of Dreuil & Company's agreement with the Canal-Louisiana Bank. By the very terms of that agreement Dreuil & Company were to take the position of 'trustee' for the bank with authority to receive 'the avails' of the goods or 'the documents' therefor for account of the bank and being bound to apply the proceeds of sale to the bank's advances. And in taking documents of title, in ordinary course, pursuant to the agreement which was intended to facilitate the

disposition of the cotton through Dreuil & Company, the latter were manifestly permitted to take such documents to their own order, as they took the bills of lading with which they were entrusted. To repeat, it was the *negotiation* of the receipts that constituted the breach of trust. But after the Canal-Louisiana Bank had allowed Dreuil & Company to be clothed with apparent ownership through possession of the receipts it cannot be heard to question the title of a *bona fide* purchaser for value to whom they had been negotiated. *In re Richheimer*, 221 Fed. Rep. 16.

It is said that under the law of Louisiana, as it stood prior to the enactment of the Uniform Warehouse Receipts Act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank (*Stern Bros.* v. *Germania-National Bank*, 34 La. Ann. 1119; *Lallande* v. *His Creditors*, 42 La. Ann. 705; *Holton* v. *Hubbard*, 49 La. Ann. 715; *Insurance Co.* v. *Kiger*, 103 U. S. 352; but see *Hardie* v. *Vicksburg S. & P. Ry., supra*); and it is urged that the new statute is but a step in the development of the law and that decisions under the former state statutes are safe guides to its construction. We do not find it necessary to review these decisions. It is apparent that if these Uniform Acts are construed in the several States adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (§ 57): "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it." This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the funda-

mental purpose of the Uniform Act and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the Act—which has been adopted in many States—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the States dealing with such documents, but there still remained diversity of legal rights under similar commercial transactions. We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the States enacting it; and, in this view, we deem it to be clear that in the circumstances disclosed the Commercial Bank took title to the warehouse receipts and to the cotton in question.

Finally, it is insisted that whatever right the Commercial Bank might have had, if it had retained the warehouse receipts, it lost as against the Canal-Louisiana Bank by permitting Dreuil & Company to withdraw the documents under the trust receipts which they gave to the Commercial Bank; that is, that as the cotton came into the possession of Dreuil & Company the equities of the two banks are equal and the earlier equity should prevail. We think that this contention begs the question. The Commercial Bank did not lose its rights, by permitting the withdrawal of its warehouse receipts under the agreement to hold for its account, any more than the Canal-Louisiana Bank lost its rights merely by the withdrawal of the bills of lading under its trust receipts. It was because the Canal-Louisiana Bank clothed Dreuil & Company with the *indicia* of ownership that a *bona fide* purchaser for value was enabled to take title; and a similar result would have followed if, after the withdrawal of the warehouse receipts from the Commercial Bank, there had been a like negotiation by Dreuil & Company. But there was no subsequent negotiation, and the Commercial

Bank in the absence of the intervention of a purchaser in good faith for value did not lose its rights by the agreement under which the cotton which it had duly acquired was to be held for its account. There is no equality of equities, for it was through the action of the Canal-Louisiana Bank and the apparent ownership it created in Dreuil & Company that the Commercial Bank was led to advance its money upon the faith of the documents of title.

The decree is reversed and the cause is remanded with direction to enter a decree in favor of the appellant.

It is so ordered.

UNITED STATES *v.* ROSS.

APPEAL FROM THE COURT OF CLAIMS.

No. 131. Argued December 10, 1915.—Decided January 10, 1916.

An army regulation can have force only so far as it may be deemed to be in accord with the Acts of Congress.

Quære whether § 1235, Rev. Stat., was intended to preclude a recovery by an enlisted man of extra duty pay where the detail of extra duty was by competent authority but not in writing and the extra duty was actually performed.

Under the Hospital Corps Act of March 1, 1887, c. 311, 24 Stat. 435, and the Army Regulations 1433, 1435, 1436, members of the Hospital Corps are required to perform, for stated pay, all duties properly incident to the conduct of hospitals as efficient institutions including maintenance of telephone and telegraph office when necessary in the judgment of the military authorities.

Whether maintenance of a telephone and telegraph office in a military hospital is necessary calls in the first instance for judgment of the Department; and, in the absence of clear abuse of necessary official discretion, this court will not overrule the judgment of the Department that it is a necessary part of the maintenance of the hospital

within the provisions of the statute and that an enlisted man detailed to perform duties in connection thereunder is not entitled to extra duty pay.

49 Ct. Cl. 55, reversed.

THE facts, which involve the construction and application of statutes of the United States and military regulations in regard to conduct of military hospitals, and the right of an enlisted man to extra pay for services in connection with a military hospital, are stated in the opinion.

Mr. Assistant Attorney General Huston Thompson for the United States.

Mr. Charles F. Consaul, with whom *Miss Ida M. Moyers* was on the brief, for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

The United States brings this appeal from a judgment of the Court of Claims awarding to Cecil D. Ross the sum of $303.45, as extra pay while he was in charge of the telegraph and telephone office at the general hospital, Presidio of San Francisco. 49 Ct. Cl. 55.

The facts found by the court were in substance as follows: The claimant enlisted on April 25, 1900, as an infantry private in the United States Army; he was transferred to the Hospital Corps and on November 8, 1900, to the general hospital at the Presidio where he was placed in charge of the telegraph and telephone office by verbal order of the surgeon commanding; and he performed duties accordingly, save for intervals of sickness, until he was discharged from the service on April 24, 1903, by reason of the expiration of his term of enlistment. He was not under the supervision of any one connected with the Signal Corps but remained under the orders of the medical

officer in command at the hospital. No pay was given to him on account of his services as telegrapher other than the usual pay and allowances of a private in the Hospital Corps. The muster rolls in the hospital show that during the entire period, except when sick, he was reported as 'telegraph operator.' These muster rolls, 'returns from the Hospital Corps,' passed under the review of the detailing and commanding officers at the hospital and in due course reached the War Department. An effort was made by the hospital authorities to secure the detail of a man from the Signal Corps in the place of the claimant but failed. During the time that the claimant was on duty at the hospital, he was excused from other duties, calls, details and inspection. The fact that he was performing duty in the telegraph and telephone department through the entire period, as stated, was personally known to the major and surgeon commanding. The findings also set forth the following exhibit:

"U. S. A. General Hospital,

"Presidio, San Francisco, Cal., November 23, 1903.

"Respectfully returned to Cecil D. Ross, late private, first class, Hospital Corps, U. S. A., Holly Springs, Miss., with the information that the following endorsement was written in this office on a communication from the Chief, Record and Pension Office, War Department, Washington, D. C., requesting information regarding your detail on extra duty in the telegraph office at this hospital:

'U. S. A. General Hospital,

'Presidio of S. F., Cal., November 12, 1903.

'Respectfully returned to the Chief, Record and Pension Office, War Department, Washington, D. C., with the information that Private Cecil D. Ross, Hospital Corps, U. S. Army, joined at this hospital for duty Nov. 8, 1900, and was discharged April 24, 1903, by reason of expiration of term of enlistment.

'He was on duty in the telephone and telegraph office

at this hospital from Nov. 9, 1900, until date of discharge, but no printed order was ever issued detailing him on extra duty, as at an institution of this kind there are many duties to be performed, the general character of which are similar.

'W. P. Kendall,
'Major and Surgeon, U. S. A., Commanding.'

Although no order was issued detailing you on extra duty in the telephone and telegraph office at this hospital, you, nevertheless, performed this duty from November 9, 1900, until the date of your discharge.

W. P. Kendall,
Major and Surgeon, U. S. Army, Commanding Hospital."

The Government insists that there is no statutory authority for extra-duty pay to enlisted men of the Medical Department of the Army, that the right of recovery is denied by the Army Regulations and by statute, and that the claimant did not perform extra duty.

From an early date, provision has been made for the payment of enlisted men on extra duty at 'constant labor of not less than ten days.' Acts of Mar. 2, 1819, c. 45, 3 Stat. 488; May 19, 1846, c. 22, 9 Stat. 14; July 13, 1866, c. 176, 14 Stat. 93; Feb. 1, 1873, c. 88, 17 Stat. 422; Revised Statutes, § 1287; Acts of July 5, 1884, c. 217, 23 Stat. 110; Mar. 3, 1885, c. 339, 23 Stat. 359. For the present purpose, we may assume that the Court of Claims correctly construed the provisos of the appropriation acts of July 5, 1884, and March 3, 1885, as amendatory of § 1287 of the Revised Statutes, and as thus having the effect of providing a general rule. 49 C. Cls., pp. 63–65. See Army Regulations (1889), 163; (1895) 165; (1901) 183; (1904) 168; (1908) 168; (1910) 169; (1913) 170; 14 Comp. Dec., p. 153; 15 Comp. Dec., p. 375. The applicable clause, in this view, of the act of 1885 provides that "such extra-duty pay hereafter shall be at the rate of fifty cents per day for mechanics, artisans, school-teachers, and clerks at

Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, and other enlisted men on extra duty."

The regulation in force at the time in question—to which the Government refers as denying the right of recovery—states that "enlisted men of the several staff departments will not be detailed on extra duty without authority from the Secretary of War. They are not entitled to extra-duty pay for services rendered in their respective departments." Army Regulations (1895), 167; (1901) 185. And the statute which the Government cites (Rev. Stats., § 1235) provides that detail for employment in "constant labor" shall be "only upon the written order of a commanding officer, when such detail is for ten or more days." We agree with the contention of the claimant that the regulation can have force only so far as it may be deemed to be in accord with the acts of Congress; and we may assume in deciding the present case, as was held by the court below, that § 1235 of the Revised Statutes was not intended to preclude a recovery of extra-duty pay, where there had been a detail to extra duty by competent authority, although not in writing, and extra duty entitling the enlisted man to extra pay under the statute had actually been performed.

But the question remains whether the claimant did perform 'extra duty.' The term is obviously a relative one; and it cannot be determined that the enlisted man was performing extra duty without a complete understanding of the scope of the duties which he might properly be expected to perform in accordance with his enlistment without receiving extra pay. What might be extra duty in the case of men of the line might not be extra duty in the case of men in the staff departments. The claimant had been transferred to the Hospital Corps; by that transfer he became a member of that Corps and bound to perform, without extra pay, any of the duties which pertained to that

service. The act of March 1, 1887, c. 311 (24 Stat. 435), organizing the Hospital Corps, defining its duty, and fixing the pay of its members (as amended by the act of July 13, 1892, c. 162; 27 Stat. 120) provides:

"That the Hospital Corps of the United States Army shall consist of hospital stewards, acting hospital stewards, and privates; and all necessary hospital services in garrison, camp, or field (including ambulance service) shall be performed by the members thereof, who shall be regularly enlisted in the military service; said Corps shall be permanently attached to the Medical Department, and shall not be included in the effective strength of the Army nor counted as a part of the enlisted force provided by law.

"SEC. 2. That the Secretary of War is empowered to appoint as many hospital stewards as, in his judgment, the service may require; but not more than one hospital steward shall be stationed at any post or place without special authority of the Secretary of War.

* * * * * * * *

"SEC. 5. That the Secretary of War is empowered to enlist, or cause to be enlisted, as many privates of the Hospital Corps as the service may require, and to limit or fix the number, and make such regulations for their government as may be necessary; and any enlisted man in the Army shall be eligible for transfer to the Hospital Corps as a private. They shall perform duty as wardmasters, cooks, nurses, and attendants in hospitals, and as stretcher-bearers, litter-bearers, and ambulance attendants in the field, and such other duties as may by proper authority be required of them.

"SEC. 6. That the pay of privates of the Hospital Corps shall be eighteen dollars per month, with the increase on account of length of service as is now or may hereafter be allowed by law to other enlisted men. They shall be entitled to the same allowances as a corporal of the arm of service with which they may be on duty."

The Army Regulations of 1895 contained the following:

"1433. General hospitals will be under the exclusive control of the Surgeon-General and will be governed by such regulations as the Secretary of War may prescribe. . . .

"1435. The senior surgeon is charged with the management and is responsible for the condition of the post hospital, which will be at all times subject to inspection by the commanding officer. . . .

"1436. The surgeon of the post will assign his assistants and the members of the Hospital Corps to duty, and report them on the muster rolls in the capacity in which they are serving. . . .

See Army Regulations (1901) 1621, 1628, 1629; (1913) 1439, 1447, 1448.

It cannot be doubted that it was the intention that the members of the Hospital Corps should perform, for the stated pay, all the duties that are properly incident to the conduct of hospitals as efficient instrumentalities. The Act provides that the privates 'shall perform duty as wardmasters, cooks, nurses, and attendants in hospitals . . . and such other duties as may by proper authority be required of them.' We know of no way of defining these 'other duties' except by reference to what may be reasonably demanded in the conduct of a fully equipped hospital, considered as an administrative unit including all that is required in its varied work. Telephone service may well be regarded as essential to the convenient conduct of a properly managed institution of this sort. With a correct understanding of its needs that facility may be deemed to be no less incidental to the hospital service than attendance at the door, or in the reception room, or in connection with the offices of administration. And if in the practical judgment of the military authorities the efficient management of a general hospital requires the maintenance of both a telephone

and telegraph office, we know of no ground for saying that members of the Corps who are assigned to this duty as a part of the current work of the establishment are any more entitled to extra pay than they would be in any other of the numerous activities which the successful administration of the hospital may demand.

Certainly, the question was one calling in the first instance for the practical judgment of the Department. Numerous regulations, for a very long period of years, have shown the desire to prevent abuses in the service by unwarranted details to 'extra duty' as a basis for extra pay. The regulation, above quoted, that enlisted men of the several staff departments will not be detailed on extra duty without authority from the Secretary of War is significant in this aspect. In the conduct of an institution like a general hospital, where Congress has provided that all necessary services shall be performed by the members of the Hospital Corps, there is every reason for caution, and for the exercise of careful official judgment, in determining whether a particular case justifies or requires a detail on 'extra duty.' It is said that the authorities in the present instance endeavored to secure the detail of a member of the Signal Corps for the duty in question, but clearly we may not infer from the failure to obtain such assistance from the outside that the service was not regarded as within the scope of the duties which members of the Hospital Corps might properly be required to perform. The inference is to the contrary.

The judgment of the Department was that the claimant was not on extra duty. He was not in fact assigned on extra duty; there was no such detail in accordance with the regulations or the statute as there should have been if he was considered to be on extra duty. And, in the only official report relative to the matter, it appears that 'no printed order was ever issued detailing him on extra duty, as at an institution of this kind there are many

duties to be performed, the general character of which are similar.'

We are asked to overrule this departmental judgment, and to take this service out of the broad description of the statute relating to the duties of members of the Hospital Corps. We find no basis for such action. On the contrary, we cannot escape the conclusion that, in view of the provisions of the Act of Congress and of the authorized regulations with respect to the conduct of military hospitals, we are not at liberty to say that extra-duty pay has been earned in connection with service therein—where there was no detail on extra duty—unless there is a clear abuse of the necessary official discretion. No such abuse is shown here.

The judgment of the court below is reversed and the cause remanded with direction to dismiss the claimant's petition.

It is so ordered.

MOSS *v.* RAMEY.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 61. Argued December 9, 1915.—Decided January 10, 1916.

The inference naturally arising from the silence of the field notes and plat that there was no island at the time of the survey, or if any, only one of inconsiderable area and value, is refutable; and in this case the evidence does refute such inference and demonstrates the existence of the island in its present condition at the time of the survey.

An error of the surveyor in failing to extend a survey over an island in a river does not make it any the less a part of the public domain.

Fast dry land, which is neither a part of the bed of a river nor land under water, being part of the public domain within the Territory of Idaho did not pass to the State on admission to the Union but remained public land as before.

Patents to lots of land abutting on a river do not include actual islands of fast dry land and of stable foundation lying between the lots and the thread of the stream. *Whitaker* v. *McBride*, 197 U. S. 510, distinguished.

An appellate court of a State may, without violating the Fourteenth Amendment, correct its interlocutory decision upon a first appeal when the same case with the same parties again comes before it; and whether this may be done in a particular case is a local question upon which the decision of the highest court of the State is controlling here.

25 Idaho, 1, affirmed.

THE facts, which involve the title under patents of the United States to an unsurveyed island in Snake River between the States of Oregon and Idaho, are stated in the opinion.

Mr. Oliver O. Haga, with whom *Mr. James H. Richards* and *Mr. McKeen F. Morrow* were on the brief, for plaintiffs in error:

Whether title to land which has once been the property of the United States has passed from the Federal Government, must be resolved by the laws of the United States. *Wilcox* v. *Jackson*, 13 Pet. 498–517; *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Choteau*, 13 Wall. 92.

When land patented by the United States Government under the public land laws is shown by the official plat of the survey as bordering on a fresh water river, the body of water whose margin is meandered is the true boundary and not the meander line. *Hardin* v. *Jordan*, 140 U. S. 371, 380; *St. Clair Co.* v. *Lovingston*, 90 U. S. 46; *Mitchell* v. *Smale*, 140 U. S. 406; *St. Paul & P. R. R.* v. *Schurmeier*, 74 U. S. 272; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; *Middleton* v. *Pritchard*, 4 Illinois, 514; *Houck* v. *Yates*, 82 Illinois, 179; *Fuller* v. *Dauphin*, 124 Illinois, 542; *Knudson* v. *Omason* (Utah), 27 Pac. Rep. 250.

One of the important rights of a riparian owner is access to the navigable part of a river from the front of his land.

St. Louis v. *Rutz*, 138 U. S. 226; *Dutton* v. *Strong*, 1 Black, 23; *St. Paul & P. R. R.* v. *Schurmeier*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 Wall. 497.

When land is bounded by a river, the water is appurtenant to the land and constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it, and for the Government to later survey and dispose of the strips of land that were left between the meander line and the body of water purporting to have been meandered, is an injustice to the original entryman or patentee who acquired the meandered lots under the belief that they extended to the river or other body of water, and a resurvey and sale of such land should not be permitted except in case of fraud or palpable mistake in the original survey. Cases *supra*, and see *Lamprey* v. *State*, 52 Minnesota, 181; *Grand Rapids &c. R. R.* v. *Butler*, 159 U. S. 87; *Chandos* v. *Mack*, 77 Wisconsin, 573.

Except in cases of omission by accident, fraud or palpable mistake, the United States has no authority to make surveys, subsequent to patent to the upland, of any land between the meander line and the body of water purporting to have been meandered in the original survey. Cases *supra*, and see *Moore* v. *Robbins*, 96 U. S. 530, 533; *Franzini* v. *Layland*, 120 Wisconsin, 72; *Davis* v. *Wiebold*, 139 U. S. 507; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 646; *Lindsey* v. *Hawkes*, 2 Black. 554, 560; *Cragin* v. *Powell*, 128 U. S. 691; *Webber* v. *Pere Marquette Co.*, 62 Michigan, 635; *Shufelt* v. *Spaulding*, 37 Wisconsin, 662; *State* v. *Lake St. Clair Fishing Club*, 127 Michigan, 587.

Where the Government has never complained of either fraud or mistake in the original survey, a squatter on land between the meander line and the water cannot be heard to complain that the Government has parted with title to a larger acreage than it received pay for, and as be-

tween such squatter and the riparian owner, the latter has the better title. *Whitaker* v. *McBride*, 197 U. S. 510.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract. Cases *supra*, and see *Churchill* v. *Grundy*, 5 Dana, 100; *St. Louis* v. *Rutz*, 138 U. S. 243; *Ross* v. *Faust*, 54 Indiana, 475; 23 Am. Rep. 658; *Turner* v. *Parker*, 14 Oregon, 341; 12 Pac. Rep. 496.

Where surveys have been made and lands entered in reliance upon the decisions of this court that the riparian owner took to the water purporting to have been meandered, such decisions will be held to constitute rules of property, and the riparian owner will be protected accordingly.

Material allegations of the complaint not denied by the answer are deemed admitted, and such admissions are conclusive on appeal. Section 4217, Idaho Rev. Codes; *Broadbent* v. *Brumback*, 2 Idaho, 366; *Knowles* v. *New Sweden*, 16 Idaho, 217; 2 Ency. Law and Pr. 179; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Eakin* v. *Frank*, 21 Montana, 192.

The claim that the land in controversy was still part of the public domain was not raised in the trial court on the second trial, and the Supreme Court of Idaho had no power to reverse that court and determine that it was public land and that title had not passed to plaintiffs in error. Sections 3817, 4824, Idaho Rev. Codes; *Lamkin* v. *Sterling*, 1 Idaho, 120, 123; *Miller* v. *Donovan*, 11 Idaho, 545; *Medbury* v. *Maloney*, 12 Idaho, 634; *Marysville* v. *Home Ins. Co.*, 21 Idaho, 377; *Pomeroy* v. *Gordan*, 25 Idaho, 279.

The action of the Supreme Court in going entirely outside the record to determine that the land in controversy

was public land and that title had not passed to plaintiffs in error was a denial of the equal protection of the laws and of due process of law. 5 Ency. U. S. Sup. Ct. Rep., p. 618.

Where a question necessary for the determination of a case has been presented to and decided by an appellate court, such decision becomes the law of the case in all subsequent proceedings in the same action and is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves. *Westerfield* v. *N. Y. Life Ins. Co.*, 157 California, 339; *Lindsay* v. *People*, 1 Idaho, 438; *Hall* v. *Blackman*, 9 Idaho, 555; 75 Pac. Rep. 608; *Hunter* v. *Porter*, 10 Idaho, 86; 77 Pac. Rep. 439; *Steve* v. *Bonners Ferry Co.*, 13 Idaho, 384, 394; *Gerber* v. *Nampa*, 19 Idaho, 765; *Nampa* v. *Irrigation Dist.*, 23 Idaho, 422; *Himely* v. *Rose*, 5 Cr. 313; *Skillern* v. *May*, 6 Cr. 267; *Martin* v. *Hunter*, 1 Wheat. 374; *Browder* v. *McArthur*, 7 Wheat. 55; *The Santa Maria*, 10 Wheat. 430; *Sibbald* v. *United States*, 12 Pet. 488; *Washington Bridge Case*, 3 How. 411; *Sizer* v. *Many*, 16 How. 98; *Roberts* v. *Cooper*, 20 How. 467; *Cook* v. *Burnley*, 76 U. S. 672; *Magwire* v. *Tyler* (*Tyler* v. *Magwire*), 17 Wall. 253, 294; *Supervisors* v. *Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 461; *Ames* v. *Quimby*, 106 U. S. 342; *Clark* v. *Keith*, 106 U. S. 464; *Chaffin* v. *Taylor*, 116 U. S. 567; *Barney* v. *Winona Ry.*, 117 U. S. 231; *Gaines* v. *Caldwell*, 148 U. S. 228; *Re Sanford Fork Co.*, 160 U. S. 247; *Gt. West. Tel. Co.* v. *Burnham*, 162 U. S. 339; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 456; *Hunt* v. *Ill. Cen. Ry.*, 184 U. S. 77; *United States* v. *Camou*, 184 U. S. 572; *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551; *Richardson* v. *Ainsa*, 218 U. S. 289; *Balch* v. *Haas*, 73 Fed. Rep. 974; *Hailey* v. *Kirkpatrick*, 104 Fed. Rep. 647; *Montana Min. Co.* v. *St. Louis Min. Co.*, 147 Fed. Rep. 897; *Taenzer* v. *Chi., Rock. Isld. Ry.*, 191 Fed. Rep. 543.

This rule applies regardless of whether the previous decision is right or wrong and is a limitation on the court's power and not a mere rule of practice. Cases *supra*, and see *Chaffin* v. *Taylor*, 116 U. S. 567; *Gaines* v. *Caldwell*, 148 U. S. 228; *Hunter* v. *Porter*, 10 Idaho, 86; *Leese* v. *Clark*, 20 California, 388, 416.

The cases from this court relied upon by the Supreme Court of Idaho to justify its departure from the rule of law of the case do not sustain its action. *United States* v. *D. & R. G. Ry.*, 191 U. S. 83; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445; *Messinger* v. *Anderson*, 225 U. S. 436; *Ches. & Ohio Ry.* v. *McCabe*, 213 U. S. 207; *King* v. *West Virginia*, 216 U. S. 92; *Remington* v. *Cent. Pac. Ry.*, 198 U. S. 95; *Gt. West. Tele. Co.* v. *Burnham*, 162 U. S. 339; *Nor. Pac. Ry.* v. *Ellis*, 144 U. S. 458.

The rule of law of the case applies to intermediate appellate courts and to the highest courts of a State where Federal questions are involved, and if, pending a second appeal, the rule of law on which such a decision was based is changed by a higher court, the lower court has no power to reverse or modify its original decree. *Silva* v. *Pickard*, 14 Utah, 245; 47 Pac. Rep. 144; *Dist. of Col.* v. *Brewer*, 32 App. D. C. 388; *Ogle* v. *Turpin*, 8 Ill. App. 453; *Herr* v. *Graden* (Colo.), 127 Pac. Rep. 319; *Bank of Commerce* v. *State*, 96 Tennessee, 591.

Under the laws of Idaho, the remittitur from the Supreme Court went down twenty days after the decision on the first appeal, and as such decision construed a Federal grant and determined the rights of plaintiffs in error to the land in controversy, the judgment of that court became final upon the expiration of the two years allowed for issuance of writ of error from this court, and the Idaho Supreme Court was without power on a subsequent appeal five years later to reverse such judgment, and its action in doing so impairs a vested right under such Federal grant. Section 3818, Idaho Rev. Codes;

Rules 60 and 61, Supreme Court of Idaho; *Moss* v. *Ramey*, 14 Idaho, 598; 25 Idaho, 1.

The findings of the trial court on the issue of adverse possession were conclusive both on this court and the state Supreme Court, and the Federal questions in this case being decisive of the whole controversy, this court, if it finds the decision of the state court on such questions erroneous, should order the affirmance of the decision of the trial court. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Robertson* v. *Moore*, 10 Idaho, 115; 77 Pac. Rep. 218; *Mellen* v. *Gt. West. Sugar Co.*, 21 Idaho, 353, 363; *Weeter Lumber Co.* v. *Fales*, 20 Idaho, 255; *Miller* v. *Blunck*, 24 Idaho, 234; *Murdock* v. *Memphis*, 20 Wall. 590, 642; *Fairfax* v. *Hunter*, 7 Cr. 603, 628; *Martin* v. *Hunter*, 1 Wheat. 304, 323, 362; *Magwire* v. *Tyler*, 17 Wall. 253, 293; *Stanley* v. *Schwalby*, 162 U. S. 255, 283.

Mr. Will R. King for defendant in error.

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

This is a suit to quiet the title to an unsurveyed island in the Snake River, a navigable stream, the thread of which at that place is the dividing line between the States of Oregon and Idaho. The island lies between the main channel and the bank on the Idaho side and is separated from the latter by a lesser channel from 100 to 300 feet in width which carries a considerable part of the waters of the river, save when it is at its lower stages. The plaintiffs hold patents from the United States, issued in 1890 and 1892, for certain lots on the Idaho side opposite the island and claim it under these patents, while the defendant insists that it remains public land and that he has a possessory right to it acquired by settling thereon in 1894 and subsequently improving and cultivating it.

The island contains about 120 acres, has banks rising abruptly above the water, is of stable formation, has a natural growth of grass and of trees suitable for firewood, and evidently has been in its present condition since long before the adjacent lands on the Idaho side were surveyed, which was in 1868. The field notes and plat represented the survey as extending to the river, but made no mention of the island. They also represented the lots or fractional tracts immediately opposite the island as containing 110.40 acres. The patents under which the plaintiffs claim described the lots by giving the numbers assigned and the acreage accredited to them on the plat and then saying "according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General." The trial court concluded that the island remained unsurveyed public land and that the plaintiffs' lands extended only to the river, and rendered judgment against the plaintiffs. They appealed and the Supreme Court of the State held, one member dissenting, that the patents passed the title not only to the lots, as shown on the plat, but also to all islands lying between them and the thread of the stream. The judgment was accordingly reversed and a new trial ordered to determine whether the plaintiffs had lost title to the island through adverse possession. 14 Idaho, 598. Upon the new trial judgment was given for the plaintiffs and the defendant appealed. The Supreme Court, in deference to our intermediate decision in *Scott* v. *Lattig*, 227 U. S. 229, then recalled its decision upon the first appeal, reversed the judgment rendered upon the second trial and remanded the cause with a direction to dismiss it. 25 Idaho, 1. The plaintiffs bring the case here.

While the inference naturally arising from the silence of the field notes and plat is that the island was not there at the time of the survey, or, if there, was a mere sand bar or of inconsiderable area and value, what is shown and

conceded respecting its stable formation, elevation, size and appearance, completely refutes this inference and demonstrates that the island was in its present condition at the time of the survey and when Idaho became a State, which was twenty-two years later.

Thus the facts bearing on the status of the island and the operation of the patents are essentially the same as in *Scott* v. *Lattig*, and, in view of what was there held, it suffices to say: The error of the surveyor in failing to extend the survey over the island did not make it any the less a part of the public domain. It was fast dry land, and neither a part of the bed of the river nor land under water, and therefore did not pass to the State of Idaho on her admission into the Union but remained public land as before. The descriptive terms in the patents embraced the lots abutting on the river, as shown on the plat, but not this island lying between the lots and the thread of the stream. *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186; *Gauthier* v. *Morrison*, 232 U. S. 452; *Producers Oil Co.* v. *Hanzen*, 238 U. S. 325. The claim that the island passed under the patents is therefore ill founded. The case of *Whitaker* v. *McBride*, 197 U. S. 510, upon which the plaintiffs rely, is distinguishable in that what was there claimed to be an island contained only 22 acres and was not shown to be of stable formation, and the Land Department had repeatedly refused to treat it as public land.

It is contended that the decision upon the first appeal became the law of the case and that by recalling that decision when considering the second appeal the court infringed upon the due process of law clause of the Fourteenth Amendment. The contention must fail. There is nothing in that or any other clause of the Fourteenth Amendment which prevents a State from permitting an appellate court to alter or correct its interlocutory decision upon a first appeal when the same case with the same

parties comes before it again; and whether this is permitted is a question of local law, upon which the decision of the highest court of the State is controlling here. *King* v. *West Virginia*, 216 U. S. 92, 100; *John* v. *Paullin*, 231 U. S. 583.

It also is contended that under the due process of law clause of such Amendment the court was not at liberty upon the second appeal to change its first decision, because after the case was remanded for a new trial the defendant acquiesced in that decision by an amendment to his answer completely eliminating from the case all controversy respecting the status of the island and the operation of the patents. This contention is without any real basis in the record. The original answer is not before us but the amended one is, and it, in addition to otherwise traversing the plaintiffs' allegation of ownership, expressly denies that they or either of them "have any right, title or interest whatever in any portion" of the island. And examining the evidence taken on the second trial we find that the defendant was then still insisting that the island was public and not private land. It is idle therefore to claim that the point involved in the first decision was completely eliminated from the case between the two appeals. Whether, if the record were otherwise, it could be said that there was an abuse of due process need not be considered.

Judgment affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* WRIGHT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 167. Argued November 30, 1915.—Decided January 10, 1916.

Taking an engine from one State to another, although only for repairs, is an act of interstate commerce. *North Carolina R. R.* v. *Zachary*, 232 U. S. 259.

Where the employé sustains injury while the company was engaged in interstate commerce and he was employed in such commerce, the responsibility of the company is governed by the Federal Employers' Liability Act, which is exclusive and supersedes state laws upon the same subject, and it is error to submit the case to the jury as if the state laws were controlling. *Wabash R. R.* v. *Hayes*, 234 U. S. 86.

Error which is not prejudicial affords no ground for reversal; and where, as in this case, it appears that the employer was not prejudiced by the difference between the Federal Employers' Liability Act which did control, and the Nebraska Law on that subject which had been superseded by the Federal Act, the judgment should not be reversed.

No prejudice can result to an employer from instructions being more favorable in regard to contributory negligence under the state law than if they had been given under the Federal Employers' Liability Act which controlled, and the giving of instructions under the state law under such circumstances does not deny defendant a Federal right.

The evidence in this case as to the existence and constructions of, and compliance with, rules in regard to speed of engines within the yard limits justified the submission of the question of negligence to the jury.

96 Nebraska, 87, affirmed.

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

Mr. E. P. Holmes, with whom *Mr. Paul E. Walker* was on the brief, for plaintiff in error.

Mr. George W. Berge, with whom *Mr. Halleck F. Rose* was on the brief, for defendant in error.

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

This was an action against a railroad company by personal representatives to recover for the death of their intestate, an employé of the company, resulting from a collision of two locomotives on the company's railroad at Lincoln, Nebraska. One of the locomotives was a switch engine returning to the city from an adjacent transfer track, and the other a road engine on the way to a distant repair shop. The former was in charge of a switching crew and the latter of an engine crew in which the intestate was the engineer. At the place of the collision the track is in a deep and curved cut which shortens the view along the track. The causal negligence set up in the petition included allegations that the defendant negligently failed to provide a suitable rule regulating the speed and movement of switch engines through the cut; that the switch engine was being run through the cut at a negligent, reckless and dangerous rate of speed and without its engineer having it under control, and that when the employés in charge of it came within view of the other engine they negligently jumped to the ground without reversing their engine or attempting to stop it, notwithstanding it reasonably and safely could have been stopped in time to prevent the collision. The answer denied all that was alleged in the petition and charged the intestate with gross contributory negligence and an assumption of the risk. The petition described the road engine as moving from one point to another in Nebraska, and said nothing about interstate commerce, but the answer alleged that this engine was being taken to a point in another State and that the defendant was engaged and the intestate was employed in interstate commerce. At the trial the evidence disclosed that the defendant was operating a railroad extending through Kansas, Nebraska, Iowa and other

States; that the road engine was on the way from Phillipsburg, Kansas, to Council Bluffs, Iowa; that the train order under which the intestate was proceeding at the time read, "Engine 1486 will run extra Fairbury to Albright," both points being in Nebraska, and that when Albright was reached another order was to be given covering the remainder of the trip. Notwithstanding the allegation in the answer and this evidence, the court submitted the case to the jury as if it were controlled by the Employers' Liability Act of Nebraska and not by the act of Congress. The plaintiffs had a verdict and judgment and the latter was affirmed by the Supreme Court of the State. 94 Nebraska, 317; 96 Nebraska, 87. The defendant prosecutes this writ of error.

It is entirely clear that taking the road engine from Phillipsburg, Kansas, to Council Bluffs, Iowa, was an act of interstate commerce, and that the intestate, while participating in that act, was employed in such commerce. That the engine was not in commercial use but merely on the way to a repair shop is immaterial. It was being taken from one State to another and this was the true test of whether it was moving in interstate commerce. See *North Carolina R. R.* v. *Zachary*, 232 U. S. 248, 259. The courts of the State rested their decision to the contrary upon the train order under which the intestate was proceeding and upon the decisions in *Chicago & Northwestern Ry.* v. *United States*, 168 Fed. Rep. 236, and *United States* v. *Rio Grande Western Ry.*, 174 Fed. Rep. 399. In this they misconceived the meaning of the train order and the effect of the decisions cited. The order was given by a division train dispatcher and meant that between the points named therein the engine would have the status of an extra train, and not that it was going merely from one of those points to the other. The cases cited arose under the Safety Appliance Acts of Congress and what was decided was that those acts were not in-

tended to penalize a carrier for hauling to an adjacent and convenient place of repair a car with defective appliances, when the sole purpose of the movement was to have the defect corrected, and the car was hauled alone and not in connection with other cars in commercial use. It was not held or suggested that such a hauling from one State to another was not a movement in interstate commerce, but only that it was not penalized by those acts.

As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the Employers' Liability Act of Congress, c. 149, 35 Stat. 65, c. 143, 36 Stat. 291, and as that act is exclusive and supersedes state laws upon the subject, it was error to submit the case to the jury as if the state act were controlling. *Wabash R. R.* v. *Hayes*, 234 U. S. 86, 89, and cases cited.

But error affords no ground for reversal where it is not prejudicial, and here it is plain that the company was not prejudiced. While there are several differences between the state act and the act of Congress, the only difference having a present bearing is one relating to contributory negligence. The state act declares that in cases where the employé's negligence is slight and that of the employer is gross in comparison, the former's negligence shall not bar a recovery, but shall operate to diminish the damages proportionally. In other cases contributory negligence remains a bar as at common law. Comp. Stat., 1907, § 2803b; Cobbey's Ann. Stat. 1911, § 10592. The act of Congress, on the other hand, declares that the employé's negligence shall not bar a recovery in any case, but shall operate to diminish the damages proportionally in all cases, save those of a designated class, of which this is not one. Thus, it will be seen that the state act is more favorable to the employer than is the act of Congress. The instructions to the jury followed the state

act and consequently were more favorable to the company than they would have been had they followed the act of Congress. To illustrate, under the instructions given a finding that the intestate's injuries were caused by concurring negligence of the company and himself and that his negligence was more than slight and the company's less than gross must have resulted in a verdict for the company, while under instructions following the act of Congress such a finding must have resulted in a verdict for the plaintiffs with the damages proportionally diminished. Of course, no prejudice could have resulted to the company from the instructions being more favorable to it than they should have been under the controlling law.

The company requested a directed verdict in its favor on the ground that there was no evidence of any negligence whereon it could be held responsible for the intestate's death, but the request was denied and the Supreme Court of the State sustained the ruling. In this it is contended that the company was denied a Federal right, that is, the right to be shielded from responsibility under the act of Congress when an essential element of such responsibility is entirely wanting. See *St. Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S. 265, 275, 277; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673. The collision was on the main track and within the outer portion of the yard limits at Lincoln. At that point the track was in a deep and curved cut which made the view along the track from an engine passing in either direction comparatively short. The intestate was proceeding to a distant point under an order which gave his engine the status of an extra train, and the switching crew were returning to the city with their engine after completing some switching work at an adjacent transfer track. The switching crew knew the extra was in the yard and that they might meet it while going through the cut, for the engineer in that crew testified: "Q. What did he [the fire-

man] say? A. He says: 'Here they are,' or 'there they are,' or something like that. Q. You knew who 'they' was, what 'they' referred to, you knew it was this extra? A. I thought it was. Q. Yes, you was expecting it? A. I was expecting it in a way. Yes, I was told to look out for it, which we were doing. Q. You knew it was likely to come around that curve? A. Yes, sir." And yet the switching crew were proceeding through the cut at so high a speed that they were unable to stop their engine and avoid a collision notwithstanding the extra was 420 feet away when it came within view and was brought practically to a stop within 50 feet. Among the company's rules were the following: "All except first class trains will approach, enter and pass through the following named yards [among them being the yard at Lincoln] under full control, expecting to find the main track occupied or obstructed." "Yard limits will be indicated by yard limit boards. Within these yard limits engines may occupy main tracks, protecting themselves against overdue trains. Extra trains must protect themselves within yard limits." The intestate's engine was neither a first class nor an overdue train, but, as before stated, had the status of an extra train. The company took the position that the rules placed upon the intestate the entire burden of taking the requisite precautions to avoid a collision with the switch engine at any place within the yard limits, whether in the cut or elsewhere, and therefore that no negligence could be imputed to the company or the switching crew in respect of the speed or control of the switch engine. This position was pointedly illustrated by the foreman of the switching crew, who testified: "Q. But you went on the theory and assumed that everything had to get out of the way for you except this passenger [a first class train soon to pass through the cut]? A. Yes, sir. Q. Although you knew the extra was in the yards? A. Yes, sir. Q. And you claim it under that rule?

A. Yes, sir. . . . Q. You ought to run under control though in the yard limits? A. Why, I don't see why? Q. How? A. Other trains are supposed to look out for us. . . . Q. What is the rule about switch engines running under control in the yard limits? A. There is not any. Q. How? A. There is no rule." And that position was also illustrated by the division train master, who stated that "switch engines had the right over all except first class trains in the yards and other trains would have to look out for them," and further testified: "Q. When you say you examine men for switch engines do you use these rules? A. Yes and the time tables. Q. You tell switch engine men that they have a right to run twenty-five miles an hour in the yards? A. Yes, sir. Q. You tell them that? A. If they want to. I don't tell them anything about running. Q. How is that? A. I don't tell them anything about how fast they shall run or how slow. Q. You understand of course that they can at any time run their engines negligently? A. I understand that, yes. Q. You don't tell them to be careful at all when you instruct your switch engine men? A. I tell them to run their engines according to the rules. Q. But you have no rules respecting switch engines? A. No, we have instructions sometimes. Q. Have you any rules respecting switch engines? A. No, sir. . . . Q. What do you tell your switch engine men about your rules, about running under control in yard limits? A. Don't tell them anything, not in regard to running under control in the yards." The plaintiffs took the position that the rules, if regarded as devolving upon one in the intestate's situation the measure of responsibility indicated and permitting the switching crew to run their engine through the cut, not under control, but at high speed, when they knew that they might meet the other engine, were unreasonable in that respect. Whether the rules were thus unreasonable was submitted to the jury as a question of

fact over the company's objection that the question was one of law for the court. The jury found, as the record plainly shows, that the rules were unreasonable and that the switch engine was negligently run at greater speed than was reasonable in the circumstances. Dealing with these subjects, the Supreme Court of the State said (96 Nebraska, 87): "The decedent was running his engine under full control, within the meaning of the rule of the company. There was no express rule as to the speed allowed to the switch engine. Of course, the law requires that such engine should not be run at an unreasonable rate of speed under the circumstances. The engineer of the switch engine must have had a clear view of the approaching engine for at least 420 feet, and it was run at least 370 feet of this distance before the collision occurred. It could have been stopped within a distance of 60 feet unless running at a greater speed than 20 miles an hour, and, knowing, as the crew of the switch engine did, that No. 1486 [the extra] was in the yards, to run at a greater speed than 20 miles an hour in such a locality and under such circumstances was in itself negligence. In such a case the court might properly have told the jury that any rule of the company which permitted such action was unreasonable, and the giving of an erroneous instruction as to the reasonableness of the rules would be without prejudice to the defendant."

While doubting that the rules, rightly understood, permitted the switching crew to proceed at a speed which obviously endangered the safety of the extra, which they knew might be coming through the cut on the same track, we agree that if this was permitted by the rules they were in that respect unreasonable and void. And in either case we think it is manifest that there was ample evidence of negligence whereon the company could be held responsible under the act of Congress.

Judgment affirmed.

SHANKS *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 477. Argued November 30, 1915.—Decided January 10, 1916.

To recover under the Employers' Liability Act, not only must the carrier be engaged in interstate commerce at the time of the injury, but also the person injured must be employed by the carrier in such commerce.

Where a railroad company, which is engaged in both interstate and intrastate transportation, conducts a machine shop for repairing locomotives used in such transportation, an employé is not engaged in interstate commerce while taking down and putting up fixtures in such machine shop, and cannot, if injured while so doing, maintain an action under the Employers' Liability Act, even though on other occasions his employment relates to interstate commerce.

214 N. Y. 413, affirmed.

THE facts, which involve the validity of a verdict and judgment in an action for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. Joseph A. Shay, with whom *Mr. Nash Rockwood* and *Mr. I. B. McKelvey* were on the brief, for plaintiff in error.

Mr. Alexander Pope Humphrey, with whom *Mr. W. S. Jenney* was on the brief, for defendant in error.

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

Shanks sued the Railroad Company for damages resulting from personal injuries suffered through its negligence while he was in its employ, and rested his right to

recover upon the Employers' Liability Act of Congress. His injuries were received in New Jersey and his action was brought in the Supreme Court of New York. He prevailed at the trial, but in the Appellate Division the judgment was reversed with a direction that his complaint be dismissed without prejudice to any remedy he might have under the law of New Jersey, and this was affirmed by the Court of Appeals, the ground of the appellate rulings being that at the time of the injury he was not employed in interstate commerce. 163 App. Div. 565; 214 N. Y. 413. To obtain a review of the judgment of the Court of Appeals he sued out this writ of error, which was directed to the Supreme Court because the record was then in its possession. See *Atherton* v. *Fowler*, 91 U. S. 143; *Wurts* v. *Hoagland*, 105 U. S. 701; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197.

In so far as its words are material here, the Employers' Liability Act declares that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," if the injury results in whole or in part from the negligence of the carrier or of any of its officers, agents or employés. Thus it is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in intrastate commerce or in what is not commerce at all, that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employés, must look for redress to the laws of the State wherein the injury occurs, save where it results from the violation of some Federal statute, such as the Safety Appliance Acts.

The facts in the present case are these: The Railroad Company was engaged in both interstate and intrastate transportation and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead counter-shaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work.

The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.

Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co.* v. *United States*, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

Applying this test, we have held that the requisite employment in interstate commerce exists where a car repairer is replacing a drawbar in a car then in use in such commerce, *Walsh* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1; where a fireman is walking ahead of and piloting through several switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade, *Norfolk & Western Ry.* v. *Earnest*,

229 U. S. 114; where a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work, *Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; where a clerk is on his way through a railroad yard to meet an inbound interstate freight train and to mark the cars so the switching crew will know what to do with them when breaking up the train, *St. Louis, San Francisco & Texas Ry.* v. *Seale*, 229 U. S. 156; where a fireman, having prepared his engine for a trip in interstate commerce, and being about to start on his run, is walking across adjacent tracks on an errand consistent with his duties, *North Carolina R. R.* v. *Zachary*, 232 U. S. 248; and where a brakeman on a train carrying several cars of interstate and two of intrastate freight is assisting in securely placing the latter on a side track at an intermediate station to the end that they may not run back on the main track and that the train may proceed on its journey with the interstate freight, *New York Central R. R.* v. *Carr*, 238 U. S. 260.

Without departing from this test, we also have held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another, *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473, and where an employé in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce, *Del., Lack. & West. R. R.* v. *Yurkonis*, 238 U. S. 439. In neither instance could the service indicated be said to be interstate transportation or so closely related to it as to be practically a part of it.

Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transporta-

tion, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the *Yurkonis Case*, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act.

Judgment affirmed.

INTERSTATE AMUSEMENT COMPANY *v.* ALBERT.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 69. Argued November 10, 1915.—Decided January 10, 1916.

An exception to the general rule that findings of fact of the state court in ordinary cases coming to this court under § 237, Judicial Code, other than those arising under the contract clause of the Federal Constitution, are binding upon this court, is where a Federal right has been denied as the result of a finding without support in the evidence.

In this case, the finding of the state court that a foreign corporation was doing business in the State other than interstate commerce having adequate support in the record, it is binding upon this court.

A State may restrict the right of a foreign corporation to engage in

business within its limits or to sue in its courts so long as interstate commerce is not burdened thereby.

A corporation of another State carrying on business in the State of Tennessee other than interstate commerce is not deprived of its property without due process of law, nor is its interstate commerce interfered with, by the statute of Tennessee requiring a foreign corporation to file a copy of its charter and take certain other specified steps before it can maintain an action in the courts of the State.

128 Tennessee, 417, affirmed.

THE facts are stated in the opinion.

Mr. G. H. West, with whom *Mr. W. E. Drummond* and *Mr. W. B. Miller* were on the brief, for plaintiff in error:

Plaintiff in error was not engaged in doing business in Tennessee. Therefore, the decision of the court below is without support in law, and operates to deprive the company of its property without due process of law.

There is no evidence to support the judgment and no basis for the conclusion that the company did business in Tennessee as contemplated by the Act. *Railroad* v. *Albers Commission Co.*, 223 U. S. 573; *Creswell* v. *Knights of Pythias*, 225 U. S. 246; *Wood* v. *Chesborough*, 228 U. S. 678; *Railroad* v. *McWhirter*, 229 U. S. 277; *Washington* v. *Fairchild*, 224 U. S. 510.

On a writ of error to a state court in such a case this court will review the findings of fact by the state court and analyze the facts when necessary to determine whether or not a Federal right, seasonably claimed, has been infringed. *Washington* v. *Fairchild*, 224 U. S. 510; *Railroad* v. *North Dakota*, 236 U. S. 485; *Railway* v. *West Virginia*, 236 U. S. 605.

While generally, if a decision of the state court can be upheld on an independent ground it will not be disturbed, yet if such ground or conclusion can only be upheld by a denial of due process of law, the state court will be reversed. *Stewart* v. *Michigan*, 232 U. S. 665.

Where a state statute creates a new offense and prescribes

the penalty, or gives a new right and declares a remedy, the punishment or remedy can be only that which the statute prescribes. *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165; *Lupton Sons Co.* v. *Automobile Club*, 225 U. S. 489.

The general right to contract relative to business and to purchase or sell labor is protected from prohibitive state legislation by the Fourteenth Amendment. *Adair* v. *United States*, 208 U. S. 173.

Plaintiff in error had a right to make the contract involved in this case and to engage actors in Chicago pursuant thereto. A judgment based solely upon a statute against foreign corporations doing business in a State is void when applied to such business done beyond the State, because a deprivation of property without due process of law. *Old Wayne Association* v. *McDonough*, 204 U. S. 22; *Simon* v. *Railroad*, 236 U. S. 115; *Railway* v. *Polt*, 232 U. S. 65.

The highest court of a State is an instrumentality of the State through which the latter may deprive a citizen of his property without due process of law. *Chicago & C. R. R.* v. *Chicago*, 166 U. S. 226; *Abbott* v. *Bank of Commerce*, 175 U. S. 409.

Whatever of business, if any, plaintiff in error did in Tennessee in connection with this contract, or while it was in force, was interstate commerce and not subject to burdens imposed by statutes of Tennessee. To hold otherwise was violative of Art. I, § 8, sub-sec. 3, Federal Constitution. *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Same* v. *Lynch*, 218 U. S. 664; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205; *Heyman* v. *Hayes*, 236 U. S. 178.

The contention that a statute as construed and applied by a state court is void as an attempted state regulation of interstate commerce, will, in event of a decision against such contention, support a writ of error from this court. *Adams Exp. Co.* v. *Kentucky*, 214 U. S. 218.

Plaintiff in error did not solicit other contracts in Ten-

nessee at the time the one in question was made or during its existence. But if it had done so, as such contracts were to be executed by it in Chicago in ordinary course, the solicitation thereof in Tennessee by traveling salesmen would have been protected as interstate commerce against the burdens imposed by the Tennessee statutes. *Stewart* v. *Michigan*, 232 U. S. 665. *Crenshaw* v. *Arkansas*, 227 U. S. 389.

The transmission of a proposal for an interstate transaction is a part of the interstate transaction. *Dozier* v. *Alabama*, 218 U. S. 124; *Davis* v. *Virginia*, 236 U. S. 697; *West. Un. Tel. Co.* v. *Milling Co.*, 218 U. S. 406; *West. Un. Tel. Co.* v. *Brown*, 234 U. S. 542.

A State cannot tax a corporation for doing such character of business, yet this Tennessee statute lays a twofold annual tax on corporations subject thereto, as before shown. *Pullman Co.* v. *Kansas*, 216 U. S. 62; *Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Railroad* v. *Texas*, 210 U. S. 217; *Railroad* v. *O'Connor*, 223 U. S. 280.

Neither can a State tax the property of a foreign corporation located in another State, or its capital stock represented by such property,—but this is precisely what the Tennessee statute does. *Ludwig* v. *Telegraph Co.*, 216 U. S. 146; *Pullman Co.* v. *Kansas*, 216 U. S. 62.

Interstate commerce includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property. *Hoke* v. *United States*, 227 U. S. 320.

The decision complained of denies to plaintiff in error the equal protection of the laws of Tennessee, contrary to the Fourteenth Amendment. *Lumber Co.* v. *Moore*, 126 Tennessee, 313, 321.

Mr. F. M. Thompson and *Mr. Joe V. Williams*, with whom *Mr. Neal L. Thompson* were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error recovered a judgment in one of the courts of the State of Tennessee upon a cause of action that arose out of a written contract, dated May 24, 1909, whereby it agreed to "engage and book" for the firm of Catron & Albert, then operating a theater in Chattanooga, Tennessee, a certain number of "vaudeville acts" each week for certain weeks in each year, during the continuance of the contract, in consideration of the payment weekly of a "booking fee" of ten dollars and a commission of 5% upon the salary of each performer. It appeared that plaintiff in error was a corporation of the State of Missouri, but had a *situs* in Chicago, Illinois. Upon the ground that it was guilty of non-compliance with the statute of Tennessee relating to foreign corporations doing business in the State, in that it had failed to file a copy of its charter in the office of the secretary of state, the Supreme Court of Tennessee reversed the judgment and dismissed the suit (128 Tennessee, 417), and the case comes here upon questions raised under the "commerce clause" of the Constitution of the United States and the "due process of law" and "equal protection" clauses of the Fourteenth Amendment.

Excerpts from the statute are set forth in the margin.[1]

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[1] Acts of 1877, chap. 31; Acts of 1891, chap. 122; Amended by Acts of 1895, chap. 81, to read as follows:

"Section 1. . . . That each and every corporation created or organized under, or by virtue of, any government other than that of the State, for any purpose whatever, desiring to own property, or carry on business in this State of any kind or character, shall first file, in the office of the Secretary of State, a copy of its charter. . . .

"Section 2. . . . That it shall be unlawful for any foreign corporation to do business, or attempt to do business, in this State without first having complied with the provisions of this Act, . . .

"Section 3. . . . That when a corporation complies with the provisions of this Act, said corporation may then sue and be sued in the

It is the insistence of plaintiff in error that it could not, consistently with the cited provisions of the Federal Constitution, be required to subject itself to the law of the State unless it was doing business within the State; and that in fact it did no such business, or, if it did any, it was interstate commerce, not subject to state regulation.

Respecting the effect of the written contract under which the cause of action arose, the court held that it created merely the relationship of principal and agent between the parties; that by it plaintiff in error became the agent of Catron & Albert bound to render them the personal services called for by the contract in consideration of the specified sums to be paid by them to it, and that this consideration was to be forwarded weekly by Catron & Albert from Chattanooga, Tennessee, to Chicago, Illinois, where the office of plaintiff in error was located; that by the terms of the agreement plaintiff in error was not to be responsible for failure on the part of the actors to fulfill their contracts nor for any accident or delay preventing their arrival in Chattanooga at the times appointed; that under the contract and the evidence showing the execution of it, it was not contemplated that plaintiff in error should engage nor did it so far as the record shows engage in the interstate transportation of the troupes of vaudeville actors, and that while interstate transportation of such actors might or might not become an incident or factor in the execution of the contract, such interstate commerce was only incidental, and not a part of the agreement as made between the parties. It was held that this circumstance did not exempt the business done under the contract from state regulation or control. *Williams* v. *Fears*, 179 U. S. 270, 274, and *Hooper* v. *California*, 155 U. S. 648, 655, were cited.

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courts of this State, and shall be subject to the jurisdiction of this State as fully as if it were created under the laws of the State of Tennessee; . . .

The court further found as matter of fact that it was the ordinary business of plaintiff in error to send troupes of actors from one theater to another in the State of Tennessee for the purpose of presenting plays to audiences assembled in each separate theater, and from the revenues derived by means of such performances it received an income, and its compensation arose from acts done in Tennessee in the several theaters where the troupes of actors appeared and performed; that the account sued on showed more than fifty different items, each representing plaintiff in error's share of the revenues received from as many separate and distinct performances by troupes of actors which it caused to appear in defendant theater alone; and that for the purpose of enlarging and extending its business in Tennessee plaintiff in error had agents who entered that State and made contracts with other theater owners than Catron & Albert; that its articles of association stated its purpose to be to conduct and operate a general theatrical and amusement business, and this purpose it carried out by the establishment of "circuits" on which were located theaters convenient one to another, and its scheme contemplated the making of contracts with each of these theaters similar to that of Catron & Albert, and the collection of its revenues arising from booking fees and its percentages on actors' salaries; that, in short, it was a middleman levying tribute from the owners of the houses where amusement was afforded and from the actors whose talents were employed; and that its claim in suit arose out of business thus conducted.

It is settled that such findings of fact, in ordinary cases other than those arising under the "contract clause" of the Constitution are binding upon this court. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 97; *Rankin* v. *Emigh*, 218 U. S. 27, 32; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal

right has been denied as the result of a finding that is without support in the evidence. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248, 259; *Carlson* v. *Washington*, 234 U. S. 103, 106.

Plaintiff in error makes the point that the findings here are without support in the evidence; but this is not well taken. The evidence is meagre—none having been offered by plaintiff in error—but there is evidence tending to show business transacted in the State, and it does not clearly appear to have been interstate business. Reference is made to the form of the contract, and especially its fifth paragraph, which states that plaintiff in error is acting solely in the capacity of agent of the theater owner, and is not responsible for failure of artists to fulfill their contracts, nor for any accident or delay preventing them from arriving in Chattanooga when scheduled; but the same paragraph binds plaintiff in error to "use every precaution to see that artists fulfill their contracts." Moreover, the prohibition of the statute, which, as construed and applied by the courts of Tennessee in a line of cases, renders illegal the contracts of foreign corporations carrying on business without complying with the laws applicable thereto, and debars such corporations from suing in the state courts thereon (*Cary-Lombard Lumber Co.* v. *Thomas*, 92 Tennessee, 587, 593; *Insurance Co.* v. *Kennedy*, 96 Tennessee, 711, 714; *Harris* v. *Water & Light Co.*, 108 Tennessee, 245; *Lumber Co.* v. *Moore*, 126 Tennessee, 313), was evidently established as a matter of public policy, not so much for the benefit of parties sued as in the interest of the people at large; and the question is not so much—What was agreed to be done? as—What was done?

There being adequate support in the record for the finding of the Supreme Court of the State that plaintiff in error was doing business in the State, other than inter-

state commerce, without complying with the statute quoted, the contentions based upon the commerce clause and the due process of law clause alike must fall. For the authority of the State to restrict the right of a foreign corporation to engage in business within its limits or to sue in its courts, so long as interstate commerce be not thereby burdened, is perfectly well settled. *Paul* v. *Virginia*, 8 Wall. 168, 181; *Hooper* v. *California*, 155 U. S. 648, 655; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589, 591; *Anglo-American Prov. Co.* v. *Davis Prov. Co.*, 191 U. S. 373; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 203.

The insistence based upon the "equal protection" clause is unsubstantial, and calls for no discussion.

Judgment affirmed.

HOME BOND COMPANY *v.* McCHESNEY, TRUSTEE IN BANKRUPTCY OF AMERICAN FIBRE REED COMPANY AND NEW ENGLAND CHAIR COMPANY.

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

No. 90. Argued December 3, 1915.—Decided January 10, 1916.

This court follows the conclusions, reached by the Special Master and affirmed by both courts below, that transactions purporting to be purchases of accounts receivable from the bankrupt were really loans with the accounts transferred as collateral security.

210 Fed. Rep. 893, affirmed.

THE facts, which involve construction of contracts between the bankrupt and one dealing with him and determination of whether such contracts were purchases of accounts or loans with the accounts as collateral, are stated in the opinion.

Mr. Robert Kinkead, with whom *Mr. S. M. Sapinsky, Mr. James R. Duffin, Mr. Owen D. Duffin* and *Mr. S. M. Stockslager* were on the brief, for appellant.

Mr. Lewis A. Nuckols, with whom *Mr. John Bryce Baskin* and *Mr. Eli H. Brown, Jr.,* were on the brief, for appellees.

Mr. Justice Pitney delivered the opinion of the court.

The New England Chair Company, and its successor, the American Fibre Reed Company, are Kentucky corporations which were engaged in business at Frankfort, in that State. On February 1, 1912, involuntary petitions in bankruptcy were filed against both companies, and they were duly adjudicated bankrupts. The two cases in bankruptcy were consolidated and directed to proceed as one cause, and the estates are under administration as one estate. The present appellant, The Home Bond Company, an Indiana corporation, filed intervening petitions, claiming certain funds in the hands of the trustee, obtained by him through the collection of accounts receivable of the bankrupt corporations, to which the petitioner claimed title under two contracts in writing made between it and the respective corporations; one with the New England Chair Company under date March 6, 1911, the other with the American Fibre Reed Company under date November 9, 1911, after the latter had taken over the assets and assumed the liabilities of the Chair Company. These agreements are identical in form, and a copy of one is set forth in the margin.[1]

[1] This agreement, made this 6th day of March, 1911, at Indianapolis, Indiana, by and between New England Chair Co., hereinafter called first party, and the Home Bond Company, hereinafter called second party.

Witnesseth, that, for One Dollar ($1.00) and other good and valuable

Petitioner also set up a claim against the trustee for the sum of $800, being $100 per month from March 16 to October 12, 1912, inclusive, paid by it to one Manning,

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considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

First. That said second party shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts:

1 per cent. on accounts that are paid within 15 days;
2 per cent. on accounts that are paid within 30 days;
3 per cent. on accounts that are paid within 60 days;
4 per cent. on accounts that are paid within 90 days;
5 per cent. on accounts that are paid within 120 days;
6 per cent. on accounts that are paid within 150 days;
7 per cent. on accounts that are paid within 180 days;

subject however, to the terms of this and any subsequent written agreements executed by the parties hereto.

Second. That the second party shall pay:

78 per cent. on 30 day accounts;
77 per cent. on 60 day accounts;
76 per cent. on 90 day accounts;
75 per cent. on 120 day accounts;
74 per cent. on 150 day accounts;
73 per cent. on 180 day accounts;

upon delivery to and acceptance by second party of such accounts duly assigned to the party of the second part; and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party, provided, however, no payment of the remainder shall be made while any of said accounts are in default.

Third. The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid.

Fourth. Said first party hereby guarantees the payment to the second

who in the sixth clause of the contract of November 9, 1911, was by the Reed Company appointed attorney in fact to receive remittances in payment of the accounts

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party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of non-payment at maturity to said second party, of any accounts purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof, and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract; said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts.

Fifth. Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party, and said second party is hereby given the right and privilege of auditing the books, accounts and records of said first party, relating to said accounts, at any time that it may see fit so to do.

Sixth. Whereas it is for the mutual benefit of the parties hereto that the collection of said accounts shall in the first instance be remitted to the party of the first part and in its name; the party of the first part shall at all times appoint some person or persons mutually acceptable to both of the parties hereto, their attorney-in-fact to receive all such remittances in whatever form they may be made, and to transfer, assign and transmit all such proceeds to said party of the second part.

And said party of the first part shall immediately upon receipt of such remittances in whatever form the same shall be made, deliver the same to such attorney for transmittal to the party of the second part; and said attorney shall at all times have access to all mail received by said party of the first part and all books and records of the party of the first part, to discover what payments and remittances are made upon such accounts.

And in consideration of the execution of this agreement by the party of the second part, said party of the first part undertakes and agrees to guarantee the faithful conduct of said attorney-in-fact in the receipt, assignment and transmittal of all such payments or remittances. And upon the like consideration said party of the first part shall pay unto said attorney-in-fact compensation for all such services so rendered in that behalf; and that we will furnish and provide for said attorney-in-fact all necessary clerical or stenographic assistance for making reports

receivable and transmit them to petitioner. It was averred that $100 per month was a reasonable charge and that under the provisions of the sixth clause the Reed Company was to pay Manning, but failed to do so, and petitioner was compelled to make such payment.

The trustee filed answers contesting the principal claim on the ground that the transactions between petitioner and the bankrupt corporations did not amount to a purchase of the accounts receivable but constituted mere loans of money (with the accounts assigned as collateral

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to party of the first part, and all postage or express charges for transmitting reports and remittances; said attorney-in-fact shall also have the right and power, and it shall be his duty to endorse the name of the party of the first part on any freight or express bill or bill of lading relating to said accounts; and ratifying and confirming all its said attorney may do in the premises. And said attorney-in-fact as to all such matters shall receive such moneys or other remittance solely for the party of the second part and shall at all times be subject to its exclusive orders with relation thereto; and it is now mutually agreed between the parties hereto that E. Manning shall be and continue such attorney-in-fact to perform such duties, until by mutual agreement of the parties hereto, another person shall be appointed in his stead.

Seventh. That said second party in making purchase of accounts hereunder relies upon the guaranties and covenants of said first party herein contained and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representation heretofore made and that may hereafter be made are for the purpose of establishing the credit of said first party with said second party so that sale of accounts may be made hereunder.

Eighth. That said first party shall execute and deliver to said second party or its assigns, any document necessary or proper to carry into effect this contract and should second party employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, either in its own name or of the name of the party of the first part, then and in either case said first party shall immediately pay to said second party or its assigns, all court costs, expenses, attorney's and stenographer's fees which may be by it expended in such proceedings.

In Witness Whereof, etc.

security) at usurious rates of interest, and traversing the claim for moneys paid to Manning upon grounds that will appear below. The special master to whom the matter was referred overruled the claim, sustaining the trustee's contention, and holding, in view of the agreed statement of facts submitted to him by the parties in lieu of proof, that the contracts were not sales of the accounts by the respective bankrupt corporations to petitioner, but were transfers of the accounts as security for loans; and that these loans were made at usurious rates of interest, whether the contracts were made in Indiana or Kentucky, since the amounts retained as a "service charge" under the contracts amounted to at least 24 per centum per annum on the moneys paid by the petitioner from the time of payment to the time of reimbursement, while the statutes of both States fixed six per centum per annum as the legal rate of interest, providing that any excess might be relieved against, and if paid recouped, and while the Indiana statute permitted interest up to 8% to be contracted for in writing, it provided that if over 8% were contracted for or collected, all over 6% should be forfeited. The special master therefore held that in the settlement the transactions between the petitioner and trustee should be purged of usury, and the petitioner be treated as a creditor of the bankrupt corporations with security for its debt. As to the claim for the $800 paid by petitioner to Manning, the special master overruled this upon the ground that there was nothing to show what services, if any, were rendered by Manning as attorney in fact during the time from March 16, 1912, to November 12, 1912. It appeared that during the continuance of the contracts between the petitioner and the Chair Company and the Reed Company respectively, Manning was an officer and employé of the respective companies; that for all services rendered by him while so employed by these companies, including such as he

rendered as attorney in fact, he was to receive a regular salary, which was paid to him by the Chair Company until the business was taken over by the Reed Company, and then by it until April 9, 1912, when the custodian took charge of the bankrupts' estates, with the exception of salary for the two weeks ending April 9, which was owing to him from the Reed Company; that from April 9 to September 9, 1912, Manning was in the employ of the custodian as clerk, and thereafter in the employ of the trustee in the same capacity, and his salary for this employment had been paid him out of the bankrupts' estates. The special master also overruled a claim made by petitioner for allowance of its counsel fee in the same proceedings. The demand for such allowance was based upon the eighth clause of the agreement, which it was contended was broad enough to embrace not only counsel fees incurred in the collection of accounts receivable from delinquent debtors or customers of the Chair Company or the Reed Company, but also counsel fees incurred by petitioner in collecting directly from either of those companies any accounts receivable which had come into its hands and for which it or its trustee in bankruptcy failed to account.

Thereupon the special master stated an account between the petitioner and the bankrupts' estates, making the proper allowances for the usury, finding a balance of only $576.10 due from the trustee to the petitioner, and recommending that this be ordered paid over, but only upon condition that the petitioner turn over or account to the trustee for the contracts of March 6, 1911, and November 9, 1911, and any uncollected accounts or papers connected with the uncollected accounts delivered to it under those contracts.

Petitioner's exceptions to this report were overruled by the District Court (206 Fed. Rep. 309), and a decree was entered in accordance with the recommendations of

the special master. The Circuit Court of Appeals affirmed the decree. 210 Fed. Rep. 893.

Upon the present appeal it is insisted that there was error in holding that petitioner and appellant, by virtue of the contracts between it and the bankrupts and the transactions and conduct of the parties, did not become the purchaser or owner of the accounts receivable in question, and that the transactions were really loans, with the accounts receivable transferred as collateral security. But it seems to us so entirely clear that the conclusions reached by the special master and approved by both courts were correct that we deem it unnecessary to discuss the matter at any length. To quote from the opinion of the District Court: "The considerations which support this conclusion are that the bankrupts were to and did collect the accounts and bear all expense in connection with their collection; what is claimed to have been the purchase price for the accounts, to-wit: the difference between the face of the accounts and the discount, was not known until payment of the account and receipt thereof by the Company and then depended on the time that had elapsed since the date of the advance of the seventy-five per cent; what is claimed to have been deferred payment of the purchase price was simply a return to the bankrupt of the excess of the collection over and above the advance and discount; and the provision that, in the event of non-payment of any of the accounts at maturity or the debtor becoming insolvent, the bankrupt should repurchase the account and pay therefor the advance made thereupon plus the discount. . . . In so far as the contracts in question here use words fit for a contract of purchase they are mere shams and devices to cover loans of money at usurious rates of interest. That the company was not adverse to the use of shams is otherwise apparent from the use by it of the word 'service,' in its dealings with the bankrupts under the con-

tracts, to characterize the discounts. In any view of the contracts those discounts were not charges for services rendered the bankrupts. Loans are never regarded as services."

Houghton v. *Burden*, 228 U. S. 161, affirming *In re Canfield*, 193 Fed. Rep. 934, is plainly distinguishable, for there the contract contemplated actual services by the lender, and this provision was found not to have been a mere cover for usury.

The rulings adverse to the claim for moneys paid to Manning and for counsel fees in the proceedings are so manifestly correct as to require no discussion.

Decree affirmed.

KANAWHA & MICHIGAN RAILWAY COMPANY *v.* KERSE, ADMINISTRATOR OF BARRY.

ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

No. 129. Argued December 10, 1915.—Decided January 10, 1916.

Where the highest appellate court of the State refuses to allow a writ of error to review a judgment based on a verdict, the writ of error from this court is directed to the trial court.

Under the Employers' Liability Act, the action lies for injury or death resulting in whole or in part from the negligence of the officers, agents or employés of such carrier.

To conduct switching operations upon a switch obstructed in such manner as to endanger the lives of brakemen upon its cars, is evidence of negligence on the part of the railroad company, and the existence of such an obstruction for a considerable period of time is presumptive evidence of notice to the company.

The burden of proof of assumption of risk is on the employer, and unless the evidence indisputably shows such assumption, the trial court does not err in refusing to take that question from the jury.

Knowledge of a fixed obstruction over a track in such position as not to clear a man standing on top of a box car necessarily imports a risk to an experienced brakeman; and, in the absence of evidence of objection on his part or promise of reparation by the employer, assumption of the risk.

The fact that the court erroneously refused defendant's request for an instruction as to plaintiff's assumption of risk based on the hypothesis of the latter's knowledge of an existing condition is not ground for reversal where the jury by a specific finding negatived that hypothesis.

THE facts, which involve the validity of a verdict and judgment in an action for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. Leroy Allebach and *Mr. W. N. King* for plaintiff in error:

The court erred in refusing to arrest the evidence from the jury and to direct a verdict in favor of defendant, at the close of plaintiff's evidence, and the court erred in refusing to direct a verdict for defendant, at the close of all the evidence. A Federal question is involved; the burden of proving negligence is on the plaintiff; assumption of risk is available as a defense; assumption of risk need not be affirmatively pleaded under West Virginia law; the accident was caused solely by employé's negligence.

The court erred in refusing to give the instructions requested by the defendant below before argument to the jury. Defendant in error had actual knowledge of the presence of the obstacle over the track and knew of the dangers connected therewith. The finding of the jury is not supported by any evidence. The court could have avoided this error by directing a verdict, as requested.

In support of these contentions, see *Farley* v. *N. Y., N. H. & H. R. R.*, 87 Connecticut, 328; *Hoylman* v. *Railway Co.*, 65 W. Va. 264, 270; *Melton* v. *Ches. & Ohio Ry.*, 64 W. Va. 168; *North Carolina R. R.* v. *Zachary*, 232 U. S.

248; *Oliver* v. *Ohio River R. R.*, 42 W. Va. 703; *Pankey* v. *A., T. & S. F. R. R.*, 180 Mo. App. 185; *Ridgeley* v. *West Grafton*, 46 W. Va. 445; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *Sanderson* v. *Panther Lumber Co.*, 50 W. Va. 42; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 502; *Southern Ry.* v. *Bennett*, 233 U. S. 80; *Williamson* v. *N. N. & M. V. Co.*, 34 W. Va. 657; *Woodell* v. *W. Va. Improvement Co.*, 38 W. Va. 23, 47; Hogg's Pleading and Forms, § 228, pp. 184–85.

Mr. George A. Berry, with whom *Mr. R. F. Downing* was on the brief, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This was an action under the Federal Employers' Liability Act to recover damages because of the death of one Barry, a brakeman in the Railway Company's yard at Charleston, West Virginia, on April 23, 1911. It was pleaded and was proved without dispute that he received injuries resulting in his death while employed in interstate commerce by the Railway Company, admittedly a common carrier. There was a verdict in favor of the administrator, and the Supreme Court of Appeals of West Virginia refused to allow a writ of error to review the resulting judgment; hence our writ was directed to the trial court.

The principal argument of plaintiff in error is addressed to the refusal of the court to direct a verdict in favor of defendant upon the ground that there was no proof of negligence on the part of the Railway Company, and that there was clear and undisputed proof that Barry assumed the risk of such an injury as that which resulted in his death.

It appears that Barry was an experienced yard brakeman, and was employed in that capacity by the Railway Company in its Charleston yard. Among the industries served by the yard was that of the Kanawha Brewing

Company, which had a private switch running through its premises and connecting with defendant's main line. Some time prior to April 23, 1911, carpenters in the employ of the Brewing Company had placed one or two pieces of timber, about 2 inches thick and 3 to 6 inches wide, in a horizontal position across the switch track and at a height between 3 feet and 4½ feet above the top of an ordinary box car. The timber was secured by nails to two buildings on opposite sides of the track. There was a conflict of testimony as to the length of time that the timber had been in position prior to the accident, witnesses fixing it at periods varying from two or three days to a month. It was necessary for members of defendant's yard crew to pass in and out of the switch and under the obstruction frequently. The timber was in plain view, but because of a sharp curve in the switch-track could be seen by those upon the top of a car for only a short distance when approaching it. On the twenty-third of April a switching crew, of which Barry was that day a member, went upon the switch to haul out upon the main line a car destined for interstate commerce. The engine, in charge of one Leonard, was backed in upon the switch, and Barry coupled up the car, which was an ordinary box car, and then climbed to the top of it. Leonard started to pull out of the switch, and as the train proceeded Barry, who was standing near the rear end of the car, and not looking forward, but sidewise (presumably watching Wintz, the conductor, who was standing upon the ground in charge of the train), came in contact with the timber and was thrown to the ground, sustaining a fracture of the skull, from which he soon died.

The action of the Railway Company, through its employés, in conducting its switching operations upon a switch obstructed, as this one was, in such manner as to endanger the lives of brakemen upon its cars, speaks so clearly of negligence that no time need be spent upon it.

The evidence that the timber had been in the position described for a considerable period of time was presumptive evidence of notice to the company, besides which the switch engineer and conductor both testified to actual knowledge on their part, prior to the time of the accident to Barry. Under the Employers' Liability Act (35 Stat. 65, c. 149, § 1) the action lies for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

Upon the question of assumption of risk, the case for the Railway Company was stronger. One Forbes, a fellow brakeman, testified that Barry had worked on the same crew with witness during all the time he was employed by the Company, this being "something like a month;" that the obstruction across the Brewing Company's track had been there "pretty near the whole time Mr. Barry was working for the company—must have been there something like a month;" that "I told Mr. Barry to be careful and watch this piece of timber, myself, and I and Mr. Barry had passed under it ourselves, and we had to get down this way (witness stoops quite low) to get under the piece of timber on the box car, and I told him several times about watching;" and that he and Barry probably went in on the switch together two or three times a day, and he had often seen Barry go under the obstruction. And Wintz, the conductor, testified that Barry commenced work for the company "about the first of the month, and worked up until the 23rd;" also that "I notified him about the overhead pieces, to be careful and watch out for them." This testimony, as seen in print, certainly seems convincing, although Wintz, upon cross-examination, could not say but that he had told Mr. Kerse, the administrator, that he and Barry had "never had any conversation at all about this overhead obstruction."

But there was substantial contradiction of the testimony

of these witnesses. Leonard, the engineer of the yard locomotive, called as a witness for plaintiff, testified distinctly that the day on which Barry met his death was the first that the witness had seen him; that he did not know whether Barry was employed by the Railway Company or not. And one Greter, called by defendant, testified that it was to him Barry had applied for employment as yard brakeman, and he identified the written application signed by Barry; he also testified that Barry entered the service of the Company "about three or four days" after the application was approved. The application itself was introduced in evidence by defendant; it is dated March 31, 1911, and is indorsed "Approved, A. N. Lyon, Supt., 4/14/1911." The latter date, coupled with Greter's testimony, would seem to fix April 17th or 18th (five or six days before the accident) as the earliest date on which Barry was employed by the Railway Company. And this is so inconsistent with a material part of the testimony of Forbes and Wintz that the jury may reasonably have concluded that their testimony should be rejected *in toto—falsus in uno, falsus in omnibus*—and that in truth, as indicated by the testimony of Leonard, Barry had never worked upon the Brewing Company's switch previous to the time of the disaster. The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury.

Only one matter remains to be mentioned. The court refused to instruct the jury, as requested by defendant, "that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of

The Kanawha and Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein."

Since knowledge of a fixed obstruction over the track in such a position as not to clear a man standing upon the top of a box car would seem necessarily to import to an experienced brakeman that there was a risk of injury to him in that situation, and since there was no evidence of objection by Barry or promise of reparation by his employer to rebut the presumption that the risk was assumed, the refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment under review, because by specific findings of fact the jury negatived the hypothesis upon which alone the instruction was based. In response to particular interrogatories submitted by the court, they found that Barry did not know that the piece of timber was stretched over the track, and (of course) did not know that the timber was so low that it would not clear him when standing upon the top of the box car.

A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. And the refusal of an instruction as to the legal result that would follow only upon the hypothesis that the deceased knew of the presence of the timber, and knew it would not clear a man standing upon the top of a box car, became legally insignificant when the jury had in its findings distinctly negatived the facts that made up the hypothesis. Thus the progress of the trial rendered the error wholly immaterial to the merits. *Greenleaf's Lessee* v. *Birth*, 5 Pet. 132, 135; *Fidelity & Deposit Co.* v. *Courtney*, 186 U. S. 342, 351.

Judgment affirmed.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* GRAY.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DISTRICT, STATE OF NEW YORK.

No. 147. Argued December 17, 1915.—Decided January 10, 1916.

The anti-pass provision in the Hepburn Act of 1906 applies to common carriers by railroad in interstate commerce with respect to transportation within the bounds of a State as part of an interstate journey.

While the anti-pass provision in the Hepburn Act of 1906 operates upon an agreement for exchange of transportation for anything else than money made prior to the passage of the Act so that specific performance can no longer be required, an interstate carrier cannot for this reason refuse to make just compensation in money for an unpaid balance for services fully performed under such a contract before the passage of the Act. *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 476, distinguished.

161 App. Div. 924, 932, affirmed.

THE facts, which involve the construction of the provisions of the Interstate Commerce Act as amended in 1906, prohibiting discrimination in regard to facilities and privileges of transportation and the validity of contracts made prior to the Hepburn Amendment and the rights of parties thereunder, are stated in the opinion.

Mr. William Mann, with whom *Mr. Charles C. Paulding* was on the brief, for plaintiff in error:

The transportation which plaintiff in error agreed to furnish defendant in error was to be used on interstate journeys and was, therefore, subject to the provisions of the Act of February 4, 1887, and the amendments thereof and supplements thereto, known as the Interstate Commerce Act. *Southern Pacific Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *Tex. & N. O. R. R.* v. *Sabine Tram Co.*, 227

U. S. 111; *Louisiana R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336.

On and after August 28, 1906, when the amendment to the Interstate Commerce Act of June 29, 1906, became effective, it was unlawful for the plaintiff in error to furnish defendant in error transportation for use on an interstate journey, except upon receiving from him in money the regular fare provided in its tariffs in payment for such transportation. *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467; *Chi., Ind. &c. Ry.* v. *United States*, 219 U. S. 486.

The refusal of plaintiff in error to furnish defendant in error transportation in September, 1906, to apply in part payment of the map in question, did not constitute a breach of the agreement on its part and no cause of action arose in favor of defendant in error because of such refusal.

Mr. Arthur W. Clement, with whom *Mr. Wilson E. Tipple* was on the brief, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

In the month of November, 1900, Charles P. Gray, the defendant in error, made an agreement with the representatives of the New York Central & Hudson River Railroad Company, plaintiff in error, to make for the company a large map of the Vanderbilt Lines for the World's Fair, which was to take place at Buffalo in the following year. The price agreed to be paid him was $750, of which $150 was to be paid in cash and the balance in transportation to be used by defendant in error in traveling between New York City and his farm in Girard, Pa., following the lines of plaintiff in error between New York and Buffalo, and the line of another and independent railroad between that point and Girard. The map was made, delivered, and accepted, and the cash payment

of $150 was made. At different times between the making of the contract and the month of September, 1906, defendant in error received from plaintiff in error transportation to the value of $55.77 applicable to this contract. In September, 1906, he called upon the company for transportation for himself and wife from New York City to Buffalo and return, intending to use it for a visit to the farm at Girard, Pa. The demand was refused, upon the ground that because of the provisions of the Interstate Commerce Law the company could furnish no additional transportation on account of his services. A second demand of the same kind having been refused, defendant in error brought an action against plaintiff in error in the City Court of the City of New York for the unpaid balance of the agreed price of the map, to which plaintiff in error set up the defense that by the terms of the Hepburn Act of June 29, 1906, it was unlawful to furnish transportation for any part of an interstate journey in payment for services or for any other consideration except a regular fare paid in money. The trial court, holding that this constituted no defense to the action, directed a verdict in favor of defendant in error for an amount made up by taking the agreed price of the map, deducting the cash payment and the amount paid in transportation, and adding interest to the balance. No particular question was or is made as to the *quantum* of recovery. The resulting judgment was affirmed by the Appellate Term of the Supreme Court, and its determination was affirmed by the Appellate Division of the Supreme Court for the First Judicial Department. 161 App. Div. 924, 932.

Leave to appeal to the Court of Appeals of the State was denied, and this writ of error was sued out.

Among the prohibitions contained in the Act of June 29, 1906, is the following (34 Stat. 587, c. 3591): "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 reference, of course, is to common carriers by railroad in interstate commerce; and it is not questioned that plaintiff in error is within this category. The act took effect August 28, 1906 (34 Stat. 838, Res. 47).

In *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 476 *et seq.*, it was held that the prohibition we have quoted prevented the exchange of transportation for services, advertising, releases, property, or anything else than money, and that this operated upon an agreement made long before the passage of the act whereby the carrier, in consideration of a release of damages for injuries sustained by Mottley and his wife in consequence of a collision of trains upon the railroad, agreed to issue free passes to them, renewable annually during their several lives, the result being that after the taking effect of the Hepburn Act specific performance of this agreement could no longer be required.

That the prohibition applies with respect to transportation within the bounds of a State as part of an interstate journey is quite clear. *So. Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498, 527; *Ohio Railroad Comm.* v. *Worthington*, 225 U. S. 101, 110; *Louisiana R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336, 340.

In the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to defendant in error in performance of the contract of November, 1900.

But from this it by no means follows that it could refuse to make just compensation in money for the unpaid balance of the purchase price of the map. The judgment of the state court proceeded upon the ground that since the contract had been fully performed by Gray, so that the railroad company had received the entire benefit of it, and since the delivery of the particular consideration stipulated for had been prohibited by the Act of Congress, the company thereupon became bound upon general principles of justice to pay him an equivalent in money for the balance of the consideration. In so holding the court was simply administering the applicable principles of state law, and did not run counter to the Act of Congress. If the court had accorded legal efficacy to an executory contract made after the taking effect of the Hepburn Act and contrary to its provisions, a different question would be presented. But there is nothing in the Act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation which the passage of the Act rendered thereafter illegal. In the *Mottley Case*, while the right to further specific performance of the contract for free passage was denied, the court said (219 U. S. 486): "Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred is a question not before us, and we express no opinion on it."

Judgment affirmed.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY *v.* DETTLEBACH.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, STATE OF OHIO.

No. 229. Argued November 29, 1915.—Decided January 10, 1916.

The effect of an express contract, made for the purpose of interstate transportation, must be determined in the light of the Act to Regulate Commerce.

Whether the responsibility of an interstate carrier as warehouseman of goods carried from another State and not called for by the consignee until after the time specified in the bill of lading after arrival at destination is to be measured by the valuation in the bill of lading is a question Federal in its nature.

Under the Act to Regulate Commerce, as amended by the Hepburn Act of 1906, the term transportation embraces all services in connection with the shipment, including storage of goods after arrival at destination.

The valuation expressed in a bill of lading of goods shipped in interstate commerce, and a limitation of the liability of the carrier made by the shipper for the purpose of obtaining the lower of two rates of freight, is, under the Carmack Amendment, valid and binding upon the shipper, and applies not only to the responsibility of the railroad company as a carrier while the goods are in transit but also to its responsibility as a warehouseman while holding the goods in storage after arrival at destination and notice to the consignee.

THE facts, which involve the responsibility of a carrier for goods under the applicable provisions of the Interstate Commerce Act, and the Carmack Amendment thereto, are stated in the opinion.

Mr. Edward A. Foote, with whom *Mr. Frank L. Littleton* was on the brief, for plaintiff in error.

Mr. C. C. Young, with whom *Mr. Jesse A. Fenner* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The court whose judgment we have here under review sustained a judgment rendered by an inferior state court in favor of Dettlebach and against the Railway Company for the market value of certain goods which, having been shipped in interstate commerce, were lost through the negligence of the Railway Company (the terminal carrier) while in its possession as warehouseman at the place of destination; overruling the contention that, because of a limitation of liability agreed upon by plaintiff's agent in consideration of a reduced rate of freight and contained in the bill of lading that was issued by the initial carrier, and by force of the provisions of the Interstate Commerce Act and its amendments, especially the Hepburn Act of 1906, the recovery ought to be limited in accordance with the stipulation. This question, it may be observed, as affecting the warehouseman's responsibility, was not passed upon in *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 109.

The facts are as follows: Dettlebach, the plaintiff, on September 18, 1911, shipped certain packages of merchandise, described as household goods, over the Chicago, Burlington & Quincy Railway and connecting lines from Denver, Colorado, consigned to his wife at Cleveland, Ohio. They were received for transportation under the terms of a bill of lading, prepared in the form approved and recommended by the Interstate Commerce Commission in its report of June 27, 1908 (14 I. C. C. 346, 352; 22 Annl. Rep. I. C. C. 1908, p. 57), which contained the following provision:

"It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, *that every service to be performed*

hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns."

Among the conditions printed upon the back were the following:

"SEC. 3. . . . The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property . . . at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence. . . ."

* * * * * * * *

"SEC. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only. . . ."

Upon the face of the bill of lading was the following declaration signed by plaintiff's agent: "I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per cwt."

The court found as a fact that the shipper by consenting to the limitation received a consideration in the shape of a substantial reduction in the freight rate, and that this supported the agreement to limit the company's liability. No question was made but that the agreement was in accordance with the filed tariff.

The goods thus shipped were transported by the initial carrier to the junction between its line and that of defend-

ant, and transported by the latter company to destination, where they arrived on September 27. They were not called for by the consignee, and remained in defendant's possession as warehouseman until November 1, 1911, when, through its negligence, certain of the goods, of the market value of $2,792, were lost.

This action having been brought to recover the value of the goods lost, and the claim of Federal right already mentioned having been made and overruled, a verdict and judgment went against defendant for the market value of the goods, and this was affirmed by the Court of Appeals, Eighth District, State of Ohio. The Supreme Court of the State declined to review the judgment. The case comes here under § 237, Jud. Code.

It is no longer open to question that if the loss had occurred in the course of transportation upon defendant's line, the limitation of liability agreed upon with the initial carrier, as this was, for the purpose of securing the lower of two rates of freight, would have been binding upon plaintiff, in view of the Carmack Amendment. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509; *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 648, 654; *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, 668. The question is, whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman. The Court of Appeals, recognizing the question as one of difficulty, reasoned thus:

"To occupy this twofold relation is of advantage to the company. As soon as the company can occupy it by replacing with it its former relation as a common carrier, it obtains the benefit of the rule of ordinary care instead of the higher degree of vigilance which the law charges upon carriers for hire. And the company is further advantaged by an early shifting of its status as carrier to that of warehouseman, through its right in the latter capacity to

charge for the storage of consigned goods, from the time when its relation to them as carrier ceases."

The court considered that the declaration of value stamped upon the bill of lading and signed by plaintiff's agent, carried no suggestion that it should inure to the advantage of a warehouseman after becoming inert for the relief of the carrier, and that the custody and protection of the goods as warehouseman is a distinct service from that of their transportation, and for it additional compensation may be charged; proceeding as follows: "The additional compensation is not at all diminished in this case because of the agreement of limitation of liability. The reduction in the rate of carriage which can be used as a consideration to support that agreement, is no consideration for a like limitation of the liability as warehouseman, because there is no reduction in warehousing charges provided or stipulated for in the transaction. It is not easy to see why the consideration—not a large one—which is permitted to support the agreement to a limited liability on the part of the carrier, should do double duty by serving also to uphold a like limitation of the liability of a warehouseman,—the latter not agreeing to abate any part of proper storage charges. To so extend the contract of release would give an advantage to the warehouseman, but none to the owner. To allow that consideration would be to permit the carrier to cast off his obligation as carrier and take up a lighter burden, while he denies to the shipper all right to share in the benefit of the changed relation. The rate which the warehouseman may charge for storage remains unaffected by the release of liability as a carrier. The warehouseman could collect the reasonable value of his service whether the limitation of the carrier's liability was or was not stipulated. He could not be compelled to take less because of the stipulation. He could collect no more if the stipulation had not been made."

We recognize the cogency of the reasoning from the

standpoint of the common-law responsibility of a railway company as carrier and as warehouseman. But we have to deal with the effect of an express contract, made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, 672; *Atchison &c. Ry.* v. *Robinson*, 233 U. S. 173, 180.

The provision that we have quoted from the contract is to the effect that "every service to be performed hereunder" is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held liable, whether or not the loss or damage occurs from negligence. And that this, as a mere matter of construction, applies to the relation of warehouseman as well as to the strict relation of carrier, is manifest from the further provision that property not removed within 48 hours after notice of arrival may be kept "subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only." Thus, "any loss or damage for which any carrier is liable" includes not merely the responsibility of carrier, strictly so called, but "carrier's responsibility as warehouseman" also.

And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term "transportation," (this, under the original act, included merely "all instruments of shipment or carriage") so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, deliv-

ery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling *of property transported;* and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transportation* of passengers or property *as aforesaid, or in connection therewith,* shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful."

From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight. It recognizes—whether correctly or not, is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classifi-

cation or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods.

We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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

SEABOARD AIR LINE RAILWAY *v.* HORTON.

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

No. 541. Argued November 30, December 1, 1915.—Decided January 10, 1916.

An employé who knows of a defect arising from the employer's negligence and appreciates the risk attributable thereto and continues in the employment without objection or promise of reparation, assumes the risk notwithstanding it arises from the employer's breach of duty. *Seaboard Air Line* v. *Horton*, 233 U. S. 504.

Where the employer promises reparation of such a defect and the employé relying on such promise continues, he does not, during such time as is reasonably required for its fulfilment, assume the risk unless at least the danger is so imminent that no ordinarily prudent man would, under the circumstances, rely upon such a promise. *Id.*

Where, as in the present case, the injury was caused by the absence of a glass protector in front of a water gauge which burst, and the employé had continued after knowledge and promise of reparation, *held* that the trial court did not err in refusing to hold as matter of law

that the danger was so imminent that no ordinarily prudent man would continue the employment in reliance on the promise and that one so continuing did assume the risk.

Reasonable reliance by an employé on a promise of reparation and continuance in his employment for a reasonable period pending performance cannot be regarded as contributory negligence as matter of law; the request and direction of the employer has a material bearing on the question; and so *held* in this case that the question was properly submitted to the jury.

Authorities differ, and not yet decided by this court in this or prior cases, as to whether continuing the employment in presence of danger so imminent that no ordinarily prudent man would confront it, even where the employer has promised reparation, amounts to assumption of risk or contributory negligence.

Distinctions between assumption of risk and contributory negligence which were of little consequence when both led to the same result become more important in cases under the Employers' Liability Act where the former is a complete bar, and the latter merely mitigates the damages.

Whether continuing to use one defective apparatus instead of another apparatus amounted to proximate cause of injury, is at most a question for the jury if it be shown that the latter was not a safe instrumentality.

85 S. E. Rep. 218, affirmed.

THE facts, which involve the validity of a verdict and judgment in an action for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. Murray Allen for plaintiff in error.

Mr. Clyde A. Douglass, with whom *Mr. William C. Douglass* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action, based upon the Federal Employers' Liability Act (35 Stat. 65, c. 149; 36 Stat. 291, ch. 143), was under consideration on a former occasion, when a judgment in favor of defendant in error was reversed and the cause remanded for further proceedings. 233 U. S. 492. There was a new trial, and the resulting judgment in favor

of Horton, the employé, having been affirmed by the Supreme Court of North Carolina (85 S. E. Rep. 218), the case is brought here again, with numerous assignments of error, of which, however, only a few need be noticed.

Plaintiff was injured while in the employ of defendant in interstate commerce. He was an experienced locomotive engineer, and was so employed when injured. His engine was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame inclosing a glass tube 12 or 14 inches long, and ½ inch in diameter, the glass being about $^3/_8$ inch thick. The tube was placed vertically, and was connected with the boiler above and below, so that it received water and steam direct from the boiler and under a pressure of 200 pounds. In order to protect the engineer and fireman from injury in case of the bursting of the tube, a thick piece of plain glass, known as a guard-glass, should have been in position in slots arranged for the purpose in front of the water tube. Plaintiff took charge of the engine in question on July 27 or 28, 1910, and noticed at that time that the guard-glass was missing. He reported this to a round-house foreman, to whom such report should properly be made, and asked for a new guard-glass. The foreman replied that he had none in stock, but would send for one, and that plaintiff in the meantime should run the engine without one. He did so for about a week, and until August 4, when the water tube exploded, and the flying glass struck him in the face, causing the injuries upon which the action was grounded.

The principal insistence of defendant (plaintiff in error) is that upon all the evidence plaintiff, as a matter of law, assumed the risk of injury arising from the absence of the guard-glass. The rule applicable to the situation was expressed by this court upon the former review of the case, in the following terms (233 U. S. 504): "When the

employé does know of the defect [arising from the employer's negligence], and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employé relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

By motions for non-suit and for dismissal of the action, and by various requests for instructions to the jury, all of which were refused, defendant raised the point that although plaintiff reported the absence of the guard-glass to defendant's foreman and received a promise of repair, yet the danger was so imminent that no ordinarily prudent man under the circumstances would have relied upon the promise, and hence plaintiff, as matter of law, assumed the risk of injury.

But we do not think it can be said as matter of law that the danger was so imminent that no ordinarily prudent man under the circumstances would continue in the employment in reliance upon the promise. It was not the function of the guard-glass to prevent the bursting of the water tube, but only to limit the effect of such an explosion in case it happened to occur. That there was a constant danger that the tube might explode was abundantly proved, and was admitted by plaintiff. But the tube was designed to withstand the pressure of 200 pounds, and ordinarily did so. It was its proper function to do so. One witness said: "They may last a day, a week, a month, or a year, or it may last an hour, or shorter." The jury

might reasonably believe that such a water-glass would probably not explode in the ordinary use of it unless it was imperfect or defective in some respect other than the absence of the guard-glass, and that, since there was no evidence of this, Horton was justified in assuming that the danger of an explosion was not immediately threatening.

There is a substantial difference in the attitude of the employé towards the known dangers arising out of defects attributable to the employer's negligence, depending upon whether there has or has not been a promise of repair. It was clearly expressed in a well-reasoned opinion by the Supreme Court of New Jersey (*Dowd* v. *Erie R. R. Co.*, 70 N. J. L. 451, 455) thus: "To the rule that the servant assumes the obvious risks of the employment, an exception is made where the master has promised to amend the defect or to make the place safe, and the servant continues the work in reliance upon the promise. . . . The master is exempted from liability in the case of obvious risks for the reason that the servant, by continuing in the employment with knowledge of the danger, evinces a willingness to incur the risk, and upon the principle *volenti non fit injuria*. But when the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk."

To relieve the employer from responsibility for injuries that may befall the employé while remaining at his work in reliance upon a promise of reparation, there must be something more than knowledge by the employé that danger confronts him, or that it is constant. The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise. The danger of the explosion of the water-glass, which normally should withstand the pressure to which it was subjected

but which might probably explode at some time near or remote, cannot be said, as matter of law, to have been so imminent as to import an assumption of the risk by Horton notwithstanding the employer's promise to replace the guard-glass. It would require a much plainer case than this to justify taking the question from the jury.

It is insisted that the trial court erred in refusing to instruct the jury that plaintiff was guilty of contributory negligence as a matter of law. This, also, is based upon the ground of the obvious and imminent nature of the danger to plaintiff arising out of the absence of the guard-glass. But the reasonable reliance of the employé upon the employer's promise to repair the defect is as good an answer to the charge of contributory negligence as to the contention that the risk was assumed. The employer's direction or request that the employé remain at work pending performance of the promise has a material bearing upon the employé's duty in the meantime, and therefore upon the question of his negligence, which involves the notion of some fault or breach of duty on his part. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503. Hence, the question of Horton's contributory negligence was at best a matter for the jury to determine.

All the disputable questions of fact were submitted to the jury under instructions that were sufficiently favorable to defendant. The jury were told, in substance, that if they found the absence of the guard-glass was known to plaintiff, and he reported the defect and was given a promise to repair, and if he knew and appreciated the danger incident thereto, and the danger was so obvious that a man of ordinary prudence would not have continued to use the water-gauge without the guard-glass, then the plaintiff assumed the risk. This was unduly favorable to defendant, in that it omitted to state that in order to qualify plaintiff's right to rely upon the

promise of reparation the danger must be imminent as well as obvious. But, besides this, we deem it proper to say, in view of the fact that the instruction referred to seems to have been intended to conform to our opinion delivered upon the former writ of error, that we did not then intend to decide whether an employé remaining at work in reliance upon the employer's promise to repair a defective appliance, but where the danger known is so imminent that no ordinarily prudent man under the circumstances would remain at work in reliance upon the promise, should be held to assume the risk, or, rather, to be guilty of contributory negligence. What we said was that the employé, in the situation described, "does *not* assume the risk *unless, at least,* the danger be so imminent," etc. While most courts agree that an employé cannot, without impairing his right to recover from the employer, remain at work in the presence of a known danger so imminent that no reasonably prudent man would confront it, even where the employer has promised reparation, they differ as to whether this is to be placed upon the ground of assumption of risk or of contributory negligence. See *Hough* v. *Railway Co.*, 100 U. S. 213, 224, 225; *Dowd* v. *Erie R. R.*, 70 N. J. L. 451, 456; *Clarke* v. *Holmes*, 7 Hurl. & Norm. 937, 945. The distinction, which was of little consequence when assumption of risk and contributory negligence led to the same result, becomes important in actions founded upon the Federal Employers' Liability Act, which in ordinary cases recognizes assumption of risk as a complete bar to the action, while contributory negligence merely mitigates the damages, as was pointed out when the case was here before. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503. The disputable point above referred to was not then presented for decision. Nor is it now presented, for upon the last trial the court, in the instruction given to the jury, put the plaintiff (upon the hypothesis of his per-

sisting in the face of an imminent danger, where a man of ordinary prudence would not) in the position of assuming the risk—a position more favorable to defendant (plaintiff in error) than that of contributory negligence.

It is further argued that Horton's own conduct in using the Buckner gauge without the guard-glass, when he could have cut this off and used the gauge-cocks, said to be an entirely safe instrumentality, was unquestionably the proximate cause of his injury. But there was evidence to show that the gauge-cocks themselves were not a safe instrumentality, because of their liability to become clogged. Hence, at the utmost, there was here no more than a question for the jury.

Other points are raised, but they are quite unsubstantial, and require no particular mention.

Judgment affirmed.

BASSO *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 143. Argued January 6, 1916.—Decided January 17, 1916.

The rule that the Court of Claims has not jurisdiction of actions founded on tort is based on a policy imposed by necessity that governments are not liable for unauthorized wrongs inflicted on the citizens by their officers, even though occurring while engaged in discharge of official duties. *Schillinger* v. *United States*, 155 U. S. 163.

Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the Government. *Schillinger* v. *United States*, 155 U. S. 163.

Neither *Dooley* v. *United States*, 182 U. S. 222, nor *United States* v. *Lynah*, 188 U. S. 445, sustaining jurisdiction of the Court of Claims in cases respectively to recover sums wrongfully exacted for taxes and for compensation for property taken for public purposes, over-

rules, or is antagonistic to, *Schillinger* v. *United States*, 155 U. S. 163, which is subsisting authority of this court that the Court of Claims has no jurisdiction of an action for a claim for private injury to an individual through the tortious act of an officer of the United States.
49 Ct. Cl. 702, affirmed.

THE facts, which involve the jurisdiction of the Court of Claims in cases founded on a tort of an officer of the United States, are stated in the opinion.

Mr. Henry M. Ward for appellant:

The Court of Claims has jurisdiction over a claim *ex delicto*, founded upon the Constitution of the United States. *Dooley* v. *United States*, 182 U. S. 222; *United States* v. *Lynah*, 188 U. S. 445.

In *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Grizzard*, 219 U. S. 180; *United States* v. *Emery*, 237 U. S. 28, the jurisdiction of the Court of Claims has been sustained in actions "sounding in tort" but founded upon a law of Congress or upon an implied contract.

See also *Christie Street Company* v. *United States*, 136 Fed. Rep. 326; *United States* v. *Hyams*, 146 Fed. Rep. 15; *Hill* v. *United States*, 149 U. S. 593.

The *Schillinger Case* has been limited, if not overruled, by the more recent decisions of this court, cited above, and consequently the proper construction of the Tucker Act is that claims founded upon the Constitution or any law of the United States are now within the jurisdiction of the Court of Claims whether based upon contract or tort.

Irrespective of the authority of the recent decisions of this court this contention is supported by the well-settled rules of statutory construction.

It was manifestly the intention of Congress in enacting the Tucker Act to give the Court of Claims jurisdiction of cases sounding in tort but founded upon the Constitution. Jurisdiction of claims upon contract the court already

had, and the words founded upon the Constitution are meaningless unless they apply to torts. See Act of February 24, 1855, 10 Stat. 612; Act of July 4, 1864, 13 Stat. 381; Act of March 3, 1887, known as the Tucker Act, 24 Stat. 505; and see § 1059, Rev. Stat.

This construction of the Tucker Act, for which appellant contends, gives effect to its language but does not extend the jurisdiction of the Court of Claims to embrace all torts committed by agents of the Government. *Peabody* v. *United States*, 291 U. S. 530, distinguished.

Ordinary torts are clearly omitted from the grant of jurisdiction, but where officers of the Government by a misconstruction of the law deprive a man of his liberty in violation of his constitutional rights, his claim is founded on the Constitution and he has the same right of redress as those whose money was taken in payment of customs duties under the same misconstruction of the law.

Mr. Assistant Attorney General Huston Thompson for the United States.

Mr. Justice McKenna delivered the opinion of the court.

Appellant is a Spanish subject who resided, at the time his alleged cause of action accrued and at the time his petition was filed in the Court of Claims, in the Island of Porto Rico.

Porto Rico was ceded to the United States by the Treaty of Paris, ratifications of which were exchanged April 11, 1899. The Island was occupied by the military forces of the United States prior to January 1, 1899, and February 1, 1899, the President of the United States by order promulgated the "Amended Customs Tariff and Regulations for Ports in Porto Rico," which fixed and provided for the collection of duties upon all articles imported into

Porto Rico. And duties were collected thereafter in accordance with such tariff and the amendments thereto made from time to time until May 1, 1900.

Certain officers of the army were designated to act and did act as collectors of customs under such tariff at the several ports of entry in Porto Rico and enforced such tariff upon merchandise brought into Porto Rico from the United States and from foreign countries.

Under authority of general order No. 88 the general commanding in the Island established a provisional court of the United States for the Department of Porto Rico.

On or about July 13, 1899, by information filed by the prosecuting officer of the provisional court, appellant was charged before that court with the crime of having imported from the United States into Porto Rico certain merchandise without having made entry of the same in the custom house and without having paid duty thereon. He was arraigned, pleaded not guilty, and the case was set for trial.

At the trial he entered a plea that §§ 2865 and 3082 of the Revised Statutes of the United States were without force or effect in Porto Rico, that the latter was part of the United States and that there was no warrant in law for imposing duties on goods brought from the United States into the Island.

The defenses were not allowed, he was found guilty, sentenced to imprisonment and was imprisoned for twenty-seven days.

He alleged the foregoing facts in his petition and that he suffered damages thereby in the sum of $10,000, $7,500 general and $2,500 special damages. That he is advised by counsel that the act for which he was accused and condemned did not then constitute a crime; that the said sections of the Revised Statutes of the United States under which the provisional court claimed authority to act were not in force in Porto Rico and the court was

wholly without jurisdiction in the premises and its sentence was null and void, and that by reason of such accusation, trial, conviction, sentence and imprisonment he was deprived of his liberty without due process of law in violation of the Constitution of the United States.

Judgment was prayed for the sum of $10,000.

The United States filed a general traverse of the petition but subsequently moved to dismiss upon the ground that the court had no jurisdiction to consider it, it presenting "an action for damages in a case sounding in tort."

The motion was sustained and judgment entered dismissing the petition for want of jurisdiction. This appeal was then taken.

Appellant concedes that "the cause of action not merely 'sounds in tort' but is based wholly upon the tortious actions of the agents of the United States." He, however, contends that the Court of Claims has jurisdiction under the Tucker Act over claims *ex delicto* founded upon the Constitution of the United States. And, this, he further contends, is supported by the recent decisions of this court, and relies especially upon *Dooley* v. *United States*, 182 U. S. 222.

But that case did not overrule *Schillinger* v. *United States*, 155 U. S. 163, which, counsel says, holds directly contrary to his contention and that he has not the ingenuity to suggest how the court can now decide the case at bar in appellant's favor without at least by implication overruling the *Schillinger Case*. We are not disposed to overrule the case, either directly or by implication. The court found nothing in it antagonistic to the reasoning and conclusion reached in the *Dooley Case*.

In *United States* v. *Lynah*, 188 U. S. 445, the *Schillinger Case* was treated as subsisting authority, and Mr. Justice Brown, who wrote the opinion in the *Dooley Case*, in his concurring opinion in the *Lynah Case*, considered it as correctly declaring the law.

The *Dooley Case* and cases subsequent to it which are relied upon by appellant concerned the exaction of duties or taxes by the United States or its officers or property taken by the Government for public purposes.[1] In such cases jurisdiction in the Court of Claims for the recovery of the duties and taxes or for the value of the property taken was declared.

In the case at bar (assuming as true all that is charged) there was a wrong inflicted, if a wrong can be said to have been inflicted by the sentence of a court legally constituted after judgment upon issues openly framed by the opposing parties both of fact and the applicable law, whether that law was §§ 2865 and 3082 of the Revised Statutes or the Constitution of the United States. But conceding that a wrong was inflicted through these judicial forms, the case nevertheless is of different character from the *Dooley Case*, as was also the *Schillinger Case*. The latter case passed upon the jurisdiction of the Court of Claims in actions founded on tort and declared the general principle to be, based on a policy imposed by necessity, that governments are not liable (155 U. S., p. 167), "'for unauthorized wrongs inflicted on the citizen by their officers, though occurring while engaged in the discharge of official duties.'" And it was further said (p. 168): "'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on wrongful proceedings of an officer of the government.'" *Gibbons* v. *United States*, 8 Wall. 269, 275; *Morgan* v. *United States*, 14 Wall. 531, 534.

The *Schillinger Case* was cited in the *New Orleans-Belize Royal Mail* v. *United States*, *ante*, p. 202, in rejection of a contention that the United States was liable for services imposed by their officers outside of a contract

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[1] *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Grizzard*, 219 U. S. 180; *United States* v. *Emery*, 237 U. S. 28.

with the Royal Mail Company, in the performance of which the vessel owned by the company was damaged.

We repeat, therefore, that the *Schillinger Case* being subsisting authority, and appellant conceding that if such be its value it is controlling, further discussion is unnecessary.

Judgment affirmed.

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

WHITE *v.* UNITED STATES.

FORD *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 153, 154. Argued January 7, 1915.—Decided January 17, 1916.

The act of March 4, 1913, c. 148, 37 Stat. 891, granting officers of the Navy, who had been advanced in rank, the pay and allowances of the higher rank, applies only to officers on the active list and does not apply to officers on the retired list who were assigned for active service after their retirement.

In construing a statute the court will regard it as more rational to assume that Congress was dealing with present affairs than that it was reopening finished transactions.

The general rule of statutes relating to duty and pay of naval officers is found in Rev. Stat., § 1462, providing that no officer on the retired list shall be employed in active duty except in time of war.

49 Ct. Cl. 702, affirmed.

THE facts, which involve the construction of various statutes of the United States relating to pay of retired naval officers while on active service, are stated in the opinion.

Mr. Frederick A. Fenning, with whom *Mr. Lloyd*

Odend'hal and *Mr. Spencer Gordon* were on the brief, for appellant in No. 154:

The act of March 4, 1913, 37 Stat. 891, should be interpreted according to the usual meaning of its words.

By the usual meaning of its words the appellant comes within its provisions and has a valid claim against the United States.

The court should not go beyond the words of the act of March 4, 1913, 37 Stat. 891, to look for a more limited construction.

Appellant's claim does not involve a repeal of the act of June 7, 1900, 31 Stat. 703, and the act of August 22, 1912, 37 Stat. 328, 329, is not in point. The act of March 4, 1913, 37 Stat. 891, allows appellant active pay.

In support of these contentions see *Maillard* v. *Lawrence*, 16 How. 255, 261; *The Cherokee Tobacco*, 11 Wall. 616, 620; *United States* v. *Temple*, 105 U. S. 97, 99; *Tyler* v. *United States*, 105 U. S. 224; *Knox County* v. *Morton*, 68 Fed. Rep. 787, 789; *Union Life Ins. Co.* v. *Champlin*, 116 Fed. Rep. 858, 860; *Tyler* v. *United States*, 16 Ct. Cls. 223; *Schuetze* v. *United States*, 24 Ct. Cls. 229; *Franklin* v. *United States*, 29 Ct. Cls. 6; *Fowler* v. *United States*, 31 Ct. Cls. 35; *Seers* v. *United States*, 46 Ct. Cls. 105.

Mr. Simon Lyon, with whom *Mr. Edward S. McCalmont* and *Mr. R. B. H. Lyon* were on the brief, for appellant in No. 153:

So long as the language used is unambiguous, a departure from the natural meaning is not justified by any consideration of its consequence, or public policy, and it is the plain duty of the court to give it force and effect. *Lake County* v. *Rollins*, 130 U. S. 662; *United States* v. *Goldenberg*, 168 U. S. 95; *Johnson* v. *So. Pac. Co.*, 196 U. S. 15.

It is fairly and justly presumable that the legislature which was unrestrained in its authority over the subject, has so shaped the law as without ambiguity or doubt, to

bring within it everything that was meant should be embraced. Cooley on Taxation (3d ed.), p. 464.

The statute must be held to mean what its language imports; when it is clear and imperative, reasoning *ab inconvenienti* is of no avail, and there is no room for construction. *Boudinet* v. *United States*, 11 Wall. 616; *Lewis* v. *United States*, 92 U. S. 621; *Lake County* v. *Rollins*, 130 U. S. 662.

Construction and interpretation have no function where the terms of the statute are plain and certain, and its meaning clear. *Colorado & N. W. R. R.* v. *United States*, 209 U. S. 544.

The statute is a remedial one and should be liberally interpreted. *Silver* v. *Ladd*, 7 Wall. 219; *Johnson* v. *So. Pacific Co.*, 196 U. S. 15; *Merchants Bank* v. *United States*, 42 Ct. Cl. 6; 1 Kent's Comm. 465.

In expounding remedial laws, the courts will extend the remedy as far as the words will admit. *Hayden's Case*, 3 Coke, 7; *Pierce* v. *Hopper*, 1 Strange, 253.

A remedial statute ought not to be construed so as to defeat in part the very purpose of its enactment. *Beley* v. *Naphtaly*, 169 U. S. 353; *Jones* v. *Guaranty Co.*, 101 U. S. 626; *Twenty Per Cent Cases*, 13 Wall. 575; *Ross* v. *Doe*, 1 Pet. 667.

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. *United States* v. *Hvoslef*, 237 U. S. 1; *Thames-Mersey Ins. Co.* v. *United States*, 237 U. S. 19.

Where a law is plain and unambiguous, whether expressed in general or limited terms, there is no room left for construction, and a resort to extrinsic facts is not permitted to ascertain its meaning. *Bartlett* v. *Morris*, 9 Porter, 266; *United States* v. *Musgrove*, 160 Fed. Rep. 700; *Lake County* v. *Rollins*, 131 U. S. 671.

Holy Trinity Church v. *United States*, 143 U. S. 463; *Binns* v. *United States*, 194 U. S. 486, do not infringe this rule. See Blackstone's Introduction, § 2, p. 60.

Mr. Assistant Attorney General Huston Thompson, with whom *Mr. Richard P. Whiteley* was on the brief, for the United States.

Mr. Justice Holmes delivered the opinion of the court.

These claims raise the same question. The claimant White was a Lieutenant Commander in the Navy. On June 30, 1905, he was transferred to the retired list, on his own request, with the rank of Commander, (Navy Personnel Act of March 3, 1899, c. 413, §§ 8, 9; 30 Stat. 1004, 1006,) and on April 13, 1911, was commissioned a Commander on the retired list from June 30, 1905. (Act of March 4, 1911, c. 266; 36 Stat. 1354.) He was continued in active service from June 30, 1905, until October 31, 1911. (Naval Appropriation Act of June 7, 1900, c. 859; 31 Stat. 684, 703.) The claimant Ford was a Captain, was retired on May 19, 1902, under Rev. Stats., § 1444, with the rank of Rear Admiral, (Act of March 3, 1899, c. 413, § 11; 30 Stat. 1007,) and was commissioned Rear Admiral on the retired list from May 19, 1902. (Act of March 4, 1911, c. 266; 36 Stat. 1354.) He was continued on active duty from May 19, 1902, until December 25, 1907. (Act of June 7, 1900, c. 859; 31 Stat. 703.) As provided by the last-mentioned statute, both of these officers received the pay and allowances of the rank they held before they were retired. By the Naval Appropriation Act of March 4, 1913, c. 148, 37 Stat. 891, 892, it was enacted that "all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher

grade or rank from the dates stated in their commissions." The claims are made under this act for the difference between the pay and allowances received during active service after retirement and that of the higher grade to which the claimants respectively had been advanced. Demurrers to the petitions were sustained by the Court of Claims.

The claimants, although pressing the universal application of the statute according to the literal meaning of its words, still tacitly concede that we must go behind the letter of the law. For while the statute says that all officers who have been advanced since the date mentioned shall have the pay of the higher grade and says nothing about active service, the claims are confined to the periods of active service named, which implies a concession that the advance in grade by itself was not enough. And this concession was required by the fact that the statute grants allowances as well as pay and that allowances are an incident of active duty alone.

As it stands admitted that the statute is of more limited scope than is apparent on its face, to an untrained reader, at least, the question is whether it is to be read as applying to all advanced officers who have been on active service or only to all such officers upon the active list. We are of opinion that the latter is the true meaning and that the decision of the Court of Claims was right. The general rule of the statutes is found in Rev. Stats., § 1462. "No officer on the retired list of the Navy shall be employed on active duty except in time of war." An exception, limited to twelve years from its passage, was made by the act of June 7, 1900, allowing officers on the retired list, in the discretion of the Secretary of the Navy, to be ordered to such duty as they might be able to perform, and giving them while so employed, the pay and allowances of the grade on the active list from which they were retired. When the act of 1913, under which these claims are made,

was passed, this exception had expired—all services under it had been rendered and paid for, and with other exceptions not affecting this case the general rule was in force. It is more rational to suppose that Congress was dealing with present affairs than that it was reopening transactions that might be ten years old and that must have been finished, at the latest, nearly a year before. And this construction is confirmed when we notice that the increased pay and allowances are given from the date of the commission, that is, if the claimants are right, from the date of their retirement without regard to the time when their active duty began. In these cases it was continuous with their service before retirement. But it might have begun years afterwards and yet by the statute the date of the increase in pay and the allowances would have been the same.

The conclusion to which the statutes directly concerned would lead us, is confirmed still further by consideration of the Naval Appropriation Act of August 22, 1912, c. 335; 37 Stat. 328, 329. This act provided that thereafter, any Naval Officer on the retired list might, with his consent, in the discretion of the Secretary of the Navy, be ordered to such duties as he might be able to perform, and while so employed in time of peace should receive the pay and allowances of an officer on the active list of the same rank, provided that he was not to receive more than the pay and allowances of a lieutenant, senior grade, on the active list of like length of service, and, if his retired pay exceeded that, then he was to receive his retired pay only. The clash that there would be between the policy of this act and that of 1913 if construed as the claimants would have it construed is plain.

Finally it may be worth noticing that the reports that introduced the enactment pointed out as the evil to be remedied that under the Act of June 22, 1874, c. 392; 18 Stat. 191, the only officers who did not receive the pay of

their grade from the time they took rank as stated in their commissions, were the youngest officers, who were appointed to the lowest grade and therefore not promoted to fill a vacancy as contemplated in the act of 1874. House Rep. No. 1089. 62d Cong., 2d Sess. Senate Rep. No. 1217. 62d Cong., 3d Sess.

Judgments affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of these cases.

NORTHERN PACIFIC RAILWAY COMPANY *v.* MEESE.

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

No. 133. Argued December 10, 1915.—Decided January 17, 1916.

Federal courts must accept the construction of a state statute deliberately adopted by the highest court of that State.

The highest court of the State having held, in construing the Washington Workmen's Compensation Act of 1911, that the compensation thereby provided in the cases covered by its terms was intended to be exclusive of every other remedy and that all causes of action theretofore existing and not saved by its provisos were done away with, the Federal court should accept that construction.

In view of that construction, *held* that although the act did not specifically repeal §§ 183 and 194, Rem. & Ball. Code, the personal representatives of an employé, killed, while in the course, and at the place, of his employment, by the negligence of one not his employer, cannot maintain a suit at law therefor against the latter.

On the record in this case it does not appear that the Workmen's

Compensation Act of Washington is unconstitutional as a denial of the equal protection of the law.

211 Fed. Rep. 254, reversed.

THE facts, which involve the construction of the Workmen's Compensation Act of Washington and the duty of the Federal court to follow the construction of that statute in cases arising thereunder, are stated in the opinion.

Mr. Charles W. Bunn for petitioner.

Mr. Govnor Teats, with whom *Mr. Leo Teats* and *Mr. Ralph Teats* were on the brief, for the respondent:

The Workmen's Compensation Act of Washington, does not and never was intended to deny to or take from the heirs or personal representatives of the deceased husband and father, their right of action for damages against the railway company, it not being an employer of the deceased whose wrongful act caused his death. The death of respondent's intestate having been caused by the wrongful act and negligence of one not his employer, his heirs, the respondents herein, are not barred by the provisions of the Workmen's Compensation Act from maintaining their statutory right of action against the railway company by reason of the fact that at the time the deceased was injured, from which injuries he died, he was working with a class of employés covered by the act and acting in the discharge of his duties as an employé of that company and at the plant of that company.

The Workmen's Compensation Law was a product of certain conditions existing between workmen and employers in Washington by reason of the fellow-servant, assumption of the risk and contributory negligence doctrine of the common law in the first place and the waste of money paid by employers to casualty companies, the

uncertainty of relief, the abuses of such companies towards the injured workman, producing estrangement between workmen and employer, inimical to all concerned including the public, and the expense to the State from increased personal injury litigation between master and servant.

The Workmen's Compensation Law was not intended and does not relate to the right of action of a workman or his heirs against negligent third persons not his employers, except as provided in §§ 3 and 5 of the act and then at his option.

The manifest intent of the law is not to cover and compensate for accidents generally but to cover accidents occurring in those employments and occupations which are specifically classed as and which may be found by the commission to be extra hazardous. *Guerrieri* v. *Industrial Ins. Comm.*, 84 Washington, 266.

The Supreme Court of the State of Washington has not by construction or otherwise extended the application of the law to cases similar to the one at bar, and when called upon to construe the law in a case of this sort will follow the construction placed upon it by the Circuit Court of Appeals for the Ninth Circuit in 211 Fed. Rep. 254.

To extend the application of the Workmen's Compensation Law to right of action of a workman against a third person under the facts of this case, would be unconstitutional, and would be a discrimination against the respondents and not an equal protection under the law.

In support of these contentions of defendant in error, see also *Barbier* v. *Connelly*, 113 U. S. 27; Bouvier's Law Dict., Title Preamble; *Bowen* v. *Lease*, 2 Hill, 226; *Diana* v. *Lamerous*, 114 Wisconsin, 44; Endlich, Int. of Statutes, § 59; *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150; *Hanly* v. *Sims*, 175 Indiana, 345; *Huntworth* v. *Tanner*, 45 Wash. Dec. 482; *Kelley* v. *Madison*, 43 Wisconsin, 638; 28 Am. Rep. 576; Lewis, Sutherland Stat. Const., §§ 120–145; *McGaffin*

v. *Cohoes*, 74 N. Y. 387; *Mo. Pac. Ry.* v. *Mackey*, 127 U. S. 205; *Peet* v. *Mills*, 76 Washington, 437; *Replogle* v. *School Dist.*, 84 Washington, 581; *State* v. *Clausen*, 65 Washington, 195; *State* v. *Mountain Timber Co.*, 75 Washington, 581; *State* v. *Taylor*, 21 Washington, 672; *State* v. *Haun*, 47 L. R. A. 369; Sutherland Statutory Const., §§ 388–499.

Mr. Justice McReynolds delivered the opinion of the court.

Benjamin Meese, an employé of the Seattle Brewing and Malting Company, was fatally injured on April 12, 1913, while engaged about his ordinary duties at its plant in Seattle. Alleging that his death resulted from the negligence of the petitioner railway company, his wife and children brought this action for damages in the District Court of the United States. They relied upon the following sections, Remington and Ballinger's Annotated Codes and Statutes of Washington:

"Section 183. . . . When the death of a person 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."

"Section 194. No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, . . . ; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children . . . "

The railway company demurred, specifying as one of the grounds therefor, "That there is no authority in law under which the plaintiffs' action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries

of which complaint is made, at the place of work and plant of his employer, and the plaintiff's claim comes within the terms of Chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to compensation of injured workmen," approved March 14, 1911.

By the act referred to the legislature of Washington specifically repealed certain sections of Remington and Ballinger's Code, not including §§ 183 and 194; established a comprehensive plan for the relief of workmen injured in extra hazardous work and their families and dependents, regardless of the question of fault; and likewise made provision for raising the necessary funds by enforced contributions from specified employers, both breweries and railroads being included.

The trial court (206 Fed. Rep. 222) held that the purpose of the act of March 14, 1911, was not merely to end controversies between employers and employés in respect of injuries to the latter, but to end all suits at law for the injury or death of employés while engaged in certain occupations, no matter by whom injured or killed, with certain exceptions not here important. And by a judgment dated July 11, 1913, the demurrer was accordingly sustained and the complaint dismissed.

This action of the trial court was reversed by the Circuit Court of Appeals (211 Fed. Rep. 254) the latter being of opinion that the act in question did not, and was not intended to, deprive complainants of their right to proceed under §§ 183 and 194 of the Code, since deceased was not its employé when the accident occurred. Counsel for the railway called especial attention to *Peet* v. *Mills*, 76 Washington, 437, decided November 28, 1913, and insisted that the conclusions there announced were in accord with the opinion and judgment of the District Court then under review; but the Circuit Court of Appeals rejected this view, saying: "We are unable to agree

with counsel that the Supreme Court of the State of Washington in that case reached a conclusion different from that reached by us in the present case."

The error now assigned and relied on is: "That the Circuit Court of Appeals should have followed *Peet* v. *Mills* and have affirmed the judgment of the District Court."

It is settled doctrine that Federal courts must accept the construction of a state statute deliberately adopted by its highest court. *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Fairfield* v. *Gallatin*, 100 U. S. 47, 52. The Supreme Court of Washington in *Peet* v. *Mills* construed the statute in question and we think its opinion plainly supports the holding of the District Court and is in direct opposition to the conclusion reached by the Circuit Court of Appeals. The following excerpts from the opinion will suffice to indicate its import:

"By this appeal, we are again called upon to review the Workmen's Compensation Act of 1911 (Laws 1911, c. 74), under appellant's contention that the act is applicable only where recovery is sought upon the ground of negligence of the employer. . . .

" . . . The conclusion is evident that, in the enactment of this new law, the Legislature declared it to be the policy of this State that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employés; and that it was the further policy of the State to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full, and complete, reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed. We can conceive of no language the Legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the first section of the act. To say with

appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens. . . . That in so doing the legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of section 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and 'such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.' . . . For these reasons we are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing except as they are saved by the provisos of the act, are done away with."

Respondents' suggestion that the construction of the act adopted by the trial court would cause it to conflict with the equal protection clause of the Fourteenth Amendment, is without merit. They have raised no other question involving application of the Federal Constitution.

The judgment of the Circuit Court of Appeals must be reversed and the action of the District Court affirmed.

And it is so ordered.

MR. JUSTICE MCKENNA is of opinion that the statute was properly construed by the Circuit Court of Appeals and that its conclusions do not conflict with the opinion of the state Supreme Court. He therefore dissents.

ROGERS *v.* HENNEPIN COUNTY.

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

No. 411. Argued December 6, 1915.—Decided January 17, 1916.

In an action brought by a number of complainants to restrain the collection of a tax separately assessed against each for under forty dollars, the aggregate exceeding the jurisdictional amount, *held* that the District Court did not have jurisdiction, as the amount as to each complainant was the sum charged against him, and demands against all could not be aggregated in order to confer jurisdiction. *Wheless* v. *St. Louis*, 180 U. S. 379.

THE facts, which involve the method of determining the amount in controversy in order to give jurisdiction to the District Court, are stated in the opinion.

Mr. H. V. Mercer for appellants.

Mr. Lyndon A. Smith, Attorney General of the State of Minnesota, with whom *Mr. William J. Stevens* and *Mr. John M. Rees* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Three complainants, claiming to represent themselves and others like situated (numbering altogether 550), instituted this proceeding in equity against Hennepin County, Minnesota, and certain of its officers, in the District Court of the United States, seeking an injunction to prevent collection of a tax under forty dollars assessed against each of them, for the year 1913, on account of his membership in the Minneapolis Chamber of Commerce.

Defendants challenged the court's power to entertain the cause upon the ground that the amount in controversy as to each complainant is the sum charged against him and demands against all cannot be aggregated in order to confer jurisdiction. The District Court sustained this objection upon authority of *Wheless* v. *St. Louis*, 180 U. S. 379, and dismissed the bill. It committed no error in so doing, and its judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

IT IS ORDERED that General Order in Bankruptcy No. 21 be amended so as to read as follows:

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer; if the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

(Promulgated November 1, 1915.)

OPINIONS PER CURIAM, ETC., FROM OCTOBER 11, 1915, TO JANUARY 17, 1916.

No. 530. GEORGE D. LANCASTER ET AL., PLAINTIFFS IN ERROR, *v.* JAMES W. THACKER ET AL. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss or affirm or place on summary docket submitted October 12, 1915. Decided October 25, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Consolidated Turnpike* v. *Norfolk &c. Railway Co.*, 228 U. S. 596, 600; *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 137; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380; (2) *Mugler* v. *Kansas*, 123 U. S. 623; *Rippey* v. *Texas*, 193 U. S. 504; *Eberle* v. *Michigan*, 232 U. S. 700. *Mr. Bynum E. Hinton* and *Mr. J. H. Hazelrigg* for the plaintiffs in error. *Mr. T. L. Edelen* for the defendants in error.

No. 549. WILLIAM WALLBRECHT, SR., ET AL., PLAINTIFFS IN ERROR, *v.* E. N. INGRAM ET AL. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss or affirm or place on summary docket submitted October 12, 1915. Decided October 25, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Waters-Pierce Oil Co.* v. *Texas* (No. 2), 212 U. S. 112, 118; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Overton* v. *Oklahoma*, 235 U. S. 31. *Mr. Lawrence Maxwell* and *Mr. James H. Hazelrigg* for the plaintiffs in error. *Mr. T. L. Edelen* for the defendants in error.

No. 18. THE LONG-BELL LUMBER CO., APPELLANT, *v.* WALTER MOSES. Appeal from the United States Circuit

Court of Appeals for the Fifth Circuit. Submitted October 21, 1915. Decided October 25, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *United States* v. *Krall*, 174 U. S. 385; *McFarland* v. *Brown*, 187 U. S. 239; *Missouri &c. Railway* v. *Olathe*, 222 U. S. 185; *United States* v. *Beatty*, 232 U. S. 463. *Mr. William R. Thurmond* for the appellant. *Mr. Elijah Robinson* for the appellee.

No. 155. First National Bank of Belle Fourche, S. Dak., Plaintiff in Error, *v.* Adolph O. Eberhart et al. In error to the District Court of the United States for the District of Minnesota. Motion to dismiss submitted October 18, 1915. Decided October 25, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Aspen Min. & Smelting Co.* v. *Billings*, 150 U. S. 31; *Brown* v. *Alton Water Co.*, 222 U. S. 325; *Union Trust Co.* v. *Westhus*, 228 U. S. 519; *Shapiro* v. *United States*, 235 U. S. 412. *Mr. Norman T. Mason* and *Mr. James A. George* for the plaintiff in error. *Mr. Harrison L. Schmidt* for the defendants in error.

No. 223. James Duval et al., Plaintiffs in Error, *v.* The State of Louisiana. In error to the Supreme Court of the State of Louisiana. Argued October 18, 1915. Decided October 25, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Waters-Pierce Oil Co.* v. *Texas* (No. 2), 212 U. S. 112, 118; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Overton* v. *Oklahoma*, 235 U. S. 31; (2) *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Hayes* v. *Missouri*, 120 U. S. 68; *Howard* v. *Kentucky*, 200 U. S. 164. *Mr. Edward N. Pugh* and *Mr.*

Philip S. Pugh for the plaintiffs in error. *Mr. R. G. Pleasant* and *Mr. Daniel Wendling* for the defendant in error.

No. 36. JOHN R. GREENLEES, PLAINTIFF IN ERROR, *v.* FRED L. MORRIS. In error to the Supreme Court of the State of Kansas. Submitted October 25, 1915. Decided November 1, 1915. *Per Curiam.* Judgment reversed with costs and cause remanded for further proceedings upon the authority of *Mullen* v. *United States*, 224 U. S. 448; *Skelton* v. *Dill*, 235 U. S. 206; *Adkins* v. *Arnold*, 235 U. S. 417. *Mr. C. A. Magaw* for the plaintiff in error. *Mr. John F. Switzer* and *Mr. Charles Blood Smith* for the defendant in error.

No. 29. THE PETERBOROUGH RAILROAD, APPELLANT, *v.* BOSTON & MAINE RAILROAD ET AL. Appeal from the District Court of the United States for the District of New Hampshire. Argued and submitted October 26, 1915. Decided November 1, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Carey* v. *Houston & Texas Central Ry.*, 150 U. S. 170; *Cornell* v. *Green*, 163 U. S. 75; *Empire State-Idaho Mining &c. Co.* v. *Hanley*, 205 U. S. 225; *Childers* v. *McClaughry*, 216 U. S. 139. *Mr. Henry A. Cutter* for the appellant. *Mr. Edgar J. Rich* and *Mr. Archibald R. Tisdale* for the appellees.

No. 20. CHARLES P. BOWDITCH ET AL., PLAINTIFFS IN ERROR, *v.* THE JACKSON COMPANY ET AL. In error to the Superior Court of the State of New Hampshire. Argued October 22 and 25, 1915. Decided November 1, 1915.

Per Curiam. Dismissed for want of jurisdiction upon the authority of *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Mallers* v. *Commercial Loan & Trust Co.*, 216 U. S. 613; *Appleby* v. *Buffalo*, 221 U. S. 524; *Cleveland & Pittsburgh R. R.* v. *Cleveland*, 235 U. S. 50. *Mr. Burton E. Eames* for the plaintiffs in error. *Mr. Frank S. Streeter* and *Mr. Edmund K. Arnold* for the defendants in error.

No. 455. Gardiner Investment Company et al., Appellants, *v.* The Jackson Company et al. Appeal from the United States Circuit Court of Appeals for the First Circuit. Argued October 22 and 25, 1915. Decided November 1, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Weir* v. *Rountree*, 216 U. S. 607; *Shulthis* v. *McDougal*, 225 U. S. 561; *St. Anthony Church* v. *Pennsylvania R. R.*, 237 U. S. 575. *Mr. Burton E. Eames* for the appellants. *Mr. Frank S. Streeter* and *Mr. Edmund K. Arnold* for the appellees.

No. 354. M. J. Bray, Trustee, etc., et al., Appellants, *v.* The United States Fidelity & Guaranty Company. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. Motion to dismiss or affirm submitted October 25, 1915. Decided November 8, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Chapman* v. *Bowen*, 207 U. S. 89, 91; *J. W. Calnan Co.* v. *Doherty*, 224 U. S. 145; *Synnott* v. *Tombstone Consol. Mines Co.*, 234 U. S. 749. See *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205. *Mr. Philip W. Frey* for the appellants. *Mr. B. M. Ambler* for the appellee.

No. 397. Laura Eichel et al., Appellants, *v.* United States Fidelity & Guaranty Company. Appeal from the United States Circuit Court of Appeals for the Third Circuit. Motion to dismiss or affirm submitted October 25, 1915. Decided November 8, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *United States* v. *Krall*, 174 U. S. 385; *German National Bank* v. *Speckert*, 181 U. S. 405; *United States* v. *Beatty*, 232 U. S. 463. *Mr. William M. Hall* for the appellants. *Mr. B. M. Ambler* for the appellee.

No. 57. David C. Andrews et al., Copartners, etc., Appellants, *v.* Harry V. Osborn, Trustee, etc. Appeal from the United States Circuit Court of Appeals for the Third Circuit. Argued November 5, 1915. Decided November 8, 1915. *Per Curiam.* Judgment affirmed with costs upon the authority of *First National Bank* v. *Littlefield*, 226 U. S. 110, 112; *Texas & Pacific Ry.* v. *Louisiana R. R. Commission*, 232 U. S. 338; *Greey* v. *Dockendorff*, 231 U. S. 513. *Mr. Sigmund Solomon* and *Mr. David C. Myers* for the appellants. *Mr. Nathan Bilder* for the appellee.

No. 43. Frank Zodrow, Plaintiff in Error, *v.* The State of Wisconsin. In error to the Supreme Court of the State of Wisconsin. Argued and submitted November 2, 1915. Decided November 8, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Parker* v. *McLain*, 237 U. S. 469, 471–472. *Mr. David S. Rose* and *Mr. Louis M. Ogden* for the plaintiff in error. *Mr. Walter C. Owen* and *Mr. J. E. Messerschmidt* for the defendant in error.

No. 45. JOE MAROUN, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the Supreme Court of the State of Louisiana. Submitted November 4, 1915. Decided November 8, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Phœnix Ry. Co.* v. *Landis*, 231 U. S. 578, 582; *John* v. *Paullin*, 231 U. S. 583; (2) *Hallinger* v. *Davis*, 146 U. S. 314; *Maxwell* v. *Dow*, 176 U. S. 581; *Jordan* v. *Massachusetts*, 225 U. S. 167, 176; *Frank* v. *Mangum*, 237 U. S. 309, 340. *Mr. A. L. Alexander* and *Mr. Taliaferro Alexander* for the plaintiff in error. *Mr. R. G. Pleasant* for the defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF CLOYD H. DUNCAN, PETITIONER. Submitted November 9, 1915. Decided November 15, 1915. Motion for leave to file petition for writ of mandamus denied. *Mr. Cloyd H. Duncan pro se.*

No. 60. W. N. SHEWALTER, ADMINISTRATOR OF ROBERT SHEWALTER, DECEASED, PLAINTIFF IN ERROR, *v.* CAROLINA, CLINCHFIELD & OHIO RAILWAY. In error to the Supreme Court of the State of Tennessee. Argued November 8, 1915. Decided November 15, 1915. *Per Curiam.* Judgment affirmed, with costs, upon the authority of (1) *Michigan Central Railroad* v. *Vreeland*, 227 U. S. 59; *American Railroad of Porto Rico* v. *Didricksen*, 227 U. S. 145; *Gulf, Colorado &c. Ry.* v. *McGinnis*, 228 U. S. 173; *Garrett* v. *Louisville & Nashville R. R.*, 235 U. S. 308; *St. Louis & Iron Mountain Ry.* v. *Craft*, 237 U. S. 648; *Kansas City Southern Ry.* v. *Leslie*, 238 U. S. 599; (2) *Barron* v. *Baltimore*, 7 Peters, 243; *Jack* v. *Kansas*, 199 U. S. 372, 379–380; *Brown* v. *New Jersey*, 175 U. S. 172; *Twining* v. *New Jersey*, 211 U. S. 78, 93. *Mr. Robert*

Burrow and *Mr. Isaac Harr* for the plaintiff in error. *Mr. J. Norment Powell* and *Mr. John W. Price* for the defendant in error.

No. 139. Pennsylvania Railroad Company *v.* W. F. Jacoby & Company. On a certificate from and writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. Argued October 20, 1915. Decided November 15, 1915. Judgment affirmed, with costs, by a divided court and cause remanded to the District Court of the United States for the District of Pennsylvania. *Mr. Francis I. Gowen, Mr. John G. Johnson* and *Mr. Frederic D. McKenney* for The Pennsylvania Railroad Company. *Mr. William A. Glasgow, Jr.*, for Jacoby & Company.

Note: December 20, 1915. Petition for rehearing granted, judgment of November 15 vacated and set aside, and case restored to the docket for re-argument.

No. 62. York & Whitney Company, Plaintiff in Error, *v.* The New York, New Haven & Hartford Railroad Company. In error to the Superior Court of the State of Massachusetts. Argued November 8, 1915. Decided November 29, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of (1) *Leathe* v. *Thomas*, 207 U. S. 93; *Yazoo & Miss. Valley R. R.* v. *Brewer*, 231 U. S. 245, 249; *The Mellon Company* v. *McCafferty*, this day decided, *ante*, p. 134; (2) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380; see *Louisville & Nashville R. R.* v. *Maxwell*, 237 U. S. 94, 97–98, and cases cited. *Mr. Amos L. Taylor* for the plaintiff in error. *Mr. John L. Hall* for the defendant in error.

No. 689. GEORGE M. DIENER ET AL., PLAINTIFFS IN ERROR, *v.* I. M. LANE ET AL. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss or affirm submitted November 29, 1915. Decided December 6, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 137; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380; (2) *Lancaster* v. *Thacker*, 239 U. S., *ante*, p. 625; *Wallbrecht* v. *Ingram*, 239 U. S., *ante*, p. 625; (3) *Waters-Pierce Oil Co.* v. *Texas* (No. 2), 212 U. S. 112, 118; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Overton* v. *Oklahoma*, 235 U. S. 31. *Mr. J. M. Collins* and *Mr. J. H. Hazelrigg* for the plaintiffs in error. *Mr. E. L. Worthington* for the defendants in error.

No. 113. HALIFAX TONOPAH MINING COMPANY, PLAINTIFF IN ERROR, *v.* JOHN W. LAWSON. In error to the Supreme Court of the State of Nevada. Argued December 7, 1915. Decided December 13, 1915. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *Philadelphia, Baltimore & Washington R. R.* v. *Schubert*, 224 U. S. 603. *Mr. Henry M. Hoyt, 2d,* and *Mr. George A. Bartlett* for the plaintiff in error. *Mr. E. C. Brandenburg, Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* for the defendant in error.

No. 115. WASHINGTON DREDGING & IMPROVEMENT COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE KINNEAR AND ANGIE KINNEAR, HIS WIFE; JOHN R. KINNEAR AND LETA KINNEAR, HIS WIFE, ET AL. In error to the Supreme Court of the State of Washington. Submitted Decem-

ber 6, 1915. Decided December 13, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Washington Dredging & Improvement Co.* v. *Washington*, 231 U. S. 742; *Washington Dredging & Improvement Co.* v. *Washington*, 235 U. S. 688. *Mr. W. F. Hays* for the plaintiff in error. *Mr. George B. Cole, Mr. George E. de Steiguer* and *Mr. W. V. Tanner* for the defendants in error.

No. 119. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* SAMUEL P. MCCONNELL. In error to the Supreme Court of the State of North Carolina. Argued December 8 and 9, 1915. Decided December 13, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Wood* v. *Chesborough*, 228 U. S. 672, 677; *New Orleans & N. E. R. R.* v. *National Rice Milling Co.*, 234 U. S. 80, 86; *Mellon Co.* v. *McCafferty*, 239 U. S., *ante*, p. 134. *Mr. Walter H. Neal* for the plaintiff in error. *Mr. S. S. Gregory* for the defendant in error.

No. 307. CHARLES H. FOUTS, PLAINTIFF IN ERROR, *v.* THE BALTIMORE & OHIO RAILROAD COMPANY. In error to the Supreme Court of the State of Ohio. Motion to dismiss submitted December 6, 1915. Decided December 13, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Wabash R. R.* v. *Hayes*, 234 U. S. 86. *Mr. David F. Anderson* for the plaintiff in error. *Mr. George F. Arrel, Mr. James P. Wilson* and *Mr. Union C. De Ford* for the defendant in error.

No. 452. THE DIRECTOR OF PRISONS, PLAINTIFF IN ERROR AND APPELLANT, *v.* THE COURT OF FIRST INSTANCE

OF THE PROVINCE OF CAVITE, TENTH JUDICIAL DISTRICT. In error to and appeal from the Supreme Court of the Philippine Islands. Motion to dismiss submitted December 6, 1915. Decided December 13, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Jones* v. *Montague*, 194 U. S. 147; *Lewis* v. *The United States*, 216 U. S. 611; *Richardson* v. *McChesney*, 218 U. S. 487; *Stearns* v. *Wood*, 236 U. S. 75. *Mr. S. T. Ansell* and *Mr. C. J. Gurkin* for the plaintiff in error and appellant. *Mr. C. W. O'Brien* for the defendant in error and appellee.

No. 132. SADIE A. STEAD, EXECUTRIX, ETC., ET AL., APPELLANTS, *v.* ISABELLA M. CURTIS ET AL. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Argued December 10 and 13, 1915. Decided December 20, 1915. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460; *Farrell* v. *O'Brien*, 199 U. S. 89; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 235–236; (2) *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Hull* v. *Burr*, 234 U. S. 712, 720; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618, 621. *Mr. Horace W. Philbrook* for the appellants. *Mr. Garret W. McEnerney*, *Mr. John S. Partridge* and *Mr. C. H. Lovell* for the appellees.

No. 144. MORTIMER M. ELKAN, PLAINTIFF IN ERROR, *v.* THE STATE OF MARYLAND. In error to the Court of Appeals of the State of Maryland. Argued and submitted December 17, 1915. Decided December 20, 1915. *Per Curiam.* Judgment affirmed with costs upon the authority of *Atkin* v. *Kansas*, 191 U. S. 207; *Heim* v. *Mc-*

Call, 239 U. S., *ante*, p. 175; *Crane* v. *New York*, 239 U. S., *ante*, p. 195. *Mr. Joseph S. Goldsmith* for the plaintiff in error. *Mr. Edgar Allan Poe* for the defendant in error.

No. 148. Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Plaintiff in Error, *v.* Louise Alexander, Administratrix, etc. In error to the Supreme Court of the State of Wisconsin. Argued January 6 and 7, 1916. Decided January 10, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 137; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380; (2) *Missouri Pacific R. R.* v. *Humes*, 115 U. S. 512; *Minnesota & St. L. R. R.* v. *Beckwith*, 129 U. S. 26; *Minnesota & St. L. R. R.* v. *Emmons*, 149 U. S. 364; (3) *Waters-Pierce Oil Co.* v. *Texas* (No. 2), 212 U. S. 112, 118; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Overton* v. *Oklahoma*, 235 U. S. 31. *Mr. William A. Hayes* for the plaintiff in error. *Mr. D. W. McNamara* and *Miss Anna B. Hull* for the defendant in error.

No. 152. Robert M. Purcell et al., Plaintiffs in Error, *v.* Quaker Realty Company, Limited. In error to the Supreme Court of the State of Louisiana. Argued and submitted January 7, 1916. Decided January 10, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Castillo* v. *McConnico*, 168 U. S. 674; *De Bearn* v. *Safe Deposit Co.*, 233 U. S. 24, 34; *McDonald* v. *Oregon Navigation Co.*, 233 U. S. 665, 669–670; (2) *Ross* v. *Oregon*, 227 U. S. 150, 161; *Moore-Mansfield Co.* v. *Electrical Co.*, 234 U. S. 619, 624; *Wil-*

loughby v. *Chicago*, 235 U. S. 45; *Cleveland & Pittsburgh R. R.* v. *Cleveland*, 235 U. S. 50. *Mr. E. Howard McCaleb* for the plaintiffs in error. *Mr. William Winans Wall* for the defendant in error.

No. —. Original. *Ex parte:* In the Matter of Robert B. Whitt, Petitioner. Submitted January 6, 1916. Decided January 10, 1916. Motion for leave to file petition for writ of mandamus denied. *Mr. Frank W. Clancy* for the petitioner.

No. 156. Leonard R. Coates, Plaintiff in Error, *v.* The District of Columbia. In error to the Court of Appeals of the District of Columbia. Argued January 7, 10, 1916. Decided January 17, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491; *District of Columbia* v. *Philadelphia, Baltimore & Washington R. R.*, 232 U. S. 716; *Washington & Mt. Vernon Ry.* v. *Downey*, 236 U. S. 190. *Mr. Francis P. B. Sands* for the plaintiff in error. *Mr. R. L. Williams* (by special leave) and *Mr. Conrad H. Syme* for the defendant in error.

No. 157. William B. Thompson, Plaintiff in Error, *v.* The City of St. Louis. In error to the Supreme Court of the State of Missouri. Argued January 11, 1916. Decided January 17, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99; *United States* v. *Beatty*, 232 U. S. 463; *Pons* v. *Yazoo & Mississippi Valley R. R.*, 232 U. S. 720. *Mr. William B. Thompson* for the plaintiff in error. *Mr. Truman P. Young* for the defendant in error.

No. 158. Hilma Nelson, Plaintiff in Error, *v.* Richard G. Wood. In error to the United States Circuit Court of Appeals for the Third Circuit. Argued January 11, 12, 1916. Decided January 17, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *McCormick* v. *Oklahoma City*, 236 U. S. 657; *St. Anthony Church* v. *Pennsylvania R. R.*, 237 U. S. 575; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618. *Mr. A. J. H. Frank* for the plaintiff in error. *Mr. R. Stuart Smith* and *Mr. C. E. Morgan, 3d*, for the defendant in error.

No. 172. Vandalia Railroad Company, Plaintiff in Error, *v.* Charles Stilwell. In error to the Supreme Court of the State of Indiana. Argued January 14, 1916. Decided January 17, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571. *Mr. Samuel O. Pickens* for the plaintiff in error. *Mr. Wymond J. Beckett* for the defendant in error.

No. 672. Robert Kitchens, Appellant, *v.* J. C. Hamilton, Sheriff, etc. Appeal from the District Court of the United States for the Southern District of Georgia. Argued January 11, 1916. Decided January 17, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Andrews* v. *Swartz*, 156 U. S. 272; *Frank* v. *Mangum*, 237 U. S. 309. *Mr. John Randolph Cooper* for the appellant. *Mr. Clifford Walker* for the appellee.

No. 729. Frank R. Shattuck, Trustee, etc., et al., Appellants, *v.* The Title Guaranty & Surety Com-

PANY. Appeal from the United States Circuit Court of Appeals for the Third Circuit. Submitted January 10, 1916. Decided January 17, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of act of Congress, January 28, 1915, c. 22, 38 Stat. 803. See *Central Trust Co.* v. *Lueders*, 239 U. S. 11. *Mr. Walter Lee Sheppard* for the appellants. *Mr. Frank Rogers Donahue* for the appellee.

Decisions on Petitions for Writs of Certiorari from October 11, 1915, to January 17, 1916.

Nos. 558 and 559. L. STEINER AND B. FRANK, INDIVIDUALLY, ETC., ET AL., PETITIONERS, *v.* T. S. FAULK & COMPANY. October 18, 1915. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Leon Weil* and *Mr. Horace Stringfellow* for the petitioners. *Mr. W. A. Blount, Mr. A. C. Blount* and *Mr. F. D. Carter* for the respondents.

No. 582. THE TRINITY GOLD DREDGING & HYDRAULIC COMPANY, PETITIONER, *v.* ANGELE BEAUDRY, AS EXECUTRIX, ETC. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward J. McCutchen, Mr. A. Crawford Greene, Mr. Alexander Britton, Mr. Evans Browne* and *Mr. F. W. Clements* for the petitioner. *Mr. Thomas B. Dozier* and *Mr. F. S. Brittain* for the respondents.

No. 594. ROBERT H. MONTGOMERY, AS TRUSTEE, ETC., PETITIONER, *v.* BOTTLERS SEAL COMPANY. October 18,

1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Selden Bacon* for the petitioner. *Mr. Alfred D. Lind* for the respondent.

No. 626. CITY OF NEW ORLEANS ET AL., PETITIONERS, *v.* PENN BRIDGE COMPANY. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. I. D. Moore* and *Mr. Percy S. Benedict* for the petitioners. *Mr. Robert E. Milling* and *Mr. William Grant* for the respondent.

No. 635. IDA R. ROBERTS ET AL., PETITIONERS, *v.* MYRA J. ROBERTS. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. M. F. Watts* and *Mr. William R. Gentry* for the petitioners. No appearance for the respondent.

Nos. 636 and 637. JOHN A. LEWIS, AS EXECUTOR, ETC., ET AL., PETITIONERS, *v.* WILLIAM B. HOLMES ET AL. October 18, 1915. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jackson H. Ralston* and *Mr. Morton S. Cressy* for the petitioners. *Mr. Ely B. Felsenthal, Mr. John P. Wilson, Mr. Nathan G. Moore, Mr. William B. McIlvaine* and *Mr. Charles L. Bartlett* for the respondents.

No. 640. MIENE WILCKENS, PETITIONER, *v.* ALWINE S. WILCKENS. October 18, 1915. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William J. Courtright* for the petitioner. *Mr. C. S. Montgomery* for the respondent.

No. 642. Lillie W. Reed, Petitioner, *v.* The Baltimore & Ohio Railroad Company. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles W. Baker* for the petitioner. *Mr. Judson Harmon, Mr. Edward Colston, Mr. George Hoadly* and *Mr. A. W. Goldsmith* for the respondent.

No. 647. Charles G. Guth, Petitioner, *v.* Guth Chocolate Company. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles F. Harley* and *Mr. George W. Lindsay* for the petitioner. *Mr. Frederick L. Emery* for the respondent.

No. 652. Charles S. Hinchman, Petitioner, *v.* Consolidated Arizona Smelting Company. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Charles H. Burr* for the petitioner. *Mr. J. Markham Marshall* for the respondent.

No. 661. Egbert Whitney, Petitioner, *v.* New York Scaffolding Company. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James A.*

Carr, Mr. Wallace R. Lane, Mr. W. A. Johnston and *Mr. Edwin S. Clarkson* for the petitioner. *Mr. Paul Bakewell* for the respondent.

No. 662. THE AMERICAN ROTARY VALVE COMPANY, PETITIONER, *v.* ALBERT E. MOORHEAD. October 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Ridout* and *Mr. W. Clyde Jones* for the petitioner. *Mr. James W. Noel* for the respondent.

No. 621. HAMILTON TRUST COMPANY ET AL., PETITIONERS, *v.* JOHN L. BISHER, JR., ETC. October 18, 1915. Petition for writs of mandamus and certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Emmett Callahan* for the petitioners. *Mr. William P. Richardson* and *Mr. Will R. King* for the respondent.

No. 667. THE UNITED STATES EX REL. THE STATE OF LOUISIANA, PETITIONER, *v.* HON. ALECK BOARMAN, JUDGE, ETC. October 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Ruffin G. Pleasant* and *Mr. Daniel Wendling* for the petitioner. *Mr. Edgar H. Farrar, Mr. Henry Bernstein* and *Mr. Willard F. Keeney* for the respondent.

No. 512. W. F. JIMMERSON, AS ASSESSOR, ETC., ET AL., PETITIONER, *v.* THE UNITED STATES EX REL. FALL CITY CONSTRUCTION COMPANY. October 25, 1195. Petition for a writ of certiorari to the United States Circuit Court

of Appeals for the Eighth Circuit denied. *Mr. C. F. Greenlee* for the petitioners. No appearance for the respondent.

No. 641. VANDALIA RAILROAD COMPANY, PETITIONER, *v.* THE UNITED STATES. October 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John G. Williams, Mr. Thomas W. White, Mr. Lindorf O. Whitnel* and *Mr. Samuel W. Fordyce, Jr.*, for the petitioner. *The Attorney General* and *Mr. Assistant to the Attorney General Todd* for the respondent.

No. 663. NATIONAL BANK OF COMMERCE OF ST. LOUIS, PETITIONER, *v.* E. B. ALLEN, UNITED STATES COLLECTOR, ETC. October 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. C. Stewart, Mr. P. Taylor Bryan* and *Mr. George H. Williams* for the petitioner. No brief filed for the respondent.

No. 665. EDMUND W. MUDGE ET AL., PETITIONERS, *v.* BLACK, SHERIDAN & WILSON ET AL. October 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank Y. Gladney* and *Mr. Frank J. Hogan* for the petitioners. No appearance for the respondents.

No. 669. MORRIS L. BETTMAN, PETITIONER, *v.* THE UNITED STATES. October 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank F. Dinsmore* for

the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 671. GEORGE L. COLBURN ET AL., PETITIONERS, *v.* THE UNITED STATES. October 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Chester H. Krum* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondents.

No. 545. ARTHUR C. BRADY, PETITIONER, *v.* MARTIN E. KERN. November 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Spencer Miller* for the petitioner. *Mr. Owen J. Roberts* for the respondent.

No. 675. LEONARD CECIL PARKER ET AL., PETITIONERS, *v.* BARBARA PARKER. November 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack* and *Mr. Gaines B. Turner* for the petitioners. *Mr. F. M. Etheridge* and *Mr. J. M. McCormick* for the respondent.

No. 678. GERARD B. TOWNSEND ET AL., PETITIONERS, *v.* GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY ET AL. November 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Louis Marshall, Mr. Marion*

Erwin and *Mr. Joseph Fried* for the petitioners. *Mr. Alexander C. King* and *Mr. J. Ellsworth Hall* for the respondents.

No. 561. CAMBRIA IRON COMPANY, PETITIONER, *v.* THE CARNEGIE STEEL COMPANY (LTD.). November 8, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Francis T. Chambers* and *Mr. James I. Kay* for the petitioner. *Mr. Charles C. Linthicum* and *Mr. David A. Reed* for the respondent.

No. 668. MARY M. HILL, EXECUTRIX, ETC., ET AL., PETITIONERS, *v.* JAMES H. LOVEWELL, ETC., ET AL. November 8, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Caruthers Ewing* for the petitioners. *Mr. W. J. Lamb, Mr. Wassell Randolph* and *Mr. William M. Randolph* for the respondents.

No. 686. LILLY BUSCH ET AL., ETC., PETITIONERS, *v.* STROMBERG-CARLTON TELEPHONE MANUFACTURING COMPANY. November 15, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph H. Zumbalen* for the petitioners. *Mr. Warwick M. Hough* and *Mr. Walter H. Saunders* for the respondent.

No. 691. BARBER ASPHALT PAVING COMPANY, PETITIONER, *v.* THE CITY OF ST. PAUL. November 15, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr.*

Morris M. Townley for the petitioner. *Mr. Thomas D. O'Brien* for the respondent.

No. 674. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER, *v.* THE UNITED STATES. November 29, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Robert Dunlap, Mr. E. W. Camp, Mr. Paul Burks, Mr. Alexander Britton* and *Mr. Evans Browne* for the petitioner. No brief filed for the respondent.

No. 707. FRED VON BAUMBACH, COLLECTOR, ETC., PETITIONER, *v.* SARGENT LAND COMPANY;

No. 708. FRED VON BAUMBACH, COLLECTOR, ETC., PETITIONER, *v.* SUTTON LAND COMPANY; and

No. 709. FRED VON BAUMBACH, COLLECTOR, ETC., PETITIONER, *v.* KEARSARGE LAND COMPANY. November 29, 1915. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. John R. Van Derlip* for the respondents.

No. 677. OTOMAN ZAR ADUSHT HANISH, PETITIONER, *v.* THE UNITED STATES. November 29, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James R. Ward* for the petitioner. No brief filed for the respondent.

No. 692. DON A. MOUN DAY AND L. D. MOUN DAY, PETITIONERS, *v.* THE UNITED STATES. November 29,

1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles Blood Smith* and *Mr. Chapin Brown* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 704. WEBSTER BALLINGER, PETITIONER, *v.* WEST PUBLISHING COMPANY. November 29, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Webster Ballinger* for the petitioner. *Mr. H. Winship Wheatley* for the respondent.

No. 581. E. I. DU PONT DE NEMOURS POWDER COMPANY ET AL., PETITIONERS, *v.* WALTER E. MASLAND ET AL. December 6, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Edwin J. Prindle* and *Mr. Warren H. Small* for the petitioners. No appearance for the respondents.

No. 718. S. S. WHITE DENTAL MANUFACTURING COMPANY, PETITIONER, *v.* OSCAR H. PIEPER ET AL. December 6, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Henry N. Paul, Jr., Mr. Joseph C. Fraley* and *Mr. Edward Rector* for the petitioner. *Mr. Charles A. Brown* for the respondents.

No. 684. THOMPSON & FORD LUMBER COMPANY, PETITIONER, *v.* CHARLES DILLINGHAM, RECEIVER, ETC., ET AL. December 6, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the

Fifth Circuit denied. *Mr. H. M. Garwood* and *Mr. William A. Vincent* for the petitioner. *Mr. Thomas M. Kennerly* for the respondents.

No. 723. MARION W. ROSE, PETITIONER, *v.* THE UNITED STATES. December 6, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George X. McLanahan* and *Mr. James T. Neville* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 724. CHARLES EDWARD GRELLE ET AL., PETITIONERS, *v.* THE CITY OF EUGENE, OREGON, ET AL. December 6, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. J. Geisler* for the petitioners. *Mr. Martin L. Pipes* for the respondents.

No. 734. HUGH MCCURDY EATON, ADMINISTRATOR, ETC., PETITIONER, *v.* COUNTY OF SHIAWASSEE. December 13, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Bernard B. Selling* for the petitioner. *Mr. Harrison Geer* for the respondent.

No. 747. ROCK SPRINGS DISTILLING COMPANY ET AL., PETITIONERS, *v.* W. A. GAINES & COMPANY. December 20, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

Mr. Luther Ely Smith and *Mr. William T. Ellis* for the petitioners. *Mr. Daniel W. Lindsey, Mr. James L. Hopkins* and *Mr. Edmund F. Trabue* for the respondent.

No. 735. St. Louis Union Trust Company, Petitioner, *v.* Mary E. Mellon et al. December 20, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. F. Wilson* for the petitioner. No appearance for the respondents.

No. 744. Dan A. Ward et al., Petitioners, *v.* Thomas W. Morgan, Warden, etc. December 20, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edwin A. Krauthoff* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Warren* for the respondent.

No. 751. The National Bank of Commerce in St. Louis, Petitioner, *v.* Equitable Trust Company of New York. December 20, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George L. Edwards* for the petitioner. *Mr. Charles C. Howland, Mr. F. N. Judson* and *Mr. John F. Green* for the respondent.

No. 752. Western Glass Company, Petitioner, *v.* The Schmertz Wire Glass Company et al. December 20, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert H. Graves* and *Mr. Louis*

Quarles for the petitioner. *Mr. Drury W. Cooper*, *Mr. Thomas B. Kerr* and *Mr. Arthur J. Baldwin* for the respondents.

No. 767. ABERCROMBIE & FITCH COMPANY ET AL., PETITIONERS, *v.* FREDERICK E. BALDWIN ET AL. January 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. James R. Offield* and *Mr. Charles K. Offield* for the petitioners. No appearance for the respondents.

No. 749. CHOY GUM, ETC., PETITIONER, *v.* SAMUEL W. BACKUS, COMMISSIONER, ETC. January 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Corry M. Stadden* for the petitioner. *The Attorney General*, *The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 755. JOHN M. BURROUGHS ET AL., PETITIONERS, *v.* FLORENCE L. CHAMBERS. January 10, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. B. F. Leighton* and *Mr. Wharton E. Lester* for the petitioners. *Mr. George E. Sullivan* and *Mr. Walter C. English* for the respondent.

No. 765. SANGAMON LOAN & TRUST COMPANY, TRUSTEE, ETC., PETITIONER, *v.* UNITED SHOE MACHINERY COMPANY. January 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry Lyman Child* and *Mr. Otis*

Scott Humphrey for the petitioner. No appearance for the respondent.

No. 770. San Antonio & Aransas Pass Railway Company, Petitioner, *v.* Streets Western Stable Car Company. January 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Thompson* and *Mr. J. H. Barwise, Jr.*, for the petitioner. *Mr. Levy Mayer* and *Mr. Carl Meyer* for the respondent.

No. 792. Wells, Fargo & Company, Petitioner, *v.* The Mayor and Aldermen of Jersey City. January 17, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles W. Stockton* for the petitioner. *Mr. John Bentley* for the respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 11, 1915, TO JANUARY 17, 1916.

No. 2. Thomas W. McComb, Plaintiff in Error, *v.* The Commonwealth of Pennsylvania. In error to the Supreme Court of the State of Pennsylvania. October 12, 1915. Dismissed, with costs, on motion of counsel for the plaintiff in error. *Mr. John G. Johnson* for the plaintiff in error. *Mr. William M. Hargest* and *Mr. Lyman D. Gilbert* for the defendant in error.

No. 151. Union Pacific Railroad Company, Plaintiff in Error, *v.* Barbora Zitnik, Administratrix, etc.

In error to the Supreme Court of the State of Nebraska. October 12, 1915. Dismissed, with costs, on motion of counsel for the plaintiff in error. *Mr. N. H. Loomis* for the plaintiff in error. *Mr. C. J. Smyth* and *Mr. Edward P. Smith* for the defendant in error.

No. 195. Illinois Central Railroad Company, Plaintiff in Error, *v.* Arthur Slaughter. In error to the Supreme Court of the State of Minnesota. October 12, 1915. Dismissed per stipulation. *Mr. Pierce Butler*, *Mr. Blewett Lee* and *Mr. W. S. Horton* for the plaintiff in error. *Mr. Samuel A. Anderson* for the defendant in error.

No. 202. Railway Transfer Company of the City of Minneapolis, Plaintiff in Error, *v.* Joseph La Mere. In error to the Supreme Court of the State of Minnesota. October 12, 1915. Dismissed per stipulation. *Mr. William H. Bremner* and *Mr. F. M. Miner* for the plaintiff in error. *Mr. Samuel A. Anderson* for the defendant in error.

No. 255. Southern Railway Company, Plaintiff in Error, *v.* A. B. Bramlett. In error to the Supreme Court of the State of South Carolina. October 12, 1915. Dismissed, with costs, on motion of counsel for the plaintiff in error. *Mr. L. E. Jeffries* for the plaintiff in error. No appearance for the defendant in error.

No. 256. The McAlester Edwards Coal Company et al., Plaintiffs in Error, *v.* M. E. Trapp, State Auditor, etc. In error to the Supreme Court of the State

of Oklahoma. October 12, 1915. Judgment reversed at the costs of the plaintiffs in error, and cause remanded for further proceedings per stipulation of counsel. *Mr. Charles B. Stuart* and *Mr. James H. Gordon* for the plaintiffs in error. *Mr. Robert E. Wood* for the defendants in error.

No. 305. W. S. Allen, Secretary of State, et al., Appellants, *v.* William R. Compton Company et al. October 12, 1915. Dismissed with costs, on motion of counsel for the appellants. *Mr. George Cosson* for the appellants. No appearance for the appellees.

No. 378. Quincy, Omaha & Kansas City Railroad Company, Plaintiff in Error, *v.* Shelby P. Noel. In error to the Kansas City Court of Appeals, State of Missouri. October 12, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Willard P. Hall* for the plaintiff in error. No appearance for the defendant in error.

No. 548. The Delaware, Lackawanna & Western Railroad Company, Petitioner, *v.* Matt Yurkonis. On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. October 12, 1915. Dismissed on motion of counsel for the petitioner. *Mr. William S. Jenney* for the petitioner. No appearance for the respondent.

No. 588. John Deere Plow Company, Petitioner, *v.* Leon D. Mowry, Trustee, etc. On petition for a writ

of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. October 12, 1915. Dismissed on motion of counsel for the petitioner. *Mr. Duane E. Fox* for the petitioner. No appearance for the respondent.

No. 11. Original. COMMONWEALTH OF VIRGINIA, COMPLAINANT, *v.* JOHN PIERPONT MORGAN. October 18, 1915. Dismissed with costs, on motion of *Mr. John Garland Pollard* for the complainant. No appearance for the defendant.

No. 7. LEM MOTLOW, PLAINTIFF IN ERROR, *v.* THE STATE OF TENNESSEE. In error to the Supreme Court of the State of Tennessee. October 18, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. John J. Vertrees* for the plaintiff in error. *Mr. Frank M. Thompson* and *Mr. William L. Granbery* for the defendant in error.

No. 416. J. M. KILLMER ET AL., PLAINTIFFS IN ERROR, *v.* SAMUEL STEWART, AS TREASURER OF WYANDOTTE COUNTY, KANS., ET AL. In error to the Supreme Court of the State of Kansas. October 18, 1915. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. L. W. Kiplinger* for the plaintiffs in error. *Mr. Richard J. Higgins* for the defendants in error.

No. 590. NICK ARRIGO, PLAINTIFF IN ERROR, *v.* GUS A. HYERS, SHERIFF, ETC. In error to the Supreme Court of

the State of Nebraska. October 21, 1915. Dismissed with costs, per stipulation. *Mr. Marquis Eaton* and *Mr. Thomas S. Allen* for the plaintiff in error. *Mr. Willis E. Reed* for the defendant in error.

No. 591. MIKE INDOVINA, PLAINTIFF IN ERROR, *v.* GUS A. HYERS, SHERIFF, ETC. In error to the Supreme Court of the State of Nebraska. October 21, 1915. Dismissed with costs, per stipulation. *Mr. Marquis Eaton* and *Mr. Thomas S. Allen* for the plaintiff in error. *Mr. Willis E. Reed* for the defendant in error.

No. 19. ROSA GUNDALL, INDIVIDUALLY, ETC., ET AL., APPELLANTS, *v.* THE MANHATTAN RAILWAY COMPANY ET AL. Appeal from District Court of the United States for the Southern District of New York. October 21, 1915. Dismissed, per stipulation. *Mr. Edward S. Hatch* and *Mr. Vincent P. Donihee* for the appellants. *Mr. James L. Quackenbush* for the appellees.

No. 46. AUGUST BOULANGER, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the Supreme Court of the State of Louisiana. October 28, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. Taliaferro Alexander* for the plaintiff in error. *Mr. R. G. Pleasant* for the defendant in error.

No. 459. STANDARD FASHION COMPANY, PLAINTIFF IN ERROR, *v.* J. L. GRANT. In error to the Supreme Court of

the State of North Carolina. November 1, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. J. S. Manning* and *Mr. Francis Rooney* for the plaintiff in error. *Mr. James R. Price* for the defendant in error.

No. 75. OZARK OIL COMPANY, APPELLANT, *v.* WILLIAM BERRYHILL. In error to the District Court of the United States for the Eastern District of Oklahoma. November 10, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. Haskell B. Talley* for the appellant. No appearance for the appellee.

No. 569. ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* W. L. PELTON. In error to the Supreme Court of the State of Iowa. November 15, 1915. Dismissed, per stipulation. *Mr. Walter S. Horton* and *Mr. Blewett Lee* for the plaintiff in error. *Mr. William Squire Kenyon* and *Mr. Denis M. Keleher* for the defendant in error.

No. 92. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION OF MISSOURI ET AL.;

No. 93. ATCHISON, TOPEKA & SANTA FE RAILWAY, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION OF MISSOURI ET AL.;

No. 94. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION OF MISSOURI ET AL.;

No. 95. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION OF MISSOURI ET AL.;

No. 96. St. Louis, Kansas City & Colorado Railroad Company, Appellant, *v.* The Public Service Commission of Missouri et al.;

No. 97. Kansas City Southern Railway Company, Appellant, *v.* The Public Service Commission of Missouri et al.;

No. 98. Missouri Pacific Railway Company, Appellant, *v.* The Public Service Commission of Missouri et al.;

No. 99. St. Louis, Iron Mountain & Southern Railway Company, Appellant, *v.* The Public Service Commission of Missouri et al.;

No. 100. Missouri, Kansas & Texas Railway Company, Appellant, *v.* The Public Service Commission of Missouri et al.;

No. 101. Chicago, Burlington & Quincy Railroad Company, Appellant, *v.* The Public Service Commission of Missouri et al.;

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No. 103. Chicago & Alton Railroad Company, Appellant, *v.* The Public Service Commission of Missouri et al. Appeals from the District Court of the United States for the Western District of Missouri. November 29, 1915. Dismissed with costs, on motion of *Mr. Frank Hagerman* for the appellants. *Mr. Frank Hagerman* for the appellants. *Mr. Edward J. White* for the appellant in No. 98. *Mr. John T. Barker* for the appellees. *Mr. William G. Buzbee* for the appellees in No. 98.

No. 215. William J. Deupree, Trustee, etc., Appellant, *v.* Alice P. Watson. Appeal from the United States Circuit Court of Appeals for the Sixth Circuit. December 2, 1915. Dismissed with costs, on motion of

counsel for the appellant. *Mr. Frederick W. Schmitz* for the appellant. No appearance for the appellee.

No. 349. THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF MISSOURI AT THE RELATION OF THE CITY OF ST. LOUIS. In error to the Supreme Court of the State of Missouri. December 2, 1915. Dismissed with costs, per stipulation. *Mr. Ernest A. Green* and *Mr. James F. Green* for the plaintiff in error. *Mr. Truman P. Young* for the defendant in error.

No. 105. RALSA F. MORLEY ET AL., PLAINTIFFS IN ERROR, *v.* WILLIAM M. FEWEL. In error to the Supreme Court of the State of Oklahoma. December 2, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. A. J. Biddison* for the plaintiffs in error. *Mr. Henry B. Martin* for the defendant in error.

No. 741. MARIANO RIERA PALMER, ON BEHALF OF HIMSELF AND OTHER NOTARIES, APPELLANT, *v.* SAMUEL D. GROMER, TREASURER; A. R. SAWYER, AUDITOR, AND FOSTER V. BROWN, ATTORNEY GENERAL OF PORTO RICO. Appeal from the Supreme Court of Porto Rico. December 6, 1915. Docketed and dismissed with costs, on motion of *Mr. Samuel T. Ansell* for the appellees. *Mr. Samuel T. Ansell* for the appellees. No one opposing.

No. 125. CLARENCE H. VENNER, PLAINTIFF IN ERROR, *v.* THE CHICAGO CITY RAILWAY COMPANY ET AL. In error to the Supreme Court of the State of Illinois. December 8, 1915. Dismissed with costs, pursuant to the

tenth rule. *Mr. Elijah N. Zoline* for the plaintiff in error. No appearance for the defendants in error.

No. 130. Maria L. Overton et al., Appellants, *v.* The United States. Appeal from the Court of Claims. December 9, 1915. Judgment reversed and cause remanded for further proceedings, upon confession of error and motion of *Mr. Solicitor General Davis* for the appellee. *Mr. W. H. Conaway* for the appellants. *The Attorney General* and *The Solicitor General* for the appellee.

No. 150. Arthur Ryle et al., as Trustees, etc., Appellants, *v.* The United States. Appeal from the Court of Claims. December 17, 1915. Judgment reversed and cause remanded for further proceedings upon confession of error and motion of *Mr. Solicitor General Davis* for the appellee. *Mr. H. T. Newcomb* and *Mr. Morris F. Frey* for the appellants. *The Attorney General* and *The Solicitor General* for the appellee.

No. 159. The United States, Appellant, *v.* Jefferson F. Moser. Appeal from the Court of Claims. December 17, 1915. Dismissed, on motion of *Mr. Solicitor General Davis* for the appellant. *The Attorney General* and *The Solicitor General* for the appellant. *Mr. George A. King* and *Mr. William B. King* for the appellee.

No. 407. Oregon-Washington Railroad & Navigation Company, Plaintiff in Error, *v.* Henry M. Pfeiffer. In error to the Supreme Court of the State of

Oregon. December 20, 1915. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. W. F. Cotton* and *Mr. Henry W. Clark* for the plaintiff in error. *Mr. H. M. Pfeiffer pro se.*

No. 334. NETTIE L. SCOTT, APPELLANT, *v.* MRS. E. N. PHILIPO ET AL. Appeal from the Supreme Court of the Territory of Hawaii. January 6, 1916. Dismissed with costs on motion of counsel for the appellant. *Mr. John W. Cathcart* for the appellant. No appearance for the appellees.

No. 796. COON RAPIDS NATIONAL BANK ET AL., PLAINTIFFS IN ERROR, *v.* MAGGIE I. LEE, EXECUTRIX, ETC. In error to the Supreme Court of the State of Iowa. Submitted December 20, 1915. Decided January 10, 1916. Docketed and dismissed with costs, pursuant to the ninth rule. *Mr. A. B. Cummins* and *Mr. O. M. Brockett* for the defendant in error. No one opposing.

CASE DISPOSED OF IN VACATION.

No. 191. THE STATE OF WASHINGTON ON THE RELATION OF AUGUSTUS S. PEABODY, TRUSTEE, PLAINTIFF IN ERROR, *v.* THE CITY OF SEATTLE ET AL. In error to the Supreme Court of the State of Washington. September 7, 1915. Dismissed pursuant to the twenty-eighth rule. *Mr. George Donworth* and *Mr. Elmer E. Todd* for the plaintiff in error. *Mr. Howard A. Hanson* for the defendant in error.

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Under Philippine Island Act of July 1, 1902, same regulations and procedure apply to review by this court of judgments of Supreme Court of Philippine Islands as to final judgments of Circuit Courts, and this provision is essential and requires compliance. *Id.*

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Appellate court may, without violating Fourteenth Amendment, correct interlocutory decision on a first appeal when case again comes up with same parties; and whether it can be done in a particular case is state matter and decision of highest court is controlling here. *Moss* v. *Ramey* 538

Unless contentions are wholly frivolous court has jurisdiction under § 237, Jud. Code, to review judgment of state court in action under Employers' Liability Act, but in this case contentions are frivolous under rule 6, § 5. *Chicago & Rock Island Ry.* v. *Devine* 52

Writ of error to review judgment in this case founded on Employers' Liability Act frivolous and judgment affirmed under rule 6, § 5. *Pennsylvania Co.* v. *Donat* 50

See **Jurisdiction.**

APPLIANCES. See **Employers' Liability Act; Safety Appliance Act.**

ARIZONA:

Act of December 14, 1914, relative to the employment of aliens, held unconstitutional under equal protection provision. *Truax* v. *Raich* 33

Cases come to this court from Supreme Court of Arizona in usual form, and not by appeal, even though entered on mandate of this court in cases originally coming from territorial court. *Steinfeld* v. *Zeckendorf* 26

ARMY AND NAVY:

Army regulation has force only so far as in accord with acts of Congress. *United States* v. *Ross* 530

Under Hospital Corps Act members of Corps required to perform for stated pay all duties properly incident to con-

ARMY AND NAVY—*Continued.* PAGE
duct of hospital including maintaining telegraph and telephone office. *Id.*
Whether maintenance of telephone and telegraph stations in military hospital necessary is for judgment of Department, and in absence of clear abuse courts will not overrule judgment. *Id.*
General rule of statutes relating to pay and duty of naval officers is found in Rev. Stat., § 1462, providing no officer on retired list shall be employed in active duty except in time of war. *White* v. *United States* 608
Act of March 4, 1913, granting officers of Navy, advanced in rank, pay and allowances of higher rank, applies only to officers on active list and not to those on retired list assigned for active duty after that date. *Id.*
See **Hospital Corps Act.**

ASSESSMENTS. See **Taxes and Taxation.**

ASSUMPTION OF RISK:
Distinctions between assumption of risk and contributory negligence formerly of little consequence when both led to same result are more important under the Employers' Liability Act, as former is complete bar and latter simply mitigates damages. *Seaboard Air Line* v. *Horton* 595
Employé knowing of defect arising from employer's negligence and appreciating risk and continuing employment without objection or promise of reparation assumes risk. *Id.*
Knowledge by experienced brakeman of obstruction over track necessarily imports risk and in absence of objection on his part or promise of reparation by employer there is assumption of risk. *Kanawha Ry.* v. *Kerse* 576
Where employer promises reparation of defect known to employé, if latter relies on promise and continues employment he does not during reasonable time assume risk unless no ordinarily prudent man would under such circumstances rely on such promise. *Seaboard Air Line* v. *Horton* 595
Trial court did not err in refusing to hold as matter of law that no ordinarily prudent man would rely on promise to repair glass of water gauge on engine. *Id.*
Authorities differ and this court has not yet decided whether continuing in employment on promise of reparation in presence of imminent danger that no ordinarily prudent man would confront amounts to assumption of risk or contributory negligence. *Id.*

ASSUMPTION OF RISK—*Continued.* PAGE

Although trial court erred in refusing to charge that knowledge by employé of defects amounted to assumption of risk, if request was based on hypothesis of knowledge and jury found specifically that employé did not have such knowledge, there is no ground for reversal. *Kanawha Ry.* v. *Kerse* 576

Burden of proof of assumption of risk of employé is on employer and unless evidence shows such assumption court does not err in submitting question to jury. *Id.*

See **Employers' Liability Act; Safety Appliance Act.**

ATTACHMENT OF SEAMEN'S WAGES. See **Seamen.**

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BALTIMORE:

Maryland-Baltimore Street Paving Acts of 1906 and 1908, not unconstitutional as abuse of legislative power or as denying due process of law or equal protection of the laws. *Wagner* v. *Baltimore*. 207

BANKRUPTCY:

Mortgage given more than four months before petition held fraudulent and void because withheld from record until day petition was filed. *National Bank* v. *Shackelford* 81

Rights and remedies of trustee determined with reference to conditions existing when petition is filed. *Bailey* v. *Baker Ice Co.* 268

Trustee in bankruptcy cannot, under § 47, par. 2, assail contract of conditional sale filed within four months on ground he has status of creditor fastening lien under provision of state law (as Kansas) on property prior to recording contract. *Id.*

Determination of proceeding between trustee and vendor of property sold under conditional sale is without prejudice to rights of third party to whom bankrupt mortgaged chattels and not party to proceedings. *Id.*

A proceeding brought by a trustee in bankruptcy asserting title to lands, reciting encumbrances and asking that they be sold and proceeds marshaled and liens be ascertained and in which all parties appear, is a controversy in bankruptcy and this court has jurisdiction to review the judgment of the Circuit Court of Appeals. *Moody* v. *Century Bank* 374

In such a proceeding, although commenced by the trustee, the appearance of the holders of mortgages is equivalent

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to intervention and makes a controversy within § 24*a* of the Act. *Id.*
Decisions of Circuit Court of Appeals in bankruptcy proceedings final. *Central Trust Co.* v. *Lueders* 11
General order No. 21 amended by order promulgated November 1, 1915 623
See **Conditional Sale.**

BENEFITS. See **Taxes and Taxation.**

BILL OF EXCEPTIONS. See **Practice and Procedure.**

BONA FIDE PURCHASER. See **Warehousemen.**

BONDS:
Instrument to indemnify bonding company for going on bond of public officer completed contract on delivery without further notice of acceptance to parties executing it. *U. S. Fidelity Co.* v. *Riefler* 17

BURDEN OF PROOF. See **Evidence.**

BUSINESS, REGULATION OF.
A person engaging in business subject to regulation by the State, such as hotel keeping, undertakes to fulfil obligations imposed on such business. *Miller* v. *Strahl.* 426

CARMACK AMENDMENT. See **Interstate Commerce.**

CARRIERS:
Carrier accepting a passenger to definite point does not discharge duty by delivering him at unsuitable place without protection from elements. *Texas & Pacific Ry.* v. *Bigger* 330
Supplementary Safety Appliance Act of 1910 relieves carrier from statutory penalties while hauling defective car to repair shop but not from liability for injury in connection with such hauling. *Great Northern Ry.* v. *Otos* 349
This court having held that by Carmack Amendment initial carrier liable for shipments on through interstate commerce over its own and connecting lines, same reasoning applies to power of State to make delivering carrier liable on through intrastate shipments even if loss occurs on lines other than its own. *Atlantic Coast Line* v. *Glenn.* 388
Permitting shipper to make freight payments on basis of

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rate less than specified in legal tariff does not modify right to insist on legal rate filed. *Dayton Coal Co.* v. *Cincinnati Ry.* 446
Where carrier files through rate with Interstate Commerce Commission to take effect on specified date thereafter, which connecting carrier accepts, receives and stamps and receives freight thereunder, rate becomes joint and there can be no departure therefrom. *Id.*
Prior to order of 1907 of Interstate Commerce Commission requiring carriers formally to accept joint rates specifically, such action not necessary and receipt of freight thereunder sufficient to put joint rate into effect. *Id.*
Carrier cannot forfeit mileage book presented by the original purchaser in payment of transportation, another accompanying him, under rule that book forfeitable if presented by one other than the purchaser for his own transportation. *Southern Railway* v. *Campbell* 99
Where only questions are whether the carrier's rule as to forfeiture of mileage books was applicable and properly applied, this court not concerned with reasonableness of the rule which is question for Interstate Commerce Commission. *Id.*
A state court does not deny Federal right to a carrier railroad company by holding it strictly to its own terms in connection with mileage books. *Id.*
Prohibition in § 240, Crim. Code, against shipping in interstate commerce packages of intoxicating liquor not marked as prescribed, is continuing act, performance of which is begun when package delivered to carrier and completed when it reaches destination. *United States* v. *Freeman* 117
Statute of South Carolina making delivering carrier responsible for damages to foods on through bills of lading of intrastate shipments not voluntarily received does not deprive delivering carrier of property without due process of law. *Atlantic Coast Line* v. *Glenn* 388
See **Employers' Liability Act; Interstate Commerce; Railroads; Safety Appliance Act.**

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CERTIORARI:
By this court of judgments of the Circuit Court of Appeals in bankruptcy proceedings. *Central Trust Co.* v. *Lueders* . . 11
Granted in patent case where conflicting opinions of different Circuit Courts of Appeals. *Fireball Tank Co.* v. *Commercial Co.*. 156

CHARGE TO JURY: PAGE

As to liability of carrier for negligence, held not erroneous in *Texas & Pacific Ry.* v. *Bigger* 330

See **Instructions to Jury.**

CHARTER PARTY:

Charterer does not become owner *pro hac vice* where control remains with general owner even though former determines direction in which vessel proceeds. *New Orleans S. S. Co.* v. *United States* 202

Under charter party in this case United States did not so become owner of vessel as to be liable for injuries and demurrage during repairs. *Id.*

United States as charterer of vessel not liable for damages due approximately to marine risk or when rendering aid to another vessel of United States, even though case be a hard one. *Id.*

CHARTERS:

Legislative charter for drainage district not a contract that laws it was created to administer will not be changed. *Houck* v. *Little River District.* 254

See **Corporations.**

CHATTEL MORTGAGE. See **Conditional Sale.**

CHICKASAW ALLOTMENTS. See **Indians.**

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CIRCUIT COURT OF APPEALS. See **Certiorari; Jurisdiction.**

CITIES. See **Municipal Corporations.**

CITIZEN AND CITIZENSHIP:

Under the Constitution every person born in the United States is a citizen thereof. *Mackenzie* v. *Hare* 299

Identity of husband and wife is ancient principle of our jurisprudence and is still retained notwithstanding much relaxation thereof and has purpose if not necessity in domestic policy and greater purpose and necessity in international policy. *Id.*

Whatever may have been law of England and original law of this country as to perpetual allegiance to land of birth, Con-

CITIZEN AND CITIZENSHIP—*Continued.* PAGE

gress has by Act of 1868, now Rev. Stat., § 1999, explicitly declared right of expatriation to be the law. *Id.*

Citizenship is of tangible worth but possessor thereof may voluntarily renounce it even though Congress may not compel renunciation; and marriage of American woman with foreigner amounts to voluntary expatriation and is within control of Congress, which did not exceed power in passing Citizenship Act of 1907. *Id.*

Provision in Citizenship Act of March 2, 1907, is explicit and circumstantial that any American woman marrying foreigner takes nationality of husband and it would transcend judicial power to insist limitations or conditions upon disputable considerations. *Id.*

In order to protect citizens of United States in employment against non-citizens, States may not require employers to employ only specified percentage of aliens. *Truax* v. *Raich* 33

Section 14, Labor Law, 1909, New York, providing that only citizens of United States be employed on public works and that preference be given to citizens of New York, not unconstitutional. *Heim* v. *McCall*. 175

Crane v. *New York*. 195

See **Expatriation.**

CIVIL LAW:

Community cannot enjoy an acquet free of obligation inseparably created with it; and if it takes real estate in Porto Rico subject to a servitude imposed by the master before acquisition it cannot thereafter enjoy it free of servitude because wife did not unite therein. *Parker* v. *Monroig* 83

CLAIMS AGAINST UNITED STATES:

Court of Claims established to consider right of claimants to recover against the United States and its findings of fact on matters within its jurisdiction conclusive unless Congress otherwise provides. *Cramp* v. *United States*. 221

Court of Claims has jurisdiction to reform contract for purpose of determining whether the claim is established and is a valid one against the United States. *Id.*

Contractor building vessel for United States who executed complete release not entitled to damages for delay, Court of Claims having found no mutual mistake in release although claimant did not understand it. *Id.*

Fact that case is a hard one cannot affect responsibility of United States. *New Orleans S. S. Co.* v. *United States* 202

CLASSIFICATION: PAGE
Conditions justify distinctions and classifications. *Hadacheck* v. *Los Angeles* 394
Ordinance applying equally to all within terms not denial equal protection law if reasonable basis for classification, even though other businesses might have been included. *Northwestern Laundry* v. *Des Moines* 486
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COLORADO:
Order of Colorado Board of Equalization increasing valuation of all taxable property in Denver, valid under state law, not violative of Fourteenth Amendment because opportunity to be heard not given city or taxpayers. *Bi-Metallic Co.* v. *Colorado* 441

COMMERCE:
Complete power of Congress over foreign commerce has been thoroughly settled by former decisions of this court. *Weber* v. *Freed* 325
Power of Congress over importations not affected by fact that articles imported are to be used for purposes subject to state control. *Id.*
Act of July 31, 1912, prohibiting importation of pictorial illustrations of prizefights for exhibition purposes valid. *Id.*
Criminal statute applicable alike to foreign and interstate commerce will not be construed so as to render it futile as to the former. *United States* v. *Freeman* 117
See **Interstate Commerce.**

COMMON CARRIERS. See **Carriers; Employers' Liability Act; Interstate Commerce; Safety Appliance Act.**

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CONDITIONAL SALE:
Difference between conditional sale of personal property and sale absolute with chattel mortgage back. *Bailey* v. *Baker Ice Co.* 268

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Requiring vendee to give notes and reserving right to vendor to file mechanic's lien not inconsistent with retention of title in vendor until full payment made. *Id.*

Trustee cannot under § 47, par. 2, of Bankruptcy Act assail contract of conditional sale filed within four months, on ground that he has status of creditor fastening lien under provisions of state law on property prior to recording contract. *Id.*

Contract for conditional sale providing for surrender to vendor in case of non-payment not preferential transfer to vendor under § 60 of the Bankruptcy Act. *Id.*

Rights of mortgagee of chattels not affected by proceeding to which he is not made party, between assignee in bankruptcy and vendor. *Id.*

Under Kansas law contract for conditional sale must be recorded to make it valid against third parties but not against assignee in bankruptcy. *Id.*

CONFISCATION:

Power arbitrarily exerted in imposing burden without an advantage of any kind amounts to confiscation and violates due process of law. *Myles Salt Co.* v. *Iberia Drainage District*. 478

CONFLICT OF LAWS:

Exclusive operation of Employers' Liability Act over its subject to exclusion of state Statute conclusively established by decisions of this court. *Chicago & Rock Island Ry.* v. *Devine*. 52

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Powers of: Congress, within its sphere, is paramount over States, and courts cannot, where will of Congress plainly appears, allow substantive rights to be impaired under name of procedure. *Atlantic Coast Line* v. *Burnette* 199
Congress, in its plenary control over Indians, had power to pass act of June 25, 1910, vesting in Secretary of Interior determination of heirs of allottee Indians dying within trust period. *Hallowell* v. *Commons*. 506
United States has power to prohibit false personation of its officers or false assumption of being an officer or holding a non-existent office, and legislation to that end does not interfere with or encroach on powers of States and § 32, Criminal Code, is not unconstitutional. *United States* v. *Barnow* 74
Congress has wisely reserved to itself the right to give relief where claim founded on torts of officer of United States. *Basso* v. *United States* 602
Army regulation has force only so far as in accord with Acts of Congress. *United States* v. *Ross* 530
Shirley Amendment to Food and Drug Act making misbranding include false and fraudulent statements as to curative power within power of Congress to regulate interstate commerce. *Seven Cases &c.* v. *United States* 510
Complete power over foreign commerce thoroughly settled by former decisions of this court. *Weber* v. *Freed* 325
Has power to prohibit importation of foreign articles, including pictorial illustrations of prizefights designed for public exhibitions. *Id.*
Power of, to prohibit importation of pictures for exhibition purposes not affected by fact that exhibitions are under state control. *Id.*

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Congress not to be denied exercise of constitutional authority over interstate commerce because necessary means have quality of police regulations. *Seven Cases &c.* v. *United States*. 510

Congress did not exceed power in passing Citizenship Act of 1907. *Mackenzie* v. *Hare*. 299

Congress has power to adopt basis of distribution between corporations carrying current indebtedness exceeding capital and those that do not, and provision in Corporation Tax Act limiting interest deductions to an amount of the indebtedness not exceeding capital is not an arbitrary classification denying due process of law under Fifth Amendment. *Anderson* v. *Forty-Two Broadway Co*. 69

Intent of: By passing act June 25, 1910, vesting power to determine legal heirs of allottee Indians in Secretary of Interior, Congress evinced change of public policy and its opinion as to better manner preserving rights of Indians. *Hallowell* v. *Commons* 506

In construing statute, the court will regard it as more rational to assume Congress dealing with present affairs than reopening finished transactions. *White* v. *United States* 608

Motive of, in exerting plenary power cannot be considered for purpose of refusing to give effect to power when exercised. *Weber* v. *Freed* 325

See **Riparian Rights.**

CONSTITUTIONAL LAW:

I. **Who may question constitutionality.**

County officers have no personal interest in litigation brought to apply public moneys and cannot defend a suit on ground that statute deprives him of his property without due process of law. *Stewart* v. *Kansas City* 14

Quære, whether grantee of Indian can avail of right, if any, to assert unconstitutionality of Act of Congress affecting rights of the Indian or whether such grantee can urge rights of tribe to which grantor belongs. *Williams* v. *Johnson* 414

II. **Congress, Powers and Duties of.** See **Congress.**

III. **States.**

State may restrict foreign corporation from doing business within State so long as interstate commerce not burdened. *Interstate Amusement Co.* v. *Albert*. 560

So far as Federal Constitution is concerned, State may defray entire expense of improving political subdivisions from

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state funds raised by general taxation, or it may apportion burden among municipalities or create tax districts either directly by legislature or by delegated authority, and propriety of delegation is a state matter not reviewable by this court. *O' Neill* v. *Leamer* 244

Section 32, Criminal Code, is not unconstitutional as an interference with or encroachment on powers of States. *United States* v. *Barnow* 74

Suit against officers of State about to proceed wrongfully to enforce unconstitutional state statute to complainant's injury not suit against State. *Truax* v. *Raich* 33

See **States.**

IV. **Contract Clause.**

Act of April 21, 1902, renewing restrictions on alienation of Choctaw allotments under act of July 1, 1902, does not impair obligation of contracts with Choctaws and Chickasaws. *Williams* v. *Johnson* 414

Legislative charter for drainage district not a contract that laws it was created to administer will not be changed. *Houck* v. *Little River District* 254

Taxes imposed by New Jersey upon lessee of Morris Canal Company not unconstitutional impairment of obligation of contract. *Morris Canal Co.* v. *Baird* 126

V. **Commerce Clause.**

Power of Congress over foreign commerce not affected by fact that article imported is to be used for purpose under state control. *Weber* v. *Freed* 325

Tennessee statute requiring foreign corporations to take specified steps before maintaining action is not unconstitutional as interference with interstate commerce. *Interstate Amusement Co.* v. *Albert* 560

See **Interstate Commerce.**

VI. **Fifth Amendment.**

Congress has power to adopt basis of distribution between corporations carrying current indebtedness exceeding capital and those that do not; and provision in Corporation Tax Act limiting interest deductions to an amount of the indebtedness not exceeding capital is not an arbitrary classification denying due process of law under Fifth Amendment. *Anderson* v. *Forty-Two Broadway Co.* 69

Act of April 21, 1902, renewing restrictions on alienation of Choctaw allotments under act of July 1, 1902, does not violate Fifth Amendment. *Williams* v. *Johnson* 414

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Shirley Amendment to Food and Drugs Act not unconstitutional under Fifth Amendment for uncertainty. *Seven Cases* v. *United States*. 510

VII. **Fourteenth Amendment.**

1. *Generally:* General provisions of Fourteenth Amendment embody fundamental conceptions of justice and do not prevent State from adopting public policy to meet special exigencies, such as establishment of drainage districts, nor do other provisions of Constitution. *O'Neill* v. *Leamer* 244

Fourteenth Amendment does not interfere with discretionary power of States to raise revenue by imposing taxes and assessments, and may impose them for improvements already made even though proceeds be used for other public purposes without violating equal protection and due process provisions. *Wagner* v. *Baltimore*. 207

Drainage District Statutes of Nebraska of 1905 and 1909 not denial of due process of law or denial of equal protection of law. *O'Neill* v. *Leamer* 244

Federal Constitution does not require all public acts to be done in town meeting. *Bi-Metallic Co.* v. *Colorado* 441

Order of Colorado Board of Equalization increasing valuation of all taxable property in Denver, valid under state law, not violative of Fourteenth Amendment because opportunity to be heard not given city or taxpayers. *Id.*

2. *Due process of law:* Appellate court may, without violating Fourteenth Amendment, correct interlocutory decision on a first appeal when case again comes up with same parties and whether it can be done in particular case is state matter and decision of highest court controlling here. *Moss* v. *Ramey* 538

Due process of law not denied by Oklahoma in disregard § 5039, Rev. Laws Oklahoma, making provisions of state statute applicable to trials by court without jury. *Porter* v. *Wilson* 170

Allowance by court, after testimony in, of amendment bringing case specifically under Employers' Liability Act, not denial of due process of law. *Seaboard Air Line Ry.* v. *Koennecke* 352

Taxation without jurisdiction denies due process of law and this rule applies to assertion of authority on the part of the State to exact license tax for acts done beyond its sphere of control. *Provident Savings Assn.* v. *Kentucky* 103

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Imposing taxes on premiums collected on life insurance policies of residents of Kentucky in pursuance of statute of that State, after company ceased doing business therein, unconstitutional denial of due process of law. *Id.*

No abuse of legislative power violating due process provision when no disproportion between assessment fixed and benefits conferred as in case of Maryland Statutes of 1906 and 1908 imposing special tax on property in Baltimore for street paving. *Wagner* v. *Baltimore* 207

Where classification of property to be improved and assessment are fixed by statute and specified sum fixed ratably by area, notice and hearing not necessary and due process clause not violated in absence of abuse of power. *Id.*

Due process not violated by State fixing basis of taxation for governmental outlay by statute directly or by appropriate legal proceeding. *Houck* v. *Little River District*. 254

So as to initial tax of twenty-five cents an acre for preliminary work under Missouri drainage statute. *Id.*

Assessments for public work may be laid either as to position, area, frontage, market value or estimated benefits without violating due process if power not abused. *Houck* v. *Little River District*. 254

Action of local administrative body arbitrarily including land not possibly benefited in drainage district solely for purpose of obtaining revenue therefrom amounts to deprivation of property without due process of law. *Myles Salt Co.* v. *Iberia Drainage District* 478

Legislature may constitute drainage districts and define boundaries or delegate authority to local administrative bodies and unless palpably arbitrary and plain abuse of power does not deny due process. *Id.*

Section 14, Labor Law 1909, New York, not unconstitutional as denying due process of law to any person because it provides that only citizens of United States be employed on public works and that preference be given to citizens of New York. *Heim* v. *McCall*. 175

Crane v. *New York*. 195

Statute of South Carolina making delivering carrier responsible for damages to foods on through bills of lading of intrastate shipments not voluntarily received does not deprive delivering carrier of property without due process of law. *Atlantic Coast Line* v. *Glenn* 388

Mere breach of contract on part of state officers does not

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amount to taking property without due process of law. *Manila Investment Co.* v. *Trammell*. 31

Power arbitrarily exerted in imposing burden without an advantage of any kind amounts to confiscation and violates due process of law. *Myles Salt Co.* v. *Iberia Drainage District*. 478

State has very broad powers over municipalities and may exercise them in many ways giving rise to inequalities between municipalities without violating due process provision. *Stewart* v. *Kansas City*. 14

Statute requiring counties to reimburse cities of first class but not of other classes for rebates allowed for prompt payment of taxes not unconstitutional under due process provision. *Id.*

Tennessee statute, requiring foreign corporations to take specified steps before maintaining action, not denial of due process of law. *Interstate Amusement Co.* v. *Albert* 560

Proper police regulation prohibiting nuisances not denial of due process law even though affecting use of property or subjecting owner to expense in compliance. *Northwestern Laundry* v. *Des Moines* 486

Des Moines Smoke Abatement Ordinance not invalid as to due process. *Id.*

State may prescribe duties of hotel keepers regarding fires and police statute expressing rules in general does not lack due process of law. *Miller* v. *Strahl*. 426

Statute of 1913 of Nebraska requiring keepers of hotels having over fifty rooms to keep night watchmen and awaken guests in case of fire not unconstitutional under due process clause. *Id.*

Under the law of Washington Territory the property escheated and passed under decree of probate court to county in which it was located and that decree, being in accord with valid law by a court of jurisdiction in a proceeding *in rem* with opportunity to be heard, was valid, could not be attacked collaterally and, there having been opportunity to be heard, it did not deny due process of law. *Christianson* v. *King County* 356

3. *Equal protection of the law:* Conditions justify distinctions and classifications. *Hadacheck* v. *Los Angeles* 394

Ordinance applying equally to all within terms not denial equal protection law if reasonable basis for classification

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even though other businesses might have been included. *Northwestern Laundry* v. *Des Moines*. 486

State police statute otherwise valid not denial equal protection because it includes some municipalities and omits others. *Id.*

Municipal ordinance cannot be attacked as denying equal protection of law when contention based on disputable considerations of classification and conditions not judicially determinable. *Hadacheck* v. *Los Angeles*. 394

State has very broad powers over municipalities and may exercise them in many ways giving rise to inequalities between municipalities without violating equal protection provision. *Stewart* v. *Kansas City* 14

Statute requiring counties to reimburse cities of first class but not of other classes for rebates allowed for prompt payment of taxes not unconstitutional under equal protection provision. *Id.*

In order to protect citizens of United States in employment against non-citizens States may not require employers to employ only specified percentage of aliens—such a statute—as in Arizona of December 14, 1914, denies aliens equal protection of laws even though allowing employment of some aliens. *Truax* v. *Raich* 33

Alien admitted to United States under Federal law has privilege of entering and abiding in any State and as inhabitant of State is entitled under Fourteenth Amendment to equal protection of law as " any person within the jurisdiction of the United States " and this includes right to earn living which was purpose of Amendment to secure. *Id.*

Section 14, Labor Law 1909 of New York does not deny equal protection of the law because it provides that only citizens of United States shall be employed on public works and preference be given to citizens of New York. *Heim* v. *McCall* 175

Crane v. *New York* 195

Police power may be exerted under proper conditions to declare under particular circumstances and in particular localities specified businesses, such as brick making, which are not nuisances *per se* to be nuisances in fact and law, as in Los Angeles Ordinance—without violating Fourteenth Amendment—but *quære* as to simply digging clay for brick-making elsewhere. *Hadacheck* v. *Los Angeles*. 394

Fact that ordinance does not prohibit brick making business

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in all sections of city, as in Los Angeles ordinance, does not make it unconstitutional as denying equal protection of law. *Id.*

State may, by direct legislation or through authorized municipalities, declare emission of dense smoke in populous neighborhoods nuisance and restrain, and unless arbitrary, such regulations not violation of Fourteenth Amendment. *Northwestern Laundry* v. *Des Moines* 486

Des Moines Smoke Abatement Ordinance not invalid under Iowa statute or Fourteenth Amendment as to equal protection. *Id.*

Nebraska statute of 1913, requiring keepers of hotels having over fifty rooms to keep night watchmen and awaken guests in case of fire, not unconstitutional under equal protection clause. *Miller* v. *Strahl.* 426

Police statute, otherwise valid, not unconstitutional as denying equal protection of law because only applicable to hotels having more than fifty rooms: classification has reasonable basis. *Id.*

On record in this case it does not appear that Washington Workmen's Compensation Act is unconstitutional as denying equal protection of the law. *Northern Pacific Ry.* v. *Meese* 614

VIII. **Fifteenth Amendment.**

Drainage District Statute of Nebraska of 1905 and of 1909 not unconstitutional under Fifteenth Amendment. *O'Neill* v. *Leamer* 244

IX. **Sixth Amendment.**

Shirley Amendment to Food and Drugs Act not unconstitutional under Sixth Amendment as preventing laying definite charge thereunder. *Seven Cases &c.* v. *United States* 510

X. **Eminent Domain.**

In Eminent Domain proceedings an award of one dollar does not deprive owner of property without due process of law if court recognized right to substantial damage if any but found no damages shown. *Provo Bench Canal Co.* v. *Tanner* 323

XI. **Privileges and Immunities.**

Under the Constitution every person born in the United States is a citizen thereof. *Mackenzie* v. *Hare.* 299

Section 14, Labor Law 1907, New York, not unconstitutional as denying privileges and immunities to foreigners because it provides that only citizens of United States shall

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be employed on public works and preference given to citizens of New York. *Heim* v. *McCall*. 175
Crane v. *New York*. 195

XII. **Retroactive Legislation.**

State statute fixing basis of taxation for governmental outlay not unconstitutional as retrospective as to drainage districts formed after its passage. *Houck* v. *Little River District* 254

XIII. **Supreme Law of the Land.**

Section 14, Labor Law 1909, New York, providing that only citizens of United States be employed on public works and preference given to citizens of New York not unconstitutional as violating treaty with Italy of 1871. *Heim* v. *McCall* . . 175
Crane v. *New York* 195

CONSTRUCTION:

General Principles: Remedial statute should be construed to embrace remedies it was intended to afford, but words should not be so extended as to destroy express limitations and cause it to accomplish results not intended. *Northern Pacific Railway* v. *Concannon* 382

Provisions exempting from taxation strictly construed under rule that such exemptions cannot be transferred. *Morris Canal Co.* v. *Baird* 126

Whether statute repealing former statute but reënacting identical matter affects validity of ordinances established under earlier statute a state matter. *Northwestern Laundry* v. *Des Moines* 486

Where penalty provisions separable court will not determine validity in suit to enjoin order in advance of attempt to enforce. *Phœnix Ry.* v. *Geary* 277

Court not precluded from construing a document because its construction is affected by facts not open to dispute. *Steinfeld* v. *Zeckendorf* 26

Of Federal Statutes: In construing a statute, the court will regard it as more rational to assume Congress dealing with present affairs than reopening finished transactions. *White* v. *United States*. 608

Rule that repeal of statute does not extinguish liability incurred thereunder not applicable where Congress simply changes tribunal and does not except pending litigation. *Hallowell* v. *Commons* 506

Criminal statute, such as § 240, Crim. Code, applicable alike to foreign and interstate commerce, should not be construed

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so as to render it futile as to the former. *United States* v. *Freeman* 117
Provision in Citizenship Act of March 2, 1907, is explicit and circumstantial that any American woman marrying foreigner takes nationality of husband and it would transcend judicial power to insert limitations or conditions upon disputable considerations. *Mackenzie* v. *Hare* 299
Phrase in list of disabilities in § 1 of alien Immigration Act to be read as generically similar to others before and after. *Gegiow* v. *Uhl*. 3
The Post Road Act of 1866 must be construed and applied in light of existing conditions and with a view to effectuate the purpose for which it was enacted. *Essex* v. *New England Telephone Co.*. 313
Right of way granted by act of 1875 is neither mere easement nor fee simple but limited fee made under implied condition of reverter in case of non-user. *Rio Grande Ry.* v. *Stringham* 44
Judgment granting railroad company right of way under Right of Way Act of 1875 uses terms with same meaning as used in Act. *Id.*
Even if statute declares transaction void for want of certain enumerated forms, party for whose protection requirement is made may waive it, and void then means voidable; and so as to Rev. Stat., § 3744, requiring officers of United States to reduce contracts to writing. *United States* v. *N. Y. & Porto Rico S. S. Co.*. 88
While not conclusive, construction of act of Congress relative to Indian allotments in course of actual administration by Secretary of Interior is entitled to great weight and should not be overruled without cogent reason. *La Roque* v. *United States* 62
Of State Constitutions and Statutes: Federal courts must accept construction of state statute deliberately adopted by highest court of State. *Northern Pacific Ry.* v. *Meese*. 614
This court accepts decision of highest state court that action of trial court does not violate state constitution. *Porter* v. *Wilson* 170
Uniform acts adopted in various States to be construed so as effectuate object of uniformity expressed in act and not construed as offshoot of local law. *Commercial Bank* v. *Canal Bank* 520
Uniform acts adopted in various States relating to commer-

CONSTRUCTION—*Continued.* PAGE

cial affairs so as to unify as far as possible under dual system of government commercial law and give effect to mercantile view of documents of title, and this principle should be given effect in construing the acts. *Id.*

South Carolina statute making delivering carrier responsible for damages, having been construed by highest court of State as not requiring carrier to accept on through bills of lading from other carriers, constitutionality of a statute requiring acceptance and making delivering carrier responsible for damages on other lines not determined. *Atlantic Coast Line* v. *Glenn* 388

Holding by highest court of State that State Workmen's Compensation Act, established comprehensive plan for relief of workmen included therein regardless of fault, is exclusive notwithstanding it did not expressly repeal statute giving right of action for death, is binding on Federal courts; and so held as to Washington statute. *Northern Pacific Ry.* v. *Meese* 614

Of Contracts: See **Contracts.**

CONTRACTS:

Contract to produce result does not bring means to provide it into the contract. *United States* v. *Normile*. 344

Claim of contractor for extra compensation disallowed. *Id.*

Effect of outbreak of war on price of labor not a basis for extra compensation. *Id.*

Construction of contract with Government for construction of dam. *Id.*

Object of Rev. Stat., § 3744, providing that Secretaries of War, Navy and Interior must sign contracts reduced to writing, is to furnish protection to United States and not for private individual and other party bound if he executed contract even if government only executed. *United States* v. *N. Y. & Porto Rico S. S. Co.* 88

Even if statute declares transaction void for want of certain enumerated forms, party for whose protection requirement is made may waive it and void then means voidable; and so as to Rev. Stat., § 3744, requiring officers of United States to reduce contracts to writing. *Id.*

Court not precluded from construing a document because its construction is affected by facts not open to dispute. *Steinfeld* v. *Zeckendorf* 26

CONTRACTS—*Continued.* PAGE
Complete on execution and delivery without notice of acceptance. *U. S. Fidelity Co.* v. *Riefler*. 17
Effect of express contract made for purpose of interstate commerce must be determined in light of Act to Regulate Commerce. *Cleveland & St. Louis Ry.* v. *Dettlebach*. 588
Interstate carrier is not relieved from making adequate money compensation for unpaid balance of contract for services fully performed before the passage of act. *N. Y. Central R. R.* v. *Gray*. 583
Where allegations of bill show mere breach of contract on part of state officers there is no real and substantial controversy as to effect of Federal Constitution and District Court does not have jurisdiction on that ground. *Manila Investment Co.* v. *Trammell*. 31
See **Constitutional Law, IV.**

CONTRIBUTORY NEGLIGENCE. See **Employers' Liability Act; Negligence; Safety Appliance Act.**

CORPORATIONS:
Charters: Express provision in legislative charter limiting exemption from taxation to such property as is possessed and enjoyed by corporation for its own actual and necessary use must be strictly construed under rule that transfers do not carry such exemptions. *Morris Canal Co.* v. *Baird*. 126
Taxes imposed by New Jersey upon lessees of Morris Canal Company not unconstitutional impairing of obligation of contract, as exemption in charter applied only while property was in actual occupancy and use of original corporation. *Id.*
After property exempted under charter during actual possession and use of exempted company is leased the exemption no longer applies; so held even though subject to State's right of purchase and of reversion to State. *Id.*
The fact that State has reserved power to buy property of corporation exempted from taxation on property in actual use and that property eventually reverts to State, does not affect construction, that exemption does not pass to lessee. *Id.*
A transfer even under legislative authority of all property and franchises of one corporation to another does not vest latter with freedom from exercise of governmental power which former enjoyed under its charter. *Id.*
Regulation: State may restrict foreign corporation from

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doing business within State so long as interstate commerce not burdened. *Interstate Amusement Co.* v. *Albert*. 560
Corporation of another State carrying on business in Tennessee other than interstate commerce not deprived of property without due process, nor is interstate commerce interfered with, by Tennessee statute requiring foreign corporation to file charter and take other specified steps before maintaining action in State. *Id.*
Whether the acts done within a State by a foreign corporation amount to doing business so as to subject the corporation to tax laws of the State is a Federal question and this court can review the decision of the state court in that respect. *Provident Savings Ass'n* v. *Kentucky*. 103
See **Corporation Tax Act; Practice and Procedure; Taxes and Taxation.**

CORPORATION TAX ACT:
Act of 1909 was not income tax but excise on conduct of business in corporate capacity, measured by reference to the income as prescribed by the act. *Anderson* v. *The Forty-Two Broadway Co*. 69
Operations of corporations having indebtedness exceeding capital may be conducted more for benefit of creditors than stockholders, and tax contributions for expense of government should be admeasured with this fact in view; and so *held* where capital was $600 and bonded debt $4,750,000. *Id.*
Where current indebtedness of corporation exceeds paid up capital stock, deductions for interest in determining net income is limited to amount of such capital. *Id.*
Congress has power to adopt basis of distribution between corporations carrying current indebtedness exceeding capital and those that do not, and provision in Corporation Tax Act limiting interest deductions to an amount of the indebtedness not exceeding capital is not an arbitrary classification denying due process of law under Fifth Amendment. *Id.*

COUNTY OFFICERS. See **Public Officers.**

COURT OF CLAIMS:
Court of Claims was established to consider right of claimants to recover against the United States and its findings of fact on matters within its jurisdiction should be conclusive unless Congress otherwise provides. *Cramp* v. *United States* 221

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Court of Claims has jurisdiction to reform contract for purpose of determining whether the claim if established is a valid one against the United States. *Id.*

Finding of Court of Claims that there was no mutual mistake in executing releases and that the instrument expressed intention of United States although claimant had mistaken its legal rights and that such misapprehension did make the release a subject for reformation, is binding on this court. *Id.*

COURTS:

Courts cannot, where will of Congress plainly appears, allow substantive rights to be impaired under name of procedure. *Atlantic Coast Line* v. *Burnette* 199

Courts are not concerned with public policy of State in determining how public work shall be done for it and its municipalities. *Heim* v. *McCall* 175

Crane v. *New York* 195

Courts not precluded from construing a document because its construction is affected by facts not open to dispute. *Steinfeld* v. *Zeckendorf* 26

Allowance, after testimony, of amendment bringing case specifically under Employers' Liability Act, not beyond discretionary power of court or denial due process law. *Seaboard Air Line Ry.* v. *Koennecke* 352

Provision in Citizenship Act of March 2, 1907, is explicit and circumstantial that any American woman marrying foreigner takes nationality of husband and it would transcend judicial power to insert limitations or conditions upon disputable considerations. *Mackenzie* v. *Hare* 299

See **Jurisdiction; Practice and Procedure; Removal of Causes.**

CREEK INDIANS. See **Indians.**

CRIMINAL CODE:

Section 32 is not unconstitutional as an interference with or encroachment on powers of States. *United States* v. *Barnow* 74

Section 240 construed. *United States* v. *Freeman* 117

CRIMINAL LAW:

Criminal statute applicable alike to shipments in interstate and foreign commerce will not be so construed as to render it futile as to the latter; but, if its words will permit, should

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be construed so as to reach both classes and accomplish object of its enactment. *United States* v. *Freeman* 117

Words " to ship " in § 240, Criminal Code, is not used in sense of " deliver for shipment " making offense completed on delivering, but refers to continuing act; and district courts of State into which goods are shipped have jurisdiction. *Id.*

Prohibition in § 240, Criminal Code, against shipping in interstate commerce packages of intoxicating liquor not marked as prescribed is continuing act, performance of which is begun when package is delivered to carrier and completed when it reaches destination. *Id.*

Offense of falsely personating officer or employé of United States under Criminal Code, § 32, is complete on the personation and demanding and obtaining money, even if person defrauded be not financially injured. *United States* v. *Barnow* 74

Prohibition in § 32, Criminal Code, against false personation of officer or employé of United States not confined to false personation of particular person but covers any false assumption or pretense of office or employment if done with intent to defraud and accompanied by specified acts. *Id.*

United States has power to prohibit false personation of its officers or false assumption of being an officer or holding a non-existent office, and legislation to that end does not interfere with or encroach on powers of States and § 32, Criminal Code, is not unconstitutional. *Id.*

Although statute may only render employer liable to prosecution if it operates directly upon employment of employé and compel his discharge the latter has no adequate relief if the statute is unconstitutional. *Truax* v. *Raich* 33

While generally equity has no jurisdiction over criminal laws, it may, when necessary to safeguard property rights, restrain criminal prosecutions under unconstitutional statutes. *Id.*

CURTIS ACT. See **Indians.**

CUSTOMS:

Procedure for review by this court of judgments of Circuit Courts of Appeals in customs cases is by appeal and not by writ of error. *Gsell* v. *Insular Customs Collector*..... 93

Writ of error is inapplicable to review customs cases involving facts to determine classification of merchandise, and judgments of Supreme Court of Philippine Islands in cus-

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toms cases must be reviewed by appeal and not writ of error. *Id.*

See **Philippine Islands.**

DAMAGES. See **Eminent Domain.**

DEBTOR AND CREDITOR. See **Bankruptcy.**

DECREES. See **Judgments and Decrees.**

DELEGATION OF POWER:
Legislature may constitute drainage districts and define boundaries or delegate authority to local administrative bodies and unless palpably arbitrary and plain abuse power does deny due process. *Myles Salt Co.* v. *Iberia Drainage District* 478
Propriety of delegating authority by legislature to a court in the matter of formation of drainage districts is local question. *O'Neill* v. *Leamer* 244

See **Territories.**

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DEPOSITIONS:
To prove claims against bankrupt's estate. General Order No. 21 amended 623

DES MOINES:
Smoke abatement ordinance not invalid under Iowa statutes or Fourteenth Amendment to Constitution. *Northwestern Laundry* v. *Des Moines* 486

DISCRETION OF COURTS. See **Practice and Procedure.**

DISTRICT COURT. See **Jurisdiction, IV.**

DIVERSITY OF CITIZENSHIP. See **Jurisdiction; Removal of Causes.**

DIVORCE:
In appeals from territorial courts this court follows and sustains application of local law to facts made by courts below unless constrained to contrary by sense of clear error and so *held* in divorce case from Philippine Islands. *De Villanueva* v. *Villanueva* 293
Jurisdiction of this court; amount in controversy. *Id.*

DRAINAGE DISTRICTS: PAGE

Legislature may constitute drainage districts and define boundaries or delegate authority to local administrative bodies, and unless palpably arbitrary and plain abuse of power, does not deny due process. *Myles Salt Co.* v. *Iberia Drainage District*. 478

Neither general provisions of the Fourteenth Amendment nor other provisions of the Constitution prevent States from adopting public policy and establishing drainage districts. *O'Neill* v. *Leamer*. 244

Propriety of legislature delegating authority to courts in regard to formation of drainage districts is matter of local law. *Id.*

Judgment of state court entitled to highest respect in regard to local matters such as necessity for drainage districts. *Id.*

Statutes of Nebraska of 1905 and 1909 establishing drainage districts and delegating authority to courts and appropriating property by eminent domain, not unconstitutional under Fourteenth or Fifteenth Amendments. *Id.*

If plaintiff in error unsuccessfully contends in state court that property appropriated for drainage district was essentially for private purpose, without due process of law, this court has jurisdiction under § 237, Jud. Code. *Id.*

Action of local administrative body arbitrarily including land not possibly benefited in drainage district solely for purpose obtaining revenue therefrom amounts to deprivation of property without due process of law. *Myles Salt Co.* v. *Iberia Drainage District*. 478

See **Taxes and Taxation.**

DUE PROCESS OF LAW. See **Constitutional Law, VII.**

EMINENT DOMAIN:

May be exercised to establish drainage districts. *Houck* v. *Little River District*. 254

On condemnation proceedings, adaptability to purpose for which land can be most profitably used to be considered only so far as public would consider it had land been offered for sale in absence of exercise of eminent domain. Owner is entitled to value of property taken at time but not what tribunal at a later date thinks a purchaser would have been wise to give. *New York* v. *Sage*. 57

Owner is entitled to rise in value before the taking not caused by the expectation of that event. *Id.*

EMINENT DOMAIN—*Continued.* PAGE

Owner is not entitled to add value resulting from union of his lot with other lots if union was solely the result of the exercise of eminent domain. *Id.*

In eminent domain proceedings an award of one dollar does not deprive owner of property without due process of law if court recognized right to substantial damage, if any, but found no damages shown. *Provo Bench Canal Co.* v. *Tanner* 323

In condemnation proceedings in New York although maps made of parcels and notices posted, the proceeding is not commenced until petition is filed and a non-resident purchasing before that can remove case into Federal court. *New York* v. *Sage*. 57

EMPLOYERS' LIABILITY ACT:

Scope and operation: Where injury was sustained while employé was engaged in interstate commerce, responsibility of carrier governed by Employers' Liability Act, which is exclusive and supersedes state law, and it is error to submit case to jury as though state law controlled. *C., R. I. & P. Ry.* v. *Wright* 548

Employers' Liability Act as amended in 1910 expressly provides state court has jurisdiction of actions thereunder, and no such case removable merely for diverse citizenship. *Southern Ry.* v. *Lloyd*. 496

Car from another State merely delayed in State of destination and finally reaching destination not thereby withdrawn from interstate commerce and operation of act. *Great Northern Ry.* v. *Otos* 349

An employé distributing cars from interstate train and clearing track for another interstate train is engaged in interstate commerce. *Seaboard Air Line Ry.* v. *Koennecke*. 352

To recover under act carrier must be engaged in interstate commerce at time of injury and person injured then employed therein. *Shanks* v. *Delaware, L. & W. R. R.*..... 556

Exclusive operation of Employers' Liability Act over its subject to exclusion of state statutes conclusively established by decisions of this court. *Chicago & Rock Island Ry.* v. *Devine* 52

Right of action under: Under Employers' Liability Act action lies for injury or death resulting in whole or in part from negligence of carrier. *Kanawha Ry.* v. *Kerse* 576

EMPLOYERS' LIABILITY ACT—*Continued.* PAGE

Employé of an interstate carrier which maintains machine shop to repair locomotives used in interstate commerce who is injured while moving machinery to repair such locomotives is not engaged in interstate commerce at the time even though at other times he may be so engaged, and he cannot maintain action under Employers' Liability Act. *Shanks* v. *Del., Lack. & West. R. R.* 556

Unless contentions are wholly frivolous, court has jurisdiction under § 237, Jud. Code, to review judgment of state court in action under Employers' Liability Act; but in this case contentions are frivolous under Rule 6, § 5. *Chicago & Rock Island Ry.* v. *Devine* 52

Negligence of master: A railroad does not guarantee or warrant absolute safety to employés under all circumstances but is bound to exercise care which exigency reasonably demands in furnishing proper roadbed and facilities. *Reese* v. *Phila. & Reading Ry.* 463

Failure to exercise care constitutes negligence, but mere existence of number of tracks near to each other in a terminal where public streets are utilized does not support inference of negligence. *Id.*

To leave switch obstructed in such manner as to endanger lives of brakemen on cars is clearly negligence, and existence of obstruction for considerable time is presumptive evidence of notice. *Kanawha Ry.* v. *Kerse* 576

Contributory negligence and assumption of risk: Distinction between assumption of risk and contributory negligence formerly of little consequence when both led to same result are more important under the Employers' Liability Act, as former is complete bar and latter simply mitigates damages. *Seaboard Air Line* v. *Horton* 595

Whether continuing to use defective apparatus instead of another which might be unsafe amounts to contributory negligence is question for jury. *Id.*

Authorities differ, and this court has not yet decided whether continuing of employment on promise of reparation in presence of imminent danger that no ordinarily prudent man would confront amounts to assumption of risk or contributory negligence. *Id.*

Reasonable reliance by employé on promise of reparation and continuance in employment not contributory negligence as matter of law and question in this case properly submitted to jury. *Id.*

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Trial court did not err in refusing to hold as matter of law that no ordinarily prudent man would rely on promise to repair glass of water gauge on engine. *Id.*

Where employer promises reparation of defect known to employé, and latter relies on promise and continues employment, he does not, during reasonable time, assume risk unless no ordinarily prudent man would under such circumstances rely on such promise. *Id.*

Employé knowing of defect arising from employers' negligence and appreciating risk and continuing employment without objection or promise of reparation assumes risk. *Id.*

Knowledge by experienced brakemen of obstruction over track necessarily imports risk and, in absence of objection on his part or promise of reparation by employer, assumption of risk. *Kanawha Ry.* v. *Kerse* 576

Although trial court erred in refusing request as to employé's assumption of risk based on hypothesis of his knowledge of obstruction causing injury, if jury specifically negatived hypothesis error not ground for reversal. *Id.*

Employer not prejudiced by instructions given under state law in regard contributory negligence more favorable than though given under Federal law and not therefore denied Federal right. *Chi., Rock Isld. & Pac. Ry.* v. *Wright* 548

Releases: Act has no application to releases given to those who are not employers. *Chicago & Alton R. R.* v. *Wagner* 452

Where one of two joint feasors, who is the employer, obtains a release from the injured employé which is invalid under § 5 of the Employers' Liability Act, the court does not deny the other joint tort feasor a Federal right by holding that the release is not valid as to it beyond setting off the amount paid. *Id.*

Pleading and practice: Allowance by court, after testimony, of amendment bringing case specifically under Employers' Liability Act not beyond discretionary power of court or denial of due process of law. *Seaboard Air Line Ry.* v. *Koennecke* 352

The possibility that local train might drop all interstate cars and take only local cars is too remote to withdraw a case under the Employers' Liability Act from the jury. *Id.*

On record in this case court should not have withdrawn case

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from jury on question of negligence or assumption of risk. *Id.*
Error not prejudicial affords no ground for reversal and if employer not prejudiced by difference between Federal Employers' Liability Act and state acts as in Nebraska judgment not reversed. *Chi., Rock Isld. & Pac. Ry.* v. *Wright* 548
Trial court entered non-suit where there was no evidence that railroad failed to furnish safe place for employé who was killed while leaning out from his engine. *Reese* v. *Phila. & Reading Ry.* 463
Although trial court erred in refusing to charge that knowledge by employé of defects amounted to assumption of risk, if request was based on hypothesis of knowledge and jury found specifically employé did not have such knowledge there is no ground for reversal. *Kanawha Ry.* v. *Kerse* 576
Congress, within its sphere, is paramount authority over States, and courts cannot, where will of Congress plainly appears, allow substantive rights to be impaired under name of procedure. *Atlantic Coast Line* v. *Burnette* 199
Even though not pleaded, if defendant insists and answer admits that an action based on Employers' Liability Act has been brought too late, action cannot be maintained. *Id.*
In action based on act, trial court properly submitted to jury question of whether injured employé was or was not engaged in interstate commerce and refused to charge he was not so engaged. *Pennsylvania Co.* v. *Donat* 50
When questions of negligence and the like brought here simply because arising under the act and involving no new principles, this court confines itself to summary statement of results. *Seaboard Air Line Ry.* v. *Koennecke* 352
Writ of error to review judgment in this case founded on Employers' Liability Act frivolous and affirmed under Rule 6, § 5. *Pennsylvania Co.* v. *Donat* 50
Evidence: Burden of proof of assumption of risk by employé is on employer and unless evidence shows such assumption court does not err in submitting question to jury. *Kanawha Ry.* v. *Kerse* 576
Evidence as to rules in regard to speed of engines and other facts justified submission of question of negligence to jury. *Chi., Rock Isld. & Pac. Ry.* v. *Wright* 548
Where there was testimony that plaintiff was engaged in interstate commerce, and court charged that burden of proof

EMPLOYERS' LIABILITY ACT—*Continued.* PAGE
was on plaintiff to show it, question properly left to jury. *Southern Railway* v. *Lloyd* 496

EMPLOYMENT. See **Labor; Master and Servant.**

EQUAL PROTECTION OF THE LAW. See **Constitutional Law, VII.**

EQUITY:
General powers of Federal courts sitting in equity can only be exerted in cases otherwise within their jurisdiction. *Briggs* v. *United Shoe Co.* 48
Only the United States can maintain bill in equity for annulment of patent on ground of procurement by fraud. *Id.*
Suit for royalties reserved on sale of patent rights is not suit arising under patent law and District Court does not have jurisdiction in equity under act of February 9, 1883. *Id.*
While generally equity has no jurisdiction over criminal laws it may, when necessary to safeguard property rights, restrain criminal prosecutions under unconstitutional statutes. *Truax* v. *Raich* 33
Alien is entitled to right to earn livelihood and continue employment unmolested, and is entitled to protection in equity in absence of adequate remedy at law. *Id.*
Although statute may only render employer liable to prosecution if it operates directly upon employment of employé and compel his discharge, the latter has no adequate remedy at law and is entitled to equitable relief if the statute is unconstitutional. *Id.*
Where valuation method is so unwarranted by law as to amount either to fraud or gross mistake equivalent to fraud on constitutional rights of person taxed, equity should enjoin enforcement of the tax. *Johnson* v. *Wells Fargo* 234
If collection of tax of previous year was enjoined on same ground as attempt to enforce similar tax for succeeding year it is continuing violation of constitutional rights affording ground for equitable relief. *Id.*
Where continual violations of constitutional rights are made on same ground which courts have decided, equity should give relief by enjoining enforcement of unconstitutional tax. *Id.*
Allowance of equitable relief question of state policy and if state court treats merits of suit in which equitable relief is sought as legitimately before it this court will not attempt

EQUITY—*Continued.* PAGE
to decide whether state court could have thrown case out. *Bi-Metallic Co.* v. *Colorado* 441
Where owner of goods clothes another with such indicia of ownership that *bona fide* purchaser is enabled to take title, rule that earlier of equal equities better not applicable as later equities are based on action of earlier holder who is estopped thereby. *Commercial Bank* v. *Canal Bank* 520
See **Court of Claims; Injunction; Jurisdiction, IV.**

ESCHEATS:
Escheat for failure of heirs has always been subject of legislation in American commonwealths. *Christianson* v. *King County* 356
Provisions for escheat for failure of heirs have proper relation to matters embraced in law establishing probate courts as in statutes of Washington Territory which are not invalid because title of probate act not broad enough to cover escheats. *Id.*
Where territory has authority to establish rule as to escheat it has power to establish tribunals with jurisdiction and procedure and if other proceedings are established, as in Washington, by probate court decree, office found is not necessary. *Id.*
As an organized political division of United States, a Territory only possesses such powers as Congress confers upon it and a legislature cannot provide for escheat unless authorized, but authority to legislate on all rightful subjects of legislation includes escheats, as in case of Organic Act of Washington Territory. *Id.*
Prohibition in Organic Act of Washington of 1853 against interference with primary disposal of soil had reference to public lands of United States and did not relate to escheat of land for failure of heirs. *Id.*
Where court of competent jurisdiction in a proceeding *in rem* under valid statute declares property has escheated as there are no heirs, the decree binds all the world including heirs who failed to appear. *Id.*
Decree of probate court of King County, Washington, sufficient to sustain escheat as being within its jurisdiction. *Id.*

ESTOPPEL:
Municipality may waive rights and by acquiescence for long period of years in maintenance of poles and expenditures by

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telegraph company be estopped or regarded as having waived rights. *Essex* v. *New England Telephone Co.*..... 313
See **Equity; Warehousemen.**

EVIDENCE:
While judge may order evidence sealed he must, when a litigant shows that it is material in his case he is entitled to have it as evidence and the judge must order it produced; and mandamus from this court is proper remedy if a Federal judge refuses so to do. *Ex parte Uppercu*..... 435
Right of a litigant to have material evidence from existing object does not depend upon his having an interest therein or upon right of public to examine that object. *Id.*
Trial court entered non-suit where there was no evidence that railroad failed to furnish safe place for employé who was killed while leaning out from his engine. *Reese* v. *Phila. & Reading Ry.*..... 463
Burden of proof of assumption of risk by employé is on employer and, unless sustained, court does not err in submitting question to jury. *Kanawha Ry.* v. *Kerse*..... 576
To operate switch so obstructed as to endanger lives of brakemen is evidence of negligence and continued existence of obstruction presumption of notice to carrier. *Id.*
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EXPATRIATION:
Citizenship is of tangible worth but possessor thereof may voluntarily renounce it even though Congress may not compel renunciation; and marriage of American woman with foreigner amounts to voluntary expatriation and is within control of Congress, which did not exceed power in passing Citizenship Act of 1907. *Mackenzie* v. *Hare*..... 299
Whatever may have been law of England and original law of this country as to perpetual allegiance to land of birth, Con-

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gress by act of 1868, now Rev. Stat., § 1999, explicitly declared right of expatriation to be the law. *Id.*
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FEDERAL QUESTION:
Whether the acts done within a State by a foreign corporation amount to doing business so as to subject the corporation to tax laws of the State, is a Federal question and this court can review the decision of the state court in that respect. *Provident Savings Ass'n* v. *Kentucky*. 103
Whether responsibility of interstate carrier as warehouseman of goods from another State not called for in 48 hours after arrival is measured by valuation in bill of lading is Federal question. *Cleveland & St. Louis Ry.* v. *Dettlebach*. 588
While action of police jury in Louisiana establishing drainage district may not be attacked except on special averment fraud, one not charging fraud or attacking statute itself may attack law as administered for including property if not benefited by drainage system, thus raising a Federal question under § 237, Jud. Code. *Myles Salt Co.* v. *Iberia Drainage District*. 478
Conclusion of state court, supported by record, that no issue was made in, or submitted to, trial court as to assumption of risk and therefore, under state practice, not presented on appeal, does not deny any Federal right. *Southern Ry.* v. *Lloyd*. 496
If plaintiff in error unsuccessfully contended in state court that property appropriated for drainage district was essen-

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tially for private purpose without due process of law this court has jurisdiction under § 237, Jud. Code. *O'Neill* v. *Leamer* ... 244
Where allegations of bill show mere breach of contract on part of state officers there is no real and substantial controversy as to Constitution or effect of Federal Constitution and District Court does not have jurisdiction on that ground. *Manila Investment Co.* v. *Trammell* ... 31
Whether statute repealing former statute but reënacting identical matter affects validity of ordinances established under earlier statute is a state matter. *Northwestern Laundry* v. *Des Moines* ... 486
Propriety of delegation of authority by legislature to court in regard to formation of drainage districts is a matter of state law. *O'Neill* v. *Leamer* ... 244

FIFTEENTH AMENDMENT. See **Constitutional Law, VIII.**

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Subsequent legislation excluded seamen engaged in trade between Hawaiian Islands from the exemption from attachment of wages provided by § 4536. *Inter-Island Navigation Co.* v. *Byrne*. 459
Writ of error proper course to review judgment of Supreme Court of Hawaii in action to quiet title involving over $5,000. *Hapai* v. *Brown* 502
Judgment of Supreme Court of Hawaiian Islands in suit for partition *res judicata* in subsequent suit between same parties and privies. *Id.*
This court will not presume that highest court of Hawaiian Islands did not know its own powers or decide in accordance with law of Kingdom. *Id.*

HEIRS. See **Escheats.**

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HOMESTEAD:
Homestead rights in land are creation of the States in which lands are situated; and validity and operation of mortgages thereon are determined by laws of State as construed by courts of the State. *Moody* v. *Century Savings Bank* 374
Under laws of Iowa a homestead may only be sold under valid mortgage for deficiency remaining after exhausting other property covered by same mortgage. *Id.*
Right to insist on exemption of homestead under Iowa statute except from sale for deficiency is not personal to owners of homestead but may be asserted by anyone holding under the mortgage, nor can they prejudice a transfer of their interest in this right. *Id.*

HOSPITAL CORPS ACT: PAGE

Under Hospital Corps Act members of corps required to perform for stated pay all duties properly incident to conduct of hospital including maintaining telegraph and telephone office. *United States* v. *Ross* 530

Whether maintenance of telephone and telegraph stations in military hospital necessary is for judgment of department, and in absence of clear abuse courts will not overrule judgment. *Id.*

HOTELS:

A person engaging in business subject to regulation by the State, such as hotel keeping, undertakes to fulfil obligations imposed on such business. *Miller* v. *Strahl.* 426

State may prescribe duties of hotel keepers regarding fires; and police statute expressing rules in general does not lack due process of law. *Id.*

Police statute, otherwise valid, not unconstitutional as denying equal protection of law because only applicable to hotels having more than fifty rooms, classification has reasonable basis. *Id.*

Statute of 1913 of Nebraska requiring keepers of hotels having over fifty rooms to keep night watchmen and awaken guests in case of fire not unconstitutional under due process or equal protection clauses. *Id.*

HUSBAND AND WIFE:

Identity of husband and wife is ancient principle of our jurisprudence and is still retained notwithstanding much relaxation thereof and has purpose if not necessity in domestic policy and greater purpose and necessity in international policy. *Mackenzie* v. *Hare.* 299

IDAHO:

Fast dry land which is neither part of bed of river nor land under water was part of the public domain within Idaho Territory and as such did not pass to State on admission to Union but remained public land. *Moss* v. *Ramey.* 538

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Act of July 31, 1912, prohibiting importation of pictorial

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illustrations of prize fights for public exhibition, sustained. *Weber* v. *Freed*. 325

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INCOME TAX. See **Corporation Tax Act.**

INDEMNITY BOND. See **Bonds.**

INDIANS:

Indians are wards of nation. Congress has plenary power over tribal relations and property and restrictions as to alienation of allotments, and act of April 21, 1902, removing restrictions on alienation of Choctaw allotments under act of July 1, 1902, does not violate Fifth Amendment or impair obligation of contracts with Choctaws and Chickasaws. *Williams* v. *Johnson*. 414

Quære, whether grantee of Indian can avail of right, if any, to assert unconstitutionality of act of Congress affecting rights of the Indians or whether such grantee can urge rights of tribe to which grantor belongs. *Id.*

Congress in its plenary control of Indians has power to pass act of June 25, 1910, vesting in Secretary of Interior determination of heirs of allottee Indians dying within trust period. *Hallowell* v. *Commons* 506

By passing act June 25, 1910, vesting power to determine legal heirs allottee Indians in Secretary Interior, Congress evinced change of public policy and its opinion as to better manner of preserving rights of Indians. *Id.*

Since passage of act June 25, 1910, District Court without jurisdiction of action to determine heirs of allottee Indian dying during trust period. *Id.*

Congress by act of June 25, 1910, restored to Secretary of Interior power taken from him by Acts 1901 and 1904 to determine legal heirs of allottee Indians dying during restriction period. *Id.*

Under act June 25, 1910, Secretary of Interior has power to ascertain legal heirs Omaha Indian dying during restriction period of allotment under act August 7, 1882, and decision final. *Id.*

Section 5, act of February 28, 1891, amending General Allotment Act of February 8, 1887, had no effect on right of inheritance as to Creek Indians in Indian Territory, as that territory was excepted. *Porter* v. *Wilson* 170

While not conclusive, construction of act of Congress rela-

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tive to Indian allotments in course of actual administration by Secretary of Interior is entitled to great weight and should not be overruled without cogent reason. *La Roque* v. *United States*. 62

Nelson Act for allotments to Chippewas on White Earth Indian Reservation contemplated only selections on part of living Indians. There was no displacement of usual rule that incidents of tribal membership and membership are terminated by death. *Id.*

The fact that the Nelson Act provided for a census of the Indians is not conclusive that the allotments were to be made to all Indians included in the census. *Id.*

The act of April 23, 1904, limiting and defining authority of Secretary of Interior in regard to cancelling patents for trust allotments does not restrict or define power or jurisdiction of court in that respect. *Id.*

Act of March 3, 1891, establishing six year limitation for actions by United States to annul patents is part of public land laws and does not refer to suits to annul patents for Indian allotments. *Id.*

Act of May 2, 1890, § 380, legalizing Indian marriages related only to those theretofore, and not to those thereafter contracted. *Porter* v. *Wilson*. 170

INDIAN TERRITORY. See **Indians.**

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INJUNCTION:

Temporary injunction should not be granted under **Jud.** Code, § 266, against enforcement of order of state railroad commission unless bill and affidavits clearly show arbitrary or confiscatory action and overcome presumption of reasonableness. *Phoenix Ry.* v. *Geary*. 277

Proper to grant where there are conflicting opinions of different Circuit Courts of Appeal in patent cases on question of infringement and identity of patents. *Fireball Tank Co.* v. *Commercial Co*. 156

Rights of telegraph company under Post Road Act which would be violated by threatened arbitrary action of municipality, may be protected by equity, but injunction must not prevent municipality from subjecting location and operation of lines to reasonable regulations. *Essex* v. *New England Telephone Co*. 313

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Duty to resort to adequate remedies provided by state law cannot be escaped by assuming even if resorted to wrong would not have been righted. *Mellon Co.* v. *McCafferty* . . . 134
Failure to resort to existing administrative remedies under State is a non-Federal ground sufficient to sustain judgment of state court refusing injunction. *Id.*
See **Jurisdiction.**

INSTRUCTION TO JURY:

Burden of proof of assumption of risk by employé is on employer and unless evidence shows such assumption court does not err in submitting question to jury. *Kanawha Ry.* v. *Kerse* 576
Employer not prejudiced by instructions given under state law in regard to contributory negligence more favorable than though given under Federal law and not therefore denied Federal right. *Chi., Rock Isld. & Pac. Ry.* v. *Wright* 548

INSULAR COLLECTOR OF CUSTOMS. See **Philippine Islands.**

INSURANCE:

Imposing taxes on premiums collected on life insurance policies of residents of Kentucky in pursuance of statute of that State after company ceased doing business unconstitutional denial of due process of law. *Provident Savings Ass'n* v. *Kentucky* 103
State cannot continue to exact license tax on premiums on lives of residents after company has withdrawn from State, on premiums paid outside of State, as right to continue contracts does not depend on consent of State. *Id.*

INTERNATIONAL RELATIONS. See **United States.**

INTERSTATE COMMERCE:

1. *What constitutes:* Taking engine from one State to another although only for repairs is interstate commerce. *Chicago, Rock Island & Pacific Ry.* v. *Wright* 548
Car from another State merely delayed in State of destination and finally reaching destination not thereby withdrawn from interstate commerce. *Great Northern Ry.* v. *Otos* 349
An employé distributing cars from interstate train and clearing track for another interstate train engaged in interstate commerce. *Seaboard Air Line Ry.* v. *Koennecke* 352

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The possibility that a local train might drop all cars and take only local cars is too remote to withdraw a case under the Employers' Liability Act from the jury. *Id.*

Employé of an interstate carrier who is injured while moving machinery in machine shop is not engaged in interstate commerce. *Shanks* v. *Del., Lack., & West. R. R.*. 556

Under Act to Regulate Commerce as amended by the Hepburn Act of 1906 transportation embraces all facilities connected with shipment, including storage after arrival. *Cleveland & St. Louis Ry.* v. *Dettlebach*. 588

Words " to ship " as used in § 240, Criminal Code, mean continuous act and not mere act of shipment, and District Court of district into which liquor is shipped has jurisdiction of offense. *United States* v. *Freeman*. 117

Prohibition in § 240, Criminal Code, against shipping in interstate commerce packages of intoxicating liquor not marked as prescribed is continuing act, performance of which is begun when package is delivered to carrier and completed when it reaches destination. *Id.*

2. *Scope of Commerce Act:* Effect of express contract made for purpose of interstate commerce must be determined in light of Act to Regulate Commerce. *Cleveland & St. Louis Ry.* v. *Dettlebach*. 588

Anti-pass provision of the Hepburn Act of 1906 applies to common carriers by railroad in interstate commerce with respect to transportation within State as part of an interstate journey. *N. Y. Central R. R.* v. *Gray*. 583

While anti-pass provision of Hepburn Act operates upon agreement made for exchange of transportation before passage of act for anything else than money and specific performance cannot be required, interstate carrier is not relieved from making adequate money compensation for unpaid balance of contract for services fully performed before passage of act. *Id.*

3. *Power of Congress over:* Congress not to be denied exercise of constitutional authority over interstate commerce because necessary means have quality of police regulations. *Seven Cases &c.* v. *United States*. 510

Shirley Amendment to Food and Drug Act, making misbranding include false and fraudulent statements as to curative power, within power of Congress to regulate interstate commerce. *Id.*

Where injury was sustained while employé was engaged

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in interstate commerce, responsibility of carrier governed by Employers' Liability Act which is exclusive and supersedes state law; and it is error to submit case to jury as though state law controlled. *C., R. I. & P. Ry.* v. *Wright*.. 548

Whether responsibility of interstate carrier as warehouseman of goods from another State not called for in 48 hours after arrival is measured by valuation in bill of lading, is Federal question. *Cleveland & St. Louis Ry.* v. *Dettlebach*..... 588

4. *Power of States over:* State may restrict foreign corporation from doing business within State so long as interstate commerce not burdened. *Interstate Amusement Co.* v. *Albert*..... 560

5. *Burdens on and interference with:* Tennessee statute requiring foreign corporations to take specified steps before maintaining action, not interference with interstate commerce. *Interstate Amusement Co.* v. *Albert*.. 560

6. *Reparation:* Interstate carrier is not relieved from making adequate money compensation for unpaid balance of contract for services fully performed before the passage of act. *N. Y. Central R. R.* v. *Gray*..... 583

7. *Tariffs:* Valuation in bill of lading of goods shipped in interstate commerce and limitation of carrier's liability made for purpose of obtaining lower rate is, under Carmack Amendment, valid and binding on shipper and applies to carrier as such while goods are in transit and as warehouseman while holding goods after arrival. *Cleveland & St. Louis Ry.* v. *Dettlebach*.... 588

8. *Generally:* Criminal statute applicable alike to foreign and interstate commerce will not be construed so as to render it futile as to former, but it should be construed so as to reach both classes. *United States* v. *Freeman* 117

See **Employers' Liability Act; Safety Appliance Act.**

INTERSTATE COMMERCE COMMISSION:

Where the only questions are whether the carrier's rule as to forfeiture of mileage books was applicable to the case and was properly applied, this court is not concerned with reasonableness of the rule which is a question for the Interstate Commerce Commission. *Southern Railway* v. *Campbell*..... 99

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INTOXICATING LIQUOR: PAGE

Prohibition in § 240, Criminal Code, against shipping in interstate commerce packages of intoxicating liquor not marked as prescribed is continuing act, performance of which is begun when package is delivered to carrier and completed when it reaches destination. *United States* v. *Freeman*. . . . 117
District Court of district into which liquor is shipped in violation of § 240, Criminal Code, has jurisdiction. Words to ship means continuous act and not deliver for shipment. *Id.*

INTRASTATE COMMERCE. See **Carriers.**

IOWA:

Under laws of Iowa a homestead may only be sold under valid mortgage for deficiency remaining after exhausting other property covered by same mortgage. *Moody* v. *Century Bank*. . . . 374
Right to insist on exemption of homestead under Iowa statute except from sale for deficiency is not personal to owners of homestead, but may be asserted by anyone holding under the mortgage, nor can they prejudice a transfer of their interest in this right. *Id.*

See **Des Moines.**

ISLANDS. See **Public Lands.**

ITALY:

As to rights of aliens under treaties with, see *Crane* v. *New York* . . . 195
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JOINT RATES. See **Carriers.**

JUDGMENTS AND DECREES:

Judgment granting railroad company right of way under Right of Way Act of 1875 uses terms with same meaning as used in act. *Rio Grande Ry.* v. *Stringham*. . . . 44
Where court of competent jurisdiction in a proceeding *in rem* under valid statute declares property has escheated as there are no heirs, the decree binds all the world including heirs who failed to appear. *Christianson* v. *King County* . . 356
Under the law of Washington Territory the property escheated and passed under decree of probate court to county

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in which it was located and that decree, being in accord with valid law by a court of jurisdiction in a proceeding *in rem* with opportunity to be heard, was valid, could not be attacked collaterally, and there having been opportunity to be heard it did not deny due process of law. *Id.*

Where final judgment of state appellate court sending case back to trial court disposes of case on merits and leaves nothing to discretion of trial court it is final and writ of error lies to that judgment and not to second judgment based thereon when case again comes up. *Rio Grande Ry.* v. *Stringham*. 44

Judgment of intermediate appellate state court not final judgment under § 237, Jud. Code, if highest court of State has discretionary power of review, as in Ohio, which has been invoked and refused. *Stratton* v. *Stratton* 55

Appellate court may without violating Fourteenth Amendment correct interlocutory decision on a first appeal when case again comes up with same parties, and whether it can be done in particular case is state matter and decision of highest court controlling here. *Moss* v. *Ramey*. 538

Where there is no doubt that import of decree pleaded as *res judicata* to bill to quiet title was to effect that plaintiff in former action had no title to property, inquiry in subsequent action narrowed to question of jurisdiction of court rendering decree pleaded. *Hapai* v. *Brown*. 502

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Provisions construed:

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Section 237. *Atlantic Coast Line* v. *Glenn*. 388
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Section 244. *Elzaburu* v. *Chaves*. 283
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JUDICIAL KNOWLEDGE: PAGE

This court may determine from knowledge of its members whether court below has properly carried out a recent mandate. *Steinfeld* v. *Zeckendorf* 26

This court takes judicial notice of European War and that inevitable consequence is to interrupt steamship business between this country and Europe. *United States* v. *Hamburg-American Co.* 466

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JURISDICTION:

I. **Generally.**

General powers of Federal courts sitting in equity can only be exerted in cases otherwise within their jurisdiction. *Briggs* v. *United Shoe Co.* 48

Courts have jurisdiction to determine whether reasons given by Immigration Commissioner for excluding aliens under the Alien Immigration Act agree with requirements of the act, and if the Commissioner exceeded his powers alien may obtain his release on habeas corpus. *Gegiow* v. *Uhl.* ... 3

Postponing consideration of a motion to dismiss until the hearing on the merits does not amount to a decision that the court has power to review the judgment. *Cerecedo* v. *United States.* 1

Mandamus from this court is proper remedy if a Federal judge refuses to present sealed evidence after litigant shows it is material. *Ex parte Uppercu.* 435

The act of April 23, 1904, limiting and defining authority of Secretary of Interior in regard to cancelling patents for trust allotments does not restrict or define power or jurisdiction of court in that respect. *La Roque* v. *United States* 62

In condemnation proceedings in New York although maps made of parcels and notices posted, the proceeding is not commenced until petition is filed and a non-resident purchasing before that can remove case into Federal court. *New York* v. *Sage* 57

II. **Jurisdiction of this court.**

1. *Over judgments of Circuit Court of Appeals:* Judgments of Circuit Court of Appeals in bankruptcy proceedings reviewable under act of 1915 only by certiorari. *Central Trust Co.* v. *Lueders.* 11

Mere formal statement that cause of action arises under

JURISDICTION—*Continued.* PAGE

Constitution and laws of United States not sufficient to give this court jurisdiction to review judgment of Circuit Court of Appeals otherwise final under § 128, Jud. Code. It must appear suit really involves substantial controversy upon which determination depends. *Norton* v. *Whiteside* 144

Averments in bill as to general intent of Congress to secure free navigation of rivers in Northwest Territory not sufficient to give jurisdiction under § 241, Jud. Code, in absence of specific legislation involved in case otherwise final under § 128. *Id.*

Where it sufficiently appears from the bill jurisdiction does not depend on diverse citizenship only but controversy involves Constitution or act of Congress, decision Circuit Court of Appeals not final, and this court has jurisdiction under § 241, Jud. Code. *Christianson* v. *King County* 356

A proceeding brought by a trustee in bankruptcy asserting title to lands, reciting encumbrances and asking that they be sold and proceeds marshaled and liens be ascertained and in which all parties appear, is a controversy in bankruptcy and this court has jurisdiction to review the judgment of the Circuit Court of Appeals. *Moody* v. *Century Savings Bank* 374

2. *Over judgments of territorial courts:* Review of judgments of Supreme Court of Philippine Islands is regulated by Act of July 1, 1902, under which this court has jurisdiction if statute of United States such as Philippine Tariff Act is involved. *Gsell* v. *Insular Customs Collector* 93

Even where this court may review findings of fact, as in appeals from Philippine Islands involving amount in controversy it will not reverse findings made by both courts below in absence of clear error. *De Villanueva* v. *Villanueva* 293

Has jurisdiction in divorce action if affidavits supporting appeal show value of community property of jurisdictional amount. *Id.*

Section 35, Foraker Act, superseded by § 244, Judicial Code. *Elzaburu* v. *Chaves* 283

3. *Over judgments of state courts:* This court has no jurisdiction under § 237, Jud. Code, to review judgment of state court determining duty of county officer under the law of the State. *Stewart* v. *Kansas City* 14

Unless contentions are wholly frivolous court has jurisdiction under § 237 to review judgment of state court in action under Employers' Liability Act, but in this case contentions are

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frivolous under Rule 6, § 5. *Chicago & Rock Island Ry.* v. *Devine*. 52

Judgment of intermediate appellate state court not final judgment under § 237, Jud. Code, if highest court of State has discretionary power of review which has been invoked and refused. *Stratton* v. *Stratton*. 55

Usual practice in States where discretionary power exists in highest appellate courts to review judgments of intermediate appellate courts is to invoke its exercise before bringing writ of error from this court. *Id.*

Whether the acts done within a State by a foreign corporation amount to doing business so as to subject the corporation to tax laws of the State is a Federal question and this court can review the decision of the state court in that respect. *Provident Savings Ass'n* v. *Kentucky*. 103

When decree of state court rests on independent non-Federal ground broad enough to sustain it, irrespective of Federal right asserted, this court has no jurisdiction under Jud. Code, § 237. *Mellon* v. *McCafferty*. 134

If plaintiff in error unsuccessfully contended in state court that property appropriated for drainage district was essentially for private purpose and was taken without due process of law this court has jurisdiction under § 237, Jud. Code. *O'Neill* v. *Leamer* 244

Although court may have charged jury there was a presumption rebuttable by proof that damage occurred on line of delivering carrier, if it excluded testimony offered by carrier to show that damage did not occur on its line on ground that statute made delivering carrier liable, judgment does not rest on independent ground and this court can review under § 237, Jud. Code, on constitutional question whether statute denied due process of law. *Atlantic Coast Line* v. *Glenn*. . . . 388

While an issue remaining open on remanding case may be one arising under state law which should primarily be disposed of by state court, this court has ultimate authority to review the decision on such question to extent necessary for enforcement of Federal rights involved. *Northern Pacific Ry.* v. *Concannon*. 382

Where state court has not passed on whether ordinance exceeds legislative grant to municipality this court will. *Northwestern Laundry* v. *Des Moines* 486

4. *In general:* The power of this court cannot be enlarged or its duty affected regarding moot case by stipulation of

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parties or counsel. *United States* v. *Hamburg-American Co.* 466

This court cannot pass on questions which have become moot as inevitable legal consequence of flagrant European War. *Id.*

III. **Of Circuit Court of Appeals.**

Judgments of Circuit Court of Appeals in bankruptcy proceedings final except on certiorari under act of 1915. *Central Trust Co.* v. *Lueders* 11

Decision of Circuit Court of Appeals not final where controversy involves Constitution or act of Congress. *Christianson* v. *King County* 356

Judgment otherwise final under § 128, Jud. Code, cannot be reviewed under § 24, Jud. Code, if statement that cause of action arises under Constitution and law of United States is merely formal. *Norton* v. *Whiteside* 144

IV. **Of District Courts.**

Of suit by railway company against members of state commission to enjoin enforcement of order if bill and affidavits clearly show arbitrary or confiscatory action and overcome presumption of reasonableness. *Phoenix Ry.* v. *Geary* 277

Since passage of act June 25, 1910, District Court has no jurisdiction of action to determine heirs of allottee Indian dying during trust period. *Hallowell* v. *Commons* 506

More than one complainant each having tax of forty dollars assessed against him cannot unite and maintain jurisdiction even if the aggregate of the claims exceeds $3,000—the amount in controversy cannot be so made up. *Rogers* v. *Hennepin County* 583

Jurisdictional amount involved in suits for injunction to abate nuisance or continuing trespass tested by value of object to be gained by complainant and not mere expense of abatement; and if value of business is over $3,000, District Court has jurisdiction. *Glenwood Light Co.* v. *Mutual Light Co.* 121

District Court of district into which liquor is shipped has jurisdiction over offenses under § 240, Criminal Code. *United States* v. *Freeman* 117

Suit for royalties reserved on sale of patent rights is not suit arising under patent law and District Court does not have jurisdiction on that ground under § 24, Judicial Code, nor in this case under Rev. Stat., § 4915 or 4918, or in equity under act of February 9, 1883. *Briggs* v. *United Shoe Co.* 48

JURISDICTION—*Continued.* PAGE

Where allegations of bill show mere breach of contract on part of state officers there is no real and substantial controversy as to effect of Federal Constitution and District Court does not have jurisdiction on that ground. *Manila Investment Co.* v. *Trammell*. 31

District Court has jurisdiction of action to enjoin enforcement of order of state railroad commission where bill shows arbitrary or confiscatory action. *Phoenix Ry.* v. *Geary* . . . 277

V. **Of Interstate Commerce Commission.** See **Interstate Commerce Commission.**

VI. **Of Court of Claims.**

Rule that Court of Claims has not jurisdiction of actions founded on torts based on policy imposed by necessity that governments not liable for unauthorized wrongs inflicted by officers on citizens even though in discharge of official duties. *Basso* v. *United States*. 602

Congress has wisely reserved to itself the right to give relief where claim founded on torts of officer of United States. *Id.* *Schillinger* v. *United States*, 155 U. S. 163, subsisting authority for rule that Court of Claims has not jurisdiction of claim founded on wrongful act of officer of United States. *Id.*

VII. **Of State Courts.**

Highest court of State ultimate judge of extent of its jurisdiction; unless Federal right denied its decision conclusive here. *Dayton Coal Co.* v. *Cincinnati Ry* 446

Failure to resort to existing ample administrative remedies under state law to review assessment is non-Federal ground sufficient to sustain judgment of state court refusing to enjoin collection of tax. *Mellon* v. *McCafferty*. 134

Employers' Liability Act as amended in 1910 expressly provides state court has jurisdiction of actions thereunder, and no such case removable merely for diverse citizenship. *Southern Ry.* v. *Lloyd* 496

Where territory has authority to establish rule as to escheat it has power to establish tribunals with jurisdiction and procedure; and if other proceedings are established, as in Washington, by probate court, decree of office found is not necessary. *Christianson* v. *King County* 356

Decree of probate court of King County, Washington, sufficient to sustain escheat as being within its jurisdiction. *Id.*

JURY AND JURORS:

Whether continuing to use defective apparatus instead of

JURY AND JURORS—*Continued.* PAGE
another which might be unsafe amounts to contributory negligence question for jury. *Seaboard Air Line* v. *Horton* 595
Reasonable reliance by employé on promise of reparation and continuance in employment not contributory negligence as matter of law and question in this case properly submitted to jury. *Id.*
Where in case under Employers' Liability Act, there was testimony that plaintiff was engaged in interstate commerce, and court charged that burden of proof was on plaintiff to show it, question properly left to jury. *Southern Ry.* v. *Lloyd*. 496
Burden of proof as to assumption of risk on employer and unless sustained question properly submitted to jury. *Kanawha* v. *Kerse*. 576
See **Employers' Liability Act; Instructions to Jury.**

KANSAS:
Statute requiring counties to reimburse cities of first class but not of other classes for rebates allowed for prompt payment of taxes not unconstitutional under due process or equal protection provision of Fourteenth Amendment. *Stewart* v. *Kansas City*. 14
Contracts of conditional sale must be recorded. *Bailey* v. *Baker Ice Co.* 268

KENTUCKY:
Imposing taxes on premiums collected on life insurance policies of residents of Kentucky in pursuance of statute of that State after company ceased doing business unconstitutional denial due process of law. *Provident Savings Ass'n* v. *Kentucky* 103

KNOWLEDGE. See **Assumption of Risk; Judicial Knowledge.**

LABOR:
Alien is entitled to earn livelihood and continue employment unmolested and is entitled to protection in equity in absence of adequate remedy at law; and unjustifiable interference of third parties is actionable even if employment is at will. *Truax* v. *Raich*. 33
Alien admitted to United States under Federal law has privilege of entering and abiding in any State and as inhabitant of State is entitled under Fourteenth Amendment to equal protection of law as " any person within the juris-

LABOR—*Continued.* PAGE

diction of the United States " and this includes right to earn living which was purpose of amendment to secure. *Id.*

Although statute may only render employer liable to prosecution if it operates directly upon employment of employé and compel his discharge the latter has no adequate relief if the statute is unconstitutional. *Id.*

Although employment is at will of employer and employé it is not at will of third parties. *Id.*

The power to control immigration—to admit or exclude aliens—is vested in Federal Government and the States may not deprive admitted aliens of right to earn living or require employers only to employ citizens. *Id.*

In order to protect citizens of United States in employment against non-citizens States may not require employers to employ only specified percentage of aliens—such a statute, as in Arizona of December 14, 1914, denies aliens equal protection of laws even though allowing employment of some aliens. *Id.*

Section 14, Labor Law 1909, New York, providing that only citizens of United States be employed on public works and that preference be given to citizens of New York, not unconstitutional. *Heim* v. *McCall* 175

Crane v. *New York* 195

Neither a municipality nor one contracting therewith, nor a taxpayer on its behalf, can assert proprietary rights of an individual against the State in determining who shall be employed on public works authorized by the State. *Id.*

State may establish as public policy, with which courts are not concerned, what class of labor shall be employed on its public works. *Id.*

LACHES:

A right may be waived or lost by failure to assert it at the proper time. *Atlantic Coast Line* v. *Burnette*..... 199

LAND GRANTS. See **Public Lands; Northern Pacific Railway.**

LAW AND FACT:

Decisions of immigration officers conclusive on questions of fact, other findings reviewable. *Gegiow* v. *Uhl*..... 3

Difference between appeal and error is not mere form but is substantial; former involves questions of law and fact and latter is limited to questions of law. *Gsell* v. *Insular Customs Collector* 93

LAW AND FACT—*Continued.* PAGE

A general contention that trial court should have directed verdict involves whole case and law and fact may become so commingled as to make latter depend on former. *Texas & Pacific Ry.* v. *Bigger* 330

LAW GOVERNING:

It would be miscarriage of justice to recover upon a statute not governing the case and in a case the statute declares was commenced too late. *Atlantic Coast Line* v. *Burnette* .. 199

Holding by highest court of State that State Workmen's Compensation Act established comprehensive plan for relief of workmen included therein regardless of fault, is exclusive notwithstanding it did not expressly repeal statute giving right of action for death, is binding on Federal courts; and so held as to Washington statute. *Northern Pacific Ry.* v. *Meese*.. 614

Where injury was sustained while employé was engaged in interstate commerce, responsibility of carrier governed by Employers' Liability Act which is exclusive and supersedes state law and it is error to submit case to jury as though state law controlled. *C., R. I. & P. Ry.* v. *Wright* 548

Homestead rights in land are creation of the States in which lands are situated and validity and operation of mortgages thereon are determined by laws of State as construed by courts of the State. *Moody* v. *Century Savings Bank* 374

LEGISLATION:

Rule that State may recognize degrees of evil, and adopt legislation accordingly applies to matters concerning which State may legislate. *Truax* v. *Raich* 33

As an organized political division of United States, a Territory only possesses such powers as Congress confers upon it and a legislature cannot provide for escheat unless authorized, but authority to legislate on all rightful subjects of legislation includes escheats as in case of Organic Act of Washington Territory. *Christianson* v. *King County*. 356

See **Congress; Construction.**

LIFE INSURANCE. See **Insurance.**

LIMITATIONS:

Act of March 3, 1891, establishing six-year limitation for actions by United States to annul patents is part of public land laws and does not refer to suits to annul patents for Indian allotments. *La Roque* v. *United States*. 62

LIMITATIONS—*Continued.* PAGE

Even though not pleaded, if defendant insists and answer admits that an action based on Employers' Liability Act has been brought too late it cannot be maintained. *Atlantic Coast Line* v. *Burnette*. 199

It would be a miscarriage of justice to recover upon a statute not governing the case and in a case which the statute declares was commenced too late. *Id.*

A right may be waived or lost by failure to assert it at the proper time. *Id.*

See **Porto Rico.**

LIQUORS. See **Intoxicating Liquors.**

LOCAL LAW:

Propriety of delegation of authority by legislature to court in matter of formation of drainage districts is matter of local law. *O'Neill* v. *Leamer* 244

Judgment of state court entitled to highest respect in regard to local matters, such as necessity for drainage districts. *Id.*

Appellate court may, without violating Fourteenth Amendment, correct interlocutory decision on a first appeal when case again comes up with same parties and whether it can be done in particular case is state matter and decision of highest court controlling here. *Moss* v. *Ramey* 538

Whether a municipal ordinance is, under state constitution, within charter power of city, is matter of state law. *Hadacheck* v. *Los Angeles* 394

Whether a state statute contravenes state constitution does not concern this court. *Miller* v. *Strahl* 426

In appeals from territorial courts this court follows and sustains application of local law to facts made by courts below unless constrained to contrary by sense of clear error and so held in divorce case from Philippine Islands. *De Villanueva* v. *Villanueva* 293

See **Law Governing and Captions of Various States, Territories and Insular Possessions.** See also **Uniform Acts.**

LOS ANGELES. See **Municipal Ordinances.**

LOUISIANA. See **Warehousemen.**

MANDAMUS:

Mandamus from this court is proper remedy if a Federal judge refuses to present sealed evidence after litigant shows it is material. *Ex parte Uppercu* 435

MANDATE: PAGE

This court may determine from knowledge of its members whether court below has properly carried out a recent mandate. *Steinfeld* v. *Zeckendorf* 26

This court will not consider provisions in a judgment of a state court entered on mandate of this court as to matters non-Federal. *Id.*

Cases come to this court from judgments of Supreme Court of Arizona in usual form, and not by appeal even though entered on mandate of this court in cases originally coming from territorial court. *Id.*

Where case to dissolve combination as illegal under Anti-trust Act becomes moot so that this court cannot decide it upon the merits and court below decided against the Government, course most consonant with justice is to reverse with directions to dismiss without prejudice to Government to assail combination in future if deemed to violate Anti-trust Act. *United States* v. *Hamburg Co* 446

As to provisions with respect to dealing with separable penalties in statute, see *Phoenix Ry.* v. *Geary* 277

MARITIME LAW. See **Charter Party.**

MARRIAGE:

Section 380, Oklahoma act of Congress of May 2, 1890, legalizing Indian marriages theretofore contracted does not relate to marriages thereafter contracted. *Porter* v. *Wilson* 170

See **Citizenship Act; Expatriation; Husband and Wife.**

MARYLAND:

Statutes of 1906 and 1908, for paving Baltimore streets, not unconstitutional as abuse of power or as denying due process of law or equal protection of the laws. *Wagner* v. *Baltimore* 207

MASTER AND SERVANT:

Authority to direct course of third person's servant does not prevent his remaining servant of such third person. *New Orleans S. S. Co.* v. *United States.* 202

Arizona statute of December 14, 1914, requiring employment of specified number of citizens, void under equal protection provisions of Fourteenth Amendment as against aliens. *Truax* v. *Raich* 33

See **Employers' Liability Act; Labor.**

MECHANICS' LIEN. See **Conditional Sale.**

MILEAGE BOOKS. See **Carriers.**

MISSOURI: PAGE

Statute authorizing initial tax of 25 cents an acre for preliminary work on drainage districts does not violate due process clause, Fourteenth Amendment. *Houck* v. *Little River District*. 254

MISTAKE. See **Fraud.**

MOOT CASE:

This court cannot pass on questions which have become moot as inevitable legal consequence of flagrant European War. *United States* v. *Hamburg-American Co*. 466

This court will not, in a case now moot, owing to legal consequences of war, determine whether combination illegal under Sherman Act because it may be recreated after war is over. *Id.*

Where case to dissolve combination as illegal under Anti-trust Act becomes moot so that this court cannot decide it upon the merits and court below decided against the Government, course most consonant with justice is to reverse with directions to dismiss without prejudice to Government to assail combination in future if deemed to violate Anti-trust Act. *Id.*

MORRIS CANAL. See **New Jersey.**

MORTGAGE AND DEED OF TRUST:

Under laws of Iowa a homestead may only be sold under valid mortgage for deficiency remaining after exhausting other property covered by same mortgage. *Moody* v. *Century Savings Bank*. 374

Right to insist on exemption of homestead under Iowa statute except from sale for deficiency, is not personal to owners of homestead, but may be asserted by anyone holding under the mortgage, nor can they prejudice a transfer of their interest in this right. *Id.*

Validity and operation of mortgages on homesteads are determined by laws of State as construed by courts of the State. *Id.*

See **Bankruptcy Act; Conditional Sale; Porto Rico.**

MUNICIPAL CORPORATIONS:

Municipalities are creatures of the State and subject to its power. *Stewart* v. *Kansas City* 14

State has very broad powers over municipalities and may

MUNICIPAL CORPORATIONS—*Continued.* PAGE

exercise them in many ways giving rise to inequalities between municipalities without violating due process or equal protection provisions of Fourteenth Amendment. *Id.*

After municipality has given telegraph company permission to erect lines under specified conditions and there has been compliance therewith such lines are protected by the Post Road Act from exclusion or arbitrary action. *Essex* v. *New England Telephone Co.* 313

Municipality may not arbitrarily exclude telegraph lines from its streets, but may impose reasonable restrictions and regulations. *Id.*

Rights of telegraph company under Post Road Act, which would be violated by threatened arbitrary action of municipality, may be protected by equity, but injunction must not prevent municipality from subjecting location and operation of lines to reasonable regulations. *Id.*

Municipality may waive rights and by acquiescence for long period of years in maintenance of poles and expenditures by telegraph company be estopped or regarded as having waived rights. *Id.*

States may apportion burdens for improvement such as drainage districts among municipalities or create tax districts either directly or by delegated authority. *O'Neill* v. *Leamer* 244

Neither a municipality nor one contracting therewith nor a taxpayer on its behalf can assert the proprietary rights of an individual against the State in determining who shall be employed on public works authorized by the State. *Heim* v. *McCall* 175

Crane v. *New York* 195

Statute requiring counties to reimburse cities of first class but not of other classes for rebates allowed for prompt payment of taxes not unconstitutional under due process or equal protection provision of Fourteenth Amendment. *Stewart* v. *Kansas City* 14

State may by direct legislation or through authorized municipalities declare emission of dense smoke in populous neighborhoods nuisance and restrain, and unless arbitrary, such regulations not violative of Fourteenth Amendment. *Northwestern Laundry* v. *Des Moines* 486

State police statute otherwise valid not denial of equal protection because it includes some municipalities and omits others. *Id.*

MUNICIPAL CORPORATIONS—*Continued.* PAGE

Where state court has not passed on whether ordinance exceeds legislative grant to municipality this court will. *Id.*

See **Police Power; Public Works.**

MUNICIPAL LAW:

Subject to general scheme of local government defined by Organic Act and special provisions it contains and right to revise, alter and revoke, legislatures of Territories have been entrusted with enactment of entire system of municipal law of Territories. *Christianson* v. *King County*. 356

MUNICIPAL ORDINANCES:

Des Moines Smoke Abatement Ordinance not invalid under Iowa statute or Fourteenth Amendment either as to due process or equal protection. *Northwestern Laundry* v. *Des Moines* 486

Police power may be exerted under proper conditions to declare under particular circumstances and in particular localities specified businesses, such as brick-making, which are not nuisances *per se* to be nuisances in fact and law as in Los Angeles ordinance, without violating Fourteenth Amendment; but *quære* as to simply digging clay for brick-making elsewhere. *Hadacheck* v. *Los Angeles* 394

Charges of one attacking municipal ordinance declaring brick-making a nuisance in sections of city that it was adopted to foster monopoly and suppresses competition held too illusive for this court to consider it, state court having refused to do so. *Id.*

Fact that ordinance does not prohibit brick-making business in all sections of city, as in Los Angeles ordinance, does not make it unconstitutional as denying equal protection of law. *Id.*

Ordinance applying equally to all within terms not denial equal protection of law if reasonable basis for classification, even though other businesses might have been included. *Northwestern Laundry* v. *Des Moines* 486

Municipal ordinance cannot be attacked as denying equal protection of law when contention based on disputable considerations of classification and conditions not judicially determinable. *Hadacheck* v. *Los Angeles*. 394

This court in determining constitutionality of municipal ordinance attacked as going too far accords good faith to municipality in absence of clear showing to contrary. *Id.*

MUNICIPAL ORDINANCES—*Continued.* PAGE
Whether ordinance is, under state constitution, within charter power of city is matter of state law. *Id.*
Whether statute repealing former statute but reënacting identical matter affects validity of ordinances established under earlier statute a state matter. *Northwestern Laundry* v. *Des Moines* 486
Where state court has not passed on whether ordinance exceeds legislative grant to municipality this court will. *Id.*

MUTUAL MISTAKE. See **Court of Claims.**

NATIONALITY. See **Citizenship Act; United States.**

NAVIGABLE WATERS. See **Riparian Rights.**

NAVY. See **Army and Navy.**

NEBRASKA:
Statute of 1913, requiring keepers of hotels having over fifty rooms to keep night watchmen and awaken guests in case of fire, not unconstitutional under due process or equal protection clauses. *Miller* v. *Strahl* 426
Drainage district statutes of 1905 and 1909 delegating authority to courts and appropriating property by eminent domain not unconstitutional under Fourteenth or Fifteenth Amendment. *O'Neill* v. *Leamer* 244
Error not prejudicial affords no ground for reversal and if employer not prejudiced by difference between Federal Employers' Liability Act and state acts as in Nebraska judgment not reversed. *C., R. I. & P. Ry.* v. *Wright*..... 548

NEGLIGENCE:
Failure to exercise care constitutes negligence, but mere existence of a number of tracks near to each other in a terminal where public streets are utilized does not support inference of negligence. *Reese* v. *Phila. & Reading Ry.*..... 463
Under Employers' Liability Act action lies for injury or death resulting in whole or in part from negligence of carrier. *Kanawha Ry.* v. *Kerse* 576
To operate switch so obstructed as to endanger brakemen's lives evidence of negligence and continued existence of obstruction, presumption of notice to carrier. *Id.*
Whether continuing to use defective apparatus instead of another which might be unsafe amounts to contributory

NEGLIGENCE—*Continued.* PAGE

negligence is question for jury. *Seaboard Air Line* v. *Horton* 595

Authorities differ and this court has not yet decided whether continuing of employment on promise of reparation in presence of imminent danger that no ordinarily prudent man would confront amounts to assumption of risk or contributory negligence. *Id.*

Verdict of jury against carrier for negligence in regard to delivering passenger in unsuitable place without protection from inclemency of weather. *Texas & Pacific Ry.* v. *Bigger* 330

Trial court entered non-suit where there was no evidence that railroad failed to furnish safe place for employé who was killed while leaning out from his engine. *Reese* v. *Phila. & Reading Ry.* 463

Distinction between assumption of risk and contributory negligence, formerly of little consequence when both led to same result, are more important under the Employers' Liability Act, as former is complete bar and latter simply mitigates damages. *Seaboard Air Line* v. *Horton* 595

Reasonable reliance by employé on promise of reparation and continuance in employment not contributory negligence as matter of law and question in this case properly submitted to jury. *Id.*

See **Employers' Liability Act; Safety Appliance Act.**

NELSON ACT. See **Indians.**

NEW JERSEY:

Taxes imposed on lessee of Morris Canal Company not unconstitutional impairment of contract of original charter exemption of property in actual possession and use of original company. *Morris Canal Co.* v. *Baird.* 126

NEW YORK:

In condemnation proceedings in New York although maps made of parcels and notices posted, the proceedings are not commenced until petition is filed and a non-resident purchasing before that can remove case into Federal court. *New York* v. *Sage* 57

Section 14, Labor Law, 1909, does not violate Treaty with Italy of 1871 nor Constitutional under privileges and immunities clause and Fourteenth Amendment. *Heim* v. *McCall.* 175

Crane v. *New York* 195

See **Treaties.**

NORTHERN PACIFIC RAILWAY: PAGE

Act of 1904 validating conveyances within right of way of Northern Pacific Railway related only to conveyances theretofore made and gave no power to railway company to make conveyances thereafter, or to others to acquire by adverse possession which had not matured prior thereto. *Northern Pacific Ry.* v. *Concannon* 382

Although adverse possession may have been the basis of the judgment of the state court, if it did not seem against a Federal instrumentality, the judgment cannot be sustained as resting on an independent non-Federal ground. *Id.*

NORTHWEST TERRITORY:

Provisions in ordinances and statutes relating to Northwest Territory, involved in this case, do not control riparian rights enjoyed under law of State carved out of the Territory. *Norton* v. *Whiteside*. 144

See **Jurisdiction.**

NOTICE:

Continued existence of dangerous obstruction over switch presumption of notice to carrier. *Kanawha Ry.* v. *Kerse* 576

See **Judicial Knowledge; Negligence.**

NUISANCE:

Police power may be exerted under proper conditions to declare under particular circumstances and in particular localities specified businesses such as brick-making, which are not nuisances *per se* to be nuisances in fact and law, as in Los Angeles Ordinance, without violating Fourteenth Amendment; but *quære* as to simply digging clay for brick-making elsewhere. *Hadacheck* v. *Los Angeles* 394

Proper police regulation prohibiting nuisances not denial of due process law even though affecting use of property or subjecting owner to expense in compliance. *Northwestern Laundry* v. *Des Moines* 486

State may by direct legislation or through authorized municipalities declare emission of dense smoke in populous neighborhoods nuisance and restrain, and unless arbitrary, such regulations not violative of Fourteenth Amendment. *Id.*

Suit to abate. See **Jurisdiction, IV.**

OFFICE FOUND:

Where Territory has authority to establish rule as to escheat it has power to establish tribunals with jurisdiction and

OFFICE FOUND—*Continued.* PAGE
procedure, and if other proceedings are established, as in Washington, by probate court, decree of office found is not necessary. *Christianson* v. *King County*. 356

OFFICERS OF UNITED STATES. See **Army and Navy; Contracts; Criminal Law; Public Officers.**

OFFICIAL BOND. See **Bonds.**

OHIO:
Judgment of intermediate appellate state court not final judgment under § 237, Jud. Code, if highest court of State has discretionary power of review, as in Ohio, which has been invoked and refused. *Stratton* v. *Stratton* 55

OKLAHOMA:
Provision in § 380 of the Oklahoma Act of May 2, 1890, legalizing Indian marriages theretofore contracted does not relate to those thereafter contracted. *Porter* v. *Wilson* . . . 170
The trial court did not deprive plaintiff of property without due process of law in disregarding § 5039, Rev. Laws Oklahoma, making provisions of the statute applicable to trials by the court without jury. *Id.*

OMAHA INDIANS. See **Indians.**

OPPORTUNITY TO BE HEARD. See **Constitutional Law; Taxes and Taxation.**

ORDINANCES. See **Municipal Ordinances; Police Power.**

ORGANIC ACTS. See **Territories.**

PARTIES:
In absence of bad faith motive of plaintiff in making defendants parties who are jointly liable does not affect right to remove case, and whether complaint states joint cause of action against resident and non-resident defendants is a matter of state law. *Chicago & Rock Island Ry.* v. *Whiteaker* 421
Plaintiff having cause of action against non-resident railroad and also against resident employé may join them both as defendants; and non-resident defendant cannot, in absence of clearly shown fraud, remove case into Federal court; and merely to traverse or apply epithets of fraud not sufficient. *Id.*
To proceeding involving title to property sold under conditional sale. See *Bailey* v. *Baker*. 268

PASSES: PAGE

Anti-pass provision of the Hepburn Act of 1906 applies to common carriers by railroad in interstate commerce with respect to transportation within State as part of an interstate journey. *N. Y. Central R. R.* v. *Gray* 583

Provision of act operates upon agreement made for exchange of transportation before passage of act for anything else than money, and specific performance cannot be required: interstate carrier is not relieved from making adequate money compensation for unpaid balance of contract for services fully performed before passage of act. *Id.*

PATENTS FOR INVENTIONS:

A process may be independent of the instruments employed and expiration of foreign patent for one may not affect United States patent for the other; and in this case patent for acetylene gas tanks is for apparatus and foreign patents are for process. *Fireball Tank Co.* v. *Commercial Co.*..... 156

Where there are conflicting opinions of different Circuit Courts of Appeal on questions in patent cases of infringement and identity of expired foreign patents, injunction pending trial is proper, and if questions of identity are decided other questions should be reserved for trial. *Id.*

Suit for royalties reserved on sale of patent rights is not suit arising under patent law and District Court does not have jurisdiction on that ground under § 24, Judicial Code, nor in this case under Rev. Stat., § 4915 or 4918, or in equity under act of February 9, 1883. *Briggs* v. *United Shoe Co.*.. 48

Only the United States can maintain bill in equity for annulment of patent on ground of procurement by fraud. *Id.*

PATENTS FOR LAND. See **Public Lands; Riparian Rights.**

PAY AND ALLOWANCES. See **Army and Navy.**

PENAL CODE. See **Criminal Code.**

PENALTIES AND FORFEITURES:

When provisions in statutes separable, court will not determine validity in advance of attempt to enforce. *Phoenix Ry.* v. *Geary* 277

Where statute attacked as unconstitutional is sustained, but penalty provisions separable, court will not attempt to determine constitutionality in advance, but will deny relief without prejudice to court below dealing with penalty provisions when they arise. *Id.*

PERSONAL PROPERTY. See **Conditional Sale.** PAGE

PHILIPPINE ISLANDS:

Value of community property sufficient to give this court jurisdiction of appeal in divorce case. *De Villanueva* v. *Villanueva* 293

In appeals from territorial courts this court follows and sustains application of local law to facts made by courts below unless constrained to contrary by sense of clear error, and so held in divorce case from Philippine Islands. *Id.*

Writ of error is inapplicable to review customs cases involving facts to determine classification of merchandise; and judgments of Supreme Court of Philippine Islands in customs cases must be reviewed by appeal and not writ of error. *Gsell* v. *Insular Customs Collector* 93

Under Philippine Island Act of July 1, 1902, same regulations and procedure apply to review by this court of judgments of Supreme Court of Philippine Islands as to final judgments of Circuit Courts, and this provision is essential and requires compliance. *Id.*

Immigration and Chinese Exclusion Acts have been carried by act of Congress to Philippine Islands to be there put into effect by Insular Government which has in express terms conferred general supervisory authority on Insular Collector of Customs. *Sui* v. *McCoy* 139

There is no conflict between the provisions of the act of Congress carrying the Immigration and Chinese Exclusion Acts to the Philippines and the action of the Insular Collector in referring questions relating to the right of a Chinese person to land and to a board acting under his supervision in immigration matters. *Id.*

Deportation orders from Philippine Islands of person of Chinese descent not improperly issued by Insular Collector because matter had been referred to board of inquiry appointed under Immigration Act. *Id.*

PHILIPPINE TARIFF ACT:

Review of judgments of Supreme Court of Philippine Islands is regulated by act of July 1, 1902, under which this court has jurisdiction if statute of United States, such as Philippine Tariff Act, is involved. *Gsell* v. *Insular Customs Collector* 93

PICTURES:

Importation of pictorial illustrations of prize fights for public exhibition prohibited. *Weber* v. *Freed* 325

PLEADING: PAGE

Allowance by court after testimony in, of amendment bringing case specifically under Employers' Liability Act, not beyond discretionary power of court or denial of due process of law. *Seaboard Air Line Ry.* v. *Koennecke* 352

Even though not pleaded, if defendant insists and answer admits that an action based on Employers' Liability Act has been brought too late it cannot be maintained. *Atlantic Coast Line* v. *Burnette*. 199

Averments in libel under Food and Drugs Act must receive sensible construction, must definitely charge statutory offense of misbranding by statements made as to articles in interstate commerce that were false and made with intent to deceive as to curative powers of drugs; and in this case allegation sufficient. *Seven Cases &c.* v. *United States* 510

Whether complaint states joint cause of action against resident and non-resident defendants is a matter of state law. *Chicago & Rock Island Ry.* v. *Whiteaker* 421

Plaintiff having cause of action against non-resident railroad and also against resident employé may join them both as defendants; and non-resident defendant cannot, in absence of clearly shown fraud, remove case into Federal court; and merely to traverse or apply epithets of fraud not sufficient. *Id.*

Right to remove cannot be established by petition simply traversing fact; state court only required to surrender jurisdiction over non-resident defendant joined with resident when facts alleged fairly raise issue of fraud in joinder. *Southern Ry.* v. *Lloyd*. 496

See **Practice and Procedure.**

POLICE POWER:

Police power, while not to be arbitrarily exercised, is one of most essential powers of State and least limitable and there is imperative necessity for its existence. *Hadacheck* v. *Los Angeles*. 394

Police power may be exerted under proper conditions to declare under particular circumstances and in particular localities specified businesses, such as brick-making, which are not nuisances *per se* to be nuisances in fact and law—as in Los Angeles Ordinance—without violating Fourteenth Amendment; but *quære* as to simply digging clay for brick-making elsewhere. *Id.*

Municipal ordinance cannot be attacked as denying equal

POLICE POWER—*Continued.* PAGE

protection of law when contention based on disputable considerations of classification and conditions not judicially determinable. *Id.*

Charges of one attacking municipal ordinance declaring brick-making a nuisance in sections of city, that it was adopted to foster monopoly and suppress competition, held too illusive for this court to consider, state court having refused to do so. *Id.*

Fact that ordinance does not prohibit brick-making business in all sections of city, as in Los Angeles ordinance, does not make it unconstitutional as denying equal protection of law. *Id.*

Vested interests cannot, because of conditions once obtaining, be asserted against proper exercise of police power. *Id.*

Congress not to be denied exercise of constitutional authority over interstate commerce because necessary means have quality of police regulations. *Seven Cases &c.* v. *United States*. 510

This court in determining constitutionality of municipal ordinance attacked as going too far, accords good faith to municipality in absence of clear showing to contrary. *Hadacheck* v. *Los Angeles* 394

State may prescribe duties of hotel keepers regarding fires, and police statute expressing rules in general does not lack due process of law. *Miller* v. *Strahl*. 426

Statute of 1913 of Nebraska, requiring keepers of hotels having over fifty rooms to keep night watchmen and awaken guests in case of fire, not unconstitutional under due process or equal protection clauses. *Id.*

Police statute, otherwise valid, not unconstitutional as denying equal protection of law because only applicable to hotels having more than fifty rooms; classification has reasonable basis. *Id.*

Proper police regulation prohibiting nuisances not denial of due process of law even though affecting use of property or subjecting owner to expense in compliance. *Northwestern Laundry* v. *Des Moines* 486

State may by direct legislation or through authorized municipalities declare emission of dense smoke in populous neighborhoods nuisance and restrain, and unless arbitrary, such regulations not violative of Fourteenth Amendment. *Id.*

State police statute otherwise valid not denial equal pro-

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tection because it includes some municipalities and omits others. *Id.*

PORTO RICO:
In cases coming from the District Court of Porto Rico, the existence of constitutional questions must appear in the bill of exceptions. *Cerecedo* v. *United States* 1
Earlier decisions of Porto Rico courts holding proceeding under Mortgage Law, § 395, to establish title not *res judicata* and that § 395 not repealed directly nor by implication, amounted to rule of property not to be overruled. *Elzaburu* v. *Chaves* 283
Code, § 4481, is only applicable to cases of lesion in cases of sale embraced in § 4480 of that code, formerly § 1375, previous Code. *Parker* v. *Monroig*. 83
Community cannot enjoy an acquet free of obligation inseparably created with it and if it takes real estate subject to a servitude imposed by the Master before acquisition it cannot thereafter enjoy it free of servitude because wife did not unite therein. *Id.*
See **Civil Law; Foraker Act.**

POST ROAD ACT:
Act of 1866 must be construed and applied in light of existing conditions and with a view to effectuate the purpose for which it was enacted. *Essex* v. *New England Telephone Co.* 313
Act declares in interest of commerce and convenient transmission of intelligence of Government of United States and its citizens that erection of telegraph lines shall so far as state interference is concerned be free to all submitting to its conditions. *Id.*
Rights of telegraph company under act which would be violated by threatened arbitrary action of municipality, may be protected by equity, but injunction must not prevent municipality from subjecting location and operation of lines to reasonable regulations. *Id.*
State has no authority to say telegraph company may not operate lines constructed over postal routes within its borders; nor may municipality arbitrarily exclude such lines from its streets, but may impose reasonable restrictions and regulations. *Id.*
After municipality has given telegraph company permission to erect lines under specified conditions and there has been

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compliance therewith such lines are protected by the Post Road Act from exclusion or arbitrary action. *Id.*

POWERS OF GOVERNMENT. See **Congress; Police Power; States.**

PRACTICE AND PROCEDURE:
Scope of review: This court will not consider provisions in a judgment of a state court entered on mandate of this court as to matters non-Federal. *Steinfeld* v. *Zeckendorf* 26
When questions of negligence and the like are brought here simply because arising under the Employers' Liability Act and involve no new principles, this court confines itself to summary statement of results. *Seaboard Air Line Ry.* v. *Koennecke* 352
Where penal provisions in constitution and laws relating to public utility corporations are separable from order of state railroad commission and authority on which it rests this court will not in advance of attempt to enforce them determine whether penalties so severe as to deny due process of law under Fourteenth Amendment: so as to Arizona statutes. *Phoenix Ry.* v. *Geary* 277
Where a state court places its decision on sustaining tax on ground that company was doing business in State, this court need only consider that question. *Provident Savings Ass'n* v. *Kentucky*. 103
Where state court has not passed on whether ordinance exceeds legislative grant to municipality this court will. *Northwestern Laundry* v. *Des Moines* 486
Charges of one attacking municipal ordinance declaring brick-making a nuisance in sections of city that it was adopted to foster monopoly and suppress competition, held too illusive for this court to consider, state court having refused to do so. *Hadacheck* v. *Los Angeles* 394
South Carolina statute making delivering carrier responsible for damages, having been construed by highest court of State as not requiring carrier to accept on through bills of lading from other carriers, constitutionality of a statute requiring acceptance and making delivering carrier responsible for damages on other lines not determined. *Atlantic Coast Line* v. *Glenn*. 388
Although adverse possession may have been the basis of the judgment of the state court, if it did not seem against a

PRACTICE AND PROCEDURE—*Continued.* PAGE

Federal instrumentality, the judgment cannot be sustained as resting on an independent non-Federal ground. *Northern Pacific Ry.* v. *Concannon* 382

The highest court of the State not having passed on whether, although questioned, taxpayer had right to maintain action, this court may, even if not required to do so, assume right exists. *Heim* v. *McCall* 175

Crane v. *New York*. 195

This court in determining constitutionality of municipal ordinance attacked as going too far accords good faith to municipality in absence of clear showing to contrary. *Hadacheck* v. *Los Angeles* 394

Whether a state statute contravenes state constitution does not concern this court. *Miller* v. *Strahl* 426

Allowance of equitable relief question of state policy and if state court treats merits of suit in which equitable relief is sought as legitimately before it this court will not attempt to decide whether state court could have thrown case out. *Bi-Metallic Co.* v. *Colorado*. 441

Highest court of State ultimate judge extent of its jurisdiction; unless Federal right denied its decision conclusive here. *Dayton Coal Co.* v. *Cincinnati Ry* 446

This court cannot pass on questions which have become moot as inevitable legal consequence of flagrant European War. *United States* v. *Hamburg-American Co*. 446

Rule of this court based on fundamental principles of public policy not to establish rules for controlling predicted future conduct; it will not in a case now moot owing to legal consequences of war determine whether combination illegal under Sherman Act because it may be recreated after war is over. *Id.*

Where no state statute is shown giving adequate remedy at law to one seeking to enjoin enforcement of ordinance, this court must deal with questions both state and Federal as they appear on face of bill. *Northwestern Laundry* v. *Des Moines* 486

Disposition of case: Where statute sought to be enjoined is sustained, but penalty provisions are separable, practice is to deny relief sought against whole statute without prejudice to court below dealing with penalty provisions when they arise. *Phoenix Ry.* v. *Geary*. 277

Error not prejudicial affords no ground for reversal and if employer not prejudiced by difference between Federal Em-

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ployers' Liability Act and state acts, as in Nebraska, judgment not reversed. *C., R. I. & P. Ry.* v. *Wright*. 548

Even if parties do not press motion to dismiss for want of jurisdiction this court cannot disregard it. *Hapai* v. *Brown* 502

Although trial court erred in refusing request as to employé's assumption of risk based on hypothesis of his knowledge of obstruction causing injury if jury specifically negatived hypothesis, error not ground for reversal. *Kanawha Ry.* v. *Kerse* 576

Where case to dissolve combination as illegal under Anti-trust Act becomes moot so that this court cannot decide it upon the merits and court below decided against the Government, course most consonant with justice is to reverse with directions to dismiss without prejudice to Government to assail combination in future if deemed to violate Anti-trust Act. *United States* v. *Hamburg-American Co.*. 446

Record discloses no sufficient ground for reversing the court below on questions of fact. *Elzaburu* v. *Chaves* 283

Following lower courts: Findings of fact made by both courts below not disturbed by this court unless clearly erroneous. *De Villanueva* v. *Villanueva* 293

National Bank v. *Shackelford*. 81

This court follows conclusions reached by Master and both courts below, in this case that transactions were loans with accounts as collateral security and not absolute sales of the accounts. *Home Bond Co.* v. *McChesney*. 568

This court follows decision of state court that a provision in its general laws regarding public work applies to the particular work involved and to the municipalities of the State. *Heim* v. *McCall* 175

Crane v. *New York* 195

Federal courts must accept construction of state statute deliberately adopted by highest court of State. *Northern Pacific Ry.* v. *Meese*. 614

This court accepts the decisions of the highest court of the State that the state constitution is not violated by any action of the trial court. *Porter* v. *Wilson* 170

While findings of fact by state court in ordinary cases coming under Jud. Code, § 237, are conclusive here in cases arising under contract clause of the Federal Constitution, they are not binding if Federal right has been denied as result of finding of fact not supported by evidence, but in this case finding supported. *Interstate Amusement Co.* v. *Albert*. 560

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In appeals from territorial courts this court follows and sustains application of local law to facts made by courts below unless constrained to contrary by sense of clear error; and so held in divorce case for Philippine Islands. *De Villanueva* v. *Villanueva* 293

Judgment of state court entitled to highest respect in regard to local matters such as necessity for drainage districts. *O'Neill* v. *Leamer*. 244

Where constitutionality of method of taxation under state statute is questioned Federal court is not bound by decision of state court upholding such method, if question of constitutionality was raised in the case decided by the state court. *Johnson* v. *Wells Fargo* 234

Holding by highest court of State that state Workmen's Compensation Act, established comprehensive plan for relief of workmen included therein regardless of fault, is exclusive notwithstanding it did not expressly repeal statute giving right of action for death, is binding on Federal courts; and so held as to Washington statute. *Northern Pacific Ry.* v. *Meese* 614

Appellate court may, without violating Fourteenth Amendment, correct interlocutory decision on a first appeal when case again comes up with same parties and whether it can be done in particular case is state matter and decision of highest court controlling here. *Moss* v. *Ramey* 538

Direction of process: Where highest court of State refuses to review judgment based on verdict the writ from this court runs to the trial court. *Kanawha Ry.* v. *Kerse*. 576

Bill of exceptions: In cases coming from the District Court of Porto Rico, the existence of constitutional questions must appear in the bill of exceptions. *Cerecedo* v. *United States* . . 1

Even though this court may have an extraordinary discretion to supply absence of bill of exceptions, in this case there is no ground for exercising that discretion. *Id.*

In general: Where case is tried to a jury, verdict for plaintiff must be considered by appellate court as determining disputed questions of fact against defendant. *Texas & Pacific Ry.* v. *Bigger* 330

A defendant removing case from state court, and not reserving question of jurisdiction of state court cannot, after pleading in and submitting to jurisdiction of Federal court, raise question of jurisdiction of state court. *Id.*

A general contention that trial court should have directed

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verdict involves whole case, and law and fact may become so commingled as to make latter depend on former. *Id.*
Congress, within its sphere, is paramount over States and courts cannot, where will of Congress plainly appears, allow substantive rights to be impaired under name of procedure. *Atlantic Coast Line* v. *Burnette* 199
Usual practice in States where discretionary power exists in highest appellate courts to review judgments of intermediate appellate courts is to invoke its exercise before bringing writ of error from this court. *Stratton* v. *Stratton*. 55
This court may determine from knowledge of its members whether court below has properly carried out a recent mandate. *Steinfeld* v. *Zeckendorf* 26
Postponing consideration of a motion to dismiss until the hearing on the merits does not amount to a decision that the court has power to review the judgment. *Cerecedo* v. *United States*. 1
See **Appeal and Error; Court of Claims; Injunction.**

PRESIDENT:
Where determination of certain questions is left by the statute to the President, court will not presume greater power entrusted to subordinates than is given by the statute to the President. *Gegiow* v. *Uhl*. 3

PRESUMPTIONS:
Existence of obstruction for considerable time endangering lives of brakemen is presumptive evidence of notice. *Kanawha Ry.* v. *Kerse* 576
This court will not presume that highest court of Hawaiian Islands did not know its own powers or decide in accordance with law of kingdom. *Hapai* v. *Brown*. 502
In absence of highest court of State passing on question whether taxpayer has right to maintain action this court may assume such right exists. *Heim* v. *McCall*. 175
Crane v. *New York* 195
Inference naturally arising from silence of field notes plat that there was no island at time of survey or if any, only inconsiderable one, refutable, and in this case is refuted, by evidence. *Moss* v. *Ramey* 538
See **Injunction; President.**

PRIVILEGES AND IMMUNITIES. See **Constitutional Law, XI.**

PRIVILEGE TAX. See **Taxes and Taxation.** PAGE

PRIZE FIGHTS:

Pictorial illustrations for use in exhibitions; importation prohibited. *Weber* v. *Freed* 325

PROCEDURE. See **Practice and Procedure.**

PROCESS. See **Appeal and Error; Habeas Corpus; Injunction; Jurisdiction.**

PROPERTY RIGHTS. See **Constitutional Law.**

PUBLIC LANDS:

An error of surveyor in failing to extend survey over island in river does not make such island any the less part of public domain. *Moss* v. *Ramey* 538

Inference naturally arising from silence of field notes plat that there was no island at time of survey or, if any, only inconsiderable one, refutable, and in this case is refuted, by evidence. *Id.*

Fast dry land which is neither part of bed of river nor land under water was part of the public domain within Idaho Territory and as such did not pass to State on admission to Union but remained public land. *Id.*

Patents to lots abutting on river do not include actual islands of fast dry land and of stable foundation lying between lots and thread of stream. *Id.*

Act of March 3, 1891, establishing six-year limitation for actions by United States to annul patents, is part of public land laws and does not refer to suits to annul patents for Indian allotments. *LaRoque* v. *United States* 62

Prohibition in Organic Act of Washington of 1853 against interference with primary disposal of soil had reference to public lands of United States and did not relate to escheat of land for failure of heirs. *Christianson* v. *King County* 356

See **Homesteads; Riparian Rights.**

PUBLIC OFFICERS:

Decision of Immigration Commissioners conclusive as to questions of fact but other findings reviewable by courts. *Gegiow* v. *Uhl* 3

Rule that Court of Claims has not jurisdiction of actions founded on torts based on policy imposed by necessity that governments are not liable for unauthorized wrongs inflicted by officers on citizens even though in discharge of official duties. *Basso* v. *United States* 602

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Schillinger v. *United States*, 155 U. S. 163, subsisting authority for rule that Court of Claims has not jurisdiction of claim founded on wrongful act of officer of United States. *Id.*
Congress has wisely reserved to itself the right to give relief where claim founded on torts of officer of United States. *Id.*
United States has power to prohibit false personation of its officers, or false assumption of being an officer, or holding a non-existent office, and legislation to that end does not interfere with or encroach on powers of States and § 32, Criminal Code, is not unconstitutional. *United States* v. *Barnow* 74
Prohibition in § 32, Criminal Code, against false personation of officer or employé of United States, not confined to false personation of particular person but covers any false assumption or pretense of office or employment if done with intent to defraud and accompanied by specified acts. *Id.*
Offense of falsely personating officer or employé of United States under Criminal Code, § 32, is complete on the personation and demanding and obtaining money even if person defrauded be not financially injured. *Id.*
This court has no jurisdiction under § 237, Jud. Code, to review judgment of state court determining duty of county officer under the law of the State. *Stewart* v. *Kansas City* .. 14
County officers have no personal interest in litigation brought to apply public moneys and cannot defend a suit on ground that statute deprives him of his property without due process of law. *Id.*
Suit against officers of State about to proceed wrongfully to enforce unconstitutional state statute to complainant's injury, not suit against State. *Truax* v. *Raich* 33

PUBLIC POLICY:

Neither general provisions of the Fourteenth Amendment nor other provisions of the Constitution prevent States from adopting public policy to meet special exigencies such as establishment of drainage district. *O'Neill* v. *Leamer* 244
By passing act June 25, 1910, vesting power to determine legal heirs allottee Indians in Secretary Interior, Congress evinced change of public policy and its opinion as to better manner preserving rights of Indians. *Hallowell* v. *Commons* 506
Rule that Court of Claims has not jurisdiction of actions founded on torts based on policy imposed by necessity that governments are not liable for unauthorized wrongs inflicted

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by officers on citizens even though in discharge of official duties. *Basso* v. *United States* 602
See **Public Works.**

PUBLIC WORKS:
State as guardian and trustee of people may prescribe conditions on which public work shall be done for it and its municipalities—being a matter of public policy courts are not concerned therewith. *Heim* v. *McCall*. 175
Crane v. *New York*. 195
Neither a municipality, nor one contracting therewith, nor a taxpayer on its behalf, can assert proprietary rights of an individual against the State in determining who shall be employed on public works authorized by the State. *Id.*
Section 14, Labor Law, New York 1909, not unconstitutional as violating treaty with Italy of 1871, or as abridging privileges and immunities of citizens of the United States, or as depriving of property without due process of law, or as denying equal protection of the laws, because it provides that only citizens of the United States be employed on public works and that preference be given to citizens of New York. *Id.*
See **Taxes and Taxation.**

PURE FOOD AND DRUGS ACT:
Shirley Amendment making misbranding include false and fraudulent statements as to curative power within power of Congress to regulate interstate commerce. *Seven Cases &c.* v. *United States*. 510
The amendment not unconstitutional under Fifth Amendment for uncertainty. *Id.*
The amendment is not unconstitutional under Sixth Amendment as preventing laying definite charge thereunder. *Id.*
False and fraudulent statements covered by Shirley Amendment are within power of Congress to regulate, whether contained in original package or on containers of articles. *Id.*
Phrase " False and Fraudulent " as used in Shirley Amendment used in accepted legal meaning, and to condemn thereunder statements have been put in package with actual intent to deceive. *Id.*
Intent to deceive may be derived from facts and circum-

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stances and can and must be established by proof of falsity as to statements accompanying drugs such as to effect they have curative powers over diseases such as pneumonia and tuberculosis. *Id.*
Averments in libel under act must receive sensible construction, must definitely charge statutory offense of misbranding by statements made as to articles in interstate commerce that were false and made with intent to deceive as to curative powers of drugs; and in this case allegation sufficient. *Id.*

RAILROAD COMMISSIONS:
District Court has jurisdiction of action to enjoin enforcement of order where bill shows arbitrary or confiscatory action; but temporary injunction should not be granted unless bill and affidavits clearly show such action. *Phoenix Ry.* v. *Geary*. 277
Where provisions for penalties are separable from order of commission court will not determine validity of former in advance of attempt to enforce. *Id.*

RAILROADS:
Right of way granted by act of 1875 is neither mere easement nor fee simple but limited fee made under implied condition of reverter in case of non-user. *Rio Grande Ry.* v. *Stringham* 44
Judgment granting railroad company right of way under act of 1875 uses terms with same meaning as used in act. *Id.*
See **Carriers; Employers' Liability Act; Interstate Commerce; Northern Pacific Railroad; Safety Appliance Act.**

RATES. See **Carriers.**

REAL PROPERTY. See **Community Property; Eminent Domain; Northern Pacific Railway; Porto Rico.**

RECORDING INSTRUMENTS. See **Conditional Sale.**

RELEASE:
Employers' Liability Act has no application to releases given to those who are not employers. *Chicago & Alton R. R.* v. *Wagner*. 452
Where one of two joint tort feasors who is the employer obtains a release from the injured employé which is invalid under § 5 of the Employers' Liability Act, the court does

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not deny the other joint tort feasor a Federal right by holding that the release is not valid as to it beyond setting off the amount paid. *Id.*
See **Court of Claims.**

REMEDIAL STATUTES. See **Construction.**

REMEDIES:
Mandamus from this court is proper remedy if a Federal judge refuses to present sealed evidence after litigant shows it is material. *Ex parte Uppercu* 435
The duty to resort to adequate remedy provided in state statute cannot be escaped by assuming that even if resorted to the wrong would not have been righted. *Mellon Co.* v. *McCafferty* 134
See **Equity; Habeas Corpus; Injunction.**

REMOVAL OF CAUSES:
Right to remove cannot be established by petition simply traversing fact; state court only required to surrender jurisdiction over non-resident defendant joined with resident when facts alleged fairly raise issue of fraud in joinder. *Southern Railway* v. *Lloyd.* 496
In absence of bad faith motive of plaintiff in making defendants parties who are jointly liable does not affect right to remove case and whether complaint states joint cause of action against resident and non-resident defendants is a matter of state law. *Chicago & Rock Island Ry.* v. *Whiteaker* .. 421
Plaintiff having cause of action against non-resident railroad and also against resident employé may join them both as defendants; and non-resident defendant cannot, in absence of clearly shown fraud, remove case into Federal court; and merely to traverse or apply epithets of fraud not sufficient. *Id.*
A defendant removing case from state court, and not reserving question of jurisdiction of state court cannot, after pleading in and submitting to jurisdiction of Federal court, raise question of jurisdiction of state court. *Texas & Pacific Ry.* v. *Bigger* 330
In condemnation proceedings in New York, although maps made of parcels and notices posted, the proceeding is not commenced until petition is filed and a non-resident purchasing before that can remove case into Federal court. *New York* v. *Sage.* 57

REMOVAL OF CAUSES—*Continued.* PAGE

Employers' Liability Act as amended in 1910 expressly provides state court has jurisdiction of actions thereunder, and no such case removable merely for diverse citizenship. *Southern Ry.* v. *Lloyd*. 496

Orders of non-suit as to resident defendant where plaintiff had, and avails, of right to appeal, does not make case removable as to non-resident defendant. *Id.*

RENUNCIATION OF CITIZENSHIP. See **Expatriation.**

REPARATION. See **Interstate Commerce.**

REPEALS. See **Construction; Statutes.**

RESERVATIONS. See **Indians.**

RES JUDICATA:

Proceedings under § 395, Mortgage Law of Porto Rico, to establish title, not *res judicata*. *Elzaburu* v. *Chaves* 283

A party defeated in a statutory proceeding in lower court which higher courts have declared was not *res judicata*, may rely on such decision and not appeal but bring suit in courts to set judgment aside. *Id.*

Judgment of Supreme Court of Hawaiian Islands in suit for partition *res judicata* in subsequent suit between same parties and privies. *Hapai* v. *Brown* 502

Where there is no doubt that import of decree pleaded as *res judicata* to bill to quiet title was to effect that plaintiff in former action had no title to property, inquiry in subsequent action narrowed to question of jurisdiction of court rendering decree pleaded. *Id.*

RESTRICTIONS ON ALIENATION. See **Indians.**

REVISED STATUTES:

Section 13 not applicable where Congress simply changes tribunal without excepting pending litigation. *Hallowell* v. *Commons* 506

Quœre, whether § 1235 intended to preclude recovery by enlisted men of extra duty pay where duty was performed under direction of competent authority but not in writing. *United States* v. *Ross*. 530

Section 1462. See **Army and Navy.**

Section 1999. See *Mackenzie* v. *Hare* 299

Section 3744. See *United States* v. *New York & P. R. S. S. Co*. 88

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Section 4536. See *Inter-Island Nav. Co.* v. *Byrne* 459
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Section 4918. See *Briggs* v. *United Shoe Co.* 48

RIGHT OF WAY ACT. See **Railroads.**

RIPARIAN RIGHTS:
Riparian rights attached to property patented by United States are to be determined by law of the State in which land is situated and rule applies where parties own land bordering on navigable river boundary between two States and land affected lies in different States. *Norton* v. *Whiteside* 144
Rights attached to property within a State carved out of Northwest Territory not affected by ordinances and statutes relating to that Territory. *Id.*
The mere fact that Congress directed improvement of a new channel in a navigable river does not destroy riparian rights existing under state law and create new ones under Federal Law. *Id.*

RIVERS. See **Public Lands; Riparian Rights.**

ROYALTIES. See **Patents for Invention.**

RULE OF PROPERTY:
Earlier decisions regarding titles and proceedings to establish have become rules of property and should not be overruled. *Elzaburu* v. *Chaves* 283

RULES OF CONDUCT:
Where rule of conduct applies to more than few people impracticable give everyone direct voice in adoption; nor does Federal Constitution require all public acts to be done in town meeting. Individual argument must be limited if government is to go on. *Bi-Metallic Co.* v. *Colorado* 441

RULES OF COURT:
Contentions wholly frivolous under Employers' Liability Act held frivolous under Rule 6, § 5. *Chicago & R. I. Ry.* v. *Devine* 52
See **Appeal and Error; Practice and Procedure.**

SAFETY APPLIANCE ACT:
Under Employers' Liability Act of 1908 breach of Safety Appliance Act on part of carrier does not operate to deprive it of defenses of contributory negligence or assumption of risk

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unless the breach contributes to the injury. *Atchison, Topeka & Santa Fe Ry.* v. *Swearingen* 339
Supplementary act of 1910 relieves carrier from statutory penalties while hauling defective car to repair shop, but not from liability for injury in connection with such hauling. *Great Northern Ry.* v. *Otos* 349
Car from another State merely delayed in State of destination and finally reaching destination not thereby withdrawn from operation of act. *Id.*
See **Employers' Liability Act.**

SALES. See **Conditional Sale.**

SEAMEN:
Subsequent legislation excluded seamen engaged in the coastwise trade from the exemption from attachment of wages provided by § 4536, Rev. Stat.; and so held as to seamen engaged in trade between Hawaiian Islands. *Inter-Island Navigation Co.* v. *Byrne* 459

SECRETARY OF INTERIOR:
While not conclusive, construction of act of Congress relative to Indian allotments in course of actual administration by Secretary is entitled to great weight and should not be overruled without cogent reason. *La Roque* v. *United States* 62
The act of April 23, 1904, limiting and defining authority of Secretary in regard to cancelling patents for trust allotments does not restrict or define power or jurisdiction of court in that respect. *Id.*
Congress in its plenary control of Indians had power to pass act of June 25, 1910, vesting in Secretary determination of heirs of allottee Indians dying within trust period. *Hallowell* v. *Commons* 506
Congress by act of June 25, 1910, restored to Secretary power taken from him by acts of 1901 and 1904 to determine legal heirs of allottee Indians dying during restriction period. *Id.*
By passing act June 25, 1910, vesting power to determine legal heirs of allottee Indians in Secretary, Congress evinced change of public policy and its opinion as to better manner of preserving rights of Indians. *Id.*
Under act June 25, 1910, Secretary has power to ascertain legal heirs Omaha Indian dying during restriction period of allotment under act of August 7, 1882, and decision final. *Id.*
See **Contracts.**

SECRETARY OF NAVY. See **Contracts.** PAGE

SECRETARY OF WAR. See **Contracts.**

SHERMAN ACT. See **Anti-trust Act.**

SHIRLEY AMENDMENT. See **Pure Food and Drugs Act.**

SIXTH AMENDMENT. See **Constitutional Law, IX.**

SMOKE LAWS. See **Des Moines; Nuisance.**

SOUTH CAROLINA:

Statute making delivering carrier responsible for damages to foods on through bills of lading of intrastate shipments not voluntarily received does not deprive delivering carrier of property without due process of law. *Atlantic Coast Line* v. *Glenn*. 388

Statute making delivering carrier responsible for damages, having been construed by highest court of State as not requiring carrier to accept on through bills of lading from other carriers, constitutionality of a statute requiring acceptance and making delivering carrier responsible for damages on other lines not determined. *Id.*

SOUTH DAKOTA:

Requirement in state constitution that all taxes on property of corporations be assessed and levied as near as may be as on property of individuals violated by giving controlling effect to gross income of the former while assessing latter at actual value. *Johnson* v. *Wells Fargo*. 234

Although taxing statute fair on face, its administration illegal by adoption of unequal methods of assessing earnings of express companies thereunder. *Id.*

SOVEREIGNTY:

United States as a government is invested with all attributes of sovereignty and has character of and powers of nationality, especially those concerning relations with foreign powers. *Mackenzie* v. *Hare* 299

STARE DECISIS:

Earlier decisions regarding title and proceedings to establish become rules of property and should not be overruled. *Elzaburu* v. *Chaves* 283

That the power of Congress over foreign commerce is complete has been so thoroughly settled by decisions of this court that to question it is frivolous. *Weber* v. *Freed*. 325

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Exclusive operation of Employers' Liability Act over its subject to exclusion of state statutes conclusively established by decisions of this court. *Chicago & Rock Island Ry.* v. *Devine*. 52
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See **Res Judicata.**

STATES:
Legislative power: State may by direct legislation or through authorized municipalities declare emission of dense smoke in populous neighborhoods nuisance and restrain, and unless arbitrary, such regulations not violative of Fourteenth Amendment. *Northwestern Laundry* v. *Des Moines* 486
Legislature may constitute drainage districts and define boundaries or delegate authority to local administrative bodies and unless palpably arbitrary and plain abuse of power does not deny due process. *Myles Salt Co.* v. *Iberia Drainage District*. 478
Rule that State may recognize degrees of evil, and adopt legislation accordingly, applies to matters concerning which State may legislate. *Truax* v. *Raich* 33
Congress within its sphere is paramount over States and courts cannot, where will of Congress plainly appears, allow substantive rights to be impaired under name of procedure. *Atlantic Coast Line* v. *Burnette* 199
State has very broad powers over municipalities and may exercise them in many ways giving rise to inequalities between municipalities without violating due process or equal protection provisions of Fourteenth Amendment. *Stewart* v. *Kansas City*. 14
General provisions of the Fourteenth Amendment embody fundamental conceptions of principles of justice and do not, nor do other provisions of the Constitution, prevent State from adopting public policy to meet special exigencies such as establishing drainage districts. *O'Neill* v. *Leamer*. 244
Regulation of common carriers: This court having held that by Carmack Amendment initial carrier liable for shipments on through interstate commerce over its own and connecting lines, same reasoning applies to power of State to make delivering carrier liable on through intrastate ship-

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ments even if loss occurs on lines other than its own. *Atlantic Coast Line* v. *Glenn*. 388

Exclusive operation of Employers' Liability Act over its subject to exclusion of state statutes conclusively established by decisions of this court. *Chicago & Rock Island Ry.* v. *Devine* 52

A state court does not deny a Federal right to a carrier railroad company by holding it strictly to its own terms in connection with mileage books. *Southern Railway* v. *Campbell*. 99

Police power: Police power while not to be arbitrarily exercised is one of most essential powers of State and least limitable and there is imperative necessity for its existence. *Hadacheck* v. *Los Angeles* 394

May prescribe duties of hotel keepers regarding fires; and police statute expressing rules in general terms does not lack due process of law. *Miller* v. *Strahl*. 426

See **Police Power.**

Taxation by: Taxation without jurisdiction denies due process of law and this rule applies to assertion of authority on the part of the State to exact license tax for acts done beyond its sphere of control. *Provident Savings Ass'n* v. *Kentucky* 103

State may in discretion lay assessments for public work either as to position, area, frontage, market value or estimated benefits, and unless flagrant abuse of power does not amount to deprivation of property without due process of law. *Houck* v. *Little River District*. 254

May fix basis directly or by appropriate legal proceeding of taxation or assessment for proper governmental outlay; unless arbitrary, due process provision of Fourteenth Amendment not violated. *Id.*

Action of local administrative body arbitrarily including land not possibly benefited in drainage district solely for purpose of obtaining revenue therefrom amounts to deprivation of property without due process of law. *Myles Salt Co.* v. *Iberia Drainage District*. 478

State cannot continue, after insurance company has withdrawn from State, to exact license tax on premiums of residents paid outside of State, as right to continue contracts does not depend on consent of State. *Provident Savings Ass'n* v. *Kentucky* 103

Fourteenth Amendment does not interfere with discretion-

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ary power to raise revenue and State may impose taxes and assessments for improvements already made without violating due process or equal protection provision of Fourteenth Amendment, even though proceeds be used for other purposes. *Wagner* v. *Baltimore*. 207

So far as Federal Constitution concerned, State may defray expenses of improving political subdivisions from state funds raised by general tax or may apportion burdens among municipalities or create tax districts either directly by legislature or by delegated authority. *O'Neill* v. *Leamer* 244

Regulation of corporations: State may restrict foreign corporation from doing business within State so long as interstate commerce not burdened. *Interstate Amusement Co.* v. *Albert*. 560

State has no authority to say telegraph company may not operate lines constructed over postal routes within its borders. *Essex* v. *New England Telephone Co*. 313

Post Road Act declares in interest of commerce and convenient transmission of intelligence of Government of United States and its citizens that erection of telegraph lines shall so far as state interference is concerned be free to all submitting to its conditions. *Id.*

Power to regulate labor: May not deprive admitted aliens of right to earn living or require employers only to employ citizens. *Truax* v. *Raich* 33

In order to protect citizens of United States in employment against non-citizens States may not require employers to employ only specified percentage of aliens—such a statute—as in Arizona of December 14, 1914, denies aliens equal protection of laws even though allowing employment of some aliens. *Id.*

Alien admitted to United States under Federal law has privilege of entering and abiding in any State and as inhabitant of State is entitled under Fourteenth Amendment to equal protection of law as " any person within the jurisdiction of the United States " and this includes right to earn living which was purpose of amendment to secure. *Id.*

It belongs to State as guardian and trustee for its people to prescribe conditions upon which public work shall be done for it and its municipalities; and this being public policy courts are not concerned therewith. *Heim* v. *McCall*. 175

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Neither a municipality nor one contracting therewith, nor a

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taxpayer on its behalf can assert proprietary rights of an individual against the State in determining who shall be employed on public works authorized by the State. *Id.*

Suits against: Suit against officers of State about to proceed wrongfully to enforce unconstitutional state statute to complainant's injury not suit against State. *Truax* v. *Raich* . . . 33

Generally: United States has power to prohibit false personation of its officers or false assumption of being an officer or holding a non-existent office, and legislation to that end does not interfere with or encroach on powers of States, and § 32, Criminal Code, is not unconstitutional. *United States* v. *Barnow*. 74

Provisions in ordinances and statutes relating to Northwest Territory do not control riparian rights enjoyed under law of State carved out of that Territory. *Norton* v. *Whiteside*, 144

Riparian rights attached to property patented by United States determined by law of State even where parties own land on opposite side of boundary river. *Id.*

The mere fact that Congress directs improvement of new channel in navigable river does not destroy riparian rights existing under state law and create new ones under Federal law. *Id.*

Plenary power of Congress over foreign commerce not affected by fact that articles imported are to be used for purpose under state control. *Weber* v. *Freed* 325

STATUTE OF LIMITATIONS. See **Limitations.**

STATUTES. See **Congress; Construction.**

STREET PAVING. See **Baltimore.**

SURVEYS. See **Public Lands.**

TARIFFS. See **Interstate Commerce.**

TAXES AND TAXATION:

By state: State may fix basis of taxation for governmental outlay by direct legislation or by appropriate legal proceeding, as in Missouri drainage statute. *Houck* v. *Little River District* 254

So far as Federal Constitution concerned, State may defray expense of improving political subdivisions from state funds raised by general tax or may apportion burdens among municipalities or create tax districts either directly by legislation or by delegated authority. *O'Neill* v. *Leamer* 244

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State cannot continue to exact license tax on premiums on lives of residents after company has withdrawn from State, the premiums being paid outside of State, as right to continue contracts does not depend on consent of State. *Provident Savings Ass'n* v. *Kentucky* 103

Taxation without jurisdiction denies due process of law and this rule applies to assertion of authority on the part of the State to exact license tax for acts done beyond its sphere of control. *Id.*

Requirement in state constitution of South Dakota that all taxes on property of corporations be assessed and levied as near as may be as on property of individuals is violated by giving controlling effect to gross income of corporation property while assessing individual property at actual value. *Johnson* v. *Wells Fargo* 234

Special assessments: Power of taxation not to be confused with eminent domain. *Houck* v. *Little River District* 254

Not necessary to show special benefits to lay a tax which is an enforced contribution for payment of public expenses. *Id.*

Where classification of property to be improved and assessments are fixed by the statute and specified sum fixed ratably by area, notice and opportunity to be heard not essential and due process clause not violated in absence of abuse of power. *Wagner* v. *Baltimore* 207

No abuse of legislative power violating due process provision of Fourteenth Amendment when there is no disproportion between assessment fixed and benefits conferred, as in case of Maryland statutes of 1906 and 1908 imposing special tax for paving streets in Baltimore. *Id.*

Constitutional validity: Assessments for public work may be laid either as to position, area, frontage, market value or estimated benefits, without violating due process provision of Fourteenth Amendment, unless flagrant abuse of power. *Houck* v. *Little River District* 254

Initial fixed reasonable tax per acre laid by Missouri statute on tax district for preliminary expense of starting work of drainage district not arbitrary action amounting to deprivation of property without due process of law. *Id.*

Missouri statute authorizing imposition of initial tax in force prior to formation of drainage district not retrospective in violation of Fourteenth Amendment. *Id.*

Fourteenth Amendment does not interfere with discretion-

TAXES AND TAXATION—*Continued.* PAGE

ary power of State to raise revenue and may impose taxes and assessments for improvements already made even though proceeds be used for other purposes, without violating due process or equal protection provisions. *Wagner* v. *Baltimore* 207

Imposing taxes on premiums collected on life insurance policies of residents of Kentucky in pursuance of statute of that State, after company ceased doing business, unconstitutional denial of due process of law. *Provident Savings Ass'n* v. *Kentucky*. 103

Statute requiring counties to reimburse cities of first class but not of other classes for rebates allowed for prompt payment of taxes not unconstitutional under due process or equal protection provision of Fourteenth Amendment. *Stewart* v. *Kansas City*. 14

Order of Colorado board of equalization increasing valuation of all taxable property in Denver, valid under state law, not violative of Fourteenth Amendment because opportunity to be heard not given city or taxpayers. *Bi-Metallic Co.* v. *Colorado* 441

Enjoining collection: Where valuation method of assessment so unwarranted by law as to amount either to fraud on or gross mistake amounting to fraud on constitutional rights of the person taxed equity should enjoin enforcement of tax. *Johnson* v. *Wells Fargo* 234

After collection of tax has been enjoined on ground that constitutional rights have been violated, imposition of similar tax on similar assessments amounts to continuing violation of constitutional rights affording ground for equitable relief. *Id.*

Failure to resort to state remedies sufficiently broad enough ground to sustain judgment of state court refusing to enjoin collection of taxes. *Mellon Co.* v. *McCafferty*. 134

Valuation for: Although a taxing statute may be fair on its face its administration may by adoption of unequal methods of valuation be illegal; and so as to given earning assessments of express companies under South Dakota statute. *Johnson* v. *Wells Fargo*. 234

Exemptions: Provision in legislative charter exempting from taxation property owned and actually used by corporation construed strictly under rule that such exemptions do not pass by transfer. *Morris Canal Co.* v. *Baird*. 126

Property exempted under charter during its actual posses-

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sion and use by exempted company ceases to be exempted if leased to another company even though subject to State's right to purchase and eventual reversion to State. *Id.*

Generally: Granting a charter for a taxing district not contract that the laws it was created to administer will not be changed. *Houck* v. *Little River District*. 254

Where constitutionality of method of taxation under state statute is questioned the Federal court is not bound by the decision of the state court upholding such method if question of constitutionality was not raised in the case decided by the state court. *Johnson* v. *Wells Fargo* 234

See **Corporations; Corporation Tax Act; Injunction.**

TELEGRAPHS:

State has no authority to say telegraph company may not operate lines constructed over postal routes within its borders, nor may municipality arbitrarily exclude such lines from its streets, but may impose reasonable restrictions and regulations. *Essex* v. *New England Telephone Co.*. 313

Post Road Act declares in interest of commerce and convenient transmission of intelligence of Government of United States and its citizens that erection of telegraph lines shall, so far as state interference is concerned, be free to all submitting to its conditions. *Id.*

Rights of telegraph company under Post Road Act which would be violated by threatened arbitrary action of municipality, may be protected by equity, but injunction must not prevent municipality from subjecting location and operation of lines to reasonable regulations. *Id.*

Municipality may waive rights and by acquiescence for long period of years in maintenance of poles and expenditures by telegraph company be estopped or regarded as having waived rights. *Id.*

See **Army and Navy.**

TENNESSEE:

Statute requiring foreign corporations to take specified steps in order to maintain action not unconstitutional. *Interstate Amusement Co.* v. *Albert* 560

TERRITORIES:

As an organized political division of United States, a Territory only possesses such powers as Congress confers upon it and a legislature cannot provide for escheat unless author-

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ized, but authority to legislate on all rightful subjects of legislation includes escheats, as in case of Organic Act of Washington Territory. *Christianson* v. *King County* 356

In determining extent of power delegated by Congress to Territory under Organic Acts and validity of a series of acts of the territorial legislature, it is significant as to extent of authority if Congress until statehood never disapproved any of such series. *Id.*

Subject to general scheme of local government, defined by Organic Act and special provisions it contains and right to revise, alter and revoke, legislatures of Territories have been entrusted with enactment of entire system of municipal law of Territories. *Id.*

In appeals from territorial courts this court follows and sustains application of local law to facts made by courts below unless constrained to contrary by sense of clear error; and so held in divorce case for Philippine Islands. *De Villanueva* v. *Villanueva* 293

See **Northwest Territory; Public Lands.**

TIME:

Rights and remedies of trustee in bankruptcy accrue at time petition is filed. *Bailey* v. *Baker Ice Co* 268

TITLE. See **Conditional Sale; Indians; Northern Pacific Railway; Real Property; Warehousemen.**

TORTS:

Rule that Court of Claims has not jurisdiction of actions founded on torts based on policy imposed by necessity that governments are not liable for unauthorized wrongs inflicted by officers on citizens, even though in discharge of official duties. *Basso* v. *United States* 602

Congress has wisely reserved to itself the right to give relief where claim founded on torts of officer of United States. *Id.*

TRANSPORTATION. See **Carriers; Interstate Commerce.**

TREATIES:

The equality of rights assured by Arts. I and II of the Treaty with Italy of 1871 is in respect of protection and security for person and property. *Heim* v. *McCall* 175

Crane v. *New York* 195

Section 14 Labor Law, 1909, New York, providing that only citizens of United States be employed on public works

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and preference be given to citizens of New York not unconstitutional under privilege and immunities, due process or equal protection clauses, nor does it violate treaty with Italy of 1871. *Id.*

As to rights of aliens under treaties with Italy and other respective nations, see *Truax* v. *Raich* 33

UNIFORM ACTS. See **Construction.**

UNITED STATES:

United States as a government is invested with all attributes of sovereignty and has character of and powers of nationality, especially those concerning relations with foreign powers. *Mackenzie* v. *Hare*..... 299

Under the Constitution every person born in the United States is a citizen thereof. *Id.*

The power to control immigration—to admit or exclude aliens—is vested in Federal Government. *Truax* v. *Raich* .. 33

Post Road Act declares in interest of commerce and convenient transmission of intelligence of Government of United States and its citizens that erection of telegraph lines shall, so far as state interference is concerned, be free to all submitting to its conditions. *Essex* v. *New England Telephone Co.*. 313

Not liable, as charterer of vessel, for damages due approximately to marine risk or when rendering aid to another vessel of United States, even though case be hard one. *New Orleans S. S. Co.* v. *United States*..... 202

Only the United States can maintain bill in equity for annulment of patent on ground of procurement by fraud. *Briggs* v. *United States*..... 48

Admission of aliens to. See **Aliens.**

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False personation of officer of. See **Criminal Law.**

Officers of. See **Public Officers.**

Public lands of. See **Public Lands.**

VALUATION. See **Eminent Domain; Taxes and Taxation.**

VESSELS. See **Charter Party.**

WAIVER:

A right may be waived or lost by failure to assert it at the proper time. *Atlantic Coast Line* v. *Burnette*..... 199

WAR: PAGE

This court takes judicial notice of European War and that inevitable consequence is to interrupt steamship business between this country and Europe. *United States* v. *Hamburg-American Co.* 446

WAREHOUSEMEN:

Whether responsibility of interstate carrier as warehouseman of goods from another State not called for in 48 hours after arrival is measured by valuation in bill of lading is Federal question. *Cleveland & St. Louis Ry.* v. *Dettlebach* 588

Under Act to Regulate Commerce, as amended by the Hepburn Act of 1906, transportation embraces all facilities connected with shipment including storage after arrival. *Id.*

Valuation in bill of lading of goods shipped in interstate commerce and limitation of carrier's liability made for purpose of obtaining lower rate is, under Carmack Amendment, valid and binding on shipper and applies to carrier as such while goods are in transit and as warehouseman while holding goods after arrival. *Id.*

Under Louisiana Uniform Warehouse Receipts Acts, 1908, if owner permits another to have custody of goods or if negotiable warehouse receipts to latter or bearer, it is a representation of title and *bona fide* purchaser protected notwithstanding breaches of trust or violation of agreement by apparent owner. *Commercial Bank* v. *Canal Bank* 520

One not having title to chattels cannot transfer title unless owner gives authority or is estopped, nor can former in absence of such authority or estoppel transfer title by warehousing the goods and endorsing receipts; but if owner clothes him with apparent ownership by permitting him obtain negotiable warehouse receipts therefor, *bona fide* purchaser for value, protected. *Id.*

WASHINGTON:

Holding by highest court of State that State Workmen's Compensation Act established comprehensive plan for relief of workmen included therein regardless of fault, is exclusive notwithstanding it did not expressly repeal statute giving right of action for death, is binding on Federal courts; and so held as to Washington statute. *Northern Pacific Ry.* v. *Meese* 614

On record in this case it does not appear that Washington Workmen's Compensation Act is unconstitutional as denying equal protection of the law. *Id.*

WASHINGTON TERRITORY: PAGE

A Territory possesses only such powers as Congress confers upon it, and authority to legislate on all rightful subjects of legislation includes escheats, as in case of Organic Act of Washington Territory. *Christianson* v. *King County* 356

Subject to general scheme of local government, defined by Organic Act and special provisions it contains, and right to revise, alter and revoke, legislatures of Territories have been entrusted with enactment of entire system of municipal law of Territories. *Id.*

Under the law of Washington Territory the property escheated and passed under decree of probate court to county in which it was located and that decree, being in accord with valid law by a court of jurisdiction in a proceeding *in rem* with opportunity to be heard, was valid, could not be attacked collaterally and there having been opportunity to be heard it did not deny due process of law. *Id.*

Where Territory has authority to establish rule as to escheat it has power to establish tribunals with jurisdiction and procedure, and if other proceedings are established, as in Washington, by probate court, decree of office found is not necessary. *Id.*

Provisions for escheat for failure of heirs have proper relation to matters embraced in law establishing probate courts as in statutes of Washington Territory which are not invalid because title of probate act not broad enough to cover escheats. *Id.*

Prohibition in Organic Act of Washington of 1853 against interference with primary disposal of soil had reference to public lands of United States and did not relate to escheat of land for failure of heirs. *Id.*

Decree of probate court of King County, Washington, sufficient to sustain escheat as being within its jurisdiction. *Id.*

WATERS. See **Riparian Rights.**

WHITE EARTH RESERVATION. See **Indians.**

WOMEN. See **Citizenship Act.**

WORDS AND PHRASES:

Judgment granting railroad company right of way under Right of Way Act of 1875 uses terms with same meaning as used in act. *Rio Grande Ry.* v. *Stringham.* 44

"False and fraudulent" as used in Shirley Amendment

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to Food Drugs Act used in accepted legal meaning and to condemn thereunder statements put in package with actual intent to deceive. *Seven Cases &c.* v. *United States* 510

"To ship" in § 240, Criminal Code, not used in sense to "deliver for shipment" but as continuing act. *United States* v. *Freeman* 117

Void may mean voidable. *United States* v. *N. Y. & Porto Rico S. S. Co.* 88

WORKMEN'S COMPENSATION:

Holding by highest court of State that State Workmen's Compensation Act established comprehensive plan for relief of workmen included therein regardless of fault, is exclusive, notwithstanding it did not expressly repeal statute giving right of action for death, is binding on Federal courts; and so held as to Washington statute. *Northern Pacific Ry.* v. *Meese* 614

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WRIT OF ERROR. See **Appeal and Error.**