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UNITED STATES REPORTS

VOLUME 241

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1915

CHARLES HENRY BUTLER

REPORTER

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NOTICE

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.[2]
CHARLES EVANS HUGHES, Associate Justice.[3]
WILLIS VAN DEVANTER, Associate Justice.
JOSEPH RUCKER LAMAR, Associate Justice.[4]
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.[5]

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 Hughes resigned June 10, 1916. July 14, 1916, President Wilson nominated John H. Clarke of Ohio to succeed Mr. Justice Hughes; he was confirmed by the Senate, July 24, 1916; his commission was dated July 24, 1916; the oath of office was administered by the Chief Justice at Washington, D. C., August 1, 1916; he did not take his seat upon the Bench until after the publication of this volume.

[4] 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, 239 U. S. For proceedings on the death of Mr. Justice Lamar see p. v., *post*.

[5] On January 28, 1916, President Wilson nominated Louis D. Brandeis of Massachusetts to succeed Mr. Justice Lamar deceased: he was confirmed by the Senate on June 1, 1916; his commission was dated June 1, 1916, and he took his seat upon the bench June 5, 1916.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1915.

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

It is ordered [1] 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, LOUIS D. BRANDEIS, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

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

For the Fifth Circuit, EDWARD D. WHITE, Chief 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.

June 12, 1916.

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[1] For next previous allotment see volume 240 U. S., p. iv.

PROCEEDINGS ON THE DEATH OF MR. JUSTICE LAMAR.

The Bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol on May 26, 1916, at twelve o'clock.

On motion of MR. SOLICITOR GENERAL DAVIS, THE HONORABLE HOKE SMITH, United States Senator from Georgia, was elected chairman, and MR. JAMES D. MAHER, clerk of the court, was elected secretary.

On motion of MR. WILLIAM G. BRANTLEY, the Chair appointed a Committee on Resolutions as follows: HONORABLE WILLIAM G. BRANTLEY of Georgia; MR. THOMAS W. HARDWICK of Georgia; HONORABLE JOHN W. DAVIS of West Virginia, Solicitor General of the United States; MR. NATHANIEL WILSON of the District of Columbia; MR. FREDERICK W. LEHMANN of Missouri; MR. FREDERIC D. MCKENNEY of the District of Columbia; MR. HANNIS TAYLOR of the District of Columbia; MR. ALFRED P. THOM of the District of Columbia; MR. HENRY E. DAVIS of the District of Columbia and MR. STEPHEN S. GREGORY of Illinois.

After deliberation the committee through its chairman presented its report preceded by the following remarks: MR. CHAIRMAN: It was my privilege to know MR. JUSTICE LAMAR long and intimately. He possessed my respect, my admiration, and my affection. I first knew him when we served together as members of the Georgia Legislature, and it was there that I came to know the wonderful clearness of his perception, the power of his logic, the varied character of his information, and the thoroughness and conscientiousness with which he did his work; and also came to know the cleanliness of his life and the gentleness of his nature.

I had the opportunity to bear testimony to his worth

to President Taft prior to his appointment to this great court. On that occasion, President Taft said to me that in filling the vacancies then existing on the bench of the Supreme Court it was his desire to find men who were big enough, courageous enough, able enough, and patriotic enough, to preserve the Republic as it was founded, and it mattered not to him from what section of our common country they came, nor what their politics were. I was proud to give my assurance that MR. LAMAR measured up to these great qualifications, and I am happy now to believe that this assurance was more than indicated by the record of JUSTICE LAMAR in the discharge of his judicial duties.

Mr. Chairman, the purity of the life that JUSTICE LAMAR lived, and the deeds he wrought, known to us all, speak their own eloquent eulogy of the man and his life, and there are no words of mine that can add anything thereto. I can only bear testimony to the strength of my devotion to him and declare my high estimate of him as man, as lawyer, and as judge, and the great sorrow into which we were all plunged when he was taken from us.

I move the adoption of the Resolutions submitted:

The Resolutions were as follows:

RESOLUTIONS.

Resolved, That the members of the bar of the Supreme Court of the United States lament the untimely death of the late JOSEPH RUCKER LAMAR, Associate Justice of the Supreme Court of the United States, and record their appreciation of his learning, ability, and high character, the affectionate regard with which they now cherish his memory, and the great loss to the bench and the country occasioned by his death.

A native Georgian, he was born of an illustrious family, and by his life's work not only sustained the best traditions thereof but added lustre to the great name he bore.

He was the second of the Georgia Lamars to win a place on the bench of the Supreme Court of the United States, the first being the late L. Q. C. LAMAR, appointed from the State of Mississippi. Each of these two Lamars brought to the court superb mental equipment, lofty ideals, intense Americanism and consecration to duty, and by the product of his labors more than vindicated the wisdom of his appointment.

JOSEPH RUCKER LAMAR was born October 14, 1857, and after a collegiate education came to the bar at 21 years of age. His entire life thereafter was one of devotion to the law, for he never knew any other field of labor.

As a practitioner at the bar he won renown and success, and, at a comparatively early age, easily ranked among the leaders of the bar of his State. As an antagonist he was always formidable, for he was always prepared, but he was also always delightful. His courtesy was disarming. He was always fair, and neither sought nor would he have any mean advantage.

In 1892 he was chosen as one of three commissioners to codify the laws of his State and the work he there did, resulting in the code of 1895, will ever stand as a monument to his discriminating judgment, to his industry, and to the thoroughness and completeness with which he performed each task assigned to him.

Prior to this work of codification he served for two terms as a member of the lower house of the General Assembly of Georgia, and to the legislative field he carried the training and habits of the lawyer, giving to his State, upon all public questions, the careful preparation, the thoughtful consideration, the sound advice and unswerving loyalty of attorney to client. He was always earnest, always sincere and never knew but one way to discharge any duty, and that way was to discharge it to the very best of his ability.

On January 13, 1903, he took his seat as an associate justice of the Supreme Court of the State of Georgia,

and resigned therefrom in 1905 on account of his health and resumed the practice of law.

The fruits of this service were found in the affection and admiration for him of his associates on the bench, and of the bar of the State, and in strong virile opinions, classically expressed, which to-day, as then, enrich the permanent judicial literature of his State.

On December 12, 1910, he was appointed an associate justice of the Supreme Court of the United States. His appointment was shortly thereafter confirmed by the Senate, and on January 3, 1911, he took his seat on the bench. He died at his home in the city of Washington on January 2, 1916, not quite completing five years of service.

From the day upon which he entered this service he consecrated his life and all that was in him to the faithful performance of its duties. His application, his untiring research, his painstaking care and his patient labor were known to all who had dealings with the court.

Others have been and no doubt will be permitted to give more years of service to their country on this great bench than was he, but to him was given the high privilege, by excessive and never-ending toil, to give his life. No man could give more.

Measured by time, his service was not long, but measured by results, a great service was completed. He served long enough to demonstrate his aptitude and fitness for the work, and long enough to leave upon the archives of his country the enduring impress of a great and just judge.

His life was one of devotion to American ideals. He was ever a student of his country's history, and no man was more familiar than he with the origin of the Government under which he lived or with the foundation principles upon which it rests. The extent and the limitations of its power were clearly defined in his mind, and full well he knew how liberty came and how only it can be preserved.

To the office of Associate Justice of the Supreme Court of the United States he brought the ability, the strength, the courage, and the patriotism to preserve our Republic as the fathers founded it, and all these he dedicated to that great end.

In May, 1914, he was invited by the President to serve as a special commissioner of the President, in connection with commissioners from certain South American countries, in the matter of mediation in the troubled affairs of our neighboring Republic of Mexico. With his habitual response to every call of duty he accepted the invitation and assumed the responsibilities thereby imposed. The commissioners so selected met with commissioners from Mexico at Niagara Falls soon after their appointment, and concluded their delicate and important labors in the month of July following, to the satisfaction of the several governments participating.

He was by nature kind and gentle, but beneath his kindliness of manner there was a fixedness of purpose and a courage of steel that knew no yielding. He was cautious and careful, but once the path of duty became clear he followed it to the end. He never faltered in the pursuit of truth.

The sweetness and gentleness of his nature, the charm of his personality, the readiness of his sympathy, were such that to know him was to love him. The same listening ear that as judge he gave to advocate he always kept attuned to hear the voice of humanity. He loved his fellows, and to him the breath of friendship was as incense. It sweetened, inspired, and strengthened his life.

In the rich fullness of his sympathetic heart, when he came to prepare his last will and testament, in 1899, he incorporated therein the following beautiful statement:

"My friendships many and precious I leave to my family in the hope that they will be cherished and continued. I know of no enmities; but if such unhappily hereafter arise, let them be forgotten."

When the end came for him, it is precious to believe

that there was still an absence of all enmities and that he went out into the great beyond leaving behind him a world of friends only. What more priceless heritage could he have bequeathed?

Resolved, That the Attorney General be asked to present these resolutions to the court, with the request that they be entered upon the records and that the chairman of this meeting be directed to forward a copy of them to the family of the late JUSTICE LAMAR, accompanied by an expression of our profound sympathy for them in their overwhelming bereavement.

Remarks were made seconding the Resolutions by the following members of the Bar: MR. E. MARVIN UNDERWOOD; MR. HANNIS TAYLOR; MR. FRANK WARREN HACKETT; MR. ALFRED P. THOM, all of which appear at length in the Memorial Volume published by the Clerk of the Court and secretary of the meeting, and which also contains the Report of the Committee appointed by the Supreme Court of Georgia to prepare a Memorial Commemoration of the life and character of MR. JUSTICE LAMAR.

The Resolutions were adopted as submitted and on motion of MR. SOLICITOR GENERAL DAVIS the meeting adjourned.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 12, 1916.

Present: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE PITNEY, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS.

MR. ATTORNEY GENERAL GREGORY addressed the court as follows:

May it please your Honors: For the second time within a year it has become my duty and sad privilege to present

to you resolutions passed by the bar on the death of a member of this court.

Upon the former occasion I paid an inadequate tribute to one who had been a friend from my youth. It was not my privilege to come in intimate contact with the late JUSTICE LAMAR until a very few years before his death, and yet the feeling which moves me most is one of keen personal loss, a feeling that a great light has gone out, not merely one that illumined the legal shadows but one that warmed the hearts of men and made them kinder, nobler, and more charitable.

In recalling the personality of a really great man who has left us we do not see him as a combination of various intellectual and moral qualities. On the contrary, we remember him as the possessor of some one striking characteristic, which, like Saul, son of Kish, towered above its brethren and challenged the attention of all observers.

While JUSTICE LAMAR was a powerful advocate, a wise counselor, an able and just judge, a cultured gentleman, and a great citizen, his dominating characteristic was a peculiarly winning courtesy, a kindly consideration for all with whom he came in contact. He was born and bred among a people who have always cherished this quality, and yet in his case it was not the result of association and training. By a perfectly natural process he garnered the sunshine of life and dispensed it with a prodigal hand.

In contemplating a life like this you think of Hawthorne's tribute to the fragrant white water lily of the Concord River, of how he marveled at its capacity for absorbing only loveliness and perfume; and we reflect, as did the author, on how some persons assimilate only what is ugly and evil from the same moral circumstances which supply good and beautiful results—the fragrance of celestial flowers—to the daily lives of others.

The power to see, to appreciate, to absorb, and to express what is good comes from the heart, and this man, like Abou Ben Adhem, would have said to the angel with

the golden book, "Write me as one that loves his fellow men."

I doubt not that it was because of this marked characteristic that JUSTICE LAMAR was selected by the President in the summer of 1914 from all the able men of the Nation, to represent the United States at the conference called by Argentina, Brazil, and Chile, to consider the delicate Mexican problem. Surely no more critical situation could have arisen to test to the utmost the best qualities of heart and mind. He approached its consideration carrying in his right hand "gentle peace to silence envious tongues," and no such mission was ever more successfully carried out.

Being a man of this type, and of strong intellect and wide learning, he naturally brought to the study of questions of abstract law a sympathetic interest and enthusiasm which made even the dry bones live again. He was never satisfied with his work while any possibility of further effort remained. Where others would have rested content, his ardent zeal for perfect accomplishment spurred him to continued labor. Accuracy, simplicity, and clearness of expression were his constant aim and his marked achievement.

In appraising the work of his professional brethren he was most generous. He took intense pleasure in the accomplishments of others, and often pronounced their work "well done" with genuine enthusiasm where he would have criticized it if his own.

JOSEPH RUCKER LAMAR was the son of Rev. James S. Lamar and Mary Rucker Lamar. His family was of Huguenot descent, the founder, Thomas Lamar, having settled in Maryland in 1663. His ancestors moved to Georgia in 1775 and have taken a prominent part in the public life of the State.

After attending preparatory schools in Georgia he matriculated at the State University in 1874, but before graduating entered Bethany College, W. Va., of which Dr. William King Pendleton, afterwards his father-in-law,

was president. He graduated from this institution in 1877, and after studying law at Washington and Lee University was, on April 16, 1878, admitted to the bar in Augusta, Ga., where he opened an office and established his home. On January 30, 1879, he married Miss Clarinda Huntington Pendleton, who, with two sons, survives him.

The society of Augusta has always been cultured, and young LAMAR was from early manhood one of the most charming of that delightful circle, and rapidly became one of the leading spirits in the social and civic life of the community.

From 1886 through 1889 MR. LAMAR represented Richmond County, in which Augusta is situated, in the Georgia Legislature. He was the author of some of the most important legislation of his State, notably the act regulating the exercise of the right of eminent domain and the laws governing voluntary assignments.

Shortly after ending his legislative services he was appointed one of the codifiers who revised and edited the Code of Georgia of 1895. His labors on this commission were most able and of great service to the State.

Meanwhile his practice had become wide and varied, and extended throughout Georgia and neighboring States. There were few cases of great magnitude in that section in which he was not employed.

On January 13, 1903, the governor appointed MR. LAMAR a justice of the Supreme Court of the State to fill a vacancy on that bench, and he was elected to the position in 1904. He resigned in the spring of 1905 and returned to the practice of law at Augusta.

He was the author of a number of historic and literary contributions, many of which are to be found in the printed volumes of the reports of the Georgia Bar Association, of which he was an active member.

Except while on the State bench, he served as a member of the board of law examiners for admission to the bar of Georgia from the organization of that institution until his appointment as a member of this court. He

was chairman of this board from the spring of 1905 until his removal to Washington.

On December 12, 1910, he was nominated by President Taft to be an Associate Justice of the Supreme Court of the United States, was confirmed by the Senate on December 15, and took his seat on January 3, 1911.

His services on the bench of this court are well known. During the five years of their duration, he participated in the decisions of 1,179 cases, wrote the opinion of the court in 114 and the dissenting opinion in 8. His opinions are found in volumes 220 to 238, inclusive, of the United States Reports. His sound judgment, wide learning, and great clearness and facility of expression won for him the confidence and admiration of the bar and the public.

Perhaps the most important opinions rendered by JUSTICE LAMAR were in the cases of *United States* v. *Grimaud*, 220 U. S. 506; *Gompers* v. *Bucks Stove & Range Company*, 221 U. S. 418; *United States* v. *Midwest Oil Company*, 236 U. S. 459; *United States* v. *Delaware, Lackawanna & Western Railroad Company and Delaware, Lackawanna & Western Coal Company*, 238 U. S. 516.

In *United States* v. *Grimaud*, the Secretary of Agriculture had passed an order forbidding grazing on public lands without permits. The defendants were charged with violating this order and contended that the act of Congress making it an offense to disobey the regulation of the Secretary was unconstitutional in that it attempted to delegate legislative authority. The decision overrules this contention.

In the case of *Gompers* v. *Bucks Stove & Range Company*, plaintiffs in error were charged with contempt in violating an injunction of the Supreme Court of the District of Columbia by publication of an "unfair" list. It was held that the publication was a contempt, but that the proceedings were not properly brought.

The case of *United States* v. *Midwest Oil Company*, was brought to test the Government's right to oil lands valued at many millions of dollars, and involved the

authority of the President to withdraw such lands from public entry. It was decided that the President had this authority.

United States v. *Delaware, Lackawanna & Western Railroad Company and Delaware, Lackawanna & Western Coal Company* arose under the commodity clause of the Act to Regulate Commerce and under the Antitrust Act. The railroad company at the time of the passage of the commodity clause was engaged in mining, buying, transporting, and selling anthracite coal. To divest itself of title before transportation began, it caused the coal company to be organized with stockholders and officers in common with itself. The railroad company then caused the output of its mines to be transferred to the coal company under a contract which placed the latter company largely, if not completely, within the power of the former.

The district court dismissed the petition. The Supreme Court reversed this decision, holding that by reason of having stockholders and officers in common and by reason further of the above-mentioned contract, the two companies were so united in ownership and management as to give the railroad company an interest in the coal of the coal company, and that, therefore, the transportation of such coal by the railroad company constituted a violation of the commodity clause. The court also held that the contract in question violated the Antitrust Act.

In 1911 Yale University, in recognition of his learning and ability, conferred on JUSTICE LAMAR the degree of Doctor of Laws.

He was active in many spheres of public work in the communities in which he lived, and in the Christian Church, of which he was a devoted member.

He died in this city on January 2, 1916, having just entered upon his fifty-ninth year. He was in the zenith of his powers and usefulness when seized with the fatal illness which terminated his life.

Such, in brief outline, is the skeleton of this man's

character and life. It conveys no idea of his vivid personality. It faintly portrays his kindly nature and the loving service to country, family, and friends bereft.

Beyond their admiration for his talents and accomplishments will stand foremost with all privileged to know him their recollection of his warm, magnetic nature.

Strong, ardent, a man among men, a warrior in every battle for truth and right, always ready for every conflict which would advance the cause he espoused, he was one of whom it could with perfect truth be said:

> His life was gentle, and the elements
> So mix'd in him, that Nature might stand up
> And say to all the world, "This was a man!"

THE ATTORNEY GENERAL then read the Resolutions adopted as they appear on pages vi–x, *ante*.

THE CHIEF JUSTICE responded:

Mr. Attorney General, there is nothing to be added to the beautiful tribute which the resolutions of the bar, so appreciatively by you presented, pay to the memory of MR. JUSTICE LAMAR. As I grasp their ultimate significance they are intended principally to express the appreciation by his brethren of the bar of his fealty to the noble ideals of the profession and of the honor which his life and work have reflected on that profession. In fact, while expressing the profound regret which the death of MR. JUSTICE LAMAR has occasioned, as I understand the resolutions, they seek not simply to express that regret but rather, as it were, to lay the foundations in the permanent records of this court of a monument to his memory which shall continue to speak of his great moral and mental qualities, of his courageous and conscientious discharge of judicial duty, long after we ourselves shall have gone.

Admirable as are these aims of the resolutions, I find it difficult to completely adjust myself to them. Ah, how can it be otherwise, since at the very mention of the death of our Brother LAMAR all sense of exultation or pride at the high ideals to which his life conformed fades

out of my thoughts and there remains only the sense of personal sorrow at the loss occasioned by the severance of those ties which were so cherished and by which his brethren were bound to him—a sorrow whose depths cannot be fully fathomed without the knowledge begotten by association in judicial work of the attributes of his nature, so gentle, so true, so faithful, so brave, so generous, so devoted! But controlling personal feelings, let me endeavor to bring myself into harmonious relations with the purposes of the resolutions by making some few suggestions as to impressions made upon me by his work on this bench and pointing out the dominant intellectual influences which, in my opinion, formed and controlled his abstract conceptions as to some important questions, and which consequently tended to shape the conclusions which he reached in the discharge of his duties concerning such questions.

Too young to have been a participant in the Civil War, he was yet old enough to have appreciated the anguish of that appalling conflict, the multitude of noble lives on both sides which were forever stilled, the homes made desolate, the fields wasted, and the blight of a destroyed society and of nearly all prosperity which came, at least, in one section, as a result of that struggle—impressions which in the very nature of things indelibly stamped upon his developing life the dread consequences which necessarily would follow in the wake of a disintegrated union and a destroyed national life. He was, moreover, old enough to have understood and appreciated the anguish, more appalling than the calamity of the war, of the period which followed in its wake, and thus to have also impressed upon his nature beyond the possibility of forgetfulness the destruction of individual right which would arise from reducing the States to mere dependent vassals deprived of local autonomy and to be governed from afar by a centralized government, whether of executive power or of bureaucratic authority. Thus indubitably, my belief is, it resulted that when by training his mind came

to explore the sources of our constitutional life, his opinions came to be composite; that is, in his mind there resulted, as it were, a fusion of state and National power, united but not destroyed, both coöperating to the perpetuation of the other. In other words, his opinions came by a natural process to embody the very concepts upon which our institutions must rest.

Reared virtually in the atmosphere of an agricultural community, when by the force of his ability he came in later life to consider a wider range—that is, the relation to each other of diverse and seemingly conflicting activities and the possibility of coördinating and preserving them all—it also seems to me clear that the process which had shaped his convictions as to our constitutional government came to mold his opinions on the subjects just stated. In other words, he came fully to appreciate that to assume a society resting solely upon the pursuit of agriculture and which would be confined to that relation was a negation of the existence of society itself, which in its very essence embodies the complex resultants of all the activities of human life, giving rise to the corresponding duty to harmonize and adjust them to each other so that they all might live and develop for the blessing and advancement of mankind.

In practice it may be said that these ultimate convictions were applied by Mr. Justice Lamar in his discharge of judicial duty in a threefold aspect: First, the relation of the activities of individuals and their results to each other; second, the relation between the power of the States and that of the Nation; and, third, the obligation and effect of the limitations imposed upon all government as the consequence of those great guarantees in favor of individual right forming an inherent part of our constitutional system. As to the first, it is enough to say that the opinions expressed by Mr. Justice Lamar in the performance of his duties here afford apt examples of the keenness of his appreciation of the duty to adjust between conflicting activities so as to preserve the rights

of all by protecting the rights of each. As to the second, intensely local as were his affections and his ties, nothing is more clearly portrayed by his work on this bench than the broad conception which he entertained of the duty to uphold and sustain the authority of the Union as to the subjects coming within the legitimate scope of its power as conferred by the Constitution. As to the third, no demonstration could be more complete than that afforded by his work of the fixed opinion on his part as to the duty to uphold and perpetuate the great guarantees of individual freedom as declared by the Constitution, to the end that the freedom of all might not pass away forever. Convinced as he was from his study of the sources of our constitutional institutions that their enjoyment was dependent upon the limitations in favor of individual right which the Constitution expressed, and that such limitations were essential to secure us from the anguish and turmoil and tyranny and the disappearance of freedom which had always resulted where such guarantees did not exist or were not adhered to, he had come to feel that for the purpose of their preservation he was but a trustee for the millions who were to come. His mind was too penetrating to listen for a moment to the suggestion that freedom would be secured by destroying principles which were essential to its preservation or that wrong would result unless truths which were eternal were violated. Thus controlled, his work on this bench leaves no room to doubt that no thought of mere expediency, no mere conviction concerning economic problems, no belief that the guarantees were becoming obsolete or that their enforcement would incur popular odium ever swayed his unalterable conviction and irrevocable purpose to uphold and protect the great guarantees with every faculty which he possessed. In considering such questions there shone ever in his heart the light of Georgia firesides and the great duty he owed to those firesides, indeed, to every individual, not only in Georgia but elsewhere, to see to it that by no act of his did the inherent

principles of individual freedom guaranteed by the Constitution fail to receive enforcement or their efficacy become impaired by misconception or misrepresentation.

O true American and devoted public servant, O cherished friend and faithful comrade, O sweet and noble soul, may it be vouchsafed that the results of your work may endure and fructify for the preservation of the rights of mankind, and may there be given to us who remain, wiping from our eyes the mists begotten by your loss, to see that through the mercy of the inscrutable providence of God you have been called to rest and to your exceeding reward!

Let the resolutions be recorded.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1915.

CHIN FONG *v.* BACKUS, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 664. Argued April 5, 6, 1916.—Decided April 17, 1916.

Where the right of a person of Chinese descent to enter this country depends, as in this case, upon the statutes regulating Chinese immigration and not upon the construction of provisions of treaties relating thereto, a direct appeal will not lie to this court under § 238, Jud. Code, from a judgment dismissing a petition for *habeas corpus* of a Chinese person detained for deportation.

The status of a Chinese merchant, as defined by the treaty with China of 1880, is that acquired in China and not in this country.

THE facts, which involve the jurisdiction of this court of appeals from the District Court under § 238, Judicial Code, are stated in the opinion.

Mr. Jackson H. Ralston, with whom *Mr. William E. Richardson* was on the brief, for appellant.

Mr. Assistant Attorney General William Wallace, Jr., for the appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a judgment dismissing a petition for *habeas corpus* and remanding petitioner to the custody of the Commissioner of Immigration for the Port of San Francisco, in whose custody he was, pending petitioner's deportation.

A summary of the petition made by the District Court is as follows:

"Petitioner Chin Fong, who had been a resident of the United States for a number of years, departed for China in November, 1912; that before he left he applied for a pre-investigation as to his status as a merchant, and a certificate was denied him on the ground that his original entry into this country was surreptitious. Notwithstanding this denial the petitioner left the country, and is now endeavoring to re-enter as a returning Chinese merchant; that he presents the affidavits of a member of the New York firm to which he claims to belong and of two reputable Americans supporting his claim; that notwithstanding these facts he has been denied admission and ordered deported on the same ground that his pre-investigation certificate was denied, that is to say, because his original entry was surreptitious; that in so deciding the immigration department has exceeded its authority, as that question can only be determined under the Exclusion laws by a Justice, Judge or Commissioner."

A demurrer was interposed to the petition which was sustained, the court saying: "Had the petitioner been content to remain in this country he could have been deported only after a hearing before a Justice, Judge or Commissioner. But as he left the country voluntarily, and even after a pre-investigation certificate was denied him, the question of his right to re-entry lies peculiarly with the immigration department, and as they have found

that he is not entitled to re-enter such finding cannot be disturbed. A different rule prevails, and a different tribunal determines in the case of a Chinese applying to enter from that of one already in this country whom it is sought to deport, under the Exclusion laws."

The decision of the court is contested and it is asserted (1) that the petition was sufficient to entitle petitioner to a discharge; (2) that the Commissioner of Immigration and Secretary of Labor could not require a greater and different degree of proof than that specified in § 2 of the act of Congress of May 5, 1892, c. 60, 27 Stat. 25, entitled "An Act to Prohibit the coming of Chinese persons into the United States"; (3) that petitioner furnished the degree of proof required by the law; (4) that the rights guaranteed petitioner under the treaty between the United States and China concerning immigration, November 17, 1880, were unduly and unlawfully infringed, and (5) that the decision of the Commissioner was against the law and was an abuse of discretion.

The appeal is direct from the District Court and can only be sustained against the motion of the United States to dismiss for want of jurisdiction in this court if there is a substantial question under the Constitution of the United States or a treaty made under their authority, § 238 of the Judicial Code permitting an appeal from a District Court when a constitutional question is involved and in any case "in which . . . the validity or construction of any treaty made under its [United States] authority is drawn in question."

It will be observed that appellant based his right to land solely on the ground that he had been a merchant in the United States before his departure to China and that, therefore, it was not competent for the immigration officers to inquire or determine whether his original entry into the United States was open or surreptitious and his stay therein legal or illegal. "The principal proposition that

we desire to maintain," counsel say, "and which has apparently been ignored by the Department of Labor, is that when Congress has definitely fixed the tests and qualifications attendant upon the determination of a given act, it is not within the power of an administrative officer to add to or subtract from the congressional rule." The case of *Lau Ow Bew* v. *United States*, 144 U. S. 47, is cited. For the "congressional rule" counsel refer to § 2 of the act of November 3, 1893 (28 Stat. 78), which reads as follows:

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

It is contended that the section requires proof by a Chinaman seeking entrance into the United States of two facts only—(1) that he had been a merchant for one year before his departure, and (2) that during such time he had not engaged in manual labor except such as was necessary in the conduct of his business as such merchant. These were the only conditions of the right to enter, it is contended, and it was an irrelevant inquiry whether he "originally entered as a laborer or even surreptitiously." And in emphasis counsel say, "The manner of entry was entirely ignored by Congress."

These being the conditions, it is hence asserted that if the Department of Labor may superadd one qualification it may another "until the law becomes entirely unrecognizable." So far manifestly there is nothing but an appeal to the statute, but the treaty is attempted to be invoked

by the following: "Such a course [the addition to the qualifications of the statute] would be in plain derogation of the treaty obligations between the United States and China, allowing to Chinese merchants freedom of egress and ingress in the manner permitted to citizens of the most favored nations, the essential fact by law and treaty being merely that of mercantile status."

No provision of the treaty is cited from which the contention is an applicable deduction, nor are we disposed to quote and comment on the entire treaty in answer to the contention. See 22 Stat. 826, Nov. 17, 1880; also *Lau Ow Bew* v. *United States, supra.* The "merchant" defined by it does not include petitioner. It was the definition of the status acquired in China, not acquired in the United States, and, having been acquired in China, gave access to the United States and after access freedom of movement as citizens of the most favored nations. And this privilege was given as well to Chinese laborers then (1880) in the United States.

We think, therefore, there is no substantial merit in the contention that the case involves the construction of a treaty and that the rights of petitioner can rest only upon the statutes regulating Chinese immigration. So concluding we are not called upon to decide or express opinion whether petitioner's original entry into the United States and his subsequent residence therein were illegal and whether he could acquire by either a status which the immigration officers were without power to disregard.

Dismissed.

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

KELLY *v.* GRIFFIN, JAILER OF LAKE COUNTY, ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 777. Argued April 6, 7, 1916.—Decided April 17, 1916.

That the arrest by state or municipal authorities is illegal does not affect the jurisdiction of a United States Extradition Commissioner.

The omission of a formal act of release of one held under an illegal arrest by state authorities and of a subsequent formal and legal arrest thereafter by a United States Marshal under an extradition warrant *held*, under the circumstances of this case, not to furnish grounds for release on *habeas corpus*, it not appearing that a different rule applies in the demanding country.

In this case *held* that the complaint charging the person demanded with having committed in Canada perjury, obtaining money under false pretenses and receiving stolen property, states offenses of perjury and obtaining money by false pretenses within the meaning of the extradition provisions of the treaty with Great Britain both in Canada where the offenses were committed, and in Illinois where the person demanded was arrested; but *quære* whether it does state an offense of receiving stolen property which is a crime in both jurisdictions.

Where the complaint properly charges an offense included in the extradition treaty and also charges one that is not included, the court will not release on *habeas corpus*, but will presume that the demanding country will respect an existing treaty and only try the person surrendered on the offenses on which extradition is allowed.

THE facts, which involve the validity of an order for extradition under the treaties with Great Britain, are stated in the opinion.

Mr. John S. Miller, with whom *Mr. Edward Osgood Brown* and *Mr. Pierce Butler* were on the brief, for appellant:

The United States Commissioner did not have jurisdiction of the person of appellant.

Appellant's arrest and detention without warrant were unlawful. Rev. Stat., § 5270; *Ex parte Cohen*, 8 Can. Cr. Cas. 312; *Re Dickey, Id.* 318; *State* v. *Shelton*, 79 N. Car. 605, 607–608; *Malcolmson* v. *Scott*, 56 Michigan, 459; *Scott* v. *Eldridge*, 154 Massachusetts, 25; *Harris* v. *Louisville &c. Ry.*, 35 Fed. Rep. 116; *Kurtz* v. *Moffitt*, 115 U. S. 487.

Appellant could not lawfully be turned over by the Chicago police officers to, or be lawfully taken from them by the United States marshal. He should have been set at liberty from such illegal arrest and detention before he could be lawfully arrested on the Commissioner's warrant. *Ex parte Cohen, supra; Hooper* v. *Lane*, 6 H. L. Cas. 443; *Mandeville* v. *Guernsey*, 51 Barb. 99.

The enactment by the Parliament of the Dominion of Canada of a statute which gives to a different moral offense, which is not a crime in Illinois or in the United States or at common law,—the name of a crime mentioned in an extradition treaty with Great Britain does not bring such different moral offense within the provisions of the treaty.

Such an enactment, however, has been made in the Criminal Code of Canada, and it is under it that the extradition of the petitioner for perjury is sought.

By the common law, by the statutes of the United States and by the statutes of Illinois, where the petitioner was seized, a false statement under oath to be "perjury" must be material to the issue pending. Coke 3d Inst. 167; Archbold's Cr. Pl. Ev. & Pr., 24th ed. 1160; *R.* v. *Townsend*, 10 Cox, 356; § 225, Crim. Code Illinois; § 125, Crim. Code U. S.

By the statutes of Canada "perjury" is a false statement under oath in a judicial proceeding whether said statement is material or not. This makes the offense against the laws of Canada, there denominated "per-

jury"—an entirely different thing from the crime of "perjury" known to the common law, to the statutes of Illinois, or to the statutes of the United States.

The extraditable crime named in the Convention of 1889, enlarging the Webster-Ashburton Treaty of 1842, as "perjury," is the common-law crime of "perjury," the definition of which is the same as that given of "perjury" in the statutes of Illinois and of the United States and of the United Kingdom. Ch. 6 of 1 & 2, Geo. V.

By indirection in 1869 and directly in 1892 and again in 1906, the Dominion Parliament denominated as "perjury" a moral dereliction which was not and is not a crime at common law, nor by the statutes either of Great Britain or of the United States or of any of them.

This did not affect the meaning of the term "perjury" as used in the Convention of 1889. Statutes of Canada, 1869, Ch. 23, 32–33 V.; 1886, Ch. 154, § 5; 1892, Ch. 29–55 & 56 V.; 1906, Ch. 146, § 170.

Not only must an offense be named in the treaty as extraditable, it must also be considered a crime in both the demanding and surrendering country. *Wright* v. *Henkel*, 190 U. S. 58.

Thus the offense denominated "perjury" in Canada is not in the United States a crime.

It is not an answer that the Commissioner or court in the United States might have considered the false statement probably material to the matter under investigation by the Canadian Committee.

If extradited for "perjury" the petitioner may be tried and condemned in Canada without proof or in the face of disproof of that which constitutes "perjury" in the United States. It is impossible to extradite for "perjury" from the United States to Canada and avoid this situation. Extradition from the United States to Canada for this alleged crime is therefore not permissible. *United States* v. *Rauscher*, 119 U. S. 407.

The alleged false statement of appellant on which the charge of perjury is based was not under oath.

The Public Accounts Committee was without power or authority to examine him under oath, with respect to the matter testified about.

The tribunal must have had jurisdiction of the cause in which the oath was administered, and this committee lacked that jurisdiction. *People* v. *Pankey*, 1 Scam. 80; *Maynard* v. *People*, 135 Illinois, 416; *Hereford* v. *People*, 197 Illinois, 222.

The complaints and the competent evidence before the Commissioner did not show probable cause that appellant was guilty of the crime of obtaining money by false pretenses—(1) under the law of Canada; and (23) under the law of Illinois. Crim. Code Canada, § 404; Rev. Stat. Illinois, Ch. 38, § B 16; *Jackson* v. *People*, 122 Illinois, 139, 149; *Moore* v. *People*, 190 *id.* 333, 335.

The complaints and the competent evidence before the Commissioner did not show probable cause of the commission by appellant of the crime of embezzlement, or larceny or receiving of money, valuable securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.

Mr. Almon W. Bulkley and *Mr. Henry B. F. Macfarland*, with whom *Mr. Clair E. More* was on the brief, for appellees:

The Webster-Ashburton Treaty, the Blaine-Pauncefote Treaty, and the supplement thereto, as are treaties of this character, are executory, and the duty to perform is imposed upon the executive, not the judicial, department. *Terlinden* v. *Ames*, 184 U. S. 270, 288.

Habeas corpus is to determine whether prisoner is lawfully detained. *Nishimura Ekiu* v. *United States*, 142 U. S. 651.

If committing magistrate has jurisdiction, the offense

charged is within the twenty, and if the magistrate has before him competent legal evidence his decision will not be reviewed on *habeas corpus*. *Terlinden* v. *Ames*, 184 U. S. 270–288; *Ornelas* v. *Ruiz*, 161 U. S. 502–508; *Bryant* v. *United States*, 167 U. S. 104; *Yordi* v. *Nolte*, 215 U. S. 227; *Nishimura Ekiu* v. *United States*, 142 U. S. 651–652; *McNamara* v. *Henkel*, 226 U. S. 520; *Ex parte Yarborough*, 110 U. S. 651–653.

A preliminary complaint on information and belief is not unlawful. *Yordi* v. *Nolte*, 215 U. S. 227.

It is immaterial how Commissioner obtains jurisdiction of person. Cases *supra* and *Wright* v. *Henkel*, 190 U. S. 40; *Iasigi* v. *Van De Carr*, 166 U. S. 391; *In re McDonald*, 11 Blatchf. 170; *Kelly* v. *Thomas*, 81 Massachusetts, 192; *Pettibone* v. *Nichols*, 203 U. S. 192; *Mahon* v. *Justice*, 127 U. S. 712; *Ker* v. *Illinois*, 119 U. S. 437.

It is not material what the Canadian statute of perjury is if the perjury charged comes within the terms of the Treaty and United States law. *Grin* v. *Shine*, 187 U. S. 180; *In re Luis Oteiza*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104; *Benson* v. *McMahon*, 127 U. S. 457; *Ornelas* v. *Ruiz*, 161 U. S. 502–508.

The Canadian Code is the equivalent of the Illinois and United States statutes regarding perjury. 22 Amer. & Eng. Ency. 684; 2 Wharton's Crim. Law (9th ed.), § 1244; *United States* v. *Landsberg*, 23 Fed. Rep. 585; *Regina* v. *Overton*, 2 Moody's Crown Cases, 336–340; *State* v. *Rosenberg*, 92 Atl. Rep. 145; *Dilcher* v. *State*, 39 Oh. St. 130.

The evidence showed materiality of alleged false assertions.

The regularity of appointment or procedure of Public Accounts Committee is not material in this proceeding. *Maynard* v. *People*, 135 Illinois, 416; *Greene* v. *People*, 182 Illinois, 178, 282.

The alleged defect was waived by Kelly's appearing and

testifying without objection or protest. *Maynard* v. *People*, 135 Illinois, 416, 430.

The evidence shows sufficient facts for jurisdiction.

Whether anyone was deceived or relied on alleged false pretenses is a question of fact not reviewable here. *McNamara* v. *Henkel*, 226 U. S. 520, and cases cited; *Thomas* v. *People*, 113 Illinois, 531–537; *Keys* v. *People*, 197 Illinois, 638–641; *People* v. *Goodhart*, 248 Illinois, 373.

The evidence was sufficient to sustain false pretenses.

Embezzlement, larceny, receiving money knowing it to have been embezzled, stolen or fraudulently obtained, is within treaty, and is a crime in both countries. *United States* v. *Gaynor*, 146 Fed. Rep. 766; *Greene* v. *United States*, 154 Fed. Rep. 401; *Greene* v. *United States*, 207 U. S. 596.

See also the following statutes: § 170, Can. Crim. Code (perjury); § 225, Ch. 38 Rev. Stat. Ill. (perjury); § 5392 of the U. S. Statutes (perjury); §§ 404, 405 and 406, Can. Crim. Code (false pretenses); § 96, Ch. 38, Rev. Stat. Ill. (false pretenses); § 347 and sub-secs., Can. Crim. Code (theft); § 359 and sub-sec. (c), Can. Crim. Code (theft by employee of government or municipality); §§ 399, 400 and 402, Can. Crim. Code (receiving stolen property); § 167, Ch. 38 Rev. Stat. Ill. (Larceny); § 74, Ch. 38, Rev. Stat. Ill. (embezzlement); § 80, Ch. 38, Rev. Stat. Ill. (embezzlement or fraudulent conversion by state or municipal officer); § 239, Ch. 38, Rev. Stat. Ill. (receiving stolen goods); §§ 5438, 5497, Rev. Stat. U. S. (false or fraudulent claims against the Government).

Mr. Justice Holmes delivered the opinion of the court.

The appellant was held for extradition to Canada and petitioned for and obtained a writ of *habeas corpus*. After a hearing upon the returns to the writ and to a writ of certiorari issued to the Commissioner by whose warrant the

petitioner was detained, the District Judge discharged the writ. An appeal was allowed and several objections have been pressed to the proceeding, which we will take up in turn. The matter arises out of frauds in the construction of the new parliament buildings at Winnipeg, in which Kelly the contractor and a number of public men are alleged to have been involved.

First it is said that jurisdiction of the appellant's person has not been obtained legally. On October 1, 1915, he was arrested without a warrant, on a telegram from Winnipeg. The next day a complaint was made before the Commissioner by the British Vice-Consul General in Chicago upon information and belief, a warrant was issued, and the petitioner was turned over to the United States Marshal by the Chicago police. On October 15 a new complaint was filed by the British Consul General, a new warrant was placed in the hands of the marshal and the former complaint was dismissed. *Wright* v. *Henkel*, 190 U. S. 40, 42, 44, 63. The contention is that the original arrest was illegal and that the appellant was entitled to be set at liberty before the warrant of October 2 or that of October 15 could be executed with effect.

But however illegal the arrest by the Chicago police it does not follow that the taking of the appellant's body by the marshal under the warrant of October 2 was void. The action of the officers of the State or city did not affect the jurisdiction of the Commissioner of the United States. Furthermore the order dismissing the complaint of October 2 was that the appellant be discharged forthwith from custody; so that on the face of the record it would seem that before being held under the present warrant the appellant had the moment of freedom which he contends was his right. It is urged that the Canadian authorities are trying to take advantage of their own wrong. But the appellant came within reach of the Commissioner's warrant by his own choice, and the most that can be said

is that the effective exercise of authority was made easier by what had been done. It was not even argued that the appellant was entitled to a chance to escape before either of the warrants could be executed. This proceeding is not a fox hunt. But merely to be declared free in a room with the marshal standing at the door having another warrant in his hand would be an empty form. We are of opinion that in the circumstances of this case as we have stated them the omission of a formal act of release and a subsequent arrest, if they were omitted, furnishes no ground for discharging the appellant upon *habeas corpus*. All the intimations and decisions of this Court indicate that the detention of the appellant cannot be declared void. *Pettibone* v. *Nichols*, 203 U. S. 192. *Iasigi* v. *Van De Carr*, 166 U. S. 391, 393, 394. *Ekiu* v. *United States*, 142 U. S. 651, 662. If we were satisfied that a different rule would be applied by the final authority in Great Britain other questions would arise. *Charlton* v. *Kelly*, 229 U. S. 447. But we are not convinced by anything that we read in *Hooper* v. *Lane*, 6 H. L. C. 443, that a different rule would be applied and we think it unnecessary to discuss the differences in detail.

The complaint of October 15 charges perjury, obtaining money by false pretenses, and, conjointly, stealing or embezzling and unlawfully receiving money and other property of the King which had been embezzled, stolen or fraudulently obtained by means of a conspiracy as set forth. The perjury alleged is swearing falsely to the proportion of cement sand and broken stone put into the caissons of the new parliament buildings at Winnipeg, in a judicial proceeding before the Public Accounts Committee of the Legislative Assembly of the Province of Manitoba, the appellant knowing his statements to be false. It is objected that although perjury is mentioned as a ground for extradition in the treaty, the appellant should not be surrendered because the Canadian Criminal Code, § 170,

defines perjury as covering false evidence in a judicial proceeding 'whether such evidence is material or not.' As to this it is enough to say that the assertions charged here were material in a high degree and that the treaty is not to be made a dead letter because some possible false statements might fall within the Canadian law that perhaps would not be perjury by the law of Illinois. "It is enough if the particular variety was criminal in both jurisdictions." *Wright* v. *Henkel*, 190 U. S. 40, 60, 61. There is no attempt to go beyond the principle common to both places in the present case. It is objected further that although the above committee was authorized to examine witnesses upon oath it was only in 'such matters and things as may be referred to them by the House.' But even if there were not some evidence and a finding, *Ornelas* v. *Ruiz*, 161 U. S. 502, 509, the nature of the investigation, the purposes for which the committee was appointed, and the fact that the appellant appeared before it without objection would warrant a presumption of regularity in a summary proceeding like this.

The plan for the foundations of the buildings was changed from piling called for by the written contract to caissons filled with concrete and the false representations alleged concern the amount of concrete, lumber, iron rings and bolts used in the extra work. They consisted in bills or 'progress estimates' addressed to the Provincial Government for 'labor and materials supplied,' setting forth the amount of each item thus stated to have been supplied. It is objected that the amounts demanded by the bills were paid not upon the bills but upon vouchers coming from the Department of Public Works, and that the provincial architect who certified the bills was not deceived. The person who made out the certificates relied upon the bills in good faith, and it appears that without the bills the payments would not have been made. The fact that there were other steps necessary in addition

to sending in a false account, or that other conspirators coöperated in the fraud, does not affect the result that on the evidence Kelly obtained the money from the Provincial Government by fraudulent representations to which he was a party and that his false statement was the foundation upon which the Government was deceived.

The last charge, stealing or embezzling and receiving money fraudulently obtained needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzlement as (commonly) defined, but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois. There may be a doubt whether the appellant, if a party to the fraud, received the money of the Government directly from it, or through a third hand so as to be guilty under this count of the complaint. We are not prepared to pronounce his detention upon the count unjustifiable in view of the finding. We assume, of course, that the Government in Canada will respect the convention between the United States and Great Britain and will not try the appellant upon other charges than those upon which the extradition is allowed. Therefore we do not think it necessary to require a modification of the complaint before the order discharging the writ of *habeas corpus* is affirmed.

Final order affirmed.

OSBORNE, RECEIVER OF THE CHATTANOOGA SOUTHERN RAILROAD COMPANY, *v.* GRAY.

ERROR TO THE SUPREME COURT OF TENNESSEE.

No. 373. Argued April 3, 1916.—Decided April 17, 1916.

In an action by representatives of an employee for his death, from negligence of an interstate carrier by rail, defendants are entitled to insist upon the applicable Federal Law as the exclusive measure of liability, whether plaintiff presents his case under the Federal or state law.

In the absence of a showing bringing the injury within the Federal act, the question whether the declaration permits a recovery at common law is a state, and not a Federal, question.

Where there is no evidence showing that the deceased was engaged in interstate commerce when killed, the court cannot supply the deficiency by taking judicial notice of that fact, basing its knowledge on facts such as that the location of the accident was near the border of the State and the direction from which the cars came.

An interstate carrier, defendant in an action for death of an employee, is bound to know the actual movement of its trains and whether they were interstate, and if it fails to inform the court on this point, it cannot complain that it is deprived of a Federal right because the court does not take judicial notice of facts bearing thereon.

THE facts, which involve the validity of a verdict under the Employers' Liability Act, are stated in the opinion.

Mr. William L. Frierson, with whom *Mr. Lewis M. Coleman* was on the brief, for plaintiff in error:

Where it appears either in the declaration or in the proof that the accident occurred in interstate commerce, the Act of Congress controls and, in case of death, a widow cannot recover in her own name. *Wabash R. R.* v. *Hayes*, 234 U. S. 86; *Toledo &c. R. R.* v. *Slavin*, 236 U. S. 454.

The amendment of the amended declaration amended both counts and, therefore, there was no count which did not allege interstate commerce or under which a widow could recover in her own name.

The view expressed by the state court that only the second count was amended is not conclusive on this court. *Light Co.* v. *Newport*, 151 U. S. 537; *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 595; *Mitchell* v. *Clark*, 110 U. S. 663; *Boyd* v. *Nebraska*, 143 U. S. 135; *Vandalia R. R.* v. *Indiana*, 207 U. S. 367.

From the facts which were established by evidence introduced before the jury, and from general knowledge the trial court was bound to know judicially and this court will know that the Chattanooga Southern Railroad extends from Chattanooga to the Georgia state line, and then through the State of Georgia and to Gadsden in Alabama; that Chattanooga is only about four or five miles from the Georgia state line and its suburb of Alton Park, immediately south of it, is almost on the state line. *Peyroux* v. *Howard*, 7 Pet. 324; *United States* v. *La Vengeance*, 3 Dall. 297; *United States* v. *Lawton*, 5 How. 26; *Watts* v. *Lindsey*, 7 Wheat. 162; *McNitt* v. *Turner*, 16 Wall. 352; *Wheeling Bridge Case*, 13 How. 561; *United States* v. *Thornton*, 160 U. S. 458–9; *Waters-Pierce Oil Co.* v. *DeSelms*, 212 U. S. 159; *Schollenberger* v. *Pennsylvania*, 171 U. S. 9–10; *New Mexico* v. *Denver &c. R. R.*, 203 U. S. 38; *Nicol* v. *Ames*, 173 U. S. 516–17; *Gibson* v. *Stevens*, 8 How. 399; *Brown* v. *Spillman*, 155 U. S. 665; *United States* v. *Trans-Missouri R. R.*, 166 U. S. 290; *Louisville Trust Co.* v. *Louisville &c. R. R.*, 174 U. S. 674; *Black Diamond Co.* v. *Excelsior Co.*, 156 U. S. 611; *Sligh* v. *Kirkwood*, 237 U. S. 52; Greenleaf on Evidence (15th ed.), § 6; *Thorson* v. *Peterson*, 9 Fed. Rep. 517; *Gilbert* v. *Moline*, 19 Iowa, 319; *Coover* v. *Davenport*, 1 Heisk. (Tenn.) 368; *St. Louis* v. *Magness*, 68 Arkansas, 289; *Perry* v. *State*, 113 Georgia, 938; *Harvey* v. *Oklahoma*, 11 Oklahoma, 156; *Harvey* v. *Wayne*, 72

Maine, 430; *Bailey* v. *Birkhofer*, 123 Iowa, 59; *Bond* v. *Perkins*, 4 Heisk. (Tenn.) 364; *Bruson* v. *Clark*, 151 Illinois, 495; *Pearce* v. *Langfit*, 101 Pa. St. 507; *Blumenthal* v. *Pacific Meat Co.*, 12 Washington, 332; *Seigbert* v. *Stiles*, 39 Wisconsin, 533; Chamberlayne on Mod. Law of Evidence, 741; *Hobbs* v. *Memphis &c.*, 9 Heisk. (Tenn.) 874; *State* v. *Railroad*, 212 Missouri, 677; *Gulf &c. R. R.* v. *State*, 72 Texas, 404; 16 Cyc. 861; *Miller* v. *Texas &c. R. R.*, 83 Texas, 518; *Smith* v. *Flournoy*, 47 Alabama, 345.

The opinion of the Court of Civil Appeals shows that the allegation which that court found to be supported by the evidence and upon which it based its judgment, is in the second and not in the first count.

Mr. B. E. Tatum, with whom *Mr. Felix D. Lynch*, *Mr. George W. Chamlee*, *Mr. Joe V. Williams* and *Mr. P. H. Thach* were on the brief, for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought, in the year 1908, by Jennie B. Gray to recover damages for the death of her husband who was employed in the operation of the railroad of which the plaintiff in error and another were receivers. The original declaration sought recovery for negligence, at common law, and did not allege that the deceased was injured while engaged in interstate commerce. The plaintiff was permitted to file an additional count and this was subsequently amended so as to allege the interstate character of the employment of the deceased at the time of his injury. The action was first tried in November, 1912; the jury rendered a verdict in favor of the plaintiff for $10,000 and judgment was entered accordingly. Thereupon, the trial judge granted a new trial upon the ground that he had erred in his instructions

to the jury with respect to the burden of proof. At the second trial, in 1913, a verdict was directed for the defendants (the plaintiffs in error) and judgment in their favor was entered. The Court of Civil Appeals reversed this judgment and reinstated the judgment entered upon the verdict at the first trial. The Court of Civil Appeals did not consider the record of the second trial but was of the opinion that the verdict first rendered in favor of the plaintiff should not have been set aside. This decision was affirmed by the Supreme Court of the State, without opinion.

The plaintiff in error presents for our consideration these assignments of error: (1) That the court erred in not holding that both counts of the declaration stated a case controlled by the Federal Employers' Liability Act and that, therefore, the widow could not recover in a suit begun in her own name; and (2) That the court erred in not holding that the evidence on the first trial made a case within the Federal Act.

In support of the first assignment, it is insisted that the amendment inserting the allegation that the injury was sustained while the decedent was engaged in interstate commerce amended both counts of the declaration. The state court treated it as an amendment of the second count and thus the declaration on which the case was tried was deemed to contain two counts, "one under the common law of Tennessee and the other charging negligence under the Employers' Liability Act." From a Federal standpoint, the question is not important, for if it had been shown that the injury had been received in interstate commerce, the defendants would have been entitled to insist upon the applicable Federal law as the exclusive measure of their liability, and they would not have lost this right merely because the plaintiff had seen fit to present the claim 'in an alternative way' by means of separate counts. *Wabash R. R.* v. *Hayes*, 234

U. S. 86, 90. And in the absence of a showing bringing the injury within the Federal Act, the question whether the declaration permitted a recovery at common law was a state question.

It was distinctly stated by the Court of Civil Appeals that if the proof showed "that the deceased was engaged in interstate commerce when he was injured," the court would "be compelled to hold that the trial judge was not in error in setting aside the verdict." But it was found that there was no basis in the evidence for such a conclusion and the second assignment of error challenges this ruling. The Court of Civil Appeals thus stated the facts:

"The proof indicates that the deceased came into Alton Park on a passenger train, and, as a part of this train there were three cars loaded with peaches. These cars were taken out of the passenger train at Alton Park, when the train went on to Chattanooga depot. After these fruit cars were taken out of the passenger train, the deceased was directed by one of his superiors, to have them re-iced and then taken to Cravens and delivered to the N., C. & St. L. Railroad Company. The proof does not show that the passenger train on which the deceased came into Alton Park, and a part of which the fruit cars were, came from another State, and in fact fails to show where it came from. The proof likewise fails to show how far through, or into what part of Tennessee the railroad of defendant company is located, and to what point it operates trains. . . . The fruit cars which he was ordered to take and deliver to the Nashville road, so far as his record discloses, were taken out of a passenger train in Alton Park. The proof does not indicate where they came from, whether from another State, or whether they were picked up in Tennessee. . . . We do not know where the passenger train came from, nor where these fruit cars came from; all we do know is, they were

cut out of the passenger train at Alton Park, and the deceased was ordered to take them down into Chattanooga and deliver them to the N., C. & St. L. R. R. Co. That being true, the deceased and these cars were engaged in intra-state commerce when he received his fatal injury, and not in interstate commerce."

The evidence has not been printed, but by stipulation between the parties it is agreed that the testimony also showed that the passenger train in question had left Chattanooga at seven o'clock in the morning of the day of the accident and that it had come into Alton Park from the south, on its return trip, late in the afternoon. But this still leaves undisclosed the origin and destination of the cars in the movement of which the decedent was employed.

It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the State. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may assume to know without evidence. The state court, with its intimate knowledge of the local situation, thought that such an assumption on its part would be wholly unwarranted and we cannot say that it erred in this view. The fact that Chattanooga and its suburb, Alton Park, were near the state line did not establish that the cars had crossed it. The defendants knew the actual movement of the cars, and failing to inform the court upon this point cannot complain that they have been deprived of a Federal right.

Judgment affirmed.

G. & C. MERRIAM COMPANY *v.* SAALFIELD AND OGILVIE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 178. Argued January 14, 17, 1916.—Decided April 17, 1916.

Whether the District Court has acquired jurisdiction over the person of defendant may be reviewed by this court on direct appeal under § 238, Judicial Code.

An affidavit of one not a party to an action showing on its face that it was to be used only as evidence for defendants, *held* in this case not to be construed as an appearance by the party making it.

Only a final judgment is *res judicata* as between the parties; nor is a decree *res judicata* as against a third party participating in the defense unless it is so far final as to be *res judicata* against the defendant himself.

Even though one not a party to the action might be estopped by final decree if and when made, he cannot be brought into the suit by ancillary proceedings before final decree as if he were already estopped.

One not a defendant, but who is estopped by the decree because of having exercised control of the defense and who is not a resident of the district, cannot be brought into the action by the filing of a supplemental bill and mere notice to, and substituted service on, him without service of original process within the district.

Such a supplemental bill is not dependent on or ancillary to the original suit, in the sense that jurisdiction of it follows jurisdiction of the original cause.

The doctrine of *res judicata* furnishes a rule for the decision of a subsequent case between the same parties or their privies respecting the same cause of action, and only applies when the subsequent action has been brought.

THE facts, which involve the jurisdiction of this court on appeal from the District Court under § 238, Judicial Code, and the jurisdiction of the District Court to make

and enforce a decree based on substituted service of process, are stated in the opinion.

Mr. William B. Hale, with whom *Mr. James A. Ford* was on the brief, for appellant:

Ogilvie was privy to the original suit, and was an actual, although not an ostensible, party thereto, in such a real sense that the decree will be *res judicata* against him.

The District Court erred in declining jurisdiction upon the sole ground that Ogilvie's defense of the suit was unknown to petitioner until after the interlocutory decree, and that, therefore, Ogilvie was not bound.

The District Court for the Northern District of Ohio, Eastern Division, had jurisdiction of Ogilvie notwithstanding he resides in the Southern District of New York, because: he submitted to the jurisdiction and waived objections, by voluntarily coming in and defending the suit; and the supplemental bill is a dependent and ancillary proceeding.

Substituted service, or mere actual notice, is sufficient to subject a party to the jurisdiction of the court in any ancillary proceeding and sufficient service was had in this case.

Ogilvie's affidavit in opposition to the motion for an injunction upon the supplemental bill, argues the case upon the merits, and subjects him to the jurisdiction of the court.

Mr. Wade H. Ellis, with whom *Mr. Challen B. Ellis* was on the brief, for appellees.

Mr. Justice Pitney delivered the opinion of the court.

This is a direct appeal from the District Court under § 238, Jud. Code, upon the sole question of the jurisdiction

of that court to make and enforce a final decree *in personam* against appellee, George W. Ogilvie. The decree was founded upon a supplemental bill making Ogilvie a party to a suit already pending, and upon substituted service of process on persons said to represent him as attorneys in the State of Ohio, he being a citizen and resident of the State of New York, and not having been personally served.

The facts are as follows: In December 1908, appellant filed its original bill against Saalfield in the then Circuit Court of the United States for the Northern District of Ohio, for relief against unfair competition in the business of publishing and selling dictionaries. Saalfield was duly served with process, appeared, and made defense. The Circuit Court having dismissed the bill, the Circuit Court of Appeals reversed the decree (190 Fed. Rep. 927; 198 Fed. Rep. 369), and remanded the cause with direction for an injunction and an accounting in conformity with its opinion. The District Court made a decree in accordance with the mandate September 11, 1912, with an order of reference for the accounting. Thereafter and on December 16, 1912, the supplemental bill was filed, setting up in substance that since the entry of the decree of September 11 complainant had discovered, and it charged the fact to be, that Ogilvie had from the beginning actively conducted, controlled, and directed the defense of the suit, having selected, retained, and paid, as solicitors and counsel for defendant Saalfield, the firm of Weed, Miller and Nason, of Cleveland, Ohio, and Mr. George F. Bean, of Boston, Massachusetts, who, in pursuance of said retainer, appeared on behalf of Saalfield, but acted for and under instructions of Ogilvie; that in fact Ogilvie was the proprietor of the dictionaries involved in the suit, which were published and sold for his benefit and profit by Saalfield under a contract providing for the payment of royalties to Ogilvie; that pending the suit Saalfield had

transferred and assigned to the Saalfield Publishing Company, a corporation, his business of publishing and selling the dictionaries; that the company, as successor of and claiming through and under Saalfield, was bound by all the proceedings in the suit, and that it was then carrying on the business, under contract with Ogilvie; and that by reason of the facts mentioned Ogilvie had made himself privy to the suit, and an actual though not a nominal party thereto, and was bound by the proceedings and decree therein. Appropriate relief was prayed against Saalfield, the Saalfield Publishing Company, and Ogilvie.

Upon the filing of the supplemental bill and an affidavit setting forth that Ogilvie was a non-resident of the Northern District of Ohio, and that as alleged in the supplemental bill the firm of Weed, Miller and Nason, of Cleveland, and George F. Bean, of Boston, Massachusetts, who had appeared respectively as solicitors and counsel for defendant Saalfield in the defense of the suit, were in fact retained and employed by Ogilvie for that purpose and paid by him and acted under his instructions and directions, complainant moved for and obtained an order authorizing substituted service of process against Ogilvie, to be made within the District upon the Cleveland attorneys, and in the District of Massachusetts upon George F. Bean. Service was made accordingly, and the process returned; and it appearing from an affidavit made by defendant, Ogilvie, and filed in the cause on February 22, 1913, that he had had actual notice of the supplemental bill, an interlocutory decree *pro confesso* was entered, and this was followed, on October 16, 1913, by a final decree for the recovery against him of profits amounting with interest to $81,312.78, besides costs. Thereafter Ogilvie, by solicitors appearing specially for the purpose, moved to quash the service of the writ of subpœna issued against him and to set aside all proceedings based thereon. The District Court, having heard testimony, granted the

motion, and at the same time denied a petition filed by complainant for enforcement of the final decree against Ogilvie; and from final orders entered for carrying into effect this decision, complainant has appealed to this court.

There is a motion to dismiss, based upon the familiar ground that the "jurisdiction of the court" referred to in § 238, Jud. Code, means its jurisdiction as a Federal court, and not its general jurisdiction as a judicial tribunal; the insistence being that the contention of complainant below presented no more than a general question of procedure in equity, and not one peculiar to the District Court as a Federal court. But the distinction referred to bears upon the nature of the jurisdiction exercised or refused to be exercised after a valid service of process upon the defendant, and does not affect the question whether the court has acquired jurisdiction over the person, which is the one here involved. This question may be reviewed on direct appeal. *Shepard* v. *Adams*, 168 U. S. 618, 623; *Remington* v. *Cent. Pac. R. R.*, 198 U. S. 95, 99; *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, 434; *Commercial Accident Co.* v. *Davis*, 213 U. S. 245, 256; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 440; *Herndon-Carter Co.* v. *Norris & Co.*, 224 U. S. 496, 498. In *Bache* v. *Hunt*, 193 U. S. 523, the decision that was held not reviewable on direct appeal was rendered upon a plea to the jurisdiction of the court over the subject-matter. In *Courtney* v. *Pradt*, 196 U. S. 89, the suit had been removed from a Kentucky state court to the United States Circuit Court, where Pradt filed a special demurrer, assigning as causes that the court had not jurisdiction of the person or of the subject-matter. The court dismissed the suit for want of jurisdiction, and it appeared from its opinion that this was done because Pradt, who was sued as executor, was appointed as such in Wisconsin, and a suit against a Wis-

consin executor could not be maintained in the Kentucky state court, nor in the Federal court. The question of jurisdiction was not certified to this court, and the appeal was therefore dismissed. These cases are plainly distinguishable. The present motion to dismiss must be denied.

Appellant's case upon the merits is rested upon the theory that Ogilvie was privy to the original suit against Saalfield, and an actual though not an ostensible party thereto, in such a real sense that the final decree therein would be *res judicata* against him; that the District Court had jurisdiction to entertain the suit as against him notwithstanding he resided outside the district, because by voluntarily coming in and defending for Saalfield he had submitted to the jurisdiction and waived the objection, and because the supplemental bill was a dependent and ancillary proceeding, and therefore properly brought in the district wherein the original proceeding was pending; and, finally, that because of its being an ancillary proceeding, substituted service upon the solicitors representing Ogilvie in the original proceeding was sufficient to subject him to the jurisdiction for the purposes of the supplemental bill. There is a faint attempt to sustain the jurisdiction on the theory that Ogilvie's affidavit, filed February 22, 1913, as mentioned in the interlocutory decree *pro confesso*, amounted to a general appearance, because it was submitted in opposition to a motion for injunction on the supplemental bill, and because it "argued the case upon the merits." This may be overruled at once. The affidavit shows on its face that it was to be used only as evidence for defendants Saalfield and the Publishing Company, and was not to be construed as an appearance by Ogilvie.

The District Court, while raising some question whether the solicitors and counsel who had appeared for Saalfield at Ogilvie's expense had not concluded their services in

Ogilvie's behalf prior to the filing of the supplemental bill, yet rested its decision substantially upon the ground that complainant did not know that Ogilvie had any connection with Saalfield or the Saalfield Publishing Company until after the making of the decree of September 11, 1912, upon the going down of the mandate from the Circuit Court of Appeals; and that for this reason Ogilvie could not have taken advantage of that decree had it been adverse to complainant, and therefore was not estopped by it, since estoppels must be mutual.

In so holding, the court applied the doctrine that has been laid down in a number of cases, that a third party does not become bound by a decree because of his participation in the defense unless his conduct in that regard was open and avowed or otherwise known to the opposite party, so that the latter would have been concluded by an adverse judgment. See *Andrews* v. *National Pipe Works*, 76 Fed. Rep. 166, 173; *Lane* v. *Welds*, 99 Fed. Rep. 286, 288. We need not consider the soundness of the doctrine, for appellant does not question it, insisting only that it is not applicable here because Ogilvie's control of the defense made in Saalfield's name became known to appellant during the progress of the suit, and before final decree; it being contended that the decree of September 11, 1912, was interlocutory and not final.

But it is familiar law that only a final judgment is *res judicata* as between the parties. And it is evident that a decree cannot be *res judicata* as against a third party participating in the defense unless it is so far final as to be *res judicata* against the defendant himself. Hence, if the decree of September 11 was not final as between appellant and Saalfield, it cannot be *res judicata* as against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is

found to be this: that upon the theory that Ogilvie would be estopped by a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles.

But, assuming for argument's sake that the decree was final, and that Ogilvie was fully estopped by it because of having taken charge and exercised control of Saalfield's defense through solicitors and counsel retained and paid by himself; and assuming that their employment had not been terminated at the time the supplemental bill was filed; the question of the sufficiency of the proceedings taken by way of substituted service to bring Ogilvie within the jurisdiction of the court still remains, and this depends upon whether the supplemental bill is a dependent and ancillary proceeding, jurisdiction of which follows jurisdiction of the original cause and may be exerted upon mere notice to the party without service of original process within the district. It seems to be thought that because Ogilvie was identified in interest with the defendant in the original suit and had and exercised the right to make defense and control the proceedings and appeal from the decree, he may be treated for all purposes as an actual party to the record. But this by no means follows. The doctrine of *res judicata* furnishes a rule for the decision of a subsequent case between the same parties or their privies respecting the same cause of action. Obviously, the rule for decision applies only when the subsequent action has been brought. So far as the supplemental bill seeks to bring in Ogilvie as a new party and obtain relief against him it is not, in any proper sense, dependent upon or ancillary to the original suit against Saalfield. It is not analogous to a suit for an injunction against the prosecution of a previous suit or the enforcement of a judgment therein. It has not

for its object some further dealing with the same subject-matter. Ogilvie is not in the position of one who, pending a suit about property, has acquired an interest in the subject-matter. The object of the original bill was to obtain an injunction and recover profits from Saalfield; that of the supplemental bill is to obtain an injunction and an accounting of profits against Ogilvie respecting the same transactions. But the merits are not to be adjudicated against him until he is brought into court, and as against him the supplemental bill is an original, not an ancillary, proceeding. In *Dunn* v. *Clarke*, 8 Pet. 1, one Graham had recovered a judgment at law in an action of ejectment against the complainants, Clarke and others, in the United States Circuit Court, jurisdiction depending upon diversity of citizenship. Graham having died, the defendant, Dunn, held the land recovered in trust under his will. Clarke and others filed their bill in the same court, praying for an injunction against the judgment and for a decree that the land in controversy be reconveyed. All the complainants and defendants were residents of the same State (Ohio). This court said: "No doubt is entertained by the court, that jurisdiction of the case may be sustained, so far as to stay execution on the judgment at law against Dunn. He is the representative of Graham; and although he is a citizen of Ohio, yet this fact, under the circumstances, will not deprive this court of an equitable control over the judgment. But beyond this, the decree of this court cannot extend. Of the action at law, the Circuit Court had jurisdiction; and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. If Graham had lived, the Circuit Court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as Dunn is his representative, the court may do the same thing, as against him. The injunction

bill is not considered an original bill between the same parties, as at law: but, if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the Circuit Court must depend upon the citizenship of the parties. In the present case, several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the Circuit Court." So far as it shows the distinction between an original bill and one that is not to be so considered, the case is in point upon the present question. The reference to "privies" must be taken in connection with the subject-matter, which in that case was the ownership of land.

No case to which we are referred, nor any other that we have found,[1] goes to the extent of sustaining as an ancillary proceeding a bill interposed for the purpose of obtaining a decree *in personam* against a party upon the ground that he had participated in the defense of a previous action against another party so as to become bound upon the doctrine of *res judicata*. *Kelley* v. *T. L. Smith Co.* (C. C. A., 7th), 196 Fed. Rep. 466, is referred to. In that case Kelley, a citizen of New York, and McConnell, a citizen of Illinois, had commenced an action in a Wisconsin state court to compel the secretary of the Smith

[1] See *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633; *Freeman* v. *Howe*, 24 How. 450, 460; *Krippendorf* v. *Hyde*, 110 U. S. 276, 285; *Clarke* v. *Mathewson*, 12 Pet. 164, 171; *Webb* v. *Barnwall*, 116 U. S. 193, 197; *Covell* v. *Heyman*, 111 U. S. 176, 179; *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, 333; *Gumbel* v. *Pitkin*, 124 U. S. 131, 144; *Morgan's Co.* v. *Texas Central Ry.*, 137 U. S. 171, 201; *Byers* v. *McAuley*, 149 U. S. 608, 614; *Root* v. *Woolworth*, 150 U. S. 401, 413; *White* v. *Ewing*, 159 U. S. 36, 39; *Carey* v. *Houston & Texas Ry.*, 161 U. S. 115, 130; *Wabash R. R.* v. *Adelbert College*, 208 U. S. 38, 54; *Cortes Co.* v. *Thannhauser*, 9 Fed. Rep. 226; *Crellin* v. *Ely*, 13 Fed. Rep. 420; *Abraham* v. *North German Fire Ins. Co.*, 37 Fed. Rep. 731; *Gasquet* v. *Fidelity Trust Co.*, 57 Fed. Rep. 80.

Company to transfer certain shares of stock standing in Kelley's name to McConnell, as his assignee. A firm of Milwaukee attorneys brought the action, and an attorney connected with that firm was in possession of the certificate as agent of McConnell. Thereupon the Company and its secretary filed in the United States Circuit Court a bill asserting that the equitable title to the shares was involved in a suit already pending in that court, to which the company was a party defendant; that thus different parties, in different courts, were insisting that complainants transfer the same shares to each, and if complainants should comply with the demand of either they would be unable to transfer the shares to the other if so ordered by a court decree, and that they had no interest in the shares, and were willing to transfer them to the party found to be the owner. On the showing that Kelley and McConnell were not to be found in the district, and that the stock certificate was within the district, in the hands of their attorneys and agent having authority to assert and preserve their rights, the court ordered the subpœna and the notice of application for an interlocutory injunction to be served, and they were served, upon said attorneys and agent. The Circuit Court overruled a demurrer, and the Court of Appeals sustained this decree, not, however, upon the ground that the suit was an ancillary proceeding in aid of the court's jurisdiction in a pending suit, but upon the ground that as an independent and original bill it presented a subject cognizable in a Circuit Court of the United States, and that although jurisdiction *in personam* could not be acquired by service of process under Equity Rule 13, because of the absence of the defendants, substituted service was permissible under the then Equity Rule 90, by analogy to the English practice. Without intimating any view as to the correctness of this reasoning, it is sufficient to say that the decision has no pertinency to the question here presented.

Upon these grounds, we are of opinion that substituted service of process against Ogilvie was inadmissible, and that the District Court did not err in quashing the service and setting aside the proceedings based thereon, nor in refusing appellant's petition for enforcement of the decree against him.

Final orders affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* RIGSBY.

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

No. 523. Argued February 21, 1916.—Decided April 17, 1916.

Disregard of the Safety Appliance Act is a wrongful act; and, where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover the damages from the party in default is implied:—*ubi jus ibi remedium.*

An employee of a railroad company has a right of action against the company for damages sustained by reason of defective appliances in violation of the Safety Appliance Act even though he was engaged at the time in intrastate, and not interstate, commerce.

Congress may, in the exercise of the plenary power to regulate commerce between the States, require installation of safety appliances on cars used on highways of interstate commerce irrespective of the use made of any particular car at any particular time.

When Congress enters a field of regulation within its paramount authority, state regulation of that subject-matter is excluded; and so *held* that, without leave of Congress, a State can no more make or enforce laws inconsistent with the Federal Safety Act giving redress for injuries to workmen or travelers occasioned by absence or insecurity of such safety devices than it can prescribe the character of the appliances.

The right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured by a defect in a safety appliance required by act of Congress, has such relation to the operation of such act as a regulation of interstate commerce that it is within the constitutional grant of authority to Congress over that subject.

Although § 4 of the Safety Appliance Act of 1910 relieves the carrier from statutory penalties while a car is being hauled to the nearest available point for repairs, it does not relieve the carrier from liability in a remedial action for the death or injury of an employee caused by, or in connection with, the movement of a defectively equipped car.

Whether the defective condition of a car under the Federal Safety Appliance Act is or is not due to negligence of the carrier is immaterial, as the Act imposes an absolute and unqualified duty to maintain the appliance in secure condition; nor under § 8 of the Act of 1893 and § 5 of the Act of 1910 is an employee deemed to have assumed the risk although continuing in the employment after knowledge of the defect.

222 Fed. Rep. 221, affirmed.

THE facts, which involve the construction of the Safety Appliance Act and the validity of a verdict against the carrier, are stated in the opinion.

Mr. F. H. Prendergast for plaintiff in error:

Defendant in error received injury caused by a defective ladder on a box car while he was working as a switchman in the yard at Marshall, Texas.

He recovered under the Safety Appliance Act.

To recover he must bring himself under the Safety Appliance Act and under the Employers' Liability Act. Both the car and the man must be engaged in interstate commerce. *Ill. Cent. Ry.* v. *Behrens*, 233 U. S. 474; *Pederson* v. *Railway*, 229 U. S. 146; *Southern Ry.* v. *United States*, 222 U. S. 27.

The car was not under the Act because it had been withdrawn from all service for several weeks.

The car was not under the Safety Appliance Act because it was not being used at the time in any character of commerce, but was being taken from the railroad yard into the shops to be repaired. *Ill. Cent. Ry.* v. *Behrens*, 233 U. S. 474; Rev. Stats. Texas, 1911, Art. 6581; *Southern Ry.* v. *Snyder*, 205 Fed. Rep. 870; Safety Act, 1910, § 2.

Defendant in error was not under the protection of the Safety Appliance Act because he was not at the time engaged in interstate commerce. *Boyle* v. *Penn. Ry.*, 221

Fed. Rep. 455; *Del., Lack. & West. R. R.* v. *Yerkomis*, U. S. Sup. Court; *Howard* v. *Ill. Cent. R. R.*, 207 U. S. 490; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 474; *Mondou* v. *N. Y. & N. H. Ry.*, 223 U. S. 51; *Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146.

Defendant in error was not under the protection of the Safety Appliance Act because at the time he was injured he was not coupling nor uncoupling cars. Bishop, Noncontract Law, 446; *The Eugene F. Moran*, 212 U. S. 472; *Howard* v. *Ill. Cent. R. R.*, 207 U. S. 490; *Mondou* v. *N. Y. & N. H. Ry.*, 223 U. S. 51; Potter's Dwarris Stat. 128, 140; Sherman & Redfield on Negligence, § 8; Safety Appliance Act, 1893, § 4; *Williams* v. *Chicago & Alton R. R.*, 135 Illinois, 491.

There was no common-law negligence giving defendant in error a right to recover damages. *Flanagan* v. *C. & N. W. Ry.*, 45 Wisconsin, 98; *S. C.*, 50 Wisconsin, 462; *Watson* v. *H. & T. C. Ry.*, 58 Texas, 439.

Mr. S. P. Jones for defendant in error:

Car from which defendant in error fell was in use on an interstate highway, and the injury was caused by a defective safety appliance. *Delk* v. *St. L. & S. F. Ry.*, 220 U. S. 580; *N. C. & H. R. Ry.* v. *Carr*, 238 U. S. 260; *Johnson* v. *Sou. Pac. Ry.*, 196 U. S. 13; *Southern Ry.* v. *United States*, 222 U. S. 23.

The Safety Appliance Law gives a cause of action to employees injured by defects while car is in use on an interstate highway, though the employee is not engaged at the time in interstate commerce. *Southern Ry.* v. *United States*, 222 U. S. 23; *United States* v. *C., B. & Q. Ry.*, 237 U. S. 410; *United States* v. *Erie Ry.*, 237 U. S. 402.

Under Texas Safety Appliance Laws, or independent of safety appliance laws, the defendant in error was entitled to an instructed verdict. Texas Safety App. Laws, Gen. Laws, 1909, p. 64.

MR. JUSTICE PITNEY delivered the opinion of the court.

The defendant in error, Rigsby, while in the employ of plaintiff in error as a switchman in its yard at Marshall, Texas, was engaged, with others of the yard crew, in taking some "bad order" cars to the shops there to be repaired. The switch engine and crew went upon a spur track, hauled out three cars, and switched them upon the main line, intending to go back upon the spur track for others, to be taken with the three to the shops, which were on the opposite side of the main line from the spur track. Rigsby, in the course of his duties, rode upon the top of one of the cars (a box car) in order to set the brakes and stop them and hold them upon the main line. He did this, and while descending from the car to return to the spur track he fell, owing to a defect in one of the handholds or grab-irons that formed the rungs of the ladder, and sustained personal injuries. This car had been out of service and waiting on the track spur for some days, perhaps a month. The occurrence took place September 4, 1912. In an action for damages, based upon the Federal Safety Appliance Acts,[1] the above facts appeared without dispute, and it was admitted that the main line of defendant's railroad was in daily use for the passage of freight and passenger trains in interstate commerce. The trial court instructed the jury, as matter of law, that they should return a verdict in favor of plaintiff, the only question submitted to them being the amount of the damages. The Railway Company excepted to this charge, and requested certain specific instructions based upon the theory that the car was out of service and marked "bad order," which was notice to Rigsby of its condition; that there was no evidence that the condition of the car had resulted from any

[1] Act of March 2, 1893, c. 196; 27 Stat. 531; amendatory act of March 2, 1903, c. 976; 32 Stat. 943; supplementary act of April 14, 1910, c. 160; 36 Stat. 298.

negligence of defendant; that it was at the time being taken to the shop for repairs; and that for these reasons plaintiff could not recover. The instructions were refused, and exceptions taken. The resulting judgment was affirmed by the Circuit Court of Appeals. 222 Fed. Rep. 221.

It is insisted that Rigsby was not within the protection of the Act because he was not coupling or uncoupling cars at the time he was injured. The reference is to § 4 of the act of March 2, 1893, which requires "secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." This action was not based upon that provision, however, but upon § 2 of the amendment of 1910, which declares: "All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders." There can be no question that a box car having a handbrake operated from the roof requires also a secure ladder to enable the employee to safely ascend and descend, and that the provision quoted was intended for the especial protection of employees engaged in duties such as that which plaintiff was performing.

It is earnestly insisted that Rigsby was not under the protection of the Safety Appliance Acts because at the time he was injured he was not engaged in interstate commerce. By § 1 of the 1903 amendment its provisions and requirements and those of the act of 1893 were made to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," subject to an exception not now pertinent. And by § 5 of the 1910 amendment the provisions of the previous acts

were made to apply to that act, with a qualification that does not affect the present case. In *Southern Ry* v. *United States*, 222 U. S. 20, which was an action to recover penalties for a violation of the Acts with respect to cars some of which were moved in intrastate traffic and not in connection with any car or cars used in interstate commerce, but upon a railroad which was a part of a through highway for interstate traffic, it was held that the 1903 amendment enlarged the scope of the original Act so as to embrace all cars used on any railway that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not. The question whether the legislation as thus construed was within the power of Congress under the commerce clause, was answered in the affirmative, the court saying (p. 27): "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are inter-dependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

It is argued that the authority of that case goes no further than to sustain the penal provisions of the Act,

and does not uphold a right of action by an employee injured through a violation of its provisions, unless he was engaged in interstate commerce. That the scope of the legislation is broad enough to include all employees thus injured, irrespective of the character of the commerce in which they are engaged, is plain. The title of the Act, repeated in that of each supplement, is general: "An act to promote the safety of employees and travelers," etc.; and in the proviso to § 4 of the supplement of 1910 there is a reservation as to "liability in any remedial action for the death or injury of any railroad employee." None of the Acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted. (See *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 8; 220 U. S. 590, 592; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 284, 295; *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580; *Cleveland &c. Ry.* v. *Baker*, 91 Fed. Rep. 224; *Denver & R. G. R. R.* v. *Arrighi*, 129 Fed. Rep. 347; *Chicago &c. Ry.* v. *Voelker*, 129 Fed. Rep. 522; *Chicago Junction Ry.* v. *King*, 169 Fed. Rep. 372.) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (*Per* Holt, C. J., *Anon.*, 6 Mod. 26, 27.) This is but an application of the maxim,

Ubi jus ibi remedium. See 3 Black. Com. 51, 123; *Couch* v. *Steel*, 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125. The inference of a private right of action in the present instance is rendered irresistible by the provision of § 8 of the Act of 1893 that an employee injured by any car, etc., in use contrary to the act shall not be deemed to have assumed the risk, and by the language above cited from the proviso in § 4 of the 1910 act.

Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 amendment was required to be secure, and the Act must therefore be deemed to create a liability in his favor, unless it be beyond the power of Congress under the commerce clause of the Constitution to create such a liability in favor of one not employed in interstate commerce. In *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473, 477, the court said, *arguendo*, with reference to this topic: "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." Judicial expressions in previous cases were referred to, and the decision in *Employers' Liability Cases*, 207 U. S. 463, was distinguished because the act of June 11, 1906, there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce for any injury to any employee, even though his employment had no relation whatever to interstate commerce.

The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the "bad order" cars in place on that track would have been obviously dangerous to through traffic; while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained.

But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the Act in its remedial aspect as broad an application as was accorded to its penal provisions in *Southern Railway* v. *United States, supra.* In addition to what has been quoted from the opinions in that case and the *Behrens Case,* the following considerations are pertinent. In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. *Southern Ry.* v. *R. R. Comm., Indiana,* 236 U. S. 439. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the conse-

quences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the States, is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce—a discrimination certainly not required by anything in the Constitution—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several States, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the Act as a regulation of commerce between the States that it is within the constitutional grant of authority over that subject.

It is argued that the statute does not apply except where the car is in use in transportation at the time of the injury to the employee, and that since it does not appear that the car in question was in bad order because of any negligence on the part of the railway company,

and it was being taken to the shop for repairs at the time of the accident, there is no liability for injuries to an employee who had notice of its bad condition and was engaged in the very duty of taking it to the shop. This is sufficiently answered by our recent decision in *Great Northern Ry.* v. *Otos*, 239 U. S. 349, 351, where it was pointed out that although § 4 of the act of 1910 relieves the carrier from the statutory penalties while a car is being hauled to the nearest available point for repairs, it expressly provides that it shall not be construed to relieve a carrier from liability in a remedial action for the death or injury of an employee caused by or in connection with the movement of a car with defective equipment. The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 294, 295; *Chicago, B. & Q. Ry.* v. *United States*, 220 U. S. 559, 575; *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 586.

Of course, the employee's knowledge of the defect does not bar his suit, for by § 8 of the Act of 1893 an employee injured by any car in use contrary to the provisions of the act is not to be deemed to have assumed the risk, although continuing in the employment of the carrier after the unlawful use of the car has been brought to his knowledge; and by § 5 of the Act of 1910 the provisions of the 1893 act are made applicable to it, with a qualification that does not affect remedial actions by employees.

The Circuit Court of Appeals correctly disposed of the case, and its judgment is

Affirmed.

RICHARDSON, AS TREASURER OF PORTO RICO, *v.* FAJARDO SUGAR COMPANY.

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

No. 280. Argued March 13, 14, 1916.—Decided April 17, 1916.

In an action in the United States District Court of Porto Rico, against the Treasurer of Porto Rico, the Attorney General of Porto Rico having appeared, made full answer to the original complaint, stipulated for a day of trial, and also answered an amended and a supplemental complaint, *held* that, even though the government of Porto Rico has sovereign attributes and has only consented to be sued in its own courts (*Porto Rico* v. *Rosaly*, 227 U. S. 270), the solemn appearance of, and the taking of other steps by, the Attorney General, amounted to a consent, in this case, to be sued in the United States court, and thereafter the government could not deny the jurisdiction. *Gunter* v. *Atlantic Line*, 200 U. S. 273.

6 Porto Rico Fed. Rep. 224, affirmed.

THE facts are stated in the opinion.

Mr. Samuel T. Ansell, with whom *Mr. Howard L. Kern* and *Mr. Lewis W. Call* were on the brief, for plaintiff in error:

This court has jurisdiction of this writ of error.

The required jurisdictional amount is here in dispute and constitutes the ground of review.

No certificate is required as to the question of jurisdiction of the court below.

Writ of error and not appeal is the proper procedure for review.

The opinion below does not stand analysis.

It seems lacking in consistency and guiding principles, upon the question of Porto Rico's immunity from suit;

upon the question whether the suit was one against Porto Rico and upon the question of consent or waiver.

It seems to have been guided by inadmissible conceptions of justice, public policy, and convenience.

The court below had no jurisdiction of the defendant or of the action.

Porto Rico's immunity from suit is the immunity of a Sovereign, and is of the same protective quality as the immunity of the United States and of the several States and Territories. *Porto Rico* v. *Rosaly*, 227 U. S. 270.

This suit, though in form against the Treasurer of Porto Rico, is in reality against the People of Porto Rico.

The Sovereign may limit its consent to be sued to its own courts.

The statute in question does not grant the consent of the People of Porto Rico to be sued in the Federal court.

The nature and incidents of the remedy created show conclusively an intention on the part of the Legislature to commit the matter solely to the Insular Courts.

The judicial power conferred upon the Federal court for Porto Rico does not authorize it to exercise the power of certification conferred by the act in question.

Consent of the Sovereign to be sued, being in derogation of sovereignty, must be established in clear and unmistakable terms, and cannot be established or enlarged by construction.

Jurisdiction of this suit and of the defendant was not conferred by the appearance and answer of the Attorney General and the Treasurer of Porto Rico, for consent of the Sovereign to suit can be granted, and exemption from suit waived only by act of the legislature.

An analysis of the authorities relied upon by the defendant in error in the court below, and the decisions of the court when carefully considered show that the judgment is wrong on the merits.

The shares of stock in question were a part of the

capital of the company "employed in the transaction of business in Porto Rico," and the assessment of the same as such was in all respects lawful.

Numerous authorities sustain these contentions.

Mr. Lorenzo D. Armstrong, with whom *Mr. Joseph W. Murphy* was on the brief, for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

Taxes for the fiscal year 1911–1912 amounting to $7038 were assessed against defendant in error on account of certain personal property and were paid under protest. Purporting to proceed under Act No. 35, Laws of Porto Rico, 1911 (copied in margin),[1] and claiming the assess-

[1] Section 1. That in all cases in which an officer charged by law with the collection of revenue due the Government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute, pay the same under protest.

Sec. 2. Be it further enacted that, upon his making such payment, the officer or collector shall pay such revenue into the Treasury of Porto Rico, giving notice at the time of the payment to the Treasurer, that the same was paid under protest.

Sec. 3. Be it further enacted that, the party paying said revenue under protest may, at any time within thirty days after making said payment, and not longer thereafter, sue the said Treasurer for said sum, for the recovery thereof in the court having competent jurisdiction thereto; and if it be determined that the same was wrongfully collected as not being due from said party to the Government for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury. Either party to said suit shall have the right of appeal to the Supreme Court.

Sec. 4. Be it further enacted that, there shall be no other remedy in

ment was wholly illegal, the Sugar Company brought this suit to recover the sum so paid. In due season the Treasurer of Porto Rico, appearing by its Attorney General, made full answer to the original complaint; a day for trial was fixed by stipulation; an amended and also a supplemental complaint were filed and appropriately answered. Eight months after institution of the action the court's jurisdiction was first challenged by motion to dismiss and thereafter the point was persistently urged. The company recovered judgment for amount claimed (6 P. R. F. R. 224); and the cause has been argued here by counsel.

It is not now seriously maintained that the tax was lawfully demanded—in effect, the contrary is conceded.

A reversal of the District Court's action is asked upon the theory that the proceeding is against Porto Rico, a government of sovereign attributes which has only consented to be sued in its own courts. *Porto Rico* v. *Rosaly*, 227 U. S. 270. Whatever might have been the merit of this position if promptly asserted and adhered to, we hold, following the principles announced in *Porto Rico* v. *Ramos*, 232 U. S. 627, that having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284. The judgment is

Affirmed.

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any case of the collection of revenue, or attempt to collect revenue illegally.

SEC. 5. Be it further enacted that, no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same shall in any wise issue, either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other.

SEC. 6. . . .

SEC. 7. . . .

ROSENBERGER *v.* PACIFIC EXPRESS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 249. Argued March 8, 1916.—Decided April 24, 1916.

Speaking generally the States are without power to directly burden an interstate shipment until after its arrival and delivery and sale in original package; and this rule applies to the movement of intoxicating liquor as to other commodities.

The Wilson Act only modifies this rule as to shipment of intoxicating liquors so as to bring them under state control after delivery, but before sale, in the original package.

The power to make interstate commerce shipments C. O. D. is incidental to right to make the shipment, and an attempt by the State to prohibit contracts to that effect or prevent fulfillment thereof is, as a burden upon, and an interference with, interstate commerce, repugnant to the Federal Constitution.

The interstate commerce which is subject to the control of Congress embraces the widest freedom including the right to make all contracts having a proper relation to the subject.

The power of the State to control interstate C. O. D. shipments prior to the enactment of the United States Penal Code cannot be deduced from the enactment of § 239 of that Code prohibiting them.

Since the enactment, and by virtue of the Wilson Act and the remedial authority thereby conferred by Congress on the States to regulate sales of liquor after arrival in the State and before sale in the original packages, a State has power to prevent solicitation of orders for intoxicating liquors to be shipped from other States. *Delamater* v. *South Dakota*, 205 U. S. 93.

The statute of 1907 of Texas imposing special licenses on Express Companies maintaining offices for C. O. D. shipments of intoxicating liquors is an unconstitutional burden on and interference with interstate commerce and does not justify an Express Company accepting such a shipment from refusing to deliver the same; and in this case *held* that such refusal amounted to conversion of the goods.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of the

statute of the State of Texas imposing licenses on places of business of Express Companies where intoxicating liquors are delivered C. O. D., are stated in the opinion.

Mr. J. J. Vineyard and *Mr. A. F. Smith*, with whom *Mr. Frank F. Rozzelle* was on the brief, for plaintiff in error.

Mr. I. N. Watson, with whom *Mr. J. L. Minnis* was on the brief, for defendant in error.

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

On the taking effect in Texas on the twelfth day of February, 1907, of a law imposing a state license tax of $5,000 annually on each place of business or agency of every express company where intoxicating liquors were delivered and the price collected on C. O. D. shipments, and by which law one-half of the amount of the state license was in addition authorized to be imposed by every county or municipality, the Express Company, the defendant in error, discontinued at all its agencies in Texas all such business. As a result the Company sent back to Kansas City, Missouri, the packages of intoxicating liquor which it had received under C. O. D. shipments made to various places in Texas from Kansas City by Rosenberger, the plaintiff in error, and tendered them to him conditioned on his payment of the return carriage charges. Rosenberger refused to accept the offer and brought this suit to recover the value of the merchandise on the ground that the failure to carry out the shipments was a conversion. The trial court holding the Texas act was repugnant to the commerce clause of the Constitution of the United States and afforded no justification to the Express Company for refusing to carry out the shipments, awarded the relief sought. And the object of this writ of error is to obtain a reversal of a final judgment of the court below reversing

the trial court and rejecting the claim on the ground that the Texas license law was not repugnant to the commerce clause and afforded ample authority to the Express Company for refusing to complete the interstate shipments in question. 258 Missouri, 97.

Passing minor contentions whose want of merit will be hereafter demonstrated, it is clear that the issue is this: Was the state license law if applied to C. O. D. interstate commerce shipments repugnant to the commerce clause of the Constitution? It is certain that this question, in view of the date of the law and of the shipments involved, must be determined in the light of the operation of the commerce clause as affected by the power conferred upon the States by what is usually known as the Wilson Law (Act of August 8, 1890, c. 728, 26 Stat. 313), and wholly unaffected by § 239 of the Penal Code enacted by Congress March 4, 1909, prohibiting the shipment of intoxicating liquors under C. O. D. contracts, and also without reference to the act of Congress known as the Webb-Kenyon Law of March 1, 1913 (c. 90, 37 Stat. 699).

Thus limited, as it is not controverted and indeed is indisputable that the provisions of the statute placed a direct burden on the shipments with which it dealt and in fact were prohibitive of such shipments, it follows that error was committed in holding that the statute was not repugnant to the Constitution of the United States in so far as it applied to interstate C. O. D. shipments for the following reasons: (a) Because it is settled from the beginning and too elementary to require anything but statement that speaking generally the States are without power to directly burden interstate commerce and that commodities moving in such commerce only become subject to the control of the States or to the power on their part to directly burden after the termination of the interstate movement, that is, after the arrival and delivery of the commodities and their sale in the original packages, and that this rule is

as applicable to the movement of intoxicating liquors as to any other commodities. (b) Because the Wilson Act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would, that is, after delivery but before sale in the original packages. (c) Because the power in interstate commerce shipments to make C. O. D. agreements, that is, agreements on delivery of the commodity shipped to collect and remit the price, is incidental to the right to make such shipments and the commodities when so shipped do not come under the authority of the State to which the commodities are shipped under such agreements until arrival and delivery, and therefore any attempt on the part of the State to directly burden or prohibit such contracts or prevent the fulfillment of the same necessarily comes within the general rule and is repugnant to the Constitution of the United States.

These propositions in substance have been by necessary implication or by direct decision so authoritatively and repeatedly determined as shown by the cases cited in the margin,[1] that there is no necessity for going further. But in view of the fact that the court below held the statute to be not repugnant to the commerce clause not because it overlooked the rulings of this court referred to but because it considered them distinguishable or inapposite to this case for reasons deemed by it to be conclusive, there being some difference of opinion on the subject in the court below, we briefly refer to those reasons.

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[1] *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438; *Heyman* v. *Southern Railway*, 203 U. S. 270; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218; *Louisville & Nashville R. R.* v. *Cook Brewing Co.*, 223 U. S. 70; *Kirmeyer* v. *Kansas*, 236 U. S. 568; *Rossi* v. *Pennsylvania*, 238 U. S. 62; *American Express Co.* v. *Iowa*, 196 U. S. 133; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129.

It was said that the shipment of commodities contains two elements, one the obligation arising from the duty of the carrier to receive and carry without express contract, and the other such obligation as arises from contracts made concerning the shipment not embraced in the duty which rested by law upon the carrier in the absence of contract, the latter being illustrated by C. O. D. contracts. These two classes of obligations, it was pointed out, arising from different sources, were controlled by a consideration of the source whence they sprang, the one, the duty independent of contract, being commerce, and the other, the duty depending upon express contract in a sense independent of commerce, being governed by the law controlling contracts; that is to say, the one being controlled by the commerce clause and the other by the law of the State. And from these generalizations it was concluded that however complete and efficacious was the control of the Constitution of the United States over the obligation resulting from shipments in the proper sense, it was clear that the power of the State was complete over the other class of obligations, those arising from distinct contracts, and hence the act imposing the burden on the contract to collect on delivery did not reach over into the domain of shipment, was independent of the same, and therefore was not repugnant to the commerce clause. But we think it is a sufficient answer to say that the reasoning referred to rests upon a misconception of the elementary notion of interstate commerce as inculcated and upheld from the beginning and as enforced in a line of decisions of this court beginning with the very birth of the Constitution and which in its fundamental aspect has undergone no change or suffered no deviation: that is, that the interstate commerce which is subject to the control of Congress embraces the widest freedom, including as a matter of course the right to make all contracts having a proper relation to the subject. Indeed, it must be at once apparent that if

the reasoning we are considering were to be entertained, the plenary power of Congress to legislate as to interstate commerce would be at an end and the limitations preventing state legislation directly burdening interstate commerce would no longer obtain and the freedom of interstate commerce which has been enjoyed by all the States would disappear. But to state these general considerations is indeed superfluous since in one of the previous cases which we have cited (*American Express Co.* v. *Iowa*, 196 U. S. 133, 143, 144) substantially the identical contention which we have just disposed of was relied upon and its unsoundness was expressly pointed out and the destructive consequences which would arise from its adoption stated.

The minor contentions to which we previously referred are these:

1. That although it be that § 239 of the Penal Code has no retroactive operation, it should be used as an instrument of interpretation from which to deduce the conclusion that the power of a State to prohibit shipments of intoxicating liquors in interstate commerce under C. O. D. contracts existed at the time here in question. But this by indirection simply seeks to cause the Act of Congress to retroactively apply by reasoning which if acceded to would require it to be said that all the previous decisions of this court dealing with the subject before the Penal Code was enacted were wrong and that in addition the enactment of § 239 was wholly unnecessary.

2. That even although there was a wrongful refusal of the Express Company to carry out the shipments its doing so was a mere violation of contract, giving a right to sue in damages but not for conversion. We see nothing in the record to indicate that this contention was urged in the trial court or in the court below. But passing this consideration, in view of our previous action rejecting a motion to dismiss, the question is foreclosed. But again

even if this be put out of view, the proposition is without merit under the controlling state law. *Rice* v. *Indianapolis & St. Louis R. R.*, 3 Mo. App. 27; *Loeffler* v. *Keokuk Packet Co.*, 7 Mo. App. 185; *Danciger Bros.* v. *American Express Co.*, 172 Mo. App. 391.

3. That this case is taken out of the settled rule to which we have referred and is controlled by the ruling in *Delamater* v. *South Dakota*, 205 U. S. 93. But the proposition presupposes that the decision in that case overruled the many decisions sustaining the rule without the slightest indication of a purpose to do so. It proceeds upon an obvious misconception of the *Delamater Case* which instead of disregarding the construction put upon the Wilson Act and the many cases dealing with the subject, was on the contrary but an application in a new form of the additional power which that act gave. In other words the case but held that inasmuch as Congress by virtue of its regulating authority had caused shipments of intoxicating liquors in interstate commerce to become subject to state authority after arrival and before sale in the original packages, the exertion by the State of its authority to prevent the carrying on in the State of the business of soliciting purchases of liquor to be shipped from other States was lawful as a mere exertion of police power not constituting a direct burden upon interstate commerce, since such a regulation was within the scope of the remedial authority conferred by Congress by virtue of the Wilson Act.

And the contention just stated leads to a reference to suggestions which we deem to be wholly irrelevant to the issue for decision made both in the opinion of the court below and in the argument at bar concerning possible abuses committed as the result of C. O. D. shipments of intoxicating liquors into States where the use of such liquor is prohibited, such as the unreasonable detention of such liquors before delivery, the ultimate delivery to a

person who had not ordered the same, the transfer to others by the ostensible person to whom the shipment was seemingly made, etc., etc. We say irrelevant suggestions because we are considering here not whether a state statute enacting reasonable regulations to prevent abuses under C. O. D. shipments would be a direct burden upon interstate commerce, but are only called upon to determine whether a statute is repugnant to the commerce clause which expressly asserts the power of the State to forbid all C. O. D. interstate commerce shipments of intoxicating liquors without reference to abuse of any kind or nature in the manner in which said contracts are carried out.

It follows from what we have said that the court below erred and that its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MENASHA PAPER COMPANY *v.* CHICAGO & NORTHWESTERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 696. Argued April 3, 1916.—Decided April 24, 1916.

The Hepburn Act of 1906 amending the Act to Regulate Commerce requires railroad companies to provide and furnish transportation to shippers on reasonable request therefor.

Where shippers, who are under contract to deliver interstate shipments in carload lots, call upon an interstate carrier for cars, the carrier is bound to furnish them, and the consignee cannot refuse delivery and by notifying the carrier of its intention to do so, relieve itself of demurrage charges according to the published tariff.

An interstate carrier cannot, at the request of a consignee who is under contract to receive interstate shipments, declare an embargo on the shipments and refuse to furnish cars for the shippers; and if it temporarily does so and then removes the embargo, the latter act is but a return to its duty under the Act; and failure to notify the consignee of its action does not relieve the latter from liability for demurrage provided by the published tariff.

Published rules relating to tariffs of interstate carriers must have a reasonable construction.

The fact that an interstate carrier complied with the request of a consignee having a private siding to deliver daily on its siding only the number of cars that could be conveniently handled, although more could be actually placed on such siding, did not in this case relieve the consignee from demurrage charges specified in the published tariff on cars held by the carrier awaiting the consignee's convenience after arrival and readiness to deliver on the siding.

159 Wisconsin, 508, affirmed.

THE facts, which involve the right of a railroad to collect demurrage on cars in interstate and intrastate commerce, are stated in the opinion.

Mr. Felix J. Streyckmans for plaintiff in error.

Mr. Louis Quarles, with whom *Mr. Willet M. Spooner* and *Mr. George Lines* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for demurrage on cars in interstate and intrastate commerce, the grounds of recovery being set forth in separate counts.

After trial judgment was entered for the railway company in the sum of $1,374.63 and $49.60 costs, being in all the sum of $1,424.23.

The judgment was affirmed by the Supreme Court of the State.

There is no dispute about the facts. The railway company operates a railroad at Menasha, Wisconsin, and elsewhere. The paper company is a corporation and has a place of business adjoining the railroad of the railway company and operated, for the purpose of unloading the cars delivered to it, a sidetrack which was contiguous to its mill and connected with the tracks of the railway company. A delay of forty-eight hours was allowed for unloading; after that time a demurrage charge of $1.00 per car per day was provided by the rules of the railway company.

The sidetrack could accommodate about seven cars but had an actual capacity, as used during the times with which the action is concerned, of three or four cars, or possibly of five. As the paper company used the sidetrack, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded, that is, about two or three cars a day.

Notice of the arrival of each car was given and acknowledged by telephone, and the railway company held the cars for unloading either at Menasha station or afterwards at Snell's siding, eight miles south of Menasha. The paper company did not ask for them sooner than shown in the complaint because it could not handle any more cars than it did. And there was neither inability nor refusal on the part of the railway company to so place the cars when so ordered.

On March 14, 1908, the railway company, at the request of the paper company, notified its agents in Wisconsin and Michigan "until further advised" to discontinue to furnish equipment to load with bolts (logs less than 8 feet in length) for the paper company. This arrangement, called an "embargo," did not run out until the close of the year and did not by its terms cover logs, nor was it modified afterwards to cover logs. The embargo was raised at the paper company's request as to a certain

number of cars but was applied again and bolts were shipped in violation thereof and without any notice from the railway company to the paper company of the intention to ship the same, resulting in the arrival of cars in great numbers on certain days.

From these facts it was concluded by the referee, to whom the case was referred, the trial court and the Supreme Court that the paper company was estopped from urging any defense other than the existence of the embargo and that the embargo was "illegal, contrary to public policy, and void."

The latter conclusion the court based on the Hepburn Act (June 29, 1906, c. 3591, 34 Stat. 584) and certain sections of the Wisconsin laws.

The case is in short compass. The first cause of action was for intrastate demurrage on logs; the second cause of action was for interstate demurrage on logs and bolts. The so-called embargo is applicable only to the bolts. The Supreme Court disposed of it, as we have seen, on the ground that it was opposed to the policy of the Federal and state laws and justified the railway company in removing it. And the court found that there was no agreement that notice should be given of its removal. The removal of the embargo undoubtedly produced a congestion of cars beyond the ability of the paper company to handle on its sidetrack in its usual way.

Two questions arise on the embargo: (1) Was it a violation of the Hepburn Act? (2) If so, could the railway company recover on account of the congestion of cars resulting from its removal? That act requires railroad companies to provide and furnish transportation to shippers upon reasonable request therefor, and to exact this duty of the railway company was the right of the shippers of the bolts to the paper company. *Chicago, R. I. & Pac. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426. This is not denied by the paper company nor did that company re-

fuse to receive the cars. It is an inference from this that the paper company recognized it was under contract obligations to the shippers to receive the bolts; indeed, the whole case supposes it. It is alleged that "between June 3, 1908, and July 20, 1908, both dates included, plaintiff [the railway company], as the last carrier, carried and delivered in interstate commerce certain freight in carload" lots (meaning the bolts). There is no denial that they were so carried. If the shippers had a right to send the bolts necessarily the railway company was under a duty to transport them. The contention of the paper company, therefore, is tantamount to saying that the railway company performed its duty at the sacrifice of its rights. We are unable to concur in this view. The railway company violated its duty when it agreed to the embargo; it returned to its duty when it removed the embargo, and the rights which it exercised where those which it would have had if there had been no agreement between it and the paper company. The paper company had a direct remedy if it had been under no obligation to receive the bolts; it could have peremptorily notified the shippers not to send them, and such notice, under the circumstances, was an obvious course. It could not be protected from their receipt nor relieved from the obligation of their receipt by an agreement with the railway company against the duty which the law devolved upon the latter company. This duty it was deemed necessary to impose. It is positive and should be kept clear from agreements with others than the shippers which in effect stipulate for its violation. And this is the basis of our decision. If the paper company was under no obligation to receive the bolts from the shippers of them it undoubtedly had the right to effectually notify the railway company not to receive them for shipment on its account except as it should direct. But, as we have seen, it received the cars, and this, we have said, was a recognition of the rights of

the shippers. The cars did not arrive all at once, and a protest made at the first delivery of cars would have notified the railway company that the paper company was under no obligations to the shippers. And this certainly was the more imperative, as the railway company was the last carrier, the shipments originating on other roads.

It seems that in the state court the paper company did not contend so much against the raising of the embargo as against the failure to give notice of it, with the consequence, it was asserted and is asserted here, of the "dumping of a large number of cars" on the paper company "and causing the accrual of the alleged demurrage sued for." But the contention is based upon the legality of the embargo, it being tantamount, it is insisted, to a consignee refusing freight consigned to it or the designation of those from whom it would receive freight. It, however, gave no notice to its consignors; it undertook to put the railway between itself and them, casting upon the railway company the hazard of the violation of its obligations, it having the ability to perform them and the shippers having the right to demand performance of them. It, besides, received the cars without protest or comment and made no provision for their disposition. The finding is "that defendant did not order cars placed for unloading sooner than as shown in Exhibits B and C, attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them." This finding applies, of course, to the placing of cars on the paper company's sidetrack. What other accommodation and arrangements it could have made does not appear from the findings, but it was testified that the paper company, if the cars had been delivered to it, could have obtained space for unloading them. The company, however, made no demand for such delivery and the referee found that the railway company "notified the defendant [paper company] upon each ar-

rival by telephone, giving the car numbers, and, according to custom, with only occasional exceptions, the plaintiff held the cars until defendant notified it to place them upon the sidetrack for unloading." And the referee also found that there was no delinquency on the part of the railway company nor insufficiency of terminal facilities.

The next contention of the paper company (it is the first discussed) is that "under the Commerce Act railroads cannot collect for any service not 'specifically set forth in the carrier's published tariffs' and tariffs and schedules must plainly show what the charges are for." These conditions, it is urged, were not satisfied by the rules of the company and the circumstances presented in this case.

The rules of the company were as follows:

"Rule 4. Cars which are stopped in transit or held by orders of shippers or consignees for reconsignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe or excessive loading, or for any other reason for which the shipper or consignee is responsible, shall be subject to Car Service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage, and all Car Service must be collected, or billed as advances when cars go forward.

"Rule 5. . . .

"Section B. Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees, or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

"Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the road offering the cars

would have made delivery had the condition of such tracks permitted."

It is somewhat difficult to state succinctly the argument of counsel by which he attempted to give pertinency to the contention based on these rules. We have seen that the sidetrack of the paper company could accommodate about seven cars, but as the company used the track it could handle only two or three cars a day and hence it did not ask for more. The Supreme Court of the State, therefore, decided that the railway company had complied with its obligation to the paper company by complying with such demand and was entitled to charge for demurrage. And answering the contention of the paper company (repeated here), the court said the railway "was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant [paper company] contrary to its orders." The court, by such holding, counsel says, decided that "the rules must have a reasonable construction." And, further, "This is the crux of the decision and it is absolutely in opposition to all of the decisions of the Interstate Commerce Commission and of the courts and of the spirit and intent of the Act to Regulate Commerce." In other words, counsel insists that there should have been an actual filling of the tracks even though this would have prevented their use and have been contrary to the directions of the company, the basis of the contention being "that the rules must be strictly construed and that there must be 'definite tariff authority' for the charges made." And the conclusion, it is asserted, is supported by all authorities, judicial, administrative and legislative. Rigorously applying the test that the exact letter of the statute must be observed, counsel goes so far as to assert that there was an imperative duty upon the railway company to so fill the tracks, and this without orders. And contesting the proposition,

decided by the Supreme Court of the State, that cars arriving at Menasha or Snell's siding had reached their destination, counsel says: "It was the duty of the railroad to keep the sidetrack filled to its physical capacity before it could hold the cars 'at the nearest available point.' To hold otherwise would leave it dependent upon the judgment of the officers of the railroad as to how much unloading the consignee could do, and would therefore result in discrimination and special privileges prohibited by the Act to Regulate Commerce." And further: "The carrier was derelict in its duty when it failed to fill the sidetrack to its capacity as it had not completed its duty as a common carrier until it had placed the cars on the sidetrack of the plaintiff in error."

We are unable to concur in counsel's construction of the rules or to hold that it has any such formidable support as he assigns to it. And we content ourselves with the bare assertion, not even pausing to review counsel's chief reliance, that is, *United States* v. *Denver & Rio Grande R. R.*, 18 I. C. C. 7. The case has not the breadth given to it. If it had we should be unable to follow it.

A motion has been made to dismiss, but it is apparent from our discussion that a Federal question was presented in the case and decided by the court. The motion, therefore, must be overruled, and the judgment

Affirmed.

UNITED STATES *v.* NEW SOUTH FARM AND HOME COMPANY.

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

No. 808. Argued April 7, 1916.—Decided April 24, 1916.

While the fraudulent advertisements covered by the provisions of § 215, Criminal Code, prohibiting using the mails for advertisements, may not include those which merely puff the article to be sold by exaggerating its qualities, it does prohibit using the mails for fraudulent statements assigning to such article qualities which it does not possess.

An article alone is not necessarily the inducement and compensation for its purchase, but the use to which it may be put and the purpose it may serve; and there is deception and fraud within the meaning of § 215, Criminal Code, when the article is not of the character represented and hence does not serve the purpose.

Persons employing such representations, if they are false, are engaged in a scheme to defraud within the meaning of § 215, Criminal Code.

The demurrer to an indictment under § 215, Criminal Code, having been sustained and the Government having appealed under the Criminal Appeals Act, and the appellee having contended that the court below passed only on the sufficiency of the indictment, and did not consider the statute, *held* that, although such contentions did involve a consideration of the indictment, they involved also the construction of the statute; but, in reversing the District Court as to its action in sustaining the demurrer, this court has no intention of controlling the District Court in its construction of the indictment and so remands the case.

THE facts, which involve the construction and application of § 215 of the Federal Criminal Code, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

Mr. W. Knox Haynes for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error is directed to a decision of the District Court sustaining a demurrer to an indictment and is prosecuted under the Criminal Appeals Act, it being contended by the Government that the decision involved the construction of § 215 of the Criminal Code. The opposing contention is that the court passed only on the sufficiency of the indictment as a criminal pleading and that, therefore, the writ of error should be dismissed. The contentions are repeated here, and make the issue. They necessarily require a consideration of the indictment. It is constituted of three counts. Their foundation is § 215, *supra*, which, so far as material, reads as follows: "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, . . . shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, . . . circular, . . . or advertisement, . . . in any post office, . . . to be sent or delivered by the post office establishment of the United States, . . ." etc.

The section is a somewhat enlarged successor of § 5480, Revised Statutes, which provides: "If any person having devised . . . any scheme or artifice to defraud, . . . shall, in and for executing such scheme or artifice, or attempting so to do, place any letter . . .," etc.

As showing a violation of § 215 the first count of the indictment charged the following facts, which we state narratively: The individual defendants are directors and stockholders of the New South Farm & Home Company, a corporation engaged in selling approximately 142,000 acres of land, referred to as the Burbank-Ocala colony and

the Florida-Palatka colony, situated in Putnam, Marion and Clay counties, Florida. They devised a scheme to defraud certain persons, who were named, and other persons, of their money and property, with the intention to convert the same to the use and gain of the defendants and the corporation, by means of correspondence and communications through the post office establishment of the United States and by means of oral and verbal communications, by offering to sell to such persons, and inducing them to purchase, certain 10-acre farms upon certain terms through false and fraudulent representations concerning the title, fertility, value, drainage, location, environs, and survey of the farms and the improvements made or to be made thereon.

The representations were these: The lands and farms were not swampy; the largest ocean steamers operating between New York and Jacksonville could load at Palatka; a family could make enough on one farm during the first year to support itself and save money; three crops a year could be grown; every month in the year was a growing month, that is, some farm or truck product could be raised during each month of the year; the farms were surrounded with orange and citrus fruit groves and vegetable truck farms; the farms had fine roads running through them, were high and well drained and on the whole like the lands of Kansas, Nebraska, Iowa and Illinois; artesian wells were scattered about on the farms or "could be obtained by going down 100 feet"; the land was divided into 160-acre tracts; roads were being built around each 160-acre tract and each 10-acre farm would face on a road, and ditches were being dug so that each farm would be drained; many miles of fence had been erected and hundreds of homes and many school houses had been built; the school houses were more than comfortably filled with pupils, and more schools would have to be built to take care of the rapid growth of the colonists settling upon the farms; com-

fortable hotels had been built upon the lands and farms and improvements of all kinds were going forward at a wonderful rate; lumber was cheap and homes could be built without nearly so great expense as in most places in Florida and at about one-half of the expense the same would cost in the North; the Title Guarantee Company of Jacksonville, Florida, would guarantee the title, with which company the New South Farm & Home Company had made arrangements so that purchasers might know that their investments were safe; the farms were cut over and ready to go upon at once and there were no timber leases upon the lands; the defendants were not land brokers or speculators; the New South Farm & Home Company owned the land outright, the title having been approved by the best attorneys, and any one buying a farm could depend upon securing a clear title as the company was selling something it owned itself; the farms were free from mosquitoes, malaria, and insects of all kinds and were below the frost line; the company had secured telephone connections with Palatka and with local exchanges at other places (they are named) which would place every farm "in direct touch with the community at all times;" the lands and farms were located high and dry and in a section well drained; hundreds of people had settled on them and at the little city of Burbank the lands and farms had increased—doubled, trebled and quadrupled—in price, and the same was true of the lands owned by the company at Silver City, and a thousand settlers were on the lands who could sell them at a large profit; land selling at $30 an acre would be worth in two years $200 and $300 per acre; well-stocked stores and factories were located upon the lands and they were the best located and the most fertile lands in America, and Luther Burbank had been arranged with for "the exclusive right for the production of certain of his farm products"; there would be installed a Burbank producing

station on the lands and farms and the purchasers of the latter would share in the profits of the station, the director of which would be available for the needs of the purchasers; one could get out of a Pullman car on the farms, use a long distance telephone, have the daily paper, rural free delivery and all the comforts of home.

There were other representations of fact, and, to give emphasis to those which we have enumerated, it was charged that the pictures in the publications sent out by the defendants represented the true conditions to be seen on the farms.

All of the representations were explicitly repeated and charged to be false; that defendants well knew them to be so and intended by them to deceive the persons to be defrauded and to induce such persons to part with their money and property in the purchase of the farms.

That the representations were made and communicated by the defendants to the persons intended to be defrauded through and by means of oral statements, circulars, maps, advertisements, photographs, etc., so worded, drawn, constructed, presented and expressed as to deceive; but all too voluminous to be set forth in the indictment, wherefore the grand jurors omitted them.

That the defendants deposited in the United States mail at Jacksonville and Palatka, in the Southern District of Florida, certain publications known as "The New Florida" and "Ten Acres and Freedom" and certain other letters, prints, pamphlets, magazines and publications containing the false representations set out above, which were addressed to the persons intended to be defrauded and on which legal United States postage had been paid.

The second count charged the defendants with entering into a conspiracy to commit the offense described in the first count and repeated its allegations and representations, varied only to meet the difference in the crime

charged. In other words, there were allegations which charged that the conspiracy was to be accomplished by the representations enumerated in the first count, that they were false and known to be so and made with the same fraudulent purpose and to be accomplished by the use of the United States mails. Two letters from the company, signed by defendant Seig as president, were set out in the indictment.

The third count was also like the first in its general charges and designated by name the persons that were intended to be defrauded. The same representations were charged to have been made "by publishing and causing and procuring to be published divers prints, papers, pamphlets, booklets, circulars, and divers advertisements." The falsity of the representations was declared, and that the scheme of fraud was to be accomplished by the use of the United States mails. A letter was quoted.

The defendants demurred to the indictment. The demurrer is a very voluminous document and practically defies condensation. It charges that the indictment does not, nor does any count of it, "aver and charge any offense against the United States," that each and every count thereof is insufficient in that they do not, nor does either of them, aver the facts constituting a scheme to defraud; that each and every count is insufficient for repugnancy, uncertainty, ambiguity and evasiveness; and that each and every count is insufficient for want of distinct and adequate specifications of the particulars wherein the several representations, called in the count false representations, were false.

The demurrer then attacks each count separately, and with much elaboration and with repetition of the allegations of the indictment sets out with particularity wherein no offense against the United States was charged.

The court sustained the demurrer, resting its decision

upon the second and third grounds of demurrer which, we have seen, charged that neither the indictment nor any of its counts averred or charged an offense against the United States or averred facts which constituted a scheme to defraud. It was said, "The scheme to defraud is alleged in the first and third counts, and the conspiracy count also sets out the same scheme. So that if the scheme to defraud set out in each of said counts is not such a scheme as is punishable under the law, the entire indictment must fail."

Describing the representations, the court said they "are as to the quality of the land, climate, crops to be raised, advantages to be obtained, and promises of improvement, etc." And further: "There is no denial of the facts of the ownership of the lands, although there is a denial that all the titles were perfect. Nor is there denial that the land was worth fully as much as was to be obtained therefor. For aught that appears in the indictment the lands to be obtained were worth fully as much as was to be paid by the parties purchasing; that the parties engaged in the sale were legitimately engaged in the sale of the lands."

The court regarded the business as legitimate and held that the statute was not violated by puffing the qualities of the article sold in advertising it. In other words, as the court expressed it, "raising the expectations of the purchaser, but giving that purchaser value received for his money, but not fulfilling those expectations," was not an offense against the statute. And, further, the court said that the deduction from the authorities referred to by counsel "is that the scheme must be one to defraud the party or by false promises, pretenses, etc., deprive him of money or property without adequate value. Mere puffing or exaggeration of qualities, usefulness, opportunities or value of an article of commerce, where the purchaser gets the article intended to be pur-

chased and the value of the article is measured by the price paid, do not constitute the false representations, promises, etc., denounced by the statute."

We have made these excerpts from the opinion of the court the better to handle the contentions of the parties, which, as we have seen, are quite accurately opposed, the Government asserting that the court construed the statute and thereby justifying its appeal to this court; the defendants insisting the court construed only the indictment as a pleading and that therefore this court is without jurisdiction.

We concur in the view of the Government. The court, we think, construed the statute and misapprehended its import. Mere puffing, indeed, might not be within its meaning (of this, however, no opinion need be expressed), that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has but invents advantages and falsely asserts their existence, he transcends the limits of "puffing" and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false they become the scheme or artifice which the statute denounces. *Harris* v. *Rosenberger* (C. C. A., 8th Cir.), 145 Fed. Rep. 449; *O'Hara* v. *United States* (C. C. A., 6th Cir.), 129 Fed. Rep. 551, 555; *Colburn* v. *United States* (C. C. A., 8th Cir.), 223 Fed. Rep. 590; *Wilson* v. *United States* (C. C. A., 2nd Cir.), 190 Fed. Rep. 427. See also *United States* v. *Barnow*, 239 U. S. 74. Especially is this true in the purchase of

small tracts for homes, and upon this, if the allegations of the indictment are true, the defendants touched every string of desire by false statements, and sounded every note that could excite and delude. We need not repeat the representations; and they were made graphic, it is alleged, by pictures and photographs.

Indeed, if it could be admitted that the article offered for sale and its price could be balanced the one against the other, the price necessarily would be the expression of value and be constituted of all the attributes of the article, intrinsic and extrinsic; and it needs no comment to show that a 10-acre farm with the character, environments, and facilities described, its price doubling, trebling and quadrupling within a year, has a seduction more powerful than one not advancing in value, but, it may be, receding, that is of swampy, not of high-land, character, without fertility, hotels, roads, artesian wells, citrus groves, Pullman cars, steamship and other facilities which the literature of defendants describes and the indictment alleges.

We can entertain no doubt that those employing such representations, if they are false, have engaged in a scheme to defraud. The defendants did not seem to be afraid of repelling by excess, and extravagance was even used in a personal communication. In a letter which was set out in the indictment it was said: "Our settlers are arriving daily and occupying their farms. The land is being rapidly cleared, crops are being planted, houses erected, stores built, and, on a whole, it is impossible for us to set forth in a letter to you exactly how stupendous is the work that is going on there. Without a question of a doubt the Florida Palatka Colony is enjoying the greatest prosperity."

Against these considerations defendants contend that there was, notwithstanding, only a construction of the indictment, but ask that, if we are of a different view,

the case be reversed only so far as the statute was construed and remanded for action upon the other causes assigned for demurrer, involving, as they say, the sufficiency of the indictment as a criminal pleading. The difficulty is to indicate a distinction. We can only say we have no intention to control the District Court in its construction of the indictment, and we have no doubt the learned court will be able to adjust its action to this opinion. *United States* v. *Portale*, 235 U. S. 27, 31.

Reversed.

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

UNITED STATES *v.* LOMBARDO.

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

No. 830. Submitted April 10, 1916.—Decided April 24, 1916.

Where a criminal statute does not define a word used therein, its etymology must be considered and its ordinary meaning applied.

The word file means to deliver to the office indicated and to send to such office through the mail.

Under § 6 of the White Slave Traffic Act the required certificate must be filed in the office of the Commissioner of Immigration, and the offense of not filing is not committed in another district where the person is harbored, nor has the District Court of the United States for that district jurisdiction of the offense.

Such an offense is not a continuing offense which, under § 42 of the Judicial Code (§ 731, Rev. Stat.), can be punished in either of more than one district.

This court will not, in order to accommodate the venue of a particular offense, introduce confusion into the law.

The proper and reasonable construction of a criminal statute must not be refused for fear of delay in prosecution of offenders; if the statute as so construed might embarrass prosecutions it may be corrected by legislation.

THE facts, which involve the construction and application of § 6 of the White Slave Traffic Act, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

There was no appearance for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error under the Criminal Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246) to review a decision of the District Court for the Western District of Washington (228 Fed. Rep. 980) sustaining a demurrer to an indictment founded on the "White Slave Traffic Act" (June 25, 1910, c. 395, 36 Stat. 825, 826).

Section 6 of that act provides that every one "who shall keep, maintain, control, support or harbor in any house or place, for the purpose of prostitution, . . . any alien woman . . . within three years after she shall have entered the United States . . . shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman, . . . the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procuration to come to this country, within the knowledge of such person; and any person who shall fail within 30 days after such person shall commence to keep, etc. . . . any alien woman, . . . to file

such statement concerning such alien woman, . . . with the Commissioner General of Immigration, or who shall knowingly and wilfully state falsely, or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman, . . . or concerning her procuration to come to this country, shall be deemed guilty of a misdemeanor, etc. . . ."

The statement is not excused because it may have incriminating character, but it is provided that the person making it shall not be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing concerning which he may truthfully report in such statement as required by the provisions of the act.

The indictment charged that one Jessie Milos, an alien woman and a citizen and subject of the Kingdom of Great Britain, had entered the United States in the month of May, 1914, and that Angeline Lombardo, knowing these facts, did, in a house in the City of Seattle, Northern Division of the Western District of Washington, keep, maintain, control and harbor Jessie Milos for the purpose of prostitution and for other immoral purposes, and unlawfully, knowingly and wilfully failed to file with the Commissioner General of Immigration a statement in writing as required by the statute, or any statement concerning Jessie Milos.

It was alleged that the United States and Great Britain are parties to an agreement or project or arrangement for the suppression of the white slave traffic adopted July 25, 1902.

There were two grounds of demurrer: (1) Section 6 of the White Slave Act is unconstitutional in that it contravenes rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States. (2) The court was without jurisdiction of the subject-

matter as the prosecution is in contravention of rights guaranteed by the Sixth Amendment.

The District Court sustained the demurrer on both grounds. We, however, shall confine our decision to the second ground as that attacked the jurisdiction of the court in that the offense was not committed in the district in which the indictment was found. Passing on it the court said:

"The gist of the offense is the failure 'to file with the Commissioner General of Immigration' a statement, etc. By the act of March 3, 1891, chap. 551, sec. 7, page 1085, 26 Stat. at Large, as amended by the act of March 2, 1895, chap. 177, 28 Stat., page 780, the office of the Commissioner of Immigration was created and his office fixed at Washington, D. C. The Government contends that the offense was a continuing one and extended from this district to Washington, D. C., and that the filing of the statement need not be at the office in Washington, but may be deposited in the post office of the United States, addressed to the Commissioner General, and this forwarding through the usual course of mail should be considered as 'filing,' and that the failure to post within thirty days would commence the offense which would be continuous. This contention cannot be reconciled with the language employed in the act. The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word 'file' is derived from the Latin word '*filum*,' and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the United States mails. *Gates* v. *State*, 128 N. Y. Court of Appeals, 221. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier

Law Dictionary; *White* v. *Stark*, 134 California, 178; *Westcott* v. *Eccles*, 3 Utah, 258; *In re Van Varcke*, 94 Fed. Rep. 352; *Mutual Life Ins. Co.* v. *Phiney*, 76 Fed. Rep. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."

The Government in its argument here contests the views of the District Court, repeats its contention that the offense was begun in the State of Washington, and relies on § 42 of the Judicial Code, substantially reproducing § 731 of the Revised Statutes. It provides as follows:

"When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

The Government also cites a number of cases which it urges support the application of the statute to the case at bar. We are unable so to regard the cases or to give the statute the application contended for. Nor does the case call for elaborate discussion. Indeed, it would be difficult to add anything to the reasoning of Judge Neterer in the District Court.

Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere, as in conspiracy.

It may be that where there is a general duty it may be considered as insistent both where the "actor" is and the "subject" is, to borrow the Government's apt designa-

tions, as in the case of the duty of a father to support his children; and if the duty have criminal sanction it may be enforced in either place. The principle is not applicable where there is a place explicitly designated by law, as in § 6.

The Government, however, contends that "with few exceptions every crime has continuity. But the law, being essentially practical, does not regard every crime as continuous for the purpose of jurisdiction. . . . For practical purposes it usually suffices to punish where the actor began, or where the subject suffered the intended result."

If these propositions be granted we do not see that they carry us far in determining where a violation of § 6 is begun or completed, nor do we appreciate the criticism of the decision of the court below that it "failed to distinguish between the 'beginning' and the 'completion' of the offense; giving the words 'shall file,' etc., a meaning so narrow as to destroy the section." But this is assertion. A court is constrained by the meaning of the words of a statute. They mark the extent of its power, and our attention has not been called to any case which decides that the requirement of a statute, whether to secure or preserve a right or to avoid the guilt of a crime, that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place. To so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files. We hesitate, in order to accommodate the venue of a particular offense, to introduce such confusion. And would it not, besides, in particular cases preclude the possibility of a conviction, putting evidence entirely in the hands of the defendant?

And there are other considerations. If depositing in the post office of the statement prescribed be required by the statute it, of course, would satisfy the statute, but to what instant of time would it be referred and at what risk the time or delays of transportation?

There need not be a prolonged embarrassment in the prosecution of offenders as the Government fears. If § 6 is deemed defective it can be corrected by legislation.

Judgment affirmed.

McFARLAND, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA, *v.* AMERICAN SUGAR REFINING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 847. Argued April 11, 12, 1916.—Decided April 24, 1916.

Act No. 10 of the Extra Session of the General Assembly of Louisiana for 1915, relating to the business of refining sugar and creating the rebuttable presumption that any person systematically paying in that State a less price for sugar than he pays in any other State is a party to a monopoly or conspiracy in restraint of trade, *held* unconstitutional under the equal protection and due process provisions of the Fourteenth Amendment; the classification therein, if not confined to a single party, being so arbitrary as to be beyond possible justice, and the presumptions created having no foundation except on intent to destroy.

While the legislature may go far in raising presumptions and changing the burden of proof, there must be rational connection between the fact proved and the ultimate fact presumed.

It is not within the province of the legislature to declare an individual guilty, or presumptively guilty, of a crime.

A statute must fall as a whole, if it falls in sections without which there is no reason to suppose it would have been passed.

229 Fed. Rep. 284, affirmed.

THE facts, which involve the constitutionality under the commerce clause of, and the Fourteenth Amendment to, the Federal Constitution of Act No. 10 of Louisiana of 1915, relative to, and regulating the business of, refining sugar, are stated in the opinion.

Mr. Donelson Caffery and *Mr. Harry Gamble*, with whom *Mr. Ruffin G. Pleasant*, Attorney General of the State of Louisiana, and *Mr. Daniel Wendling* were on the brief, for appellants.

Mr. James M. Beck, with whom *Mr. Joseph W. Carroll*, *Mr. George Denegre*, *Mr. Hugh C. Cage* and *Mr. Frank L. Crawford* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by a New Jersey corporation, the appellee, against the Inspector of Sugar Refining, the Governor and the Attorney General of Louisiana, to prevent the enforcement of Act No. 10 of the Extra Session of the General Assembly of that State for 1915. The grounds of relief are the commerce clause and the Fourteenth Amendment of the Constitution of the United States.

The plaintiff was granted a preliminary injunction by three judges in the District Court and the defendants appealed. 229 Fed. Rep. 284.

A summary of the statute is as follows: The business of refining sugar is declared to be impressed with a public interest 'by reason of the nature and by reason of the monopolization thereof,' and on that footing the regulations are made. After providing for elaborate reports and inspection of books by the Inspector the act imposes for the benefit of the Inspection Fund a tax of one-half cent for every three hundred and fifty pounds of granu-

lated sugar made. It then makes it unlawful to buy sugar on an *ex parte* test of quality, &c., and proceeds to authorize the Inspector to make such reasonable regulations not only concerning that, but affecting any branch of the business of sugar refining, as he may deem proper and as may be conducive to the public interest, and to the prevention of monopoly in the business or to the protection of the public from its consequences. Then come the provisions chiefly in issue here. By § 7 "any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other State shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of five hundred dollars a day for the period during which he is adjudged to have done so"; his license to do business in the State is to be revoked, and any foreign corporation (such as the plaintiff is) is to be ousted from the State and its property sold. If irreparable injury to the public interest is shown in such a case the court may appoint a receiver at any stage of the proceedings, &c. By § 8 if shown by affidavit or otherwise either *in limine* or after trial that any refinery has been closed or kept idle for more than one year it shall be presumed to have been done for the purpose of violating this act or the laws against monopoly, &c., and if the counter evidence does not rebut the presumption the court shall order the owner to sell the refinery within six months and if that is not done shall appoint a receiver to do it within twelve months. In computing the year of idleness any plant shall be treated as idle that has not been operating *bona fide*. By § 9 in suits for ouster, &c., upon showing by the State that the monopoly, &c. are detrimental to the public welfare, an injunction may be issued or a receiver appointed, after a hearing, subject to an appeal return-

able within five days to be determined within forty days, &c. By § 10 a fine of from fifty to twenty-five hundred dollars a day is imposed for violations of the act not otherwise provided for or of any of the regulations promulgated by the Inspector. By § 11, in suits under the act, books, letters and other documents, 'or apparent copies thereof,' of the defendant shall be given effect as being what they purport to be and 'as establishing the facts carried on their face' unless sufficiently rebutted, upon proof of their having been in the possession or control of the defendant; and any report of any legislative committee of the State, or of the Senate or House of Representatives of the United States, or of any bureau, department, or commission acting under the authority either of the State or of the Senate or the House of Representatives of the United States, and the records of any court of any State, or of the United States are made *prima facie* evidence of the facts set forth therein, subject to rebuttal. In conclusion, by § 15 the business of refining sugar is defined to be "that of any concern that buys and refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it."

Besides the allegations that bring the plaintiff within the purview of the act, the claims of the protection of the Constitution, and the invocation of the principle of *Ex parte Young*, 209 U. S. 123, for equitable relief, the bill sets forth some facts that throw special light upon the case. First for the bearing of § 8, it shows that formerly the plaintiff purchased a consolidated refinery called the Louisiana Refinery, increased its capacity to 2,500,000 pounds daily and worked it until 1909. It then built at a cost of about six million dollars a new refinery at Chalmette with a daily melting capacity of 3,000,000 pounds since increased to 3,500,000. It then closed the Louisiana

Refinery as it could not distribute from New Orleans more refined sugar than could be made at Chalmette. The machinery of the Louisiana Refinery is comparatively antiquated and could not be operated economically, although in case of the destruction of the Chalmette plant it could be used as a substitute at considerable expense and after some delay.

As to the presumption created from the systematic paying in Louisiana a less price for sugar than is paid in any other State, the bill alleges that the plaintiff purchases on an average less than one-half of the Louisiana sugar crop, of which half over a third is shipped as bought, to the plaintiff's northern refineries, so that not much over thirty per cent. is melted at Chalmette. In fact only a comparatively small portion of the plaintiff's meltings in Louisiana is of sugar produced in Louisiana, the remainder having been imported. The chief port for the receipt of raw sugar imported is New York, at or near which there are seven large refineries now in operation.—The Louisiana sugar customarily has been brought on the market in November and December, during which months it is pressed for sale in amounts far in excess of the requirements of all the refineries in the State. Purchasers therefore had either to ship a part north or to store it with consequent loss from deterioration and in weight, interest, and cost of storage and insurance, and at the risk of a decline in the market. These elements necessarily affect the price, which cannot be higher than that in the ultimate market less the cost of transportation, and which has been approximately that. Furthermore the period of storage is a time when the market for raw sugar generally declines and the price of refined sugar follows that of raw to the refiner's loss.

Formerly a large part of the sugar manufactured in Louisiana by the plaintiff was sold in the middle west and in Minnesota, Iowa, the Dakotas, &c., and it was to meet

that market that the Chalmette refinery was built. But the great and rapid increase in the production of beet sugar, which now forms one-sixth of all the sugar consumed in the United States and is sold at prices below those of cane sugar, has driven the plaintiff out of those markets to a great extent. The result frequently has been that the plaintiff has derived little or no advantage from the purchase of Louisiana sugar even when bought at a less price than that in New York on the same day.

The bill also shows fully that the plaintiff melts solely on its own account so that its only contact with the public is as a buyer of raw and a seller of refined sugar and its business is affected with a public interest not otherwise than as any other business is, according to its importance and size. It also shows that much the greater part of its Chalmette commerce both in purchase and sale is foreign or among the States. There are other allegations besides those that we have summed up but enough has been stated to disclose the plaintiff's case.

The answer alleges that the plaintiff is a monopoly and combination in restraint of trade in buying, refining and selling sugar throughout the United States and completely controls the sugar trade in Louisiana and sets forth a long series of letters thought to show efforts to obtain and keep such control. It obliquely intimates that the plaintiff can fix prices on occasion even in the New York market, admitted to be the ruling one in the United States. It alleges that suits have been brought against the plaintiff by sugar planters, under the Sherman Act, for a total of near $200,000,000, and that after the exposure of the plaintiff's criminality in a suit by the United States that seems to have come to nothing, this law was passed. All of the foregoing, the main portion of the answer, is offered as ground for denying to the plaintiff any equitable relief.

In the alternative, if the plaintiff has a standing in

equity, the answer denies the plaintiff's explanation of the idleness of the Louisiana Refinery and avers that the statement that it buys less than half the Louisiana crop is deceptive, and that it buys seventy per cent. of the raw sugar sold to refiners. It alleges that the shipping of raw sugar north is due to artificial conditions created by the plaintiff and that but for them the whole would be 'handled locally.' It also alleges that the difference between the Louisiana and the New York price has been made less by the plaintiff since 1911, in order to prevent a repetition of the one successful combination made by the planters. Finally it alleges that the shipments to New York arrive when there is no sugar on hand or when the first sugar from Cuba is coming in, and enable the plaintiff to influence downward the price of the Cuban sugar that it needs. Most of the allegations of the bill are denied, and it is said that the rush to sell in November and December would have found a market but for the plaintiff's wrongful deeds.

The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other voice of the State heard in Act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff is the only one to whom the act could apply and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity since it made the legislation necessary. If the connection were admitted it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights or prevent it from asserting them in the only practicable and adequate way.

The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We deem it sufficient to refer to those that were mentioned by the District Court; a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice,—and a creation of presumptions and special powers against it that can have no foundation except the intent to destroy. As to the classification, if a powerful rival of the plaintiff should do no refining within the State it might systematically pay a less price for sugar in Louisiana than it paid elsewhere with none of the consequences attached to doing so in the plaintiff's case. So of anyone who purchases but does not refine. So of any concern that does not buy and refine more sugar 'than the aggregate of the sugar produced by it from cane grown and purchased by it' as easily might happen with a combination of planters such as the answer gives us to understand has been attempted heretofore.

As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Mobile, Jackson & Kansas City R. R.* v. *Turnipseed*, 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof

that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed.

Decree affirmed.

NORTHERN PACIFIC RAILWAY CO. *v.* WALL, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 350. Argued December 1, 1915.—Decided April 24, 1916.

Laws, in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it, as if expressly referred to or incorporated therein.

A bill of lading is a contract; and, if interstate, it is to be construed in the light of the provision of the Carmack Amendment, which prescribes how it shall be issued and makes the connecting carrier the agent of the receiving carrier for the purpose of completing the transportation and delivering the goods.

Whether in construing an interstate bill of lading issued under the Carmack Amendment due effect is given to the latter is a Federal question.

A stipulation in a bill of lading of an interstate shipment of cattle that the shipper must, as a condition precedent to his right of recovery for injury to the cattle while in transit, give notice thereof in writing to some officer or station agent of the initial carrier before the cattle are removed from the place of destination or mingled with other live stock, is to be construed in the light of the Carmack Amendment making the connecting or delivering carrier agent of the initial carrier; and notice given to the station agent or officer of the former operates as notice to the latter, and the fact that there is no officer or station agent primarily employed by the initial carrier at the point of destination does not relieve the shipper from compliance with the stipulation.

50 Montana, 122, reversed.

THE facts, which involve the right of a shipper to recover from the carrier damages for injury to cattle being transported in interstate commerce owing to delay in transit and resulting decrease in weight, are stated in the opinion.

Mr. Charles Donnelly for plaintiff in error.

Mr. Thomas J. Walsh, with whom *Mr. Walter Aitkin* was on the brief, for defendant in error.

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

This was an action to recover for injuries to cattle being transported in interstate commerce, the gravamen of the complaint being that the cattle were unreasonably delayed in transit and consequently were greatly reduced in weight and emaciated in appearance.

The cattle were shipped in January, 1912, from Belgrade, Montana, to the Union Stock Yards at Chicago over two connecting railroads—the Northern Pacific and the Burlington—under a through bill of lading issued by the initial carrier. The shipment was at a reduced rate based upon the stipulations in the bill of lading. The rate and the bill of lading had been regularly established and put in force under the Interstate Commerce Act and its amendments. One stipulation was to the effect that the shipper, as a condition precedent to his right to recover for any injury to the cattle while in transit, should give notice in writing of his claim to some officer or station agent "of said company" before the cattle were removed from the place of destination or mingled with other stock; and another was to the effect that the terms of the bill of lading should inure to the benefit of any connecting carrier over whose line the cattle should

pass in the course of their transportation. By an endorsement on the bill of lading the Burlington Company was designated as the connecting carrier. The shipment was accompanied by an attendant selected by the shipper and authorized to represent him in all matters pertaining to the general care and handling of the cattle. Upon reaching their destination the cattle were delivered by the Burlington Company to an agent of the shipper and were sold, removed and mingled with other stock before any notice was given of a claim for injury to them while in transit.

This action was brought against the initial carrier—the Northern Pacific Company—and the damages sought were for alleged injuries to the cattle while passing over both roads. In its answer the defendant set up the stipulations before named; insisted that they were established under the Interstate Commerce Act and that a Montana statute invalidating such stipulations was, as applied to bills of lading in interstate commerce, in conflict with the congressional enactment and void; alleged that no notice of any claim for injury to the cattle had been given "to any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier," until after the cattle had been removed from the place of destination and mingled with other stock, and claimed that by reason of the failure to give the stipulated notice the plaintiff was not entitled to recover. In his reply the plaintiff, while expressly admitting that he had not complied with the stipulation relating to notice, denied that it was established or effective under the Interstate Commerce Act, insisted that it was unreasonable and in contravention of the Montana statute, alleged that compliance with the stipulation had been waived by the defendant, and set forth at length and invoked the Carmack Amendment to the Interstate Commerce Act in support of the effort to recover from the initial carrier

for the injuries occurring while the cattle were on the line of the connecting carrier. Upon the trial, and after the evidence was concluded, the defendant moved for a directed verdict in its favor upon the ground that the contract embodied in the bill of lading was valid, that confessedly the notice "required by the contract" was not given, and that there was no evidence showing a waiver of the notice. The motion was denied upon the ground that under the evidence the question of waiver was for the jury, and an exception was reserved by the defendant. At its request the court in charging the jury said: "One of the defenses relied upon by the defendant is that no notice of claim for damages for loss or injury to the stock in question was given by the plaintiff to the defendant or to the connecting carrier, before the stock was removed from the place of destination or mingled with other stock. This provision of said contract is a reasonable one, binding upon the plaintiff, and under the admissions in his reply, prevents him from recovering in this action, unless you find that . . . defendant expressly or impliedly by its conduct waived the giving of said notice in accordance with this provision of the contract." The jury, evidently resolving the question of waiver against the defendant, returned a verdict for the plaintiff, and the judgment thereon was affirmed by the Supreme Court of the State. 50 Montana, 122.

From what has been said it is apparent not only that the damages sought were for injuries occurring while the cattle were being transported in interstate commerce but also that both parties relied upon the Interstate Commerce Act and its amendments—the plaintiff to sustain his right to recover for the injuries on the line of the connecting carrier and the defendant to sustain its defense based upon the stipulations in the bill of lading. And it is plain that the trial court gave controlling effect to that act and its amendments, for otherwise the instruc-

tion upholding the validity of the stipulation for notice could not have been given, in the presence of the Montana statute (Laws 1909, c. 138) declaring such a stipulation void.

The Supreme Court, passing the question whether notice had been waived, interpreted the stipulation as requiring that the notice be given to an officer or station agent primarily employed by the Northern Pacific Company, and thereby excluding notice to an officer or station agent of the Burlington Company, and then held the stipulation unreasonable and inoperative because no officer or agent primarily employed by the Northern Pacific Company was accessible at the place of destination. Whether in so interpreting the stipulation that court gave proper effect to the Interstate Commerce Act and its amendments is the Federal question pressed upon our attention, and we think it is fairly presented by the record. The shipment being interstate, that legislation was controlling; the through bill of lading was issued under it; the pleadings show that its application was invoked; and in the answer, as also in the instruction given at the defendant's request, there was a distinct assertion that notice was not given "to any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier," which meant that the defendant was proceeding upon the theory that the stipulation, when read in connection with the Carmack Amendment, contemplated and recognized that notice to an officer or agent of the connecting carrier—the Burlington Company—would suffice.

As this court often has held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Ed-*

wards v. *Kearzey*, 96 U. S. 595, 601. A bill of lading is a contract and within this rule. The Carmack Amendment to the Interstate Commerce Act (§ 7, c. 3591, 34 Stat. 584, 593), which was in force when this bill of lading was issued, directs a carrier receiving property for interstate transportation to issue a through bill of lading therefor, although the place of destination is on the line of another carrier; subjects the receiving carrier to liability for any injury to the property caused by it or any other carrier in the course of the transportation, and requires a connecting carrier on whose line the property is injured to reimburse the receiving carrier where the latter is made to pay for such injury. Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for the purpose of completing the transportation and delivering the property. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 196, 206; *Galveston &c. Ry.* v. *Wallace*, 223 U. S. 481, 491. This bill of lading was issued under that statute and should be interpreted in the light of it. *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, 593. The shipment was to pass over both roads in reaching its destination; the delivery at that place was to be made, as in fact it was, by an officer or station agent of the connecting carrier; and the stipulated notice was to be given before the cattle were removed from the place of destination or mingled with other stock, that is, while it was yet possible from an inspection of them to ascertain whether the claim of injury, if any, was well founded. In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose and gives

due effect to the statute under which it was issued. True, the words "said company" in the stipulation, if read only in connection with an introductory sentence in the bill of lading, would seem to refer to the initial carrier alone, but when they are read in connection with the statute and other parts of the bill of lading, including the provision that its terms and conditions "shall inure to the benefit of" any connecting carrier, it is apparent that they embrace the carrier making the delivery as well as the initial carrier, especially as the former is in legal contemplation the agent of the latter.

The act of March 4, 1915, c. 176, 38 Stat. 1196, altering the terms of the Carmack Amendment is without present bearing, because passed long after this shipment was made.

We are of opinion that the Supreme Court of the State failed to give proper effect to the Carmack Amendment in interpreting the bill of lading and that the judgment should be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

MR. JUSTICE MCREYNOLDS with whom MR. JUSTICE MCKENNA concurred, dissenting.

For two reasons I am unable to agree with the opinion of the court.

First. If reiteration can establish a rule of law, it must be taken as settled that in causes coming here by writs of error from state courts of last resort we may not consider Federal questions not specially set up below. And further, that such a question comes too late if raised for the first time after final decision in the highest state court by petition for rehearing unless this was actually entertained. *St. Louis & San Francisco R. R.* v. *Shepherd*, 240 U. S. 240, 241; *McCorquodale* v. *Texas*, 211 U. S. 432, 437.

The following recitals are parts of the bill of lading:

Par. 6. "The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said Company before said stock has been removed from the place of destination or mingled with other stock."

Par. 9. "The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said Company, to which the said property may come for purpose of transportation."

A rehearing was denied by the Supreme Court of Montana in this brief order: "Appellant's motion for a rehearing herein heretofore submitted is after due consideration by the court denied." An elaborate written argument filed there in support of the petition and incorporated in the record, states:

"Appellant did not brief nor argue the reasonableness of the provisions of paragraph 6 of said contract from the view point considered by the court on page 3 to line 5 of page 7 of the opinion, for the reason that no such question was raised by the plaintiff in the court below. In fact the only grounds upon which the defendant attacked said provisions of the contract in his answer was that it 'is unreasonable, unjust, burdensome against the policy of the law and contrary to the express provisions of chapter 138 of Session Laws of the State of Montana for 1909.' Not until his brief was filed in this court did such question appear in the case.

"In view of the provision of paragraph 9 of the contract, also of plaintiff's position in the court below, and of the fact that the defendant company has always considered that a notice served upon 'some officer or station agent' of the connecting carrier at point of delivery in the manner required by paragraph 6 of the contract, was a sufficient

notice to show a compliance with such provision in an action brought against the initial carrier, we did not consider the question as presented for the first time in respondent's brief of any importance and did not even reply thereto in our oral argument.

"Under section 9 of said contract the terms and conditions thereof inure to the benefit of the connecting carrier. Therefore, such notice should be given to some officer or station agent of such carrier at point of delivery when damages are claimed.

"The importance of this is apparent when considered in connection with the Carmack Amendment to the Interstate Commerce Law."

The only ground for reversal now seriously relied upon is that the Carmack Amendment (June 29, 1906, § 7, c. 3591, 34 Stat. 584, 593) made "the connecting carrier, and therefore its agents, the agents of the initial carrier," and consequently the court below wrongly held, because no officer or station agent primarily employed by Northern Pacific Railway was shown to have been in Chicago, paragraph six was unreasonable and inoperative, and notice to a Burlington agent would not have been effective for any purpose. I fail to find that this point was definitely raised at any stage prior to the application for rehearing; and counsel for the railroad below seem to have been equally unsuccessful. If they had already wittingly relied upon it, they would hardly have burdened their argument for rehearing with an excuse for failure so to do. Former opinions imperatively demand that the foundation for our jurisdiction be laid in plain view and not around a corner where only an esoteric eye can detect it. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 487.

Second. "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the com-

panies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in *National Bank* v. *Insurance Co.*, 95 U. S. 673, 679: 'Both reasonable and just that its own words should be construed most strongly against itself.'" *Tex. & Pac. Ry.* v. *Reiss*, 183 U. S. 621, 626.

Apparently the bill under consideration followed a form adopted before passage of the Carmack Amendment or at least before this was adequately understood. It is dated "Belgrade, Montana, Station, January 2, 1912," purports to be an "agreement, made the day above stated between the Northern Pacific Railway Company, hereinafter called the 'Company,' and R. J. Wall, hereinafter called the 'Shipper,'" and contains, in addition to paragraphs 6 and 9 copied above, the following ones:

Par. 7. "It is further agreed and provided that no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be sustained by any court against said Company unless suit or action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said Company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding."

Par. 8. The "said Company shall not be liable for the non-delivery or loss of, nor for injuries suffered by any of the stock beyond the line of its own railroad."

Commenting on paragraph 6, the Supreme Court of Montana said (50 Montana, 127):

"If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of the Northern Pacific Company. Notice to an agent of the Burlington road would not have been effective for any purpose. The *company* mentioned in paragraph 6 is defined by the preamble to the contract to mean the 'Northern Pacific Railway Company.' Furthermore, if this provision is valid, it must be so construed as to serve some purpose. Its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made or a reasonable time therefor had elapsed. By the facts before us the reasonableness of the provision is to be tested. The contract is silent upon the question of service of the notice. If personal service was necessary, the shipper was required to hold the cattle at the Union Stock Yards until he could find an officer or station agent of the Northern Pacific Company. No particular officer or station agent is designated, and if this provision is to be taken literally, the shipper was required at his peril to assume the burden of finding some person who answered the description given. There is not a suggestion in the contract, in the pleadings or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of its road—more than 400 miles away. If service could have been made by mail, plaintiff would have been in no better position, though doubtless a letter written to the station agent at Belgrade, and mailed postpaid at Chicago, would have sufficed for a literal compliance with the terms of this provision. But in any event, plaintiff would have had to bear the burden of keeping his cattle on the cars or in the Stock Yards until the notice had been received and a reasonable time for inspection

had elapsed. If the paragraph in question be construed to mean that a written notice mailed from Chicago to any station agent of the Northern Pacific Company, even the agent at Seattle, would suffice, it is senseless. If it is construed to mean that the shipper should travel from Chicago to St. Paul and make personal service of the notice upon an officer or station agent of the Northern Pacific Company, then it is unreasonable to the point of being unconscionable. Whether the company had an officer or station agent at Chicago—at a point where it has no road—upon whom service of this notice could have been made, was a matter peculiarly within its own knowledge, and for this reason the burden was upon it to make proof of such fact."

Manifestly its language has given rise to a very grave doubt; therefore I think the contract should be construed most strongly against the company and with a view to preserve shipper's rights. The construction placed upon paragraph 6 by the state Supreme Court, when sitting within surroundings designed to stimulate clear thinking, is diametrically opposed to the one now adopted. In such circumstances it appears to me hardly reasonable to say that a stockman at a wayside Montana station was bound instantly to apprehend the true interpretation, notwithstanding any mental quickening which he may have received from a "rough wind" and a modest thermometer pointing to only "seven or eight degrees below zero."

I am authorized to say that Mr. Justice McKenna concurs in this dissent for the second reason stated.

GIDNEY *v.* CHAPPEL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 263. Submitted March 8, 1916.—Decided April 24, 1916.

Sections 6509 and 6521, Mansfield's Digest of the General Laws of Arkansas dealing with appeals from the Probate to the Circuit Court, were not put in force in Indian Territory by the Act of May 2, 1890, c. 182, § 31, 26 Stat. 81, as they were inapplicable to conditions then existing in Indian Territory.

Section 6525 upon being adopted and separated from conflicting provisions of the Civil Practice Act of Arkansas, assumed its normal place among the other laws with which it was adopted and was put in force by the Act of May 2, 1890.

Quære whether § 6523 was adopted by the Act of 1890.

43 Oklahoma, 267, affirmed.

THE facts, which involve the application and construction of statutes of the United States relating to the probate of wills in Indian Territory, are stated in the opinion.

Mr. William T. Hutchings for plaintiff in error.

Mr. Napoleon B. Maxey and *Mr. Charles F. Runyan* for defendants in error.

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

This was a suit to set aside a will probated in common form and to avoid its probate. The suit was begun in the United States Court for the Indian Territory, wherein the will had been probated, and was transferred to an Oklahoma court when that State was admitted into the Union. The plaintiff ultimately prevailed and the Supreme Court

of the State affirmed the judgment. 38 Oklahoma, 596; 43 Oklahoma, 267.

The Federal question in the case is whether certain statutes bearing upon such a suit were put in force in the Indian Territory by the act of May 2, 1890, c. 182, § 31, 26 Stat. 81, 94, whereby Congress adopted and extended over the Indian Territory certain general laws of Arkansas "in force at the close of the session of the general assembly of that State of 1883, as published in 1884 in the volume known as Mansfield's Digest," where "not locally inapplicable or in conflict with" that or some other act of Congress. In Arkansas there were probate courts and courts of general jurisdiction designated as circuit courts, while for the Indian Territory only one court had been established at that time, and it was a court of general jurisdiction. In view of this the act declared that "the United States Court in the Indian Territory herein referred to shall have and exercise the power of courts of probate under said laws," and "wherever in said laws of Arkansas the courts of record of said State are mentioned the said court in the Indian Territory shall be substituted therefor."

Among the Arkansas laws enumerated in the act was chapter 155 containing sections numbered from 6490 to 6548. The section under which the will was probated declares:

"Sec. 6522. When any will shall be exhibited for probate, the court of probate . . . may and shall receive the probate thereof in common form, without summoning any party, and shall grant a certificate of probate, or, if the will be rejected, shall grant a certificate of rejection; . . ."

Other sections (6509 and 6521) provide for an appeal to the circuit court from an order of the probate court establishing or rejecting a will and for bringing in parties and giving a hearing *de novo* upon the appeal. The sections under which the suit was brought read as follows:

"Sec. 6523. Any person interested who, at the time of the final decision in the circuit court, resided out of this state, and was proceeded against by order of appearance only, without actual appearance, or being personally served with process, and any other person interested who was not a party to the proceedings by actual appearance, or being personally served with process, may, within three years after such final decision in the circuit court, by a bill in chancery, impeach the decision and have a re-trial of the question of probate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age."

"Sec. 6525. If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and, by petition to the circuit court of the county in which such will was established or rejected, pray to have any such will rejected, if previously established, or proven, if previously rejected by the court of probate, it shall be the duty of the circuit court to direct an issue to try the validity of such will, which issue shall in all cases be tried by a jury."

As the functions of the probate and circuit courts in Arkansas were united in a single court in the Indian Territory, it seems plain, as was held by the Supreme Court of Oklahoma in this case, that the sections (6509 and 6521) dealing with appeals from the probate to the circuit court were not applicable to the conditions in the Indian Territory and therefore were not adopted by the act of Congress. It hardly was intended that a court at all times presided over by a single judge should entertain appeals from its own decisions.

The contention advanced respecting § 6523 is that it related only to decisions of the circuit court upon appeals from the probate court and was inapplicable where such an appeal could not be had, and therefore was not adopted.

This point was not considered in the opinion of the Supreme Court of Oklahoma and it need not be decided here. However it might be resolved the result in the present case would be the same.

The contention made respecting § 6525 is that it was not adopted, because not in force in Arkansas at the close of the session of the general assembly of 1883. The claim that it was not then in force is based upon a decision of the Supreme Court of Arkansas in 1885 holding that it was impliedly repealed by the inclusion in the civil practice act of 1868, which was a later enactment, of certain provisions regulating appeals from the probate to the circuit court and prescribing the effect to be given to the latter's decision upon such an appeal. *Dowell* v. *Tucker*, 46 Arkansas, 438. Of course, that decision was controlling in Arkansas, but it has little bearing upon the question here presented, and for these reasons: Section 6525 was published in 1884 in Mansfield's Digest as a general law "in force at the close of the general assembly of 1883" (see title page of that publication), and the Supreme Court of the State had been treating it as such, *Tobin* v. *Jenkins*, 29 Arkansas, 151; *Janes* v. *Williams*, 31 Arkansas, 175, 189; *Jenkins* v. *Tobin*, *ibid.*, 306, 308; *Mitchell* v. *Rogers*, 40 Arkansas, 91, 93–95. Besides, the particular provisions of the civil practice act which ultimately were regarded as effecting its implied repeal in Arkansas—they became §§ 6509 and 6521 of Mansfield's Digest—were not adopted by the act of Congress, because inapplicable to the conditions in the Indian Territory. In these circumstances we think the adopting act, rightly interpreted, put the section in force there. Separated, as it then was, from the restraining influence of the supposedly conflicting provisions of the civil practice act it assumed its normal place among the other laws with which it was adopted. This conclusion is not opposed to our decisions in *Adkins* v. *Arnold*, 235 U. S. 417, and *Perryman* v. *Woodward*, 238 U. S. 148, as

seems to be claimed by the plaintiff in error, but on the contrary is in accord with what actually was there decided.

Other questions are discussed in the briefs, but as they are not Federal but essentially local they cannot be re-examined by us.

Judgment affirmed.

LAMAR *v.* UNITED STATES.

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

No. 895. Argued April 4, 1916.—Decided May 1, 1916.

The Circuit Court of Appeals has no power to compel a party, who has prosecuted both a direct appeal from this court under § 238, Judicial Code, and a writ of error from the Circuit Court of Appeals, to elect which method he will pursue, and, in default of his withdrawing the direct appeal, to dismiss the writ of error.

While the general rule, when this court reverses a decision of the Circuit Court of Appeals wholly on the question of its jurisdiction, is to remand the case to that court without passing upon the merits, this court has the power to, and, in exceptional cases such as the present, will, determine the merits.

While a penal provision may not be enlarged by interpretation, it must not be so narrowed as to fail to give full effect to its plain terms, as made manifest by its text and context.

A member of the House of Representatives is an officer of the United States within the meaning of § 32 of the Penal Code.

Section 32 of the Penal Code prohibits and punishes the false assuming, with the intention to defraud, to be an officer or employee of the United States; and also the doing in the falsely assumed character of any overt act to carry out the fraudulent intent whether it would have been legally authorized had the assumed capacity existed or not.

The indictment in this case clearly charges the fraudulent intent under § 32 of the Penal Code and is sufficient under § 1025, Revised Statutes.

There was proof in this case of intent to defraud, and to establish

criminality under § 32, Penal Code; and there was no error in refusing an instruction to acquit and in submitting the case to the jury. There was no lack of jurisdiction of this case in the District Court because the trial was presided over by a judge of a different district assigned to the court for trial conformably to the act of October 3, 1913, c. 18, 38 Stat. 203.

THE facts, which involve the jurisdiction of this court, and of the Circuit Court of Appeals, the construction of § 32 of the Penal Code, and the power of assignment of a judge of one District to preside over the District Court of another district under the Act of October 3, 1913, are stated in the opinion.

Mr. A. Leo Everett and *Mr. Francis L. Kohlman*, with whom *Mr. H. B. Walmsley* was on the brief, for David Lamar:

A congressman is not an officer of the United States. Bowen's Documents of the Constitution; 1 Farrand Records of the Fed. Conv., p. 376; 3 id., pp. 597–599–620; *Blount's Case*, Wharton's St. Trials, 200; Story's Comm. on Const., 1st ed., § 791; Tucker on Const., § 199; Cong. Rec., 1914, p. 8831; H. R., 63d Cong., 2d Sess., Rep. No. 677; *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Smith*, 124 U. S. 525; *Burton* v. *United States*, 202 U. S. 344; *Kelly* v. *Common Council*, 77 N. Y. 503; N. Y. Public Officer's Law, § 2, Art. 1; Am. & Eng. Enc., 2d ed., tit., "Public Officers," p. 322; *United States* v. *Wiltberger*, 5 Wheat. 76; *Hackfield* v. *United States*, 197 U. S. 442; *Martin* v. *United States*, 168 Fed. Rep. 198; *United States* v. *Barnow*, 239 U. S. 74; *United States* v. *Ballard*, 118 Fed. Rep. 757; *Mackey* v. *Miller*, 126 Fed. Rep. 161.

It was not charged or proven that the defendant pretended to act "under the authority of the United States." *United States* v. *Curtain*, 43 Fed. Rep. 433; *United States* v. *Bradford*, 53 Fed. Rep. 542; *United States* v. *Taylor*, 108 Fed. Rep. 621; *United States* v. *Ballard*, 118 Fed.

Rep. 757; *United States* v. *Brown*, 119 Fed. Rep. 482; *United States* v. *Farnham*, 127 Fed. Rep. 478; *Littel* v. *United States*, 169 Fed. Rep. 620; *United States* v. *Barnow*, 239 U. S. 74.

The indictment is defective in failing to describe the circumstances of the offense. *United States* v. *Carll*, 105 U. S. 611; *Evans* v. *United States*, 153 U. S. 584; *United States* v. *Hess*, 124 U. S. 483; *Keck* v. *United States*, 172 U. S. 434; *Moore* v. *United States*, 160 U. S. 268; *Bartell* v. *United States*, 227 U. S. 427; *Martin* v. *United States*, 168 Fed. Rep. 198.

There was no proof of an intent to defraud.

The District Court in which the defendant was tried under an indictment charging him with the commission of a crime, had no jurisdiction in view of the provisions of the Sixth Amendment.

The designation of a judge from a district in one circuit to hold a district court in another circuit trespasses upon the executive power of appointment in that it permits a United States District Judge to hold court in a district to the court of which he was not nominated by the President and confirmed by the Senate.

This court will at all times and may upon its own motion inquire into the jurisdiction of the court below. *Ball* v. *United States*, 140 U. S. 118; *Chicago &c. Ry. Co.* v. *Willard*, 220 U. S. 419; *Ex parte Lange*, 18 Wall. 163; *Ex parte Nielsen*, 131 U. S. 176; *Ex parte Seebold*, 100 U. S. 371; *Fore River Ship Co.* v. *Hagg*, 219 U. S. 275; Jud. Code, § 18; Judiciary Law, § 2; *Kentucky* v. *Powers*, 201 U. S. 1; *Kansas* v. *Colorado*, 200 U. S. 46; *Marbury* v. *Madison*, 1 Cranch, 138; *McDowell* v. *United States*, 159 U. S. 596; *Mackey* v. *Miller*, 126 Fed. Rep. 161; *M. C. L. Ry.* v. *Swann*, 111 U. S. 379; *Nashville* v. *Cooper*, 6 Waters, 247; *Norton* v. *Shelby County*, 118 U. S. 448; *Sheldon* v. *Sill*, 8 How. 441, No. 8448; 2 Story on Const., p. 1557; *Teel* v. *Chesapeake Ry.*, 204 Fed. Rep. 918.

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

Section 32, Crim. Code, prohibits the false assumption or pretense to be a member of Congress.

The legislative history of the act reënforces this view.

A member of the House of Representatives is an officer of the Government of the United States and acting under its authority.

Members of Congress hold "office," and a member of Congress is an "officer." 2 Bouvier's Law Dict., p. 540, ed. of 1897; *Swafford* v. *Templeton*, 185 U. S. 487, 492; *The Floyd Acceptances*, 7 Wall. 666, 676; *United States* v. *Maurice*, 2 Brock. 96, 102.

The Revised Statutes of the United States recognize members of Congress as such officers. Revised Stat., §§ 1756, 1759, 1786, 2010.

Decisions of state courts and state statutes recognize members of the state legislatures as "state officers." The analogy is complete. *Morril* v. *Haines*, 2 N. H. 246, 251; *Shelby* v. *Alcorn*, 36 Mississippi, 273, 291; *State* v. *Dillon*, 90 Missouri, 229, 233; Rev. Stat., N. Y., 1829, v. 1, p. 95.

A member of Congress is a Federal and not a state officer. *Eversole* v. *Brown*, 21 Ky. Law Rep. 925, 927; *State* v. *Gifford*, 22 Idaho, 613, 632–633; *State* v. *Russell*, 10 Ohio Dec. 255, 264.

Other decisions of this court do not contravene the proposition here contended for.

It is not necessary that defendant's pretense be to act lawfully under the authority of the United States. *Littell* v. *United States*, 169 Fed. Rep. 620; *United States* v. *Ballard*, 118 Fed. Rep. 757; *United States* v. *Barnow*, 239 U. S. 74.

The indictment sufficiently particularizes the circumstances of the offense.

The defendant's objection is not one of substance, but

of form. *Evans* v. *United States*, 153 U. S. 584; *United States* v. *Barnow*, *supra*.

All substantial rights of defendant were observed. *Bartell* v. *United States*, 227 U. S. 427; *Durland* v. *United States*, 161 U. S. 306.

Section 1025, Rev. Stat., controls. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Ledbetter* v. *United States*, 170 U. S. 606.

The proof of the intent to defraud was ample.

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

Charged in the trial court (Southern District of New York) by an indictment containing two counts, with violating § 32 of the Penal Code, the petitioner was convicted and on December 3, 1914, sentenced to two years' imprisonment in the penitentiary. The trial was presided over by the District Judge of the Western District of Michigan assigned to duty in the district conformably to the provisions of § 18 of the Judicial Code as amended by the Act of Congress of October 3, 1913 (c. 18, 38 Stat. 203). To the conviction and sentence in January following error was directly prosecuted from this court, the assignments of error assuming that there was involved not only a question of the jurisdiction of the court as a Federal court, but also constitutional questions. For the purpose of the writ one of the district judges of the Southern District of New York gave a certificate as to the existence and character of the question of jurisdiction evidently with the intention of conforming to § 238 of the Judicial Code.

After the record on this writ had been filed in this court a writ of error to the conviction was prosecuted in May, 1915, from the court below. In September following that court, acting on a motion to dismiss such writ of error on

the ground that its prosecution was inconsistent with the writ sued out from this court, entered an order providing for dismissal unless the plaintiff in error within ten days elected which of the two writs of error he would rely upon and subsequently before the expiration of the time stated the court declined to comply with the request of the plaintiff in error that the questions at issue be certified to this court. On October 29, 1915, the election required of the plaintiff in error not having been made, the writ of error was dismissed.

On January 31, 1916, the writ of error prosecuted from this court came under consideration as the result of a motion to dismiss, and finding that there was no question concerning the jurisdiction of the trial court within the intendment of the statute and no constitutional question, the writ was dismissed for want of jurisdiction. 240 U. S. 60. Thereupon the plaintiff in error in the court below asked that the cause be reinstated and heard and upon the refusal of the request an application was made to this court for leave to file a petition for mandamus to compel such action and if not, for the allowance of a certiorari, and although the former application was denied, the case is here because of the allowance of the latter remedy.

Primarily the question is, Was it the duty of the court below to exercise jurisdiction? As under the statute it is indisputable that there was jurisdiction and the duty to exert it unless the conditions existed which authorized a direct writ of error from this court, it follows that the dismissal by this court of the direct writ for want of jurisdiction affirmatively determined that there was jurisdiction in the court below and error was committed in not exerting it unless by some neglect to avail of proper procedure or because of some line of inconsistent conduct the right to invoke the jurisdiction of the court below was lost. As we have seen, the assumed existence of the latter cause was the basis of the refusal to exercise jurisdiction, that is,

the inconsistency which it was assumed resulted from prosecuting the direct writ of error from this court and subsequently suing out the writ of error from the court below from which it was deduced that there was a duty to elect between the two as a prerequisite to the right to ask at the hands of the court below the exertion of the jurisdictional authority cast upon it by law. But if the exercise of the assumed duty of election which was imposed had resulted in the abandonment of the writ from the court below, there would have been nothing left upon which the jurisdiction of that court could have been exerted, and it is hence apparent that in substance the order was but a direction that the plaintiff in error abandon the direct writ prosecuted from this court as a prerequisite to his right to invoke the action of the court upon the writ pending before it. But aside from the demonstration of error which arises from the mere statement of this inevitable result of the order made by the court below, it is equally clear that such order rested upon a misconception arising from treating as one, things which are distinct, that is, the existence of authority to compel the abandonment of one of two valid and available remedies because of their inconsistency, leaving therefore the one not abandoned in force, and the want of power to compel an election of one of two remedies where the exertion of judicial power alone could determine which of the two was available and where therefore the exercise of the election ordered in the nature of things involved the power to destroy all relief and thus frustrate the right of review conferred by the statute by one or the other of the remedies. As in view of this distinction it clearly results that the determination of the plaintiff in error to abandon under the order of the court one or the other of the two writs of error could not have validated the writ not abandoned if it was not authorized by law, it must follow that the election to which the order of the court submitted the plaintiff in error was

not real and therefore afforded no basis for the refusal of the court to determine the validity of the writ of error pending before it and to decide the case if it deemed it had jurisdiction. Indeed, if it be conceded that the situation arising from the pendency of the two writs created doubt, that concession would not change the result since we are of opinion that the power to have certified to this court the jurisdictional or other questions as to which the doubt existed was the remedy created by the statute to meet such a situation and to obviate the possibility of denying to the plaintiff in error the right to a review which again it must be borne in mind the statute gave under one or the other of the two writs.

Correcting the error committed by the court below by its order of dismissal, the case on its merits is within our competency to decide as the result of the operation of the certiorari. As, however, it is clear that the questions on the merits, as demonstrated by the previous judgment of dismissal of the direct writ of error, are of a character which under the statute if they had been disposed of by the court below in the discharge of its duty would have been finally determined, and as it is equally apparent that none of the questions except the one of jurisdiction, that is, the duty of the court below to have decided the cause, are within the exceptional considerations by which certiorari is allowed, it follows that in order to give effect to the statute our duty would be as a general rule having corrected the error resulting from the dismissal and having afforded a remedy for the failure of the court below to exercise jurisdiction, to go no farther and remand the case so that the questions at issue might be finally disposed of. *Lutcher & Moore* v. *Knight*, 217 U. S. 257. But while not in any degree departing from the general rule, we think it is inapplicable here because of the serious doubt which may have been engendered by the certificate as to the jurisdictional question given by the district judge,

although it is now established that there was no foundation whatever for allowing it, and because of the resulting complexity of the question as to whether the jurisdiction of this court had not attached to the subject-matter and excluded the advisability if not the power on the part of the court below to certify to this court the question of which writ of error was paramount, when of necessity a certificate involving the solution of that question had already been made by the district judge. We therefore dispose of the merits, restating the case so far as may be essential.

The section of the Penal Code charged to have been violated punishes anyone who "with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain 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," etc. The indictment charged that at a stated time the petitioner "unlawfully, knowingly and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to-wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the Twenty-sixth District of the State of Pennsylvania, with the intent, then and there, to defraud Lewis Cass Ledyard," and other persons who were named and others to the grand jury unknown, "and the said defendant, then and there, with the intent and purpose aforesaid, did take upon himself to act as such member of Congress; against the peace," etc., etc.

We consider the contentions relied upon for reversal separately.

1. It is insisted that no offense under the statute was stated in the indictment because a member of the House of Representatives of the United States is not an officer acting under the authority of the United States within the meaning of the provision of the Penal Code upon which the indictment was based. This contention is supported by reference to what is assumed to be the significance in one or more provisions of the Constitution of the words "civil officers," and reliance is specially placed upon the ruling made at an early day in the *Blount Case* (Wharton's State Trials, p. 200) that a Senator of the United States was not a civil officer subject to impeachment within the meaning of § 4 of Article II of the Constitution. But, as previously held in sustaining the motion to dismiss the direct writ of error, the issue here is not a constitutional one, but who is an officer acting under the authority of the United States within the provisions of the section of the Penal Code under consideration? And that question must be solved by the text of the provision, not shutting out as an instrument of interpretation proper light which may be afforded by the Constitution and not forgetting that a penal statute is not to be enlarged by interpretation, but also not unmindful of the fact that a statute because it is penal is not to be narrowed by construction so as to fail to give full effect to its plain terms as made manifest by its text and its context. *United States* v. *Hartwell*, 6 Wall. 385, 395; *United States* v. *Corbett*, 215 U. S. 233, 242, 243.

Guided by these rules, when the relations of members of the House of Representatives to the Government of the United States are borne in mind and the nature and character of their duties and responsibilities are considered, we are clearly of the opinion that such members are embraced by the comprehensive terms of the statute. If however considered from the face of the statute alone the question was susceptible of obscurity or doubt—which

we think is not the case—all ground for doubt would be removed by the following considerations: (a) Because prior to and at the time of the original enactment in question the common understanding that a member of the House of Representatives was a legislative officer of the United States was clearly expressed in the ordinary, as well as legal, dictionaries. See Webster, *verbo* office; Century Dictionary, *verbo* officer; Bouvier's Law Dictionary (edition of 1897) Vol. 2, page 540, *verbo* legislative officers; Black's Law Dictionary (2nd edition) page 710, *verbo* legislative officer. (b) Because at or before the same period in the Senate of the United States after considering the ruling in the *Blount Case*, it was concluded that a member of Congress was a civil officer of the United States within the purview of the law requiring the taking of an oath of office. (Cong. Globe, 38th Congress, 1st session, pt. 1, pp. 320–331.) (c) Because also in various general statutes of the United States at the time of the enactment in question a member of Congress was assumed to be a civil officer of the United States. Revised Statutes, §§ 1786, 2010, and subdivision 14 of § 563. (d) Because that conclusion is the necessary result of prior decisions of this court and harmonizes with the settled conception of the position of members of state legislative bodies as expressed in many state decisions. *The Floyd Acceptances*, 7 Wall. 666, 676; *Ex parte Yarbrough*, 110 U. S. 651, 654; *Wiley* v. *Sinkler*, 179 U. S. 58, 64; *Swafford* v. *Templeton*, 185 U. S. 487, 492; *People* v. *Common Council*, 77 N. Y. 503, 507–508; *Morril* v. *Haines*, 2 N. H. 246; *Shelby* v. *Alcorn*, 36 Mississippi, 273, 291; *Parks* v. *Soldiers' Home*, 22 Colorado, 86, 96.

2. But it is urged, granting that a member of Congress is embraced by the word officer, yet no offense was stated since it was not charged that in pretending to be an officer the accused did an act which he would have been authorized to do under the authority of the United States had he

possessed the official capacity which he assumed to have. In other words, the proposition is that the first clause of the section prohibits the falsely assuming or pretending to be an officer with intent to defraud and as such officer taking upon himself to act under the authority of the United States, that is, to do an authorized act. The contention which the proposition covers was insisted upon not only in the demurrer which was overruled, but by requests to charge and exceptions to the charge given. While it is undoubtedly true that the construction asserted finds some apparent support in one or more decided cases in district courts of the United States (*United States* v. *Taylor*, 108 Fed. Rep. 621; *United States* v. *Ballard*, 118 Fed. Rep. 757; *United States* v. *Farnham*, 127 Fed. Rep. 478), we are of opinion that it misconceives the statute and fails to give it proper effect because when rightly construed the operation of the clause is to prohibit and punish the falsely assuming or pretending, with intent to defraud the United States or any person, to be an officer or employee of the United States as defined in the clause and the doing in the falsely assumed character any overt act, whether it would have been legally authorized had the assumed capacity existed or not, to carry out the fraudulent intent. Briefly stated, we conclude this to be the meaning of the clause for the following reasons: (a) Because the words "acting under the authority of the United States" are words designating the character of the officer or employee whose personation the clause prohibits since if the words are thus applied, the clause becomes coherent and free from difficulty, while if on the other hand they are applied only as limiting and defining the character of the overt act from which criminality is to arise, confusion and uncertainty as to the officer or employee whose fraudulent simulation is prohibited necessarily results. (b) Because the consequence of a contrary construction would be obviously

to limit the application of the clause as shown by its general language and as manifested by the remedial purpose which led to its enactment. (Cong. Rec. vol. 14, pt. 4, p. 3263, 47th Cong. 2d Sess.) (c) Because to adopt a contrary view would be absolutely inharmonious with the context, since it would bring into play a conflict impossible of reconciliation. To make this clear it is to be observed that the last clause of the section makes criminal the demanding or obtaining in the assumed capacity which the first clause prohibits, "from any person or from the United States, . . . any money, paper, document, or other valuable thing, . . ." We say which the first clause prohibits because there is no reëxpression of the prohibition against assuming or pretending contained in the first clause except as that prohibition is carried over and made applicable to the second by the words "or shall in such pretended character demand," etc. As it is obvious that the acts made absolutely criminal by the second clause are acts which may or may not have been accomplished as the result of exerting in the pretended capacity an authority which there would have been a lawful right to exert if the character had been real and not assumed, it results not only that the conflict which we have indicated would arise from adopting the construction claimed, but the error of such contention as applied to the first clause is conclusively demonstrated.

Indeed the consideration thus given the contention in question was unnecessary because its error is persuasively if not conclusively established by the ruling in *United States* v. *Barnow*, 239 U. S. 74. In that case the accused was charged under both clauses of the section with having on the one hand falsely assumed to be an employee 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 with having taken

upon himself to act as such by visiting a named person for the purpose of carrying out the intended fraud, and on the other hand under the second clause of the section with having by means of the same false personation obtained a sum of money. The case came here to review the action of the court below in sustaining a demurrer to the indictment as stating no offense because there was no authorized employee of the character which had been falsely assumed and no legal authority therefore to have done the overt acts with which either count was concerned. The judgment was reversed under the express ruling that the existence of the office or the authority was not essential as the assuming or pretending to be and act as an officer or employee of the United States was within the purview of the statute and necessarily embraced within its prohibitions.

3. It is urged that the indictment is defective because of its failure to describe the circumstances of the offense. It suffices to say that after considering them we think that the many authorities cited to support the contention are wholly inapplicable to the conditions disclosed by the record and we are further of opinion that those conditions make it clear that the contention is devoid of merit. We say this because it will be observed from the text of the indictment which we have previously reproduced that it clearly charges the illegal acts complained of and the requisite fraudulent intent, states the date and place of the commission of the acts charged and gives the name and official character of the officer whom the accused was charged with having falsely personated. It is moreover to be observed that there is not the slightest suggestion that there was a want of knowledge of the crime which was charged or of any surprise concerning the same, nor is there any intimation that any request was made for a bill of particulars concerning the details of the offense charged. Under this situation we think that

the case is clearly covered by § 1025, Revised Statutes. *Connors* v. *United States*, 158 U. S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84; *New York Central R. R.* v. *United States*, 212 U. S. 481, 497; *Holmgren* v. *United States*, 217 U. S. 509, 523.

4. It is insisted that there was no proof whatever tending to show an intent to defraud or to establish criminality under the section relied upon and therefore there should have been an instruction to acquit. In so far as the proposition concerns the absence of proof of the doing of an overt act which was authorized by law and therefore relates to the wrongful construction of the statute which we have previously pointed out, it is disposed of by what was said on that subject. As to the want of any evidence justifying the submission of the case to the jury on the question of the criminal intent relied upon or of the acts charged, we content ourselves with the statement that after a close scrutiny of the record we are of the opinion that the contention is wholly without merit and that the case was clearly one where the proof was of such a character as to justify its being submitted to the jury for its consideration.

5. Finally we come to consider a contention not raised in the trial court, not suggested in the court below while the case was there pending and before the order of dismissal which we have reviewed was entered, and not even indirectly referred to in this court when the case was pending on the direct writ of error which writ was, as we have seen, dismissed because it presented for consideration no question of jurisdiction and none arising under the Constitution. Indeed the contention now relied on was for the first time urged in a supplemental brief filed on the present hearing. The proposition is that the trial court had no jurisdiction, in fact that no such court existed, because the trial was presided over by the District Judge of the Western District of Michigan assigned to the

Southern District of New York conformably to the statute (Oct. 3, 1913, c. 18, 38 Stat. 203) and that the effect of such assignment under the statute was virtually to destroy the Southern District of New York by creating a new district whose boundaries were undefined, thus violating the rights secured to the accused by the Sixth Amendment since he was subjected to trial in a district not established when the offense with which he was charged was committed. In fact the further contention is made that to assign a judge of one district and one circuit to perform duty in another district of another circuit was in substance to usurp the power of appointment and confirmation vested by the Constitution in the President and Senate. As to the first of these contentions, we think it suffices to say that it rests upon a construction of the words of the statute authorizing the assignment of a judge of one district and circuit to duty in another district and circuit which is wholly unfounded and which rests upon a premise conflicting with the practice of the Government under the Constitution substantially from the beginning. As to the second contention, we think merely to state it suffices to demonstrate its absolute unsoundness.

Affirmed.

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

UNITED STATES *v.* ARCHER.

APPEAL FROM THE COURT OF CLAIMS.

No. 112. Argued December 7, 1915.—Decided May 1, 1916.

As questions of fact confront the court before a decision can be reached on the proposition of law herein involved, and the finding of fact on which the court below based petitioner's right of recovery for lands appropriated as a result of construction and extension of dikes by the Mississippi River Commission acting under authority of Congress are not sufficiently definite; this court, without expressing any opinion and reserving all questions of law, remands the case to the Court of Claims, for more particular findings on the testimony already taken or, in the discretion of the court, on further testimony.

Quære whether the liability to the owner of a tract of land part of which was taken for erection of a dike in a navigable river is limited to compensation for the area actually occupied by the dike itself under *Bedford* v. *United States*, 192 U. S. 217 and *Jackson* v. *United States*, 230 U. S. 1, or includes compensation for the remainder of the tract destroyed by the deflection upon it of waters of the river by reason of the construction and maintenance of the dike under *United States* v. *Grizzard*, 219 U. S. 180.

47 Ct. Cl. 248, reversed.

PETITION in the Court of Claims for the recovery of $300,000 for damages alleged to have been caused by the officers and agents of the United States under the authority of an act of Congress creating the Mississippi River Commission by the construction and extending of a dike known as the Leland Dike upon the land of petitioners, called the Point Chicot Plantation.

A demurrer to the petition was overruled and after answer and hearing judgment was rendered for claimants in the sum of $54,920, to review which this appeal is prosecuted.

The findings were necessarily voluminous; we condense them narratively as follows: Claimants' plantation prior to the construction of the levee system to the state of completion which now exists was of great value and in a

high state of cultivation, being reclaimed lands comparatively free from overflows of the Mississippi river except at intervals, the recurrence of such overflows being so separated in point of time as not to materially affect either the value or the productive capacity of the plantation. It was highly improved with houses and cabins thereon and stocked with laborers and tenants and yielded large crops.

It has been overflowed at certain rises of the water in the river (the rise in feet, according to certain data, is given from 1844 to 1910), and during the twenty years following 1891 after the levee system had been made effective there were eight years during which it was not overflowed.

Gauges of the height of the water are taken at Memphis and Greenville. Claimants' plantation is overflowed whenever the water rises to 135 feet, Memphis datum, and it has been more or less overflowed every year except two years (1872 and 1889) during the eighteen years prior to 1891, up to which time the levee system had not been completed sufficiently to withstand great floods and the outlets unclosed; and during the twenty years following 1891 after the levee system had been made effective and the outlets closed by the United States and the local authorities, there were eight years, namely, 1894, 1895, 1896, 1900, 1901, 1902, 1905, and 1910, during which claimants' land was not overflowed.

The plantation is overflowed at a stage of 38 feet on the Greenville gauge, or whenever the surface water rises to 135 feet, Memphis datum, and the gauge readings show that of the fifteen years from 1882 to 1896, inclusive, there were only four years in which this stage was not exceeded, and that for the fourteen years from 1897 to 1910, inclusive, there were five years in which this stage of 38 feet on the Greenville gauge was not exceeded.

From time immemorial the waters of the river during its

highest stages when not contained within the low-water banks have naturally found outlets through certain basins (they are mentioned) and through the rivers draining them into the Gulf of Mexico. And the plantations that were not overflowed so frequently before such outlets were closed by levee construction were consequently little injured by overflows.

Prior to 1883 the State and local authorities constructed a system of levees, miles of which were destroyed in 1882.

Beginning in 1883 the officers of the United States under the authority of an act of Congress creating the Mississippi River Commission and other acts amendatory thereof adopted the so-called Eads plan, and in consequence thereof have projected and constructed levees on both sides of the river for various distances from Cairo, Illinois, to near the Head of the Passes, a distance of 1050 miles from Cairo; and the local authorities along the river on both sides from Cairo to the Gulf have before and since also constructed and maintained levees at various places and of various lengths for the purpose of protecting and reclaiming land within their respective districts.

The levee lines so constructed by the United States and local authorities have been practically joined, with the result of confining the river within a narrow scope, increasing its velocity and elevation and the strength of its current. The highest elevation is approximately six feet in times of high water, and the plan of the United States was to increase the scouring power of the water, deepen the channel and improve navigation, and that of the local authorities to reclaim and to protect the land on both sides of the river from overflowing at times of high water.

From time immemorial the high-water bed of the river has been between the highlands on the east side and the highlands on the west side and the claimants' plantation is within this boundary, that is, between the highlands on the Mississippi side and the highlands on the Arkansas

side, and has been occasionally overflowed at times of high water, as stated above, before as well as since the construction of the levees.

From Cairo to the mouth of the Yazoo river the Mississippi river is practically leveed on both sides, except on the east side where the high lands abut on or very near the river in Kentucky and Tennessee, and there is a gap in the line of levees of 234 miles from the mouth of the Yazoo river to Baton Rouge unleveed.

The extension of the levee system has resulted in an increased elevation of the general flood levels which subjects claimants' land to a deeper overflow than they were subjected to formerly and consequently has somewhat reduced its value for agricultural purposes. The immediate cause of the deeper overflow on claimants' land is the increased elevation of the flood heights, which is the result of the general confinement of the flood discharge by the levee system as a whole.

During the flood waters of 1882 the levees failed throughout the length of the river. In 1884 the crevasses were still open in all basins. They were open and closed in subsequent years (which are given); they were all closed in 1904 to 1910. In consequence of the closing of the natural basins, outlets and crevasses, overflowed lands on both sides of the river have been reclaimed and protected from overflow in times of high water and vast benefit has accrued to the States of Illinois, Kentucky, Tennessee, Mississippi, Arkansas and Louisiana, but the land of claimants, situated between the levees and outside thereof and not protected thereby, has been subjected to repeated overflow, tending to diminish and impair its value, but to what extent does not satisfactorily appear from the evidence.

A part of the levee system runs back of claimants' plantation, not touching the same, and between it and the plantation is a stretch of ground lower than the main

body of the plantation, and in periods of high water the water, rising and passing over and upon said land, has by reason of its lowness first gone thereupon and its main current was across said land and not upon the plantation, which, while in extreme high water it would be flooded, did not have the full force of the current of the river but was covered in part or in whole by slacker water. The current during high-water seasons struck against the levee back of claimants' plantation, eroding and washing it away, to the great danger of its existence and the inundation of the lands to the rear thereof and diverting the water from the channel of the river. A breach or crevasse in the levee would have entailed damage to it and to the adjacent landowners and impaired the efficacy of the levee system as projected, constructed and maintained by the officers of the Mississippi River Commission in accordance with the plans heretofore stated.

In addition to the danger to the levee the current, impinging upon the banks of the stream and the neck of the land adjoining Point Chicot to the mainland, cutting into it, threatened to and would have, if permitted to continue, cut through the neck of land, thus straightening the channel and making the plantation an island.

In order to prevent the threatened danger to the levees and the neck of land the officers of the United States, acting under the authority of the acts of Congress, and the Mississippi River Commission constructed what is known as the Leland Dike, running diagonally and at an angle from the main line of levee on the Arkansas side across and on the land of claimants to a point 662 feet beyond where the line of the plantation begins, their object being to divert the current of the stream during high waters from impinging upon the levee, and, by throwing it northeastward by the dike, to prevent the destruction of the levee and the cutting across the neck of land.

The dike first went into and on the land a distance of

662 feet, but, its end being exposed to the waters of the river and to its powerful current, the officers deemed it necessary to extend the dike a distance of some 2700 feet farther upon the land of claimants and did so extend it in 1907 without any condemnation of the land and with no remuneration therefor being made to claimants. A large part of the soil was used for this construction.

Before the United States joined the levee lines in accordance with the Eads plan, thus making the same continuous, there were occasional overflows of the plantation but they have been made deeper and more forceful by the adoption of such system. But before the erection of the dike the overflows did not materially damage the plantation and it remained still valuable for agricultural purposes. By the extension of the dike the high-water current of the river has been deflected over and across a large part of the plantation, but flows in the same direction as did a portion of the high waters of the river before the erection of the dike—but with greater force and depth—the escape of a portion of the high waters over and across the neck of land being thereby prevented, in consequence of which the overflows of the plantation have been greatly increased and intensified, the result of which has been to wash and scour out its top soil and to deposit upon a large part of the plantation great burdens of sand and gravel, and 3,696 acres have been thereby rendered totally unfit for cultivation or any other profitable use. This result has been caused partly by the joining of the levee systems and the erection of said dike, but directly and proximately by the erection of said dike.

The lines of levees constructed in part by the officers of the United States and in part by the officers and agents of the local organizations of the States bordering on the river to 1909 had a length of 1,548 miles and contained 229,729,354 cubic yards. The officers of the United States constructed 1,050 miles of the total. Since 1909

the authorities of the United States have built additional lines of levees containing 2,970,224 cubic yards and the local authorities lines of levees containing 5,063,427 cubic yards, thus bringing the work of levee construction up to the year 1910.

The 3,696 acres of land damaged as stated was, at the time of the erection of the dike, of the value of $83,920, and 31-4/10 acres of the same is actually and wholly occupied by the United States by the construction of the dike, and the balance, to-wit, 3,664-6/10 acres, has been destroyed and rendered wholly unfit for cultivation or any other profitable use. The land is described.

As an ultimate fact, the court finds, in so far as it is a question of fact, the 3,696 acres of land was somewhat impaired in value by the construction of the levee system, but that its use was totally destroyed by the erection of the Leland Dike and was thereby taken, its value at the time of such destruction and taking being $83,920.

Before this suit was brought George F. Archer, one of the claimants, brought a suit in the United States Circuit Court for the Western District of Arkansas against the Board of Levee Inspectors of Chicot County, Arkansas, for the damages arising from the erection of said dike and the taking of the 31-4/10 acres of land. A demurrer by the defendants to the complaint was overruled (128 Fed. Rep. 125); and thereafter and before the beginning of this suit Archer discontinued the suit brought against the Board.

The ownership of the plantation by the claimants was found. From the findings of fact the court concluded that claimants were entitled to a judgment of $54,920.

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

Liability of the Government for damages is limited to

land actually occupied by the Leland Dike. *Jackson Case*, 230 U. S. 1; *Hughes Case*, 230 U. S. 24.

Occupancy of part of claimants' land creates no liability for remote damages to the balance. *United States* v. *Grizzard*, 219 U. S. 180.

Mr. Percy Bell for appellee:

Taking and using dike site without condemnation or compensation by the agents, officers, and employees of the Government in improving navigation, or protecting a levee as incident thereto, a virtual trespass and actual taking which creates an undisputed liability.

The superimposition of sand and gravel on adjacent lands of same tract, as the immediate result of the construction of the dike, so as to destroy their value and prevent their use by the owners, is a destruction thereof which constitutes a taking and creates a liability for the value thereof.

The destruction of adjacent lands of owners in same tract, as the immediate result of the dike, and its effect as intended and foreseen by the builders thereof, constitutes a taking and creates a liability for the value thereof.

The value of lands was fixed as of the time of taking.

In support of these propositions, see *Fawcett* v. *United States*, 25 Ct. Cl. 188; *Grant* v. *United States*, 1 Ct. Cl. 41; *King* v. *United States*, 59 Fed. Rep. 9; *M. & C. Ry.* v. *B., S. & T. Ry.*, 18 L. R. A. 166; *Manigault* v. *Springs*, 199 U. S. 473; *Merriam* v. *United States*, 29 Ct. Cl. 250; *Mills* v. *United States*, 19 Ct. Cl. 79; *Morris* v. *United States*, 30 Ct. Cl. 324; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Sharp* v. *United States*, 191 U. S. 351; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Grizzard*, 219 U. S. 180; *United States* v. *Lynah*, 188 U. S. 445; *Welch* v. *United States*, 217 U. S. 33; *Williams* v. *United States*, 104 Fed. Rep. 50.

The following cases cited by the United States are considered and distinguished: *Bedford* v. *United States*, 192 U. S. 217; *Levee Commissioners* v. *Harkleroads*, 62 Mississippi, 807; *Fort Smith Ry.* v. *Schulte*, 109 Arkansas, 575; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 320; *Hughes* v. *United States*, 230 U. S. 24; *Jackson* v. *United States*, 230 U. S. 1; *McCoy* v. *Plum Bayou Levee*, 95 Arkansas, 345; *Peabody* v. *United States*, 231 U. S. 530; *Railroad Co.* v. *Hopkins*, 90 Illinois, 316; *Railroad Co.* v. *Roskemmer*, 264 Illinois, 103; *Railway Co.* v. *Allen*, 41 Arkansas, 431; *Railway Co.* v. *Hunt*, 51 Arkansas, 330; *Richardson* v. *Levee Commissioners*, 68 Mississippi, 539; *Sharp* v. *United States*, 191 U. S. 341; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

Upon the findings as thus made the parties to the action base opposing contentions. The Government asserts that the Government's liability is limited to the land actually taken and all other damages are consequential. In other words, that the appropriation of the land and the erection of the Leland Dike put the Government in the position of owner of the land with the rights and liabilities of owner, and that besides it had the rights of government to improve navigable waters. There was concession or some concession of the contention by the Court of Claims in its opinion. The court, through Mr. Justice Barney, said:

"In the decision of this case it may be admitted that if the Government had owned the site of the Leland Dike at the time of its erection, or if it had been owned by a stranger to this suit, and hence had made no invasion upon the lands of the plaintiff, it would not have been

liable for the destruction thereby inflicted, under the ruling in the *Bedford Case*." [192 U. S. 217.]

But it was further said: "Under the decisions of the Supreme Court in all cases of this character, it is the invasion upon the lands and the actual and visible possession which constitutes the taking, and when thus taken all of the consequences incident to such invasion necessarily follow, among which is the liability to pay for the damage thereby occurring to the balance of the tract to which the land thus taken belongs." Citing *United States* v. *Grizzard*, 219 U. S. 180.

Claimants concede the power of the Government over the river and that they "do not base their claim upon any raising of the flood levels of the Mississippi River, although it is stated by them and was found as a fact by the lower court that the high-water flood level of the Mississippi River had been raised six feet by the completion of the general levee system."

They "recognize the fact that the right of the United States Government to complete the levee system and maintain the same is indisputable, and that any purely incidental injury which might have resulted to them solely from raising the flood level would be a *damnum absque injuria*. They claim nothing by reason of said fact, adducing the same merely by way of inducement as showing that the ruin, which would inevitably have come to their plantation from the deflecting thereon of the flood waters by the construction of Leland Dike, was merely accelerated and expedited but not caused by the raising of the flood level.

"Their claim is that the deposit of sand and gravel and the destruction of their lands thereby were a direct and immediate result of the construction of the dike which was built on their plantation, using a part of it for the base thereof and the material thereof, and constructing the same without any condemnation of their lands and

ouster of them therefrom, which with the destruction constituted the taking of their lands within the meaning of the Fifth Amendment, and entitled them to compensation therefor."

And they rely on *United States* v. *Grizzard*, 219 U. S. 180, and other cases, and distinguish the *Jackson Case*, 230 U. S. 1, and the *Hughes Case*, 230 U. S. 24.

A serious proposition of law is hence presented by the contentions and controversy arises, as we have seen, whether an appropriation of the land without condemnation proceedings can have different legal results from its appropriation by such proceedings. In other words, whether compensation for the land appropriated in either case would be the only measure of relief, and its payment or recovery transfer ownership of the land and the rights of ownership.

But before reaching decision on this proposition questions of fact confront us. It will be observed that the findings are somewhat involved, mixing statement with inference, indeed, it may be said, even with prophecy. And it may be said again (we say "may be said" to avoid the expression of a definite judgment at this time) that there are effects caused by the United States and effects caused by the State which are not distinguished. We think there should be more precision. Great problems confronted the National and state governments, great and uncertain natural forces were to be subdued or controlled, great disasters were to be averted; great benefits acquired. There might be liability to the individual; if so, the liability should be clear, the cause of it direct and certain. This we explained in *Jackson* v. *United States*, 230 U. S. 1, and in *Hughes* v. *United States*, *Id.*, 24. There is an effort in the present case to satisfy these conditions, but we do not think it goes far enough.

The finding which recites the effects upon claimants' property is as follows: "In addition to the danger which

threatened the levee [that is, by the concentration of the current and during seasons of high water], said current, impinging upon the banks of the stream and the neck of land adjoining Point Chicot to the mainland, cutting into it, threatened to and would have, if permitted to continue, cut through said neck of land, thus straightening the channel and making Point Chicot plantation an island." In other words, it is found that but for the dike the river would have cut through the neck of land. Or, to express it another way, the dike kept the river in its channel. But, as we have seen, many forces were at work, and if the conditions at claimants' plantation were artificial they were the result of the lawful exercise of power over navigable rivers.

The finding seems to be definite, but it is too broad in its inference. It may indeed be a just inference, but the elements are wanting upon which a judgment can be with assurance pronounced. Besides there were two agencies at work, National and state, in the construction of the levees. There is no distribution of liability; all the results to claimants' plantation are assigned to the Government. Yet it is found that the claimants at one time conceived that the local authorities were the offenders, that is, the Board of Levee Inspectors of Arkansas was alone responsible, and brought an action against the Board. In passing upon the ground of action and its sufficiency challenged by demurrer the court said that the action "was instituted to recover damages alleged to have been sustained by him [Archer] by reason of the trespass of the defendant [the Board of Levee Inspectors], who unlawfully, with force and arms, entered upon his premises—a plantation in the county of Chicot—and built a levee thereon, without having made compensation therefor." The demurrer was overruled, the court expressing the view that the action could be maintained and intimated an opinion that an injunction might have been granted to enjoin the

trespass but that Archer could elect an action for damages.

The action was discontinued. We are not informed by the findings for what reason. It may have been for good reason; we make no intimation to the contrary, but its commencement and subsequent discontinuance suggest some questions which may lead to answers pertinent to be considered. In that action the trespass upon claimants' plantation by the construction of the Leland Dike was attributed to the local levee board; in the action at bar it is ascribed exclusively to the officers of the United States and it is averred that the encroachment of the trespass was at different times, and to a greater extent the second than the first time. Did claimants object at either time? And if not, why not? Upon the answer may depend a serious legal question. Or, if they were silent, why were they silent? What were the local conditions which called for judgment, not only the general conditions to which we have adverted and the findings describe, but the exact conditions as to claimants' property? Did danger threaten it before the erection of the dike as well as threaten the levees? As we have said, great forces were in operation and a judgment or prediction of their effect might have been difficult and uncertain, and claimants have regarded the dike as a protection to their plantation as well as to the levees.

The flow of the river is towards the Gulf and necessarily the water is always higher on the upper side of the reaches or bends such as exist at claimants' plantation. It may be inferred, therefore, that the pressure of the water, compounded of its velocity and volume, is greatest at the recesses or apices of the bends, has its first effect there, but necessarily extends along the whole concave shore. At first, of course, there would be a break at the neck or narrowest part, but would it not successively extend until the whole mass would crumble and a wide breach be

formed through which the river would pour with its full eroding force? And that such might be the effect we gather from the report of the United States engineers, of which we take judicial notice. It certainly may be questioned, therefore, whether the river breaking through at the neck would have confined itself to a narrow channel, "making Point Chicot plantation an island," and would not have permanently submerged it or swept it away. The Leland Dike prevented a demonstration of experience but it would seem that examples elsewhere on the river could give testimony of what would have occurred if the dike had not been constructed. It may be they were adduced, it may be expert testimony was heard and all pertinent facts exhibited to the court, and its finding is a true deduction from the testimony and the facts. We think, however, as we have already said, it is too broad in its inference, and that therefore, the case should be remanded to the court for more particular findings on the testimony in the case or, in the discretion of the court, upon further testimony to be taken; and the case should be given such dispatch as may be consistent with such purposes.

In what we have said no opinion is intended to be expressed of the case as it is presented or may be presented, and all questions of law are reserved.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

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

MR. JUSTICE PITNEY, dissenting.

Being unable to perceive that the facts found by the Court of Claims are in any material respect lacking in certainty, or are inadequate to support the judgment of that court, I am constrained to record my dissent.

The salient facts included in the findings are as follows: Claimants' plantation comprises about 6,000 acres, and includes the whole or the greater part of Point Chicot, on the Arkansas side of the Mississippi River. Point Chicot is a peninsula formed by a sweep of the river, being joined at its southwesterly end to the back land by a narrow neck of comparatively low land, which is the property of others than the claimants. The river flows easterly past this neck of land on its upper or northwesterly side, and after flowing around the Point, passing the important town of Greenville, which is on the easterly or Mississippi side, it of course flows past the southerly side of the plantation and of the neck of land, on its way to the Gulf. The distance on the course of the river from the upper side of the neck of land to the lower is approximately 13 miles, while the distance across the neck is less than a mile. The situation is clearly shown upon the map annexed to the findings of the Court of Claims, and reproduced with the report of the case. 47 Ct. Cls. 248, 264.

The findings show that levee construction work of two different kinds has been in progress along the Mississippi River for more than 30 years. On the one hand, the States and local organizations of the States bordering the river on both sides have, both before and since the year 1883, constructed and maintained certain lines of levees at various places and of various lengths, for the purpose of protecting and reclaiming land within their respective districts from overflow in times of high water. The lands of claimants are not included within any such levee district, and are not affected by any state or local levee construction except as such construction has contributed to closing certain natural outlets that formerly accommodated the flood waters of the river, the result of closing the outlets being to raise the elevation of the river in times of high water. On the other hand, beginning about the year 1883, and continuing to the present time,

the officers and agents of the United States, in pursuance of an act of Congress creating the Mississippi River Commission and other acts amendatory thereof, and for the improvement of the river for navigation, have adopted the so-called Eads plan, and in pursuance of it have projected, constructed, and maintained, and are engaged in constructing and maintaining certain lines of levees on both sides of the river at various places; the plan being to increase the velocity and scouring power of the water, and thus deepen the channel of the river and improve it for navigation.

The findings show that "The extension of the general levee system by the United States and the local authorities has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly or would be subject to now if the levee system were not in existence, and consequently somewhat reduced its value for agricultural purposes," and this because "the lands of claimants, situated between said levees and on the outside thereof and not protected thereby, have been subjected to repeated overflow, tending to diminish and impair their value, but to what extent does not satisfactorily appear."

It is important to observe that for the diminution of the value of claimants' land thus produced by the general effect of levee construction, State and National, no compensation is claimed from the United States, and no part of such diminution is included in the amount of the judgment awarded by the Court of Claims.

But it came to pass that "a part of the levee system so constructed and maintained runs back of said Point Chicot plantation, not touching the same [whether this was a part of the state or of the National system does not appear from the findings, and is quite immaterial, for it was not this that encroached upon claimants' land or caused an actual invasion of it and direct damage to it],

and that between it and said Point Chicot plantation is a stretch of ground lower than the main body of said plantation [this is the neck of land already mentioned, owned by other parties, and, as the map shows, it extends for nearly a mile from the face of the levee to claimants' nearest boundary line], and in periods of high water, the water rising, passing over and upon said land, has, by reason of its lowness, first gone thereupon, and its main current was across said land and not upon Point Chicot plantation, which, while in extreme high water it would be flooded as hereinabove set forth, did not have the full force of the current of the Mississippi River thereupon, but was covered in part or in whole by slacker water.

"The current during high-water seasons (being) as aforesaid struck against and impinged upon the said levee back of said Point Chicot plantation and protecting the lands on the interior, and such impingement resulted in the waters of said river eroding and washing away said levee, to the great danger of its existence, and threatening to break through said levee and inundate said lands to the rear thereof [not claimants' lands] and divert the water from the channel of the river. Such breach or crevasse in said levee would have entailed damage thereunto and to the adjacent landowners [not to claimants] and impaired the efficacy of said levee system as projected, constructed, and maintained by the officers of said Mississippi River Commission in accordance with the plans heretofore stated. In addition to the danger which threatened the levee, said current impinging upon the banks of the stream, and the neck of land adjoining Point Chicot to the mainland, cutting into it, threatened to and would have, if permitted to continue, cut through said neck of land [owned by others than claimants] thus straightening the channel and making Point Chicot plantation an island."

It is obvious that the straightening of the channel, by permitting the river to make a "cut-off" at the neck of

land, would have sent the principal flow of the river through the shorter route, thus interfering with and probably closing navigation along the 13 miles of river around Point Chicot, to the especial detriment of navigation at Greenville. For it is a well-known fact, and a subject of official comment, that when the river forms a new channel for itself across such a neck of land, the old bed has a tendency to fill up at the head and foot and become a lake. There are many crescent-shaped lakes in the Mississippi bottom-lands, thus caused. Rep. Sec. War, 1875, Vol. 2, Pt. 2, p. 499. In many cases the entire bed along the former and more circuitous channel has been transformed into dry land, or nearly so. Two historic instances of this kind have given rise to interstate suits now pending on the original docket of this court: No. 6 Original, *Arkansas* v. *Tennessee*, turns upon the effect of the "Centennial Cut-off" of 1876, while in No. 10 Original, *Arkansas* v. *Mississippi*, the effect of the cut-off of 1848 is the subject of inquiry. We can thus appreciate the situation, in view of which the powers of the Government of the United States were put forth in the taking of a considerable portion of claimants' land, as is shown by the findings that follow.

In order to prevent the threatened danger to the levees and the neck of land, the officers of the United States, acting under the authority of the acts of Congress, and the Mississippi River Commission, constructed what is known as the Leland Dike, running diagonally and at an angle from the main line of levee on the Arkansas side, across and on the land of claimants to a point 662 feet beyond where the line of the plantation begins, their object being to divert the current of the stream during high waters from impinging upon the levee, and, by throwing it northeastward by the dike, to prevent the destruction of the levee, and the cutting across the neck of land. The dike first went into and on the land of

claimants a distance of 662 feet, but, the end of it being exposed to the waters of the river and to its powerful current, the officers deemed it necessary to extend the dike a distance of some 2700 feet farther upon the land of claimants, and did so extend it in 1907, without any condemnation of the land and with no remuneration therefor being made to claimants. A large part of the soil was used for the construction of the extension.

Before the United States joined the levee lines in accordance with the Eads plan, thus making the same continuous, there were occasional overflows of the plantation, but they have been made deeper and more forceful by the adoption of said system. But before the erection of the dike the overflows did not materially damage the plantation and it remained still valuable for agricultural purposes. By the extension of the dike the high-water current of the river has been deflected over and across a large part of the plantation, flowing in the same direction as did a portion of the high waters of the river before the erection of the dike, but with greater force and depth, the escape of a portion of the high waters over and across the neck of land being prevented by the dike, in consequence of which the overflows of the plantation have been greatly increased and intensified, the result of which has been to wash and scour out its top soil and to deposit upon a large part of the plantation great burdens of sand and gravel, and 3,696 acres have been thereby rendered totally unfit for cultivation or any other profitable use. This result had been caused partly by the joining of the levee systems and the erection of the dike, but directly and proximately by the erection of said dike.

"The 3,696 acres of land hereinbefore mentioned at the time of the erection of the Leland Dike was of the value of $83,920. Thirty-one and four-tenths acres of the same is actually and wholly occupied by the United States by the construction of the dike before mentioned,

and the balance of said 3,696 acres, to wit, 3,664.6, has been destroyed and rendered totally unfit for cultivation or any other profitable use by the owners thereof. . . . The court finds as an ultimate fact, in so far as it is a question of fact, that the said 3,696 acres of land was somewhat impaired in value by the construction of said levee system, but that its use was totally destroyed by the erection of the Leland Dike and was thereby taken, its value at the time of such destruction and taking being $83,920."

Upon these findings, a judgment was rendered in favor of the claimants for $54,920, the difference between this and the total value of the land apparently being represented by an outstanding mortgage.

The record shows that the case was tried and considered with unusual care and deliberation in the Court of Claims. The petition was filed July 19, 1909; final judgment was entered February 17, 1914, *nunc pro tunc* as of February 12, 1912. The merits of the case were argued at least three times, and the United States filed several motions for new trial, for amendment of the findings, etc. It was therefore only after years of contentious litigation that the Court of Claims arrived at the findings and conclusions upon which it based its judgment.

In this court the case has been fully argued upon the facts disclosed by the findings; the argument for the Government being conducted by the learned Solicitor General in person. It was not suggested in argument that the findings were incomplete or wanting in certainty.

That the essential facts clearly appear from the findings is evident from the following excerpt from the Government's brief:

"From the findings of the Court of Claims the following facts appear: The plantation, described as 'Point Chicot Plantation,' is situated in Chicot County, in the

southeastern corner of Arkansas. It is in a bend, bounded on the north, east, and west by the river. Behind the Point Chicot Plantation to the south was a levee, a part of the general system constructed by the United States and local authorities after 1883, pursuant to the Eads plan for the improvement of navigation. Between the levee and Point Chicot Plantation was a low strip of ground often covered by the river. The natural current of the river in high water seasons running over the low strip of ground behind the Point Chicot Plantation threatened the destruction of the levee, and a severance of the Point from the mainland, leaving Point Chicot an island. To forestall the danger to the levee from erosion, and to the connecting neck of land, and thus to prevent the river from leaving its channel, agents of the United States Government constructed the Leland Dike in 1904, running 662 feet into the Point Chicot Plantation. In 1907 the dike was extended 2,700 feet further on claimants' land. In all, 31.4 acres were occupied in the construction of the Leland Dike. . . . In periods of high water the floods deflected by the dike came over the plantation, rendering 3,696 acres of the plantation unfit for cultivation."

Even were it suggested, as it is not, that the Court of Claims had committed some trial error or had drawn improper inferences from the evidence there submitted, this court would have no authority to review the judgment and reverse it upon that ground. The rules established by this court, pursuant to § 708, Rev. Stat. (now § 243, Jud. Code), for regulating appeals from the Court of Claims require that the record shall contain "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; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or

decree." The findings are conclusive upon this court unless error of law appear in the record. *United States* v. *Smith*, 94 U. S. 214; *Stone* v. *United States*, 164 U. S. 380; *District of Columbia* v. *Barnes*, 197 U. S. 146, 150.

The entire argument for the Government may be reduced to the single contention that its liability for damages is limited to the 31.4 acres of claimants' lands that are actually occupied by the Leland Dike, and that the Court of Claims erred in awarding compensation also for the 3,664.6 acres destroyed by the deflection upon it of the flood waters of the river through the construction and maintenance of the dike. The simple question is whether the case should be governed by *United States* v. *Grizzard*, 219 U. S. 180, upon which the Court of Claims rested its decision, or by *Bedford* v. *United States*, 192 U. S. 217; and *Jackson* v. *United States*, 230 U. S. 1.

It was attempted to be shown in argument that the causes of the damage to claimants' lands were diverse, it being attributable in part to the levee work of the local and state authorities, and only in part to the construction of the Leland Dike by the agents of the United States Government. It seems to me that the findings render this matter perfectly clear, for they show that while the general work of levee construction in which local, state, and Federal agencies coöperated, resulted in an increased elevation of the flood levels and subjected claimants' land to deeper overflows than before, and consequently somewhat reduced its value for agricultural purposes, no compensation was awarded—indeed, none was or is asked—for this general and consequential result of levee construction. Nor was the judgment in favor of claimants based at all upon the value that claimants' lands would have had but for this levee construction. On the contrary, the finding is explicit that while the tract of 3,696 acres of land was somewhat impaired in value by the construction of the levee system, its use was totally

destroyed by the subsequent erection of the Leland Dike, and that *its value at the time of such destruction* was $83,920.

In view of this, I confess myself unable to comprehend the basis of the criticism that the findings lack precision and that the effects of the work done, respectively, by the States and by the United States ought to be more clearly distinguished. It is not suggested in what respect the findings lack precision, and the Government advances no such contention. The findings certainly render it most clear that no compensation is claimed or allowed for anything done by the state or local authorities; that neither of these has invaded the soil of claimants' lands; that this invasion was done solely by agents of the United States Government, acting under the authority of acts of Congress, in the execution of an important public work; and that by their acts 31.4 acres were actually occupied for the construction of the dike and the balance of the 3,696 acres were destroyed as the direct consequence of the effect of the dike in turning the flood waters of the river upon and across claimants' lands in other than their natural course; and this because the dike performed the very function that it was designed to perform.

Unfavorable reference is made to the finding that, in addition to the danger which threatened the levee, the current, impinging upon the banks of the stream at the neck of land, cut into it, threatening to cut through it and thus straighten the channel and make of Point Chicot plantation an island. I am unable to see in this anything else than a very clear and direct inference based upon the physical facts and the effect of previous floods upon the neck of land as recited in the findings, viewed in the light of a history of cut-offs so frequent and familiar along the lower Mississippi as to have become a matter of common knowledge. But, if the finding is wanting in any respect, this has nothing to do with claimants' right to compensation for the taking of their lands. The

danger to the neck of land connecting Point Chicot with the mainland does not affect the question of the quantity or value of the land taken from claimants. It bears *solely* upon the *necessity* for the taking. Now, the objection of want of necessity may be appropriately raised by an objecting land owner. But surely it does not lie in the mouth of the Government, after an actual taking of private property, to answer a claim for compensation by setting up that there was no necessity for taking it.

It is said that it may be questioned whether the river, breaking through at the neck, would have confined itself to a narrow channel, making Point Chicot plantation an island, and would not have permanently submerged it or swept it away. Plainly, this is wholly speculative; and it seems to me, in view of the findings and the illustrative map, that the result hinted at is not even a remote possibility. The findings are clear to the effect that, before the construction of the dike, flood waters went across the neck of land, to the relief of the Point Chicot plantation, upon which the ground is much higher. The entire width of the river opposite the neck of land and on its upper side is about one-half mile, perhaps less. As already mentioned, the neck is less than a mile across, and it extends for over a mile from the levee to the nearest line of the Point Chicot plantation.

My brethren deduce an inference of possible extensive erosion from the reports of the United States engineers. The reports at the utmost, would be no more than evidential as to this point. Nor am I aware that this court, in reviewing a judgment of the Court of Claims, is at liberty to seek contradiction of the express findings of fact made by that court by reference to some government publication of which we may take judicial notice.

But if, before construction of the Leland Dike, there was any probability, near or remote, that the opening of a cut-off at the neck of land would lead to any encroach-

ment of the river upon claimants' land, the only possible legitimate effect of this upon their claim for compensation for the lands actually taken and directly damaged by the construction of the dike would be to reduce the damages to such extent as it should be made to appear that by such construction claimants had been specially benefited through the saving of their other lands from destruction. But the burden of showing this was upon defendant, not upon claimants. And I can see no justification for reversing a judgment, fairly recovered by claimants, upon the mere conjecture that possibly there ought to have been an allowance in favor of the United States for the direct benefit that the dike construction conferred upon claimants.

Reference is made to the fact that before this suit was brought George F. Archer, one of the claimants, brought a suit in the United States Circuit Court for the Eastern District of Arkansas against the board of levee inspectors of Chicot County, Arkansas, for the damages arising from the erection of the dike and the taking of the 31.4 acres of land, and that after the overruling of a demurrer to the complaint the action was discontinued before the commencement of this suit (128 Fed. Rep. 125). As a finding of fact, this manifestly imports nothing whatever pertinent to the right of action of claimants against the Government of the United States. As an evidential circumstance, even were it entitled to any weight, this court has nothing to do with it, for we have no jurisdiction to consider or weigh evidence. Even as against the defendant in that action, the discontinued suit would not estop the plaintiff therein; and certainly this court does not intend to intimate that it furnishes any bar to the recovery by the claimants of compensation for the land actually taken by the Government of the United States.

The question whether claimants objected to the entry by the officers of the United States is likewise immaterial,

for their suit is based, not upon the ground that the officers were trespassers, but upon the ground that they were lawfully engaged in the construction of a public work under governmental authority, and in the doing of it found it necessary to take and did take a considerable part of claimants' land, with incidental direct damage to another and greater part. This, upon well-settled principles, is to be deemed a taking of private property for the public use, and by the plain mandate of the Fifth Amendment to the Constitution is to be made the subject of compensation. The protest of the property owner is not necessary to entitle him to compensation. Acquiescence in an unauthorized taking may estop a landowner from having equitable relief by way of injunction against the consequences of the taking, or from treating the taking as a trespass; but it does not disentitle him to compensation for the land actually taken. *New York* v. *Pine*, 185 U. S. 93, 96, 103. Nor is the absence of formal condemnation proceedings of any consequence. An agreement on the part of the Government to pay him the fair value of his property is necessarily implied, on principles of justice and equity, from the mere act of taking, and it is upon the implied assumpsit that the action rests. *United States* v. *Lynah*, 188 U. S. 445, 462, 465, 468–470.

Stress is laid upon the suggestion that if the Government or some third party had owned the site of the Leland Dike at the time of its erection, so that in its construction there had been no invasion of the lands of the claimants, the Government would not have been liable for the destruction thereby inflicted. It is quite true that the constitutional inhibition against the taking of private property for public use without compensation has been generally construed as not conferring a right to compensation upon a landowner, no part of whose property has been actually invaded, and who has sustained only consequential damages by reason of the erection of a public work upon

adjoining land owned by a third party. It is this doctrine that underlies the decisions of this court in *Bedford* v. *United States*, 192 U. S. 217; and *Jackson* v. *United States*, 230 U. S. 1. The great hardship of the doctrine has been so generally recognized that many of the States have established constitutions providing in substance that private property shall not be taken *or damaged* for public use without compensation. *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 554. A rule so harsh in its operation ought not to be extended; and this case very clearly stands on the other side of the line, and comes within a class of cases quite as well established, of which *United States* v. *Grizzard*, 219 U. S. 180, is an example.

I cannot yield assent to the suggestion that the taking of the 31.4 acres, actually invaded and occupied by the construction of the dike, can be treated as a matter apart from the destruction of the 3,664.6 acres of claimants' lands immediately adjoining, which, as a direct result of the construction of the dike and because of the function that it performs, have been "rendered totally unfit for cultivation or any other profitable use by the owners thereof." Assuming, for the purposes of the argument, that if the Government itself, or some stranger, had owned the site of the dike, so that in the erection of it no actual invasion had been made upon claimants' lands, the Government would not have been liable on an implied assumpsit for the destruction thereby inflicted, it is sufficient to say that *that is not this case*. The whole of the lands in question were owned by claimants, and were in use as integral parts of a single plantation. There was an actual invasion and exclusive occupancy of claimants' lands in the construction of the dike, and the destruction of the adjoining lands was a direct and necessary consequence of the use made of the dike, and, in justice, must be regarded as an inseparable part of the taking. It is the established rule, recognized everywhere, that where

only part of a tract of land is taken the owner is entitled not merely to the market value of the part taken, but to all damages to the remainder of his tract proximately resulting from the use made of the part actually taken; or, putting it in another way, he is entitled to the difference between the market value of the entire tract and the market value of that which is left; excluding from consideration, however, any general benefit that is shared by all landowners whose property is similarly circumstanced. A multitude of cases might be cited in support of this proposition, but it is not necessary, for they can be found in the text books and cyclopedias. The doctrine has been uniformly adhered to by this court. In *Bauman* v. *Ross*, 167 U. S. 548, 574, it was expressed thus: "When part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened." In *Sharp* v. *United States*, 191 U. S. 341, 353, 354, an attempt was made to apply the same rule to separate and independent farms owned by the same owner and having no necessary relation to each other, the farming on each having been conducted separately, and each farm having its own house and outbuildings. The court said: "Upon the facts which we have detailed, we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had

been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract." In *United States* v. *Grizzard*, 219 U. S. 180, 182, 183, which was an action by the owners of a farm for a taking of a part of it by the United States for public purposes, the court said: "Reference has been made to the well-known class of cases touching an injury to land not taken by the construction of a railroad along and upon an abutting public road, or a change of grade to the damage of adjacent property, and like indirect injuries to the use of property adjacent but of which no part was taken from the owner. *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Sharp* v. *United States*, 191 U. S. 341. But here there has been an actual taking by permanently flooding a part of the farm of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owners' single tract and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case. . . . Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted."

Bedford v. *United States*, 192 U. S. 217, 225, is clearly

distinguishable, it being an instance of consequential damages to the claimants' land by reason of Government operations conducted six miles farther up the river. There was no actual invasion of any part of their land, and therefore no responsibility for the consequential damages arising from the Government operations. *Jackson* v. *United States*, 230 U. S. 1, 23, was likewise a case of consequential damages without actual taking of any part of the claimant's lands. It was decided both in the Court of Claims (47 Ct. Cl. 579, 613) and by this court upon the authority of the *Bedford Case*.

It seems to me that the findings of the Court of Claims are sufficiently clear and definite to furnish the materials for a proper judgment upon the claim in controversy; that an actual invasion and occupation of a part of claimants' lands, particularly described, by the agents of the United States, in the construction of the dike under the authority of acts of Congress, is shown, as well as the market value of the particular part actually invaded and of the larger and adjacent portion of the same tract necessarily destroyed as a direct and immediate result of the construction and maintenance of the dike. I also think that the case comes clearly within the authority of *United States* v. *Grizzard*, *supra*, and that the judgment under review should be affirmed.

More than eight years have elapsed since the practical destruction of the greater part of claimants' plantation; nearly seven years since the suit was commenced. And as no interest is allowable against the Government in a case of this kind up to the time of the rendition of judgment in the Court of Claims, (§ 1091, Rev. Stat., § 177, Jud. Code; *Tillson* v. *United States*, 100 U. S. 43, 47; *Harvey* v. *United States*, 113 U. S. 243) any unnecessary postponement of the judgment is a virtual denial of justice.

For these reasons, I dissent.

WHITE, RECEIVER OF COWARDIN, BRADLEY, CLAY & CO. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 309. Argued April 19, 1916.—Decided May 1, 1916.

As the plans annexed to the contract for construction of a filtration plant and reservoir showed a roadway around the reservoir, as also did plans subsequently furnished the contractor, and the engineer in charge of the work, gave the grade lines of such roadway, and the voucher for the first payments included work thereon, *held*, that although there was ambiguity in the contract, the roadway was included in the contract and the contractor is entitled to be compensated for work done thereon in accordance with the terms of the contract.

48 Ct. Cl. 169, reversed.

APPELLANT is the receiver of the firm of Cowardin, Bradley, Clay & Company, and the successor of one John D. McClennan. The latter filed in the Court of Claims a petition, subsequently amended by appellant, praying a judgment against the United States for the sum of $43,510, the amount due that company on a contract for labor and materials furnished for the construction of a filtration plant in the District of Columbia.

The court found, among other things, that there is a driveway running completely about the reservoir, which is an irregularly shaped body of water, comprising the western and southern part of the filtration plant. The starting point of "the roadway" (so-called by the court), its course and termination are stated.

The set of plans attached to the written contract and by its terms made a part of the agreement included certain plans showing the roadway bordering the reservoir west of the filter beds. One of the plans (sheet 2) was a draw-

ing showing the work in general sections; another plan (sheet 4) was a general plan and showed finished surfaces; and general plan No. 1 showed the entire projected plant. All of these plans indicated a roadway, and sheet No. 16 also indicated a roadway.

Afterwards two supplemental plans, relating to the roadway and giving details as to grades, were furnished the contractor.

Appellant's predecessor, McClennan, began work on the roadway in January or February, 1904. It does not appear that the contractor was ordered in terms by the Government engineers to build the roadway but it is shown that when he commenced work on it the engineers gave him the line of the toe of the slope and from time to time furnished him with the lines showing the direction of the road and the stakes showing the grade, and that the work was done under their inspection as to the lines, slopes, and the character of the material allowed to be deposited thereon.

The contractor began to build the roadway by filling with earth excavated from other parts of the work, and he continued to fill in and build the roadway in accordance with the plans and under the inspection of the engineers until February 14, 1905, and had been paid at various times about $12,000 on account of the work done on estimates made by the Government. The first payment was on voucher, month of March, 1904, covering all work done on the road up to the end of February, 1904, for "embankment (A, item No. 2), 13,000 cubic yards, at 30 cents, less 10 per cent. retained, amounting to $3,510." Except for said voucher no separate estimates were made of the amount of fill placed in the roadway, the work done thereon being included in the regular monthly estimates with the work done on other portions of the filtration plant.

Shortly after McClennan was appointed receiver in

August, 1903, he made arrangements with the Soldiers' Home authorities, at a considerable cost, to dispose of waste material on the Soldiers' Home grounds under certain conditions, the terms of which, so far as the amount of material to be placed thereon is concerned, were never carried out. The roadway was just as convenient a place as any to dispose of waste material and the cost of putting it there was no more than it would have been to have placed it on the Soldiers' Home grounds.

McClennan, he then being receiver, was informed by the engineer officer in charge on behalf of the United States that he would not allow any further payments for work done on the roadway. For a short time afterward and pending negotiations regarding the matter with the engineer officer appellant continued dumping material that he wanted to dispose of on the roadway. He finally discontinued work thereon, at which time about 6,000 cubic yards of fill was necessary to complete the roadway. It was subsequently finished by the United States without further cost.

In the final settlement there was deducted from the amount paid a sum equal to such of the fill in the roadway as had been paid for at the rate of 30 cents per cubic yard, amounting to about $12,000.

"On or about February 15, 1904, the Government engineer in charge had cross sections taken over the line of the roadway in question, which cross sections were used in computing the amount of work done by the contractor thereon outside of the lines allowed and paid for in the final estimate, and the amount of fill so made and not paid for was found to be 67,578 cubic yards, which at 30 cents per cubic yard amounts to $20,273.40."

From these facts the court concluded that appellant was not entitled to recover and dismissed the petition. Judgment was entered accordingly and this appeal was then prosecuted.

Mr. Chauncey Hackett for appellant.

Mr. Assistant Attorney General Huston Thompson for the United States.

Mr. Justice McKenna, after stating the facts as above, delivered the opinion of the court.

It appears from the findings that the plans showed a roadway bordering the reservoir. This finding seems to be contested by the Government, the contention being that where the roadway was to be placed was "merely marked" and no detail whatsoever as to its exact location or dimensions was shown by the plans. The finding, however, is more specific. One of the plans showed the work in general sections and indicated the roadway; another showed finished surfaces, with the roadway thereon; still another showed the entire filtration plant, the road again being indicated, and it was marked again on another plan. Such persistent repetition must have had other purpose than mere designation, and, besides, there were supplemental plans furnished the contractor relating to the roadway, giving detail as to grades. And, further, the engineer in charge gave the "toe of the slope" to the contractor and "from time to time furnished him with the lines showing the direction of the road and the stakes showing the grade." "The lines, slopes, and the character of the material allowed to be deposited thereon" were under his inspection.

The force of these findings is added to by the fact that the engineer first in charge and under whom the work was commenced on the roadway drew the plans and his action was their interpretation. It was not inadvertent. The first payment to the contractor was on a voucher which contained the work on the road as an item of liability, and, though subsequent vouchers omitted such

specification, work on the roadway was included in the regular monthly estimates. And this continued until a new engineer came upon the scene. With him came controversy. He not only introduced a new construction of the contract but so far reversed the construction and action of his predecessor as to deduct in the final settlements the amounts allowed by the latter.

Undoubtedly the contract has ambiguity and to present and resolve the ambiguity in detail would require a precise and literal examination of the contract. Such examination would greatly and, we think, uselessly prolong this opinion. We should be brought nevertheless to a few broad determining considerations.

The contention of the Government is based upon what is said to be the purpose of the contract, which, it is further said, "*so far as appellant was concerned* [italics counsel's], was the construction of the filtration plant proper." The appellant, in opposition, declares that the contract enumerated three kinds of fills "and all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge." Though some doubts beset appellant's contention and some considerations bear against it, there are others which determine for it. The most important of the considerations against it is the charge by the Government that the contractor was paid for every yard of excavation and that the dirt excavated had to be deposited somewhere and the roadway "was just as convenient a place as any to dispose" of it. And this is given strength by the fact that the contractor had arranged, at a considerable cost, with the Soldiers' Home authorities to dispose of waste material on the grounds of the Soldiers' Home.

But there is the countervailing consideration to which we have adverted, that is, of the action of the engineer first in charge, and it was he who drew the contract. He was there for direction. He considered that the roadway

was part of the scheme. He directed and superintended its construction. And it was a systematic structure, not a mere dumping place or deposit for material. It was constructed upon lines, slopes and grades and of selected materials. Further, in continued manifestation of his judgment that the contract included it and in approval of its conformity to the contract, he directed payment for it. There is nothing which reflects upon the sincerity of his judgment and it is necessarily the important factor in determining the responsibility of the Government.

Whether the roadway was necessary or accessory to the filtration plant is not important to consider. We may observe, however, that it was subsequently finished by the United States, and manifestly deemed desirable.

Judgment reversed and cause remanded with directions to enter judgment for appellant on the findings and in accordance with this opinion.

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

DE LA RAMA *v.* DE LA RAMA.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 216. Submitted April 18, 1916.—Decided May 1, 1916.

The rule that local practice, sanctioned by the local courts, should not be disturbed, applied in this case to the union of two causes of action, one of divorce and the other separation of the conjugal property, and both within the jurisdiction of the Court of First Instance of the Philippine Islands.

An objection to the competency of the presiding judge which was not

made in the courts below, and could have been corrected if made in the trial court, cannot be tolerated in this court except under the most peremptory requirements of law.

Due process of law does not forbid a hearing upon a transcript of evidence formerly heard in court; and where, as in this case, the parties assented to the course pursued.

As the evidence is not before this court, and there is nothing in the record to control the opinion of the Supreme Court of the Philippine Islands that the method adopted by the Court of First Instance was substantially in accord with the method prescribed by the Code, this court disallows an attempt to open questions of detail, no clear and important error being shown and the matter being one of local administration.

A discretion is recognized in regard to allowing interest even in matters of tort; and this court will not hold that the court below erred in fixing the date at which, but for the law's delay, the money would have been paid, even though the appellate court did reduce the amount awarded by the trial court.

The review of judgments of this nature of the Supreme Court of the Philippine Islands is by appeal and not by writ of error.

THE facts, which involve the validity of provisions in decree for divorce affecting division of conjugal property made by the Supreme Court of the Philippine Islands, are stated in the opinion.

Mr. Rufus S. Day, Mr. Charles Edmond Cotterill and *Mr. Edmund W. Van Dyke* for plaintiff in error and appellant:

The courts below were without, and erred in assuming, jurisdiction to determine whether any, and if so what, conjugal partnership property existed, or, on finding that any did exist, to order a division thereof between the parties, since the proceeding for divorce and the proceeding to secure a separation of the property were required by law in the Philippines to be instituted, if at all, in separate actions, and they were, therefore, improperly joined.

The special judge who rendered the decision purporting to be that of the Court of First Instance of Iloilo in the branch of the proceedings that relates to the separation of the conjugal partnership property, and which is now here for review, was not properly designated and empowered, nor did he afterwards properly qualify himself to act. He was, therefore, without jurisdiction.

The retrial in the Court of First Instance with respect to the existence and value of the conjugal partnership property and the amount divisible between the parties was not in conformity with law in that the case was not decided by the judge who presided at the retrial, and before whom the witnesses appeared, but by another judge, before whom not a single witness appeared, and who was specially assigned to the case when the trial judge had resigned his office without having announced a decision.

The courts below erred in attempting to liquidate the claim of the wife to a share in the conjugal partnership property as of July 5, 1902, the date of the judgment of divorce. The Supreme Court of the Islands erred in not reversing the trial court because of the failure of that court to require an inventory required by law; also in sustaining the holding of that court to the effect that an alleged share in the supposed profits of a firm to which appellant belonged was property in his possession, though there was no proof of the existence of such profits at the time of the trial or rendition of the judgment; also in affirming that part of the judgment of the Court of First Instance which includes in the award to the wife an amount arrived at by an attempt to compute profits of said firm based on mere conjecture.

The court below erred in affirming the judgment of the Court of First Instance, that allows interest on the amount stated therein from July 5, 1902.

In support of these contentions, see *Behn Co.* v. *Camp-*

bell, 205 U. S. 402; *Chew Heong* v. *United States*, 112 U. S. 436; Vols. I and IX, Codigo Civil Interpretado por el Tribunal Supremo, El—by Martinez Ruiz; Vols. I and IX, Comentarios al Codigo Civil Español—by Manresa y Navarro; vol. 23, Cyclopædia of Law and Procedure; *De la Rama* v. *De la Rama*, 201 U. S. 203; 1 Encyc. Pl. & Pr.; *Garrozi* v. *Dastas*, 204 U. S. 64; *Gsell* v. *Insular Collector*, 239 U. S. 93; *Ill. Cent. R. R.* v. *Turrill*, 110 U. S. 301; *Kneeland* v. *Am. Trust Co.*, 138 U. S. 509; *Mansfield &c. Ry. v. Swan*, 111 U. S. 379; *Minnesota* v. *Hitchcock*, 185 U. S. 382; *Thomas* v. *Board of Trustees*, 195 U. S. 207; *United States* v. *Levois*, 17 How. 85.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury* for defendant in error and appellee.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit by a wife for divorce, alimony *pendente lite* and a division of the conjugal property. It has been before this court in the first aspect, 201 U. S. 303, and now comes here on matters affecting the division of property, beginning with the fundamental objection that the division could not be asked in the divorce suit but must proceed on the footing of a decree already made. As to this it is enough to say that no such error was assigned as a ground for appeal, and the objection comes too late. At the previous stage the right of the plaintiff to her proportion of the conjugal property, to alimony pending suit and to other allowances claimed, was said to be the basis of our jurisdiction. 201 U. S. 318. *Villanueva* v. *Villanueva*, 239 U. S. 293, 294. The Court of First Instance had jurisdiction of the subject-matter, and the separation or union of the two causes was merely a question of procedure and convenience. The defendant im-

pliedly admitted the jurisdiction by pleading that there was no common property and that "therefore" the separation should be denied. After the matter had been adverted to by the trial judge and the joinder declared proper it was dealt with as legitimate by the Supreme Court and upon a petition for rehearing the only objections urged by the defendant concerned matters of detail. There is every reason that the local practice sanctioned in this case by the local courts should not be disturbed.

The next error alleged in argument also was not assigned. It is that Judge Norris who first heard the evidence having resigned, Judge McCabe, of the Court of First Instance, who finally decided the separation of conjugal property, was designated by Judge Ross (before whom otherwise the case would have come), on the ground that the latter was disqualified; and that Judge Ross had no power to do so under the Code of Civil Procedure then in force. Upon this point again we should not disturb the course adopted by the local tribunals without stronger reasons than are offered here and therefore do not discuss the question at length. The parties could have agreed in writing upon a judge and they did agree in writing at a later stage that Judge McCabe should decide the case without waiting for the action of the assessors whom the law provides to assist upon matters of fact. This objection like the preceding seems not to have been even suggested to the Supreme Court of the Philippines. To listen to it now would be not to prevent but to accomplish an injustice not to be tolerated except under the most peremptory requirement of law.

The next point argued, again not assigned as error, is that it seems from the opinion of the judge of first instance that the trial was had upon the evidence that had been offered before Judge Norris. If we are to assume the fact, it is a most extraordinary suggestion that, even though the parties seem to have assented to the course

pursued, due process of law forbids a hearing upon a transcript of evidence formerly heard in court. We shall say no more upon this point.

The errors that were assigned may be disposed of with equal brevity. The first one is the taking of July 5, 1902, the date of the decree of divorce, afterwards affirmed, as the date for liquidating the wife's claim. It is urged that there was no formal decree of separation of the property and that until such an order had been made the court had no right to enter a judgment. It also is argued that there was no such inventory as was required by law. But the testimony and other evidence are not before us, and, apart from our often stated unwillingness to interfere with matters of local administration unless clear and important error is shown, there is nothing in the record sufficient to control the opinion of the Supreme Court of the Islands that 'the method adopted by [the judge of first instance] in liquidating the assets of the conjugal partnership was substantially in accord with the method prescribed in the code.' We disallow the attempt to reopen some questions of detail such as a charge of estimated profits, upon this and other grounds. See *Piza Hermanos* v. *Caldentey*, 231 U. S. 690.

The only remaining item is charging interest on the judgment from July 5, 1902. But that was the date at which but for the delays of the law the wife would have received her dues, the husband has had the use of the money meanwhile, and we are not prepared to say that it was not at least within the discretion of the court to allow the charge, notwithstanding the success of the husband in reducing the amount on appeal. *Stoughton* v. *Lynch*, 2 Johns. Ch. 209, 219. *Hollister* v. *Barkley*, 11 N. H. 501, 511. See *Barnhart* v. *Edwards*, 128 California, 572. *McLimans* v. *Lancaster*, 65 Wisconsin, 240. *Rawlings* v. *Anheuser-Busch Brewing Co.*, 69 Nebraska, 34. A discretion is recognized even in actions of tort. *Eddy* v.

Lafayette, 163 U. S. 456, 467. *Frazer* v. *Bigelow Carpet Co.*, 141 Massachusetts, 126. The judgment upon the appeal will be affirmed and the writ of error dismissed. *De la Rama* v. *De la Rama*, 201 U. S. 303. *Gsell* v. *Insular Collector of Customs*, 239 U. S. 93.

Writ of error dismissed.
Judgment affirmed.

JOHNSON, TRUSTEE IN BANKRUPTCY OF WARREN CONSTRUCTION COMPANY, *v.* ROOT MANUFACTURING COMPANY.

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

No. 308. Argued April 18, 1916.—Decided May 1, 1916.

An agreement was made by way of compromise more than four months before the petition was filed to pay from a fund of which the bankrupt was entitled to the residue all lienable claims, including claims of one who had waived the right to file liens, but had subsequently filed claiming the right so to do owing to failure of bankrupt to fulfil contract, and to whom payments were made from the fund within four months of the filing of the petition which the trustee brought suit to recover as preferential. *Held* that the earlier agreement created an equitable lien in favor of all parties thereto having color of right, and the payments thereunder did not become preferential because the amounts were not ascertained and liquidated until within the four-month period.

219 Fed. Rep. 397, affirmed.

THE facts, which involve the right of a trustee in bankruptcy to recover an alleged preferential payment made by the bankrupt within four months of the filing of the petition under an agreement made more than four months before the filing, are stated in the opinion.

Mr. W. H. Thompson, with whom *Mr. W. H. H. Miller, Mr. C. C. Shirley, Mr. S. D. Miller, Mr. Fred H. Atwood, Mr. Frank B. Pease, Mr. Charles O. Loucks* and *Mr. Vernon R. Loucks* were on the brief, for plaintiff in error:

The action was to cover an alleged unlawful preference. The judgment of the District Court did not depend upon diverse citizenship alone.

The defendant in error waived its lien. The right to file a lien may be waived before lien accrues. No equitable lien was created by agreement of January 12, 1912. There was no equitable lien in this case.

Preferences in ordinary course of trade are voidable. Accounts receivable may be disposed of in violation of the Bankruptcy Act. The payment was made out of bankrupt's funds.

Numerous authorities, state and Federal, support these contentions.

Mr. Frank S. Roby and *Mr. Elias D. Salsbury* for defendant in error submitted:

The payment was not preferential; the agreement of January 12, 1912, was more than four months prior to the petition and created liens and was otherwise legal.

In support of these contentions see *Albrecht* v. *Foster Lumber Co.*, 126 Indiana, 318; *Brzezinski* v. *Neeves*, 93 Wisconsin, 567; 67 N. W. Rep. 1125; *Carson-Payson Co.* v. *C., C., C. & St. L. Ry. Co.* (Ind. App. Ct.), 105 N. E. Rep. 503; *Closson* v. *Billman*, 161 Indiana, 610; *Cushing* v. *Hurley*, 112 Minnesota, 83; 127 N. W. Rep. 441; *Continental & Commercial Tr. & Sav. Bank* v. *Chicago Title & Tr. Co.*, 229 U. S. 435; *Coder* v. *Arts*, 213 U. S. 223, 229; *In re Dismal Swamp Contr. Co.*, 135 Fed. Rep. 415; *Early* v. *Atchison &c. Co.*, 167 Mo. App. 252; 149 S. W. Rep. 1170; *In re Ft. Wayne Electric Corp.*, 99 Fed. Rep. 400; *Globe Bank & Tr. Co.* v. *Martin*, 236 U. S. 288; *Grant* v.

Strong, 18 Wall. 624; *Greey* v. *Dockendorff*, 231 U. S. 513; *In re Great Western Mfg. Co.*, 152 Fed. Rep. 123, 127, 128; *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296; *Johnson* v. *Hanley*, 188 Fed. Rep. 752; *Kelly* v. *Johnson*, 251 Illinois, 135; 95 N. E. Rep. 1068; 36 L. R. A. (N. S.) 573, 577; *Kertscher* v. *Green*, 205 N. Y. 522; 99 N. E. Rep. 146; *Ketcham* v. *St. Louis*, 101 U. S. 306, 315; *Knapp* v. *Milwaukee Tr. Co.*, 216 U. S. 545; *Long* v. *Caffrey*, 93 Pa. St. 526; *Long* v. *Farmers State Bank*, 147 Fed. Rep. 360; 9 L. R. A. (N. S.) 585; *Ludowici Roofing Tile Co.* v. *Pa. Inst. &c.*, 116 Fed. Rep. 661, 662; *McCabe* v. *Rapid Transit Co.*, 127 Fed. Rep. 465; *McDonald* v. *Daskam*, 116 Fed. Rep. 276; *McHenry* v. *Knickerbacker*, 128 Indiana, 77.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit to recover an alleged preference from the defendant in error. The Circuit Court of Appeals reversed a judgment recovered by the plaintiff and ordered judgment for the defendant. 219 Fed. Rep. 397; 135 C. C. A. 139. This writ of error was taken out before the passage of the Act of January 28, 1915, c. 22, § 4, 38 Stat. 803, 804.

The facts are these: On May 9, 1910, the Warren Construction Company, the bankrupt, had contracted to do some construction for a railroad company, receiving monthly payments on account, and agreeing that if at any time there should be evidence of any lien for which the railroad might become liable and which was chargeable to the Warren Company the railroad might retain an amount sufficient to indemnify it. Should there prove to be such a claim after the payments were made the Warren Company agreed to refund all moneys the railroad might be compelled to pay in discharging any lien made obligatory in consequence of the Warren Company's default. The Warren Company gave a bond with sureties for the performance of this contract. Later it made a

written subcontract with the Root Manufacturing Company for materials, in which the Root Company in the fullest terms renounced all lien on its own behalf and contracted that all under it should do the same. Monthly payments were to be made on account and final payment within forty days after the contract was "fulfilled."

In 1911 the Root Company notified the railroad that it was not being paid and that it would not furnish more material unless the railroad would see that it was paid. The railroad gave the assurance and the Root Company continued to furnish the materials called for by its contract. Seemingly the payments continued to be unsatisfactory and on November 18, 1911, after the Root Company had performed its contract there was unpaid $12,895.34. On November 25, 1911, the Root Company filed statutory notices of its intention to hold a lien upon the railroad's property for the amount then due. On January 12, 1912, after conferences of all parties concerned, a contract was made between the railroad, the Warren Company and its sureties, reciting controversy as to whether the Warren Company's contract had been performed, the filing of claims for liens and attachment suits for more than the sum admitted by the railroad to be due, and the railroad's assertion of its right against the surety companies. This contract fixed $42,000 as a sum to be paid by the railroad in full settlement of the mutual claims between it and the Warren Company, and provided that with $20,000 to be furnished by the surety companies the sum should be put into the hands of named trustees 'to be used in paying all lienable claims' growing out of the construction contract. If the fund was not sufficient to pay lienable claims in full, the surety companies were to furnish the additional money necessary. After all lienable claims were paid, the balance, if any, of the fund was to be paid first to reimburse the surety companies for their contribution

and after that to the Warren Company, subject to such attachments as might be filed against the sum.

On April 10, 1912, a written contract was made between the railroad, the sureties, the Warren Company and the Root Company, which recited the claim of the Root Company and that the railroad had money in its hands held back under its contract with the Warren Company for the purpose of protecting the road against liens, and agreed that $6,447.67 should be paid to the Root Company by way of compromise, that the Root Company should assign its claim to the trustee under the former instrument, surrendering to the Warren Company notes for sixty per cent. of its claim, and that the trustee should reassign to the Root Company the unpaid portion of its claim when attachments against the fund had been disposed of. The payment was made the same day and the Root Company executed a release as agreed. The sum was a larger percentage than will be received by the unsecured creditors of the Warren Company but a smaller one than that received by any other subcontractors with a lien. The petition in bankruptcy was filed on July 18, 1912, and the above payment was a preference if it stood as a payment to an unsecured creditor in the circumstances on the date when it was made.

The Circuit Court of Appeals held that the instrument of January 12 created an equitable lien that justified the payment, although it was of opinion that the lien asserted by the Root Company could not have been enforced. The plaintiff in error contends that the provision in favor of 'lienable claims' was confined to those that were secured by a valid lien. We express no opinion as to whether the lien of the Root Company asserted against the property of the railroad could have been defeated by its contract with the Warren Company notwithstanding the Warren Company's default. It is enough that we agree with the ultimate view of the Circuit Court of

Appeals. The agreement of January 12 was intended for practical purposes, to clear the railroad property from claims. It contemplated possible controversies as it provided for costs, but it did not require that every disputed lien should be fought out to the end. It was understood by the parties to extend to the compromise of claims that stood upon debatable ground, as was shown by the agreement under which the payment was made. It set aside a specific fund in a third hand to that end. All the parties acted in good faith. The $42,000 credited to the Warren Company as retained by the railroad was nearly twice what the railroad admitted to be due, apart from the compromise by which it secured the application of that sum to clearing its land. We are of opinion that there is no reasonable doubt that all parties were justified in the course adopted, that the instrument of January 12 created an equitable lien in favor of all alleged liens which the parties should deem to have color of right, and that the fund being thus appropriated and set aside it does not matter that the formal ascertainment of the specific beneficiary was made within four months of the bankruptcy proceedings. It was well understood before. The Root Company took part in the preliminary discussions and there can be no doubt that it was expected by all on January 12 that its claim, however disputed, would have to be dealt with when the fund came to be paid out.

Decree affirmed.

THE RAITHMOOR.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 24. Argued January 26, 1916.—Decided May 1, 1916.

In determining whether the admiralty has jurisdiction over an incompleted structure in navigable waters to be used when completed as a governmental aid to navigation, its location and purpose are controlling from the time it was begun.

The jurisdiction that admiralty has over an incompleted structure in course of construction extends to that which is a mere incident to such construction.

The admiralty has jurisdiction of a libel *in rem* against a vessel for damages caused by its colliding with an incompleted beacon in course of construction in, and surrounded by, navigable waters and which when completed is to be used solely as a governmental aid to navigation.

186 Fed. Rep. 849, reversed in part.

THE facts, which involve the jurisdiction in admiralty of the District Court of a libel *in rem* against a vessel for damages caused by its colliding with an incompleted beacon in navigable water, are stated in the opinion.

Mr. H. Alan Dawson, with whom *Mr. Edward J. Mingey* and *Mr. J. Rodman Paul* were on the brief, for appellant:

The analogy to an unfinished ship supports the jurisdiction in the case. *Ferry* v. *Bers*, 20 How. 393; *Edwards* v. *Elliott*, 21 Wall. 532, 553; *Graham* v. *Morton Transp. Co.*, 203 U. S. 577, distinguished, and see *Phila. W. W. & B.*

[1] Docket title: *Latta & Terry Construction Company* v. *British Steamship "Raithmoor," William Evans, Master and Claimant.*

R. R. v. *Towboat Co.*, 23 How. 209, 215; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59; *Martin* v. *West*, 222 U. S. 191.

A ship becomes such when she is launched, notwithstanding she is still unfinished. *Tucker* v. *Alexandroff*, 183 U. S. 424. This case is governed by *The Blackheath*, 193 U. S. 361, and the general principles therein announced and applied, and see *The Arkansas*, 17 Fed. Rep. 383, 387, as interpreted by *Cleveland R. R.* v. *Cleveland S. S. Co.*, 208 U. S. 316; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, and *Johnson* v. *Elevator Co.*, 119 U. S. 388.

Courts of Admiralty have taken jurisdiction for damages to the following structures for the reason that they were located in navigable waters and did not concern commerce on land. A beacon. *The Blackheath*, 195 U. S. 361.

Submarine cables resting on the bottom of navigable water, notwithstanding connection of the ends with the shore. *Postal Tel. Co.* v. *Ross*, 221 Fed. Rep. 105; *The William H. Bailey*, 100 Fed. Rep. 115; *S. C.*, 111 Fed. Rep. 1006; *The Anita Berwing*, 107 Fed. Rep. 721; *The City of Richmond*, 43 Fed. Rep. 85; *S. C.*, affirmed, 59 Fed. Rep. 365; *Stephens* v. *West. Un. Tele. Co.*, 8 Ben. 502.

Temporary platform structure resting on girders sunk into the bottom of navigable waters. *The Senator Rice*, 122 Fed. Rep. 331.

Injury to a person on a pontoon fastened to the shore by a cable and used as a landing in connection with a ferry. *The Mackinaw*, 165 Fed. Rep. 351.

Floating bath-house moored to the shore by poles and chains. *The M. R. Brazos*, 10 Fed. Cas. No. 9898.

Floating drydock moored to a wharf. *Simpson* v. *The Ceres*, Fed. Cas. No. 12,881.

Raft of logs in tow of tug in navigable waters. *The F. & P. M.*, 33 Fed. Rep. 511.

Fish nets extending out from the shore into navigable waters. *The Armorica*, 189 Fed. Rep. 503.

Steel brooms thrown into navigable water through the breaking down of defective wharf. *The City of Lincoln*, 25 Fed. Rep. 835, but see *contra*, *Martin* v. *West*, 222 U. S. 191.

Salvage by a tug in extinguishing a fire on a steamship in drydock undergoing repairs. *The Steamship Jefferson*, 215 U. S. 130.

Hire of a dredge while engaged in a partly land transaction in dredging material from a navigable stream for the purpose of piping it onto the land in aid of a land project. *Bowers* v. *Federal Contracting Co.*, 148 Fed. Rep. 290.

Repairs to an intrastate canal boat in drydock. *The Robert W. Parsons*, 191 U. S. 17.

Injury to a floating elevator anchored to and moving up and down upon wooden spuds imbedded in the mud under navigable waters. *The Frank R. Gibson*, 87 Fed. Rep. 364.

Courts of Admiralty have declined to take jurisdiction of injuries to the following classes of objects upon the ground that they were land structures:

Warehouse on wharf, houses on shore and contents of warehouse on shore. *The Plymouth*, 3 Wall. 20; *Ex parte Phenix Ins. Co.*, 118 U. S. 610; *Johnson* v. *Elevator Co.*, 119 U. S. 388.

Injuries to a pier, wharf or dock, and to persons or property thereon. *Cleveland Terminal R. R.* v. *Cleveland S. S. Co.*, 208 U. S. 316; *The Mary Stewart*, 10 Fed. Rep. 137; *The Mary Garrett*, 63 Fed. Rep. 1009; *The Albion*, 123 Fed. Rep. 189; *Homer Ramsdell Co.* v. *Compagnie Générale Co.*, 63 Fed. Rep. 845; *The Curtin*, 152 Fed. Rep. 588; *The Haxby*, 94 Fed. Rep. 1016; *The Ottowa*, Fed. Cas. No. 10,616.

Injuries to bridges which immediately concern com-

merce upon land. *The Troy*, 208 U. S. 321; *The Rock Island Bridge*, 6 Wall. 213; *City of Milwaukee* v. *Curtis*, 37 Fed. Rep. 705; *The John C. Sweeney*, 55 Fed. Rep. 540; *The Neil Cochran*, Fed. Cas. No. 7996.

A marine railway the upper end of which was on shore and securely and permanently fastened to the shore. *The Prof. Morse*, 23 Fed. Rep. 803.

The surface part of borings made to locate aqueduct. *The Poughkeepsie*, 162 Fed. Rep. 494; *S. C.*, aff'd in 212 U. S. 558.

Goods lost in navigable waters through being thrown from a wharf as a result of the collision by a vessel with the wharf. *The Haxby*, 95 Fed. Rep. 170.

A derrick used in erecting light house pier. *The Maud Webster*, Fed. Cas. No. 9302. See also on question of admiralty jurisdiction: *The Steamer Lawrence*, 1 Black, 522, 526; *Benedict's Admiralty*, 3d ed., §§ 329, 358; 1 Kent's Comm., 14th ed. at p. 379; *Toledo S. S. Co.* v. *Zenith Transp. Co.*, 184 Fed. Rep. 391; *The Harriett*, 1 Wm. Robinson Adm. 183, 192; *The Virgin*, 8 Pet. 537, 549; *American Ins. Co.* v. *Johnson*, 1 Blatch. & H. 9; *S. C.*, 1 Fed. Cas. No. 303; *Dean* v. *Angus*, Bee, 369; *S. C.*, Fed. Cas. No. 3702.

For discussions or application of the general principles above stated, see also *The J. E. Rumble*, 148 U. S. 1, 15; *Andrews* v. *Wall*, 3 How. 568; *The Lottawanna*, 20 Wall. 201, 223; *S. C.*, 21 Wall. 558, 582; *The Hamilton*, 207 U. S. 398, 406; *The Mary Ford*, 3 Dall. 188; *Waring* v. *Clarke*, 5 How. 441; *Erie R. R.* v. *Erie Transp. Co.*, 204 U. S. 220; *United States* v. *Cornell Steamboat Co.*, 202 U. S. 184; *The Genessee Chief*, 12 How. 443; *The Angelique*, 19 How. 239; *The John E. Mulford*, 18 Fed. Rep. 455, 459; *The Mariska*, 107 Fed. Rep. 989; *Leland* v. *Medora*, 2 Woodb. & M. 92; *S. C.*, Fed. Cas. No. 8237; Rule 43 in Admiralty.

For other cases containing instructive discussions of the rule that locality is the test of jurisdiction in tort,

see *The Belfast*, 7 Wall. 624, 637; *Manro* v. *Almeida*, 10 Wheat. 473; *Waring* v. *Clarke*, 5 How. 441, 459; *The Lexington*, 6 How. 344, 394; *Ex parte Easton*, 95 U. S. 68, 72; *Leather* v. *Blessing*, 105 U. S. 626, 630; *Panama R. R.* v. *Napier Shipping Co.*, 166 U. S. 280, 285; *Atlee* v. *Packet Co.*, 21 Wall. 389; *The Strabo*, 90 Fed. Rep. 110; *Herman* v. *Port Blakely Co.*, 69 Fed. Rep. 646; *The H. S. Pickands*, 42 Fed. Rep. 239; *Etheridge* v. *City of Philadelphia*, 26 Fed. Rep. 43; *The C. Accame*, 20 Fed. Rep. 642; *Leonard* v. *Decker*, 22 Fed. Rep. 741; *The Florence*, 2 Flip. 56; *S. C.*, Fed. Cas. No. 4880; *Steel* v. *Thacher*, 1 Ware, 85; *S. C.*, Fed. Cas. No. 13,348.

A court of admiralty, having rightfully taken jurisdiction of the damage to appellant's pile driver and barge, should retain it to redress the entire wrong inflicted by the same maritime tort.

Mr. Henry R. Edmunds for appellee:

An injury to a structure affixed to the land and wholly or partially supported by it, is not capable of being redressed in admiralty. *The Professor Morse*, 23 Fed. Rep. 803; *The Maud Webster*, 8 Ben. 547, and see following instances in which the property specified was involved:

A pier, because it is a part of the land, and property on a pier, because it is on land. *The Haxby*, 95 Fed. Rep. 170.

Houses on a wharf, destroyed by a fire originating on a vessel lying thereby. *The Plymouth*, 3 Wall. 20.

A bridge with a draw, because it is a part of the land. *The John C. Sweeney*, 55 Fed. Rep. 540; *Martin* v. *West*, 222 U. S. 191.

A building on land, struck by the jib boom of a moving vessel. *Johnson* v. *Chicago Elev. Co.*, 119 U. S. 388.

A swinging bridge, because it is a part of the land. *Milwaukee* v. *The Curtis*, 37 Fed. Rep. 705; *The Blackheath*, 195 U. S. 361, distinguished.

An unfinished structure, for whatever purpose intended, is not an aid to navigation. So far as it has anything to do with navigation, it is an obstruction and a source of danger. Neither is it subject to admiralty jurisdiction unless it is an instrumentality of the Government. These two elements must coexist in order to bring the case within the rule laid down by *The Blackheath.*

A drawbridge is an aid to navigation. It has no other purpose. It is a disadvantage to the bridge itself. It is never employed except where vessels have a right to pass. It is thus an aid to navigation just as truly as a beacon is, though in a different way. Yet an injury to it is not cognizable in admiralty. The *John C. Sweeney,* 55 Fed. Rep. 540; *Martin* v. *West,* 222 U. S. 191. So also a swinging bridge. *Milwaukee* v. *The Curtis,* 37 Fed. Rep. 705. The reason is obvious. The drawbridge is not a Government aid to navigation.

Since *The Blackheath* was reported, two cases, *Cleveland Terminal Co.* v. *Steamship Co.,* 208 U. S. 316, and *The Troy, Id.* 321, have come before this court, and it has decided that the doctrine of *The Plymouth* is still in force, unaffected by *The Blackheath.*

Although the injury was committed in navigable water, there is no case actually deciding that the sole test of jurisdiction in cases of tort is locality. The true meaning of the rule of locality in cases of maritime torts is that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters. The rule goes no farther than this. *The Plymouth,* 3 Wall. 34.

A tort must be committed wholly upon navigable waters, but the converse is not true. It is not the law that everything that takes place upon navigable waters is cognizable in admiralty. Such a doctrine would lead to absurd consequences. If a malicious or negligent act were committed by a bather in the surf at Atlantic City,

causing the death of another by drowning, the widow would proceed to obtain redress by filing a libel, on the ground that the cause of action arose wholly in navigable water.

Whether a certain tort is maritime must be resolved according to the character and locality of the injured thing. *Martin* v. *West*, 222 U. S. 191, 197; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Campbell* v. *Hackfeld Co.*, 125 Fed. Rep. 696; *Cleveland Terminal R. R.* v. *Cleveland S. S. Co.*, 208 U. S. 316, 321.

The temporary platform was placed around the building which was under construction solely for the purpose of aiding in the work; and, in its legal aspect was on the same footing as the tools used by the laborers. It was not maritime in its character or in its object.

The jurisdiction of the Federal courts in admiralty cases is given by the Constitution. Not even Congress has power to add anything to it. If a subject is not within this class, the courts can take no cognizance of it, whether or not it is connected, as to time and place, with some others which they clearly have power to adjudicate. *The St. David*, 209 Fed. Rep. 985.

Mr. Justice Hughes delivered the opinion of the court.

The appellant filed a libel *in rem* in the admiralty against the steamship "Raithmoor" to recover damages for tort. The steamship, coming up the Delaware River on the evening of July 18, 1909, collided with a scow and pile driver belonging to the appellant, and also with a structure which the appellant was erecting for the United States to serve as a beacon, and with a temporary platform used in connection with the work of construction. For the injury to the scow and pile driver, a decree was entered in favor of the libellant. But the District Court

held that there was no jurisdiction in the admiralty of the claim for the damage to the structure and platform, and the libellant appeals. *The Raithmoor*, 186 Fed. Rep. 849.

The District Court thus states the character and location of the structure:

"The company" (the appellant) "was executing an independent contract with the United States, which bound them to furnish the necessary materials, labor, plant, etc., and to erect in place a foundation pier to receive a gas beacon. The work was under the continual supervision of a government official, but had neither been finished nor accepted. The structure was to consist of three cylindrical piles of reinforced concrete to be sunk about 19-½ feet into the bottom of the river, and to project 12 feet above mean high water, these to be covered with a sheet steel cap. The piles were to be encased in steel and to be protected also by depositing rip-rap around them to a specified height. When completed, the pier was to be used solely as a beacon on the edge of a navigable channel that has not yet been made ready, and the government was to install upon the cap a lamp and other appliances. The site is three-fourths of a mile from the eastern or New Jersey shore, and about two miles from the western or Delaware shore, of the river, and is surrounded by navigable water, about twenty-seven feet deep at low tide. The work was begun in June, and at the time of the collision was approaching completion. The piles were in place, and not much remained to be done except to put the metal cap into place and deposit the rip-rap. The necessities of the work required a temporary platform to be built close to the concrete piles. This was of wood, about 15 feet square, and rested upon wooden piling driven into the bottom of the river." *Id.*, p. 850.

The decisions of this court with respect to the jurisdic-

tion of the admiralty in cases of tort make the question to be determined a very narrow one. In *The Plymouth*, 3 Wall. 20, 36, it was broadly declared that "the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends—on the high seas or the navigable waters." Accordingly it was held that a libel for damage to a wharf and storehouses caused by a fire started on a vessel through negligence was beyond the limit of admiralty cognizance, as the damage was wholly done, and the wrong was thus consummated, upon the land. Upon this ground, the jurisdiction of the District Court to entertain a petition for the limitation of the liability of the ship owner in such a case was denied in *Ex parte Phenix Insurance Co.*, 118 U. S. 610. The principle was restated in *Johnson* v. *Chicago &c. Elevator Co.*, 119 U. S. 388, 397. And see *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 643; *Homer, Ramsdell Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406, 411. But in *The Blackheath*, 195 U. S. 361, a distinction was drawn, and the jurisdiction of the admiralty was upheld in the case of an injury caused by a vessel in negligently running into a beacon which stood fifteen or twenty feet from the channel of Mobile river, or bay, in water twelve or fifteen feet deep, and was built on piles driven firmly into the bottom. The court pointed out the essential basis of the decision, in saying: "It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea." (*Id.*, p. 367.) It was suggested in the concurring opinion of Mr. Justice Brown (*Id.*, p. 368) that the decision

practically overruled the earlier cases, and that it recognized the principle of the English statute extending the jurisdiction of the admiralty court to "any claim for damages by any ship." This consequence, however, was expressly denied in *Cleveland Terminal R. R.* v. *Cleveland Steamship Co.*, 208 U. S. 316, 320. In that case it was decided that the admiralty did not have jurisdiction of a claim for damages caused by a vessel adrift, through its alleged fault, to the center pier of a bridge spanning a navigable river and to a shore abutment and dock. Referring to *The Blackheath*, and drawing the distinction we have noted, the court said: "The damage" (that is, in *The Blackheath*) "was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function. . . . But the bridges, shore docks, protection piling, piers, etc.," (of the Cleveland Terminal Company) "pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such." The decision in *The Troy*, 208 U. S. 321, was to the same effect. The steamer Troy had collided with the center pier of a swinging span over the St. Louis river, a navigable stream, and the jurisdiction of the admiralty of a libel for the injury was denied. See, also, *Phœnix Construction* Co. v. *The Poughkeepsie*, 212 U. S. 558; *Martin* v. *West*, 222 U. S. 191, 197.

If then, in the present instance, the metal cap of the beacon had been in place, the rip-rap deposited, and the beacon put into actual service, the case would fall exactly within the ruling of *The Blackheath* and the admiralty would have jurisdiction although the structure was attached to the bottom. There would be no difference in the two cases which would afford the slightest ground for argument. If, on the other hand, simply because of the

incompleteness of the beacon, it is to be exclusively identified with the land and its intended purpose is to be disregarded, the admiralty would have no jurisdiction. We think that a distinction based solely on the fact that the beacon was not fully completed would be a needless refinement,—a nicety in analysis not required by reason or precedent. We regard the location and purpose of the structure as controlling from the time the structure was begun. It was not being built on shore and awaiting the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached,—at least in all cases where the wrong was of a maritime character. See *The Plymouth, supra; Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 58–61, and cases there cited. The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on land. It was simply to serve as an aid to navigation, and while it had not yet been finished and accepted, it was being erected under the constant supervision of a Government inspector acting under the authority of the United States in the improvement and protection of navigation. It is urged that the Government might abandon its plan; but there has been no abandonment. The question is not as to an abandoned mass, but as to a beacon in course of erection. Even a completed beacon might be abandoned and whatever question might arise in such a case is not presented here. Again, an analogy is suggested to the case of a vessel which is being constructed on shore, but the argument falls short, as it is to be remembered that as soon as a vessel is launched, although still incomplete, it is subject to the admiralty jurisdiction. *Tucker* v. *Alexandroff*, 183 U. S. 424, 438. This is not the case of a structure which at any time was identified with the shore, but from the beginning

of construction locality and design gave it a distinctively maritime relation. When completed and in use, its injury by a colliding ship would interfere, or tend to interfere, with its service to navigation; and, while still incomplete, such an injury would tend to postpone that service. We know of no substantial reason why the jurisdiction of the admiralty should be sustained in the one case and denied in the other.

With respect to the temporary platform, it is to be observed that this was a mere incident to the structure and as such the jurisdiction would extend to the claim for the damage to it.

The decree, so far as it dismissed the libel for want of jurisdiction, is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* HARRINGTON.

ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 853. Motion to dismiss or affirm submitted April 17, 1916.—Decided May 1, 1916.

Unless the injured employee of an interstate and intrastate carrier is engaged in interstate commerce at the time of the injury, the Federal Employers' Liability Act does not apply; and it is immaterial whether such employee had previously been, or in the immediate future was to be, engaged therein.

An employee of a carrier engaged in removing coal from storage tracks to coal chutes is not engaged in interstate commerce, even though the coal had been previously brought from another State and was to be used by locomotives in interstate hauls. *Del., Lack. & West R. R.* v. *Yurkonis*, 238 U. S. 439.

The Federal Employers' Liability Act refers to interstate commerce in a practical sense; and the test is whether the employee at the time of the injury was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556.

180 S. W. Rep. 443, affirmed.

THE facts, which involve the validity of a judgment for damages recovered by the representative of an employee of an interstate carrier in the state court and under the state law, are stated in the opinion.

Mr. J. G. L. Harvey for defendant in error in support of the motion.

Mr. William Warner, Mr. Oliver H. Dean, Mr. William D. McLeod, Mr. O. M. Spencer and *Mr. H. M. Langworthy* for plaintiff in error in opposition thereto.

MR. JUSTICE HUGHES delivered the opinion of the court.

Margaret Harrington brought this action to recover damages for the death of her husband, Patrick Harrington, a switchman employed by the plaintiff in error. She obtained judgment under the state law, the plaintiff in error contending unsuccessfully that the decedent was engaged in interstate commerce and that the case was governed by the Federal Employers' Liability Act. 180 S. W. Rep. 443. The state court said, in its statement of facts:

"Defendant owns and operates a system of railroads covering this and a number of other western States and is a common carrier of both interstate and intrastate traffic. Its terminal yards at Kansas City are in Missouri and are an important center for the handling of both kinds of business originating upon and confined to defendant's lines, as well as for the interchange of business with other interstate railroads. Locomotives and cars

used in both kinds of traffic are received, sent out, cared for and repaired in the yards. The switching crew of which Harrington was a member did not work outside of this State and was engaged, at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic.—It may be conceded, as argued by defendant, that none of its locomotives or cars was set apart for service only in intrastate commerce. Defendant operated local trains from Kansas City to terminal points in this State which carried only intrastate commerce, but the locomotives and cars of such trains were subject to be diverted to other trains engaged in interstate commerce."

The plaintiff in error takes exception to the statement in part, asserting that there was no evidence that any of the locomotives, which were supplied with fuel from the coal chutes, were engaged exclusively in intrastate commerce, or that any of the defendant's trains within the State were engaged exclusively in that commerce. For the present purpose, we may assume the fact to be as stated by the plaintiff in error, and we may also assume, as it insists, that there was no evidence that the coal had been brought from mines within the State of Missouri or from mines owned by the plaintiff in error. With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the Company and "had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident." So, also, as the question is with respect to the employment of the decedent at the time of the injury (*Illinois*

Central R. R. v. *Behrens*, 233 U. S. 473, 478), it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal Act is that the coal thus placed was to be used by locomotives in interstate hauls.

As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and "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." *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556, 558, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier while he is mining coal in the carrier's colliery intended to be used by its interstate locomotives is not engaged in interstate commerce within the meaning of the Federal Act (*Del., Lack. & West. R. R.* v. *Yurkonis*, 238 U. S. 439), and there is no distinction in principle between the two cases. In *Great Northern Ry.* v. *Knapp*, 240 U. S. 464, the question whether the employee was engaged in interstate commerce was not presented, as the application of the Federal statute was conceded in the state court.

Judgment affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* JONES, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 492. Argued April 3, 4, 1916.—Decided May 1, 1916.

In the trial of an action under the Federal Employers' Liability Act defendant is denied a Federal right if he is denied a fair opportunity to show, in accordance with proper practice, negligence attributable to the employee in diminution of damages; nor, in the absence of a settled local rule of practice requiring counsel to announce in advance the purpose for which evidence is tendered, can evidence as to contributory negligence be excluded because tendered without notice that it is restricted to diminution of damages.

When evidence can be introduced for one purpose only it is unnecessary for counsel in offering it to go through the idle form of announcing its purpose.

137 Louisiana, 178, reversed.

THE facts, which involve the validity of a judgment for damages recovered by the representative of an employee of an interstate carrier in the state court and under the Federal Liability Act, are stated in the opinion.

Mr. S. W. Moore, with whom *Mr. F. W. Moore* and *Mr. J. D. Wilkinson* were on the brief, for plaintiff in error.

Mr. Leon R. Smith, with whom *Mr. Newton C. Blanchard* and *Mr. Otis W. Bullock* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Claiming under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65; April 5, 1910, c. 143,

36 Stat. 291), defendant in error brought this suit in a state court against the railroad company to recover damages resulting from her husband's death by accident while employed as engineer on a passenger train. A loaded car, having escaped from the switching crew, ran down a long grade, struck his engine with great violence as it was rounding a curve near the Shreveport yard, and killed him.

The company denied negligence on its part but interposed no plea setting up the defense of contributory negligence. A jury found for the administratrix and judgment thereon was affirmed by the Supreme Court of the State.

During cross-examination of the fireman, counsel attempted to show that the engineer was negligent in not having his train under proper control. The court sustained an objection "to any evidence as to contributory negligence as same is not pleaded." Proper exception was taken and duly noted. Thereupon, the record recites, "counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered." Upon rehearing the Supreme Court held evidence of contributory negligence, though not pleaded and inadmissible to defeat a recovery, should have been received in mitigation of damages if offered for that specific purpose. But it said the evidence in question was properly excluded because tendered without restriction.

We have been cited to no authority showing a settled local rule requiring counsel, without inquiry by the court, to announce in advance the purpose for which evidence is tendered. Earlier cases in Louisiana lend support to the contrary and commonly approved practice. *Thompson* v. *Chauveau*, 6 Mart. N. S. 458, 461; *Hitchcock* v. *North*, 5 Robinson, 328, 329; *Fortunich* v. *New Orleans*, 14 La. Ann. 115; *Caspar* v. *Prosdame*, 46 La. Ann. 36. See *McAfee* v. *Crofford*, 13 How. 446, 456; *Buckstaff* v. *Russell*, 151 U. S. 626, 636; *Farnsworth* v. *Nevada Co.*, 102

Fed. Rep. 578, 580; *Hubbard* v. *Allyn*, 200 Massachusetts, 166, 171; *Mighell* v. *Stone*, 175 Illinois, 261, 262.

It is declared by the act of Congress upon which the suit is based:—

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death; the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . ."

Manifestly, under this provision a defendant carrier has the Federal right to a fair opportunity to show in diminution of damages any negligence attributable to the employee.

The state Supreme Court upheld the railway company's claim of right to show contributory negligence under its general denial; but the trial court emphatically denied this and positively excluded all evidence to that end. As, under the Federal statute, contributory negligence is no bar to recovery, the plain purpose in offering the excluded evidence was to mitigate damages. In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the Supreme Court had been sustained, it could have been easily obviated; but counsel had no reason to anticipate such a ruling and certainly, we think, were not required to do so at their peril.

Plaintiff in error has been improperly deprived of a Federal right. The judgment below is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MARYLAND DREDGING AND CONTRACTING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 310. Argued April 25, 1916.—Decided May 8, 1916.

A government contract for dredging a channel contained a provision that time was an essential feature, and provided for a specified amount per day as liquidated damages for delay and not as a penalty; it also provided that unless extraordinary and unforeseen conditions should supervene the time allowed was sufficient and extensions could only be granted on recommendation of engineer in charge affirmed by Chief of Engineers; a submerged forest which had not been discovered by the contractor prior to commencement of the work, although the contract placed the burden on him to do so, was encountered and so impeded progress as to cause delay for which the Government deducted as liquidated damages the amount specified in the contract. In a suit to recover that amount *held:*

The provision in the contract that the time was sufficient unless extraordinary conditions should supervene does not amount to a promise for extension if such conditions do supervene.

The extent of promise for an extension under the contract was confined to what the engineer in charge would grant with the sanction of the Chief Engineer; nor was the Chief Engineer bound, in the absence of fraud, to give his sanction to a recommendation of the engineer in charge for an extension.

For extraordinary conditions to supervene in such a case they must come into being after commencement of the work, and not merely be thereafter discovered to have existed and still to exist.

The provision in the contract for liquidation of damages at $20 per day contains no element of deception or exorbitance and the contractor cannot escape the terms agreed upon.

THE facts, which involve the construction of a contract with the United States for excavation of a channel, and the liability of the contractor for damages for delay in completion, are stated in the opinion.

Mr. C. C. Calhoun, with whom *Mr. D. B. Henderson* and *Mr. J. Barrett Carter* were on the brief, for appellant:

The submerged forest encountered as it was entitled appellant to an extension of time. Appellant is also entitled to such extension under paragraph 16 of the specifications, and Article V of the contract. Provisions of contract and specifications relieving contractor from performance are equivalent to the phrase "Act of God" as defined in 1 Cyc. 758, and Words and Phrases, 118. There is no inconsistency between paragraph 16 of the specifications and Article V of contract. The construction given by arbitrator named in contract should govern. The sanction of the Chief Engineer is a ministerial and not a judicial act. The construction given by parties to the contract should control.

The first paragraph of Article V of the contract contemplated a penalty and not liquidated damages. There is a distinction between liquidated damages and penalty.

In support of these contentions see *Barlow* v. *United States*, 35 Ct. Cls. 514; *S. C.*, 184 U. S. 123; *Chicago & Santa Fe R. R.* v. *Price*, 138 U. S. 187; *Dist. of Col.* v. *Gallaher*, 124 U. S. 505; *Garrison* v. *United States*, 7 Wall. 688; *Gibbons* v. *United States*, 109 U. S. 200; *Kihlberg* v. *United States*, 97 U. S. 398; *New Jersey Foundry* v. *United States*, 44 Ct. Cls. 570; 1 Sedgwick on Damages, 9th Ed., p. 779; *Stewart* v. *Stone*, 14 L. R. A. 215, note; *Sun Printing Assn.* v. *Moore*, 183 U. S. 642; *Tayloe* v. *Sandiford*, 7 Wheat. 13; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105; *United States* v. *Gleason*, 175 U. S. 589; *Van Buren* v. *Digges*, 11 How. 461; *Williams* v. *Grant*, 1 Connecticut, 487.

Mr. Assistant Attorney General Huston Thompson for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims dismissing the claimant's petition upon demurrer. On August 15, 1908, the claimant made a contract with Captain Brown of the Engineers, acting for the United States, to excavate a channel from Beaufort Inlet to Pamlico Sound through Core and Adams Creeks in conformity with specifications made part of the contract. It was approved on September 10 and required the work to be begun within forty-five days after date of notification of approval, September 14, and to be completed within eighteen months. The work not having been finished on time $7,320 of the agreed compensation was withheld as liquidated damages and $210.50 as additional costs of superintendence and inspection, $7,530.50 in all, for which sum this suit is brought.

The petition alleges that after getting through Core Creek to and through the headwaters of Adams Creek to a point on tide water about five miles from its mouth, where for a mile and a half it averages more than 1200 feet wide and for the next three miles and a half 2500 feet, the stumps and roots of a submerged forest were encountered at about eight feet below the bottom of the water, which made it impossible to do the work with the ordinary machinery and in the ordinary way, or to finish the work by the time agreed. It is alleged that the forest was submerged by some abnormal force and violence of the elements, and that it could not have been discovered by the ordinary methods of inspection and was not discovered in fact, although the claimant and others and the Government had exercised every known precaution and had made exhaustive examinations with the utmost care and skill. The petition sets up that this was a prevention 'by abnormal force and violence of the elements' within

the contract and that the claimant also was entitled to an allowance of time under a clause in the specifications stating that the time is considered sufficient 'unless extraordinary and unforeseeable conditions supervene.' It also sets up that an extension of time was recommended by Captain Brown although disallowed by the Chief Engineer. Finally the petition alleges that it was known by the Government officials when the contract was made that the portion of the canal excavated by the claimant could not be used to any practical extent for commercial purposes until adjoining portions of a proposed line were completed and that the additional work was not provided for or seriously contemplated within the time of the claimant's work. It is concluded that although the contract purports to provide for liquidated damages fixed at $20 a day, yet in the circumstances it really imposed a penalty and that the Government has no right to retain the sum.

As has been implied already the contract agreed "that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty (20) dollars for each division for each and every day the party of the second part shall delay in the completion of this contract" and the claimant agrees to pay that amount 'as liquidated damages, and not by way of penalty.' It is agreed further that the United States shall have the right to recover all costs of inspection and superintendence incurred by it during the period of delay, and that it may

retain all the above-mentioned sums from any moneys falling due under the contract.

There is a proviso that if the claimants 'shall by strikes, epidemics, local or state quarantine restrictions, or by the abnormal force or violence of the elements, be actually prevented from completing the work . . . at the time agreed upon' without contributory negligence on his part 'such additional time may, with the prior sanction of the Chief of Engineers, be allowed him' . . . 'as, in the judgment of the party of the first part, or his successor, shall be just and reasonable.' As we have intimated, the specifications also state that the time allowed is considered sufficient 'unless extraordinary and unforeseeable conditions supervene.' The claimant further thinks that he finds some support for his argument in a provision that 'solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered their removal, if required by the engineer, will be done under special agreement and paid for as extra work.' On the other hand the claimant was required to remove all trees and "The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section, . . . the cost of same being included in the unit price bid for excavation." The claimant invokes a provision that the engineer's decision as to quality, quantity and interpretation of the specifications shall be final; and this ends the statement of his case.

It is hopeless to argue against the provisions that we have recited, and the further express warning that each bidder 'is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated,' except as above recited with regard to solid rock, &c. It is suggested that the special agreement to be made for the removal of 'such materials'

means materials of similar kind; but the phrase cannot be stretched to cover roots. The statement in the specifications that the time is sufficient unless extraordinary conditions supervene does not promise an extension if such conditions do supervene. The extent of this promise is found in the words of the contract providing for the allowance of such additional time as with the sanction of the Chief Engineer the engineer in charge may think reasonable. Those words tend also to support the contention of the Government that 'supervene' means come into being in the course of the work, as in the case of strikes, epidemics, &c., and not merely be discovered to have existed and still to exist. We may add that the averment hazarded that the submergence of the forest was due to abnormal force of the elements is too obvious an attempt to pervert the meaning of the proviso as to being actually prevented by such force from completing the work, to require analysis. But it is enough to say that any extension depended on the sanction of the Chief of Engineers and that that sanction was denied. It is said that the engineer in charge construed the contract differently as he recommended an allowance of time. But the ground of the recommendation does not appear to have been an incorrect interpretation of the contract, on the contrary it is alleged that the liquidated damages were withheld by Captain Brown; and if his interpretation had been wrong, it is hard to see how it would have bound his superior on whose sanction the recommendation depended for effect. The suggestion that it was the duty of the Chief Engineer to give his sanction in the absence of fraud finds no support in the words used. The claimant must abide by the words. *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164.

The allegations by which the claimant attempts to avoid his contract making time of the essence, that the damages were difficult to prove and that therefore they should be fixed at twenty dollars a day, are too specula-

tive to do more than emphasize the necessity for the liquidation. There is no element of deception or exorbitance and although the case seems a hard one we see no ground upon which the claimant can escape from the terms to which he has agreed. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

Judgment affirmed.

GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY *v.* BLISH MILLING COMPANY.

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

No. 292. Argued March 15, 1916.—Decided May 8, 1916.

The bill of lading of an interstate shipment issued by the initial carrier contained a stipulation that claims for failure to make delivery must be made in writing to the carrier at point of delivery within a specified period otherwise carrier not liable; there was a delivery, but it was made contrary to instructions, and the shipper telegraphed the terminal carrier that it made claim for entire value at invoice price. *Held* that:

Under the Carmack Amendment the connecting carrier was not relieved from liability, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and fixes the obligations of all participating carriers to the extent that its terms are applicable and valid.

The question of proper construction of the bill of lading of an interstate shipment is a Federal question.

Multitudinous transactions of a carrier justify the requirement of written notice of misdeliveries of merchandise and claims against it even with respect to its own operations.

The Carmack Amendment casts upon the initial carrier responsibility with respect to the entire transportation; and in case of misdelivery by the terminal carrier the initial carrier is liable.

A provision in an interstate bill of lading is to be construed

the same as to the connecting or terminal carrier as it is to be construed as to the initial carrier, as the obligations of the latter are measured by the terms of the bill of lading.

Where the bill of lading of an interstate shipment requires notice of claim for misdelivery, such notice must be given before action can be brought against the terminal carrier making the misdelivery complained of.

The effect of such stipulation cannot be escaped by form of action; and if a suit cannot be maintained for damages against the delivering carrier without the required notice, it cannot be maintained for conversion.

Parties to the contract of an interstate shipment by rail made pursuant to the Act to Regulate Commerce cannot waive its terms; nor can the carrier by its conduct give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations.

Where a provision in a bill of lading for an interstate shipment is applicable and valid effect must be given thereto.

The stipulation in this case was satisfied by the telegram from the shipper to the terminal carrier, it appearing that there was no such variance from a claim for value of the shipment as to be misleading and no prejudice resulted; such a stipulation being addressed to a practical exigency must be construed in a practical way and does not require a particular form of notice.

15 Ga. App. 142, affirmed.

THE facts, which involve the rights and duties of carriers and shippers under the Carmack Amendment, are stated in the opinion.

Mr. T. S. Hawes, with whom *Mr. Alexander Akerman* and *Mr. Charles Akerman* were on the brief, for plaintiff in error.

Mr. A. L. Miller and *Mr. E. M. Donalson* for defendant in error submitted:

There was no Federal question construed or decided by the Georgia court.

Even though a Federal question had been presented

and construed and a construction of the same were necessary to determine the cause, the remedy was not exclusively against the initial carrier; the contract of carriage did not provide that the shipper must give a written notice to the carrier who abandoned the contract and converted the property, but only provided that this written notice must be given in the event of loss or damage in order to recover; though a written claim were demanded, in order to recover for a conversion, such claim was made within a few days after the railway company converted the flour.

Mr. Justice Hughes delivered the opinion of the court.

The Blish Milling Company brought this action in trover against the Georgia, Florida & Alabama Railway Company and recovered judgment which was affirmed by the Court of Appeals of Georgia. 15 Ga. App. 142. The facts are these:

On May 13, 1910, the Blish Milling Company shipped from Seymour, Indiana, to Bainbridge, Georgia, a carload of flour consigned to its own order with direction to notify Draper-Garrett Grocery Company at Bainbridge. The bill of lading was issued by the Baltimore & Ohio Southwestern Railroad Company. The shipper's sight draft upon the Draper-Garrett Grocery Company, for $1,109.89 covering the price of the flour with a carrying charge, was attached to the bill of lading and forwarded to a bank in Bainbridge for collection. The flour was transferred to another car by the Central of Georgia Railway Company, a connecting carrier, and reached Bainbridge on June 2, 1910, over the line of the Georgia, Florida & Alabama Railway Company, the plaintiff in error, in accordance with routing. The plaintiff in error, without requiring payment of the draft and surrender of the bill

of lading (which were ultimately returned to the Blish Milling Company), delivered the car to the Draper-Garrett Grocery Company immediately on its arrival by placing it on the side track of that company. In the course of unloading the grocery company discovered that some of the flour was wet and thereupon reloaded the part removed and returned the flour to the plaintiff in error. The subsequent course of events is thus stated by the Court of Appeals (*Id.*, pp. 144, 145):

"The railway company" (that is, the plaintiff in error) "retook possession of the car and unloaded it, and in a few days sold, as perishable property, a part of the flour alleged to be damaged, and on December 23, 1910, sold the remainder. On June 3, 1910, after the grocery company had turned the flour back to the railway company, B. C. Prince, traffic manager of the Georgia, Florida & Alabama Railway Company, telegraphed to the Blish Milling Company as follows: 'Flour order notify Draper-Garrett Grocery Company refused account damage. Hold at your risk and expense. Advise disposition.' On the next day the milling company replied by telegraphing to Prince, 'Sending our representative there. What is nature of damage?' To this Prince replied: 'Flour transferred in route. Slight damage by water, apparently rough handling. When will your representative reach Bainbridge?' The Blish Milling Company replied that their man would be there that night or the next day. On June 7 (after the milling company's representative had reached Bainbridge and conferred with the agents of the railway company and with the grocery company) the milling company sent a final telegram, saying, 'We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we can not handle.' It appears, from the evidence of Mr. Draper, that the price of flour declined after his order was given and before the flour reached Bainbridge. There

is conflict in the evidence as to a tender of the flour by the railway company to the milling company's representative. According to some of the testimony, about 18 barrels of the flour had been sold by the railway company before the alleged tender was made, and therefore it was not within the power of the carrier to tender the shipment in its entirety." The verdict in favor of the Milling Company was for $1,084.50 from which the Court of Appeals required a deduction of the amount of the unpaid freight which was held to have been erroneously included.

With other defenses, the Railway Company pleaded that the shipper had failed to comply with the following provision of the bill of lading, issued by the initial carrier: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." This defense was overruled. The Court of Appeals stated that "so far as appears from the record, no claim was filed by the shipper," but deemed the provision to be inapplicable. *Id.*, p. 149.

There are only two questions presented here, and these are thus set forth in the brief of the plaintiff in error:

"1st. That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of Section Twenty of the Hepburn Bill.

"2nd. That under the stipulation in the bill of lading providing for the filing of claims for loss or damage the action was barred."

The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon

an interstate shipment governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act." *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 648. See *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 507, 508; *C. C. & St. L. Ry.* v. *Dettlebach*, 239 U. S. 588, 591; *Southern Railway* v. *Prescott*, 240 U. S. 632, 637; *Northern Pacific Ry.* v. *Wall*, *ante*, p. 87.

These decisions also establish that the question as to the proper construction of the bill of lading is a Federal question. The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention—specifically covers "failure to make delivery." It is said that this is not to be deemed to include a case where there was not only failure to deliver to the consignee but actual delivery to another or delivery in violation of instructions. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive,—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on

through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations.

There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 199–203; *N. Y., P. & N. R. R.* v. *Peninsula Produce Exchange*, 240 U. S. 34, 38), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation which, as defined in the Federal Act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims "in case of failure to make delivery" the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (*Kansas Southern*

Ry. v. *Carl, supra; Southern Railway* v. *Prescott, supra*); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid.

In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the state court said, "if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier." 15 Ga. App., p. 147. It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. *Chi. & Alt. R. R.* v. *Kirby*, 225 U. S. 153, 166; *Kansas Southern Ry.* v. *Carl, supra; A., T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173, 181; *Southern Ry.* v. *Prescott, supra.* We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it.

But, while this is so, we think that the plaintiff in error is not entitled to succeed in its ultimate contention under the stipulation for the reason that it appears that notice

of the claim was in fact given. It is true that in the statement made by the Court of Appeals it is said that so far as appears from the record "no claim was filed by the shipper." We must assume, however, that this was in effect a construction of the provision as requiring a more formal notice than that which was actually sent. For the court had already set forth the uncontroverted facts in detail showing that the shipper (having made an investigation in response to the communication of the traffic manager of the Railway Company) had telegraphed to the latter, on June 7, 1910, only five days after the arrival of the goods at destination, as follows: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we can not handle." In the preceding telegrams, which passed between the parties and are detailed by the state court in stating the facts, the shipment had been adequately identified, so that this final telegram taken with the others established beyond question the particular shipment to which the claim referred and was in substance the making of a claim within the meaning of the stipulation,—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim, for while it stated that the claim was for the entire contents of the car 'at invoice price' this did not constitute such a variance from the claim for the value of the flour as to be misleading; and it is plain that no prejudice resulted. Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which in itself or taken with other telegrams contained an adequate statement must be deemed to satisfy this requirement. See *Ryan* v. *United States*, 136 U. S. 68, 83; *Kleinhans* v. *Jones*,

68 Fed. Rep. 742, 745; *Godwin* v. *Francis*, L. R. 5 C. P. 295; *Queen* v. *Riley* [1896], 1 Q. B. 309, 314, 321; *Howley* v. *Whipple*, 48 N. H. 487, 488; *State* v. *Holmes*, 56 Iowa, 588, 590.

Judgment affirmed.

STOWE, TRUSTEE IN BANKRUPTCY OF HARVEY, *v.* HARVEY.

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

No. 329. Argued April 27, 28, 1916.—Decided May 8, 1916.

In this case the substantial controversy was whether a transfer made by the bankrupt to his wife of certain valuable certificates of stock was made before or after insolvency; and, notwithstanding doubts engendered by conflicting statements and questionable circumstances and the different conclusion reached by the trial court, this court agrees with the conclusion reached by the Circuit Court of Appeals that the gift was made during the period of solvency.

In California, where the bankrupt resided, title to stock may be transferred by delivery of certificates and the corporate books are not for public information.

219 Fed. Rep. 17, affirmed.

THE facts, which involve the legality of a transfer of assets made by the bankrupt more than four months prior to the filing of the petition, are stated in the opinion.

Mr. A. E. Shaw, with whom *Mr. Bert Schlesinger*, *Mr. Edwin H. Williams* and *Mr. Edward M. Cleary* were on the brief, for appellant.

Mr. Charles S. Wheeler, with whom *Mr. John F. Bowie* was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

J. Downey Harvey of San Francisco was adjudged a bankrupt November 17, 1911. Appellant having become trustee of the estate instituted this proceeding to set aside a transfer by the bankrupt to his wife—defendant in error—of certain stock in Shore Line Investment Company because made without consideration and with intent to delay and defraud his creditors. The complaint alleges that the gift was made and stock transferred in November, 1909, when it is admitted Harvey was insolvent. Mrs. Harvey maintains that her husband gave the stock and actually delivered the properly endorsed certificate to her in 1905, during all of which year his solvency is conceded. The substantial controversy throughout has been upon the question of fact thus raised.

Having heard witnesses, the trial court held the transfer was made in 1909 and rendered a decree in favor of the trustee. The Circuit Court of Appeals after a careful review of the evidence, reached a contrary conclusion. 219 Fed. Rep. 17. We are now asked to reverse its decree and sustain the trial court.

Notwithstanding doubts necessarily engendered by some conflicting statements and questionable circumstances, upon consideration of the whole record we think the decision of the Circuit Court of Appeals is correct.

Appellant also suggests (a) that the gift is void because Mrs. Harvey permitted her husband for more than four years to retain apparent title to the stock and hold himself out as its real owner; and (b) that there was no actual and continuous change of possession as required by the state statute against fraudulent conveyances. In reply to these suggestions it seems only necessary to cite *National Bank* v. *Western Pacific Ry.*, 157 California, 573, 581, which announces as settled doctrine in California

that title to stock may be transferred by delivery of certificates and corporate books are not for public information.

The judgment of the Circuit Court of Appeals is

Affirmed.

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

LANE, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. MICKADIET AND TIEBAULT.

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

No. 449. Argued April 10, 1916.—Decided May 22, 1916.

The general rule that courts have no power to interfere with the performance by the Land Department of the administrative duties devolving upon it, although they may, when the functions of the Department are at end, correct, as between proper parties, errors of law committed by the Department in such administration, *held* to be applicable in this case, as no exception exists to take it out of the rule.

Under the acts of May 8, 1906 and June 25, 1910, the Secretary of the Interior has exclusive authority and jurisdiction to determine the heirs of an allottee Indian who are entitled to succeed to the allotment made to him under the act of February 8, 1887, in case of his death during the restricted period; and this authority includes the right to reopen and review a previous administrative order on proper charges of newly discovered evidence or fraud while the property is still under administrative control.

A court has no power to issue a writ of mandamus to control the conduct of the Secretary of the Interior concerning a matter within his administrative authority.

43 App. D. C. 414, reversed.

THE facts, which involve the construction of the act of February 8, 1887, and the jurisdiction of the courts to control by mandamus the action of the Secretary of the Interior concerning an allotment thereunder, are stated in the opinion.

The Solicitor General, with whom *Mr. Robert Szold* was on the brief, for plaintiff in error:

Since the United States, the real party defendant, has not consented to be sued in this cause, it should be dismissed for want of jurisdiction.

The United States is the real party defendant. *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60.

The immunity of the United States from suit is not waived by failure to present the point in the lower court. *Carr* v. *United States*, 98 U. S. 433, 438; *Stanley* v. *Schwalby*, 162 U. S. 255, 270.

Prior to conveyance of legal title to the heirs of the Indian allottee the Secretary of the Interior has jurisdiction to reconsider a determination of heirship.

The statutory direction that the Secretary's decision shall be "final and conclusive" is addressed to the courts. *Hallowell* v. *Commons*, 239 U. S. 506; *Pearson* v. *Williams*, 202 U. S. 281.

The decided cases settle the general rule. *Brown* v. *Hitchcock*, 173 U. S. 473; *Knight* v. *Lane*, 228 U. S. 6.

In this case the legal title beyond all doubt remains in the United States. *United States* v. *Rickert*, 188 U. S. 432.

The judgment of the Secretary cannot be controlled by mandamus. The petition was premature.

The order for rehearing was not arbitrary, but within the exercise of reasonable discretion. *Jaster* v. *Currie*, 69 Nebraska, 4; *Tucker* v. *Fisk*, 154 Massachusetts, 574.

Mr. Irving F. Baxter, with whom *Mr. Norris Brown*, *Mr. Edward F. Colladay* and *Mr. Howard Saxton* were on the brief, for the defendant in error:

There is no disagreement as to the facts. The petition of the relators and the return thereto are in substantial accord. The demurrer to the return and the assignments of error appearing in the record present, in substance, the following propositions of law:

The Secretary of the Interior is without jurisdiction to annul a decision of his predecessor relating to property rights because such decision is a judicial act and can only be reviewed, if reviewable at all, by the courts.

The Secretary of the Interior is without power under the act of June 25, 1910, to review, vacate or ignore the decree of adoption entered by the County Court.

The decree of adoption of the County Court, acting within its jurisdiction, from which no appeal was taken, is not subject to collateral attack, and the Secretary of the Interior is without power or jurisdiction to annul, modify, vacate or ignore said decree.

Harrison Tebo, who made the application to have the decision of the Secretary of the Interior heretofore rendered in favor of these relators reviewed and vacated, together with all other blood relatives of the deceased, are estopped in law to question the validity of said decree of adoption, said decree being final and binding upon deceased in his lifetime and upon his heirs after his death.

The petition of the relators to the Secretary of the Interior under the provisions of the act of May 8, 1906, to issue to them patents in fee simple presented but one question within the jurisdiction of the Secretary to decide, namely, whether said applicants were capable of managing their own affairs and were hence entitled to such patents. Said petition did not, and could not, raise any issue as to their heirship.

Mr. Charles J. Kappler and *Mr. Harry L. Keefe*, by leave of the court, filed a brief as *amici curiæ*.

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

The relators, who are defendants in error, invoked the aid of the trial court to control by mandamus the action of the Secretary of the Interior concerning an allotment in severalty of land made to an Indian in pursuance of the authority conferred by the act of February 8, 1887 (c. 119, 24 Stat. 388), entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations." Under the facts stated in his return to the alternative rule the Secretary, asserting that the land embraced by the allotment in question was held in trust by the United States for the benefit of the allottee and that the official action sought to be prohibited was not subject to judicial control because it was one of exclusive administrative authority, denied that there was a right to grant the relief prayed. The return was demurred to as stating no ground for withholding the relief. The trial court overruled the demurrer and discharged the rule but the court below reversed and, holding that the Secretary had no power to take the action which it was alleged he intended to take concerning the allotment in question, awarded the mandamus prayed (43 App. D. C. 414), and the correctness of this ruling is the question now to be decided.

The facts are these: Tiebault was a Winnebago Indian living on the tribal reservation in Nebraska and in August, 1887, received an allotment in severalty of the tribal land to which he was entitled made in virtue of the act of 1887. That act after conferring authority upon the Secretary of the Interior to make allotments of tribal lands as therein specified, directed that official to issue

to the allottees patents, which "shall be of legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, to his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of such period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period." (Section 5.)

About ten years after the allotment Tiebault having continued to reside on the land and to enjoy the same conformably to the statute, began proceedings in the court of Thurston County, Nebraska, for the adoption as his children of the two relators, who were also Winnebago Indians, and a decree of adoption as prayed was entered. When ten years after the adoption Tiebault died without surviving issue, the adopted children, asserting rights as his sole heirs, sought the possession of the land embraced by the allotment and of some other land which had also been covered by an allotment made to a daughter of Tiebault, who died before him without issue and which land he had therefore inherited. This claim of heirship was disputed by nephews and nieces of Tiebault claiming to be his next of kin. The result was the commencement of proceedings in the District Court of the United States for the District of Nebraska on the part of the adopted children to obtain a recognition of their right of heirship, the nephews and nieces being among the parties defendant. Considerable testimony was taken, but no decree was entered because by the act of May 8, 1906 (c. 2348, 34 Stat. 182) and the act of June 25, 1910 (chap. 431, section 1, 36 Stat. 855) it resulted that the District Court was

without power to proceed further, exclusive jurisdiction over the subject having been conferred by the acts in question upon the Secretary of the Interior. The pertinent provisions of the act last referred to are in the margin.[1]

The theatre of the controversy was therefore by the assent of the parties and of the United States transferred to the Interior Department where testimony was begun before an examiner, and the Secretary of the Interior, in June, 1913, entered an order in favor of the adopted children, holding them to be the lawful heirs of Tiebault and entitled under the statute to the ownership and enjoyment of the allotted lands.

The Secretary having been given authority both by the sixth section of the act of 1906 and by the provisions of the act of 1910 which we have quoted to reduce the twenty-five year period, the recognized heirs applied for an order terminating the trust period and for the issue to them of a fee simple patent. This application was opposed by the next of kin who had been parties to the previous proceeding as to heirship and they also asked

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[1] "That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor."

to be permitted to re-open the controversy as to the validity of the adoption and the heirship resulting from it on the ground that as the result of newly discovered evidence they desired to show that the Nebraska decree of adoption and the previous administrative order had been obtained by fraud. Under this request it would seem that considerable testimony was taken, but it was never acted upon because the recognized heirs, the relators, disputed the authority of the Secretary to re-open the controversy on the ground that the previous departmental order recognizing them as heirs was not subject to be re-opened or reviewed and in any event that the decree of adoption of the Nebraska court was beyond the competency of the Secretary to review or set aside even upon the charges of fraud which were made. Without passing upon the merits involved in the claim to re-open, or expressing any opinion concerning the conclusiveness of the Nebraska decree, the Secretary granted the application to re-open and ordered the issues thereon to stand for future consideration. Thereupon the petition for mandamus was filed, to which a return was made alleging the facts to be as we have stated them, resulting in the judgment of the court below awarding the mandamus which is before us for review.

It is undoubted that the fee simple title to the land embraced by the allotment had not passed from the United States and that, as expressly stated in the granting act, the land was held in trust by the United States for the benefit of the allottees to await the expiration of the trust period fixed by law when the duty on the part of the United States of conveying the fee of the land would arise. It is equally undoubted under these conditions that the land was under the control in an administrative sense of the Land Department for the purpose of carrying out the act of Congress. As there is no dispute, and could be none, concerning the general rule that courts have no

power to interfere with the performance by the Land Department of the administrative duties devolving upon it, however much they may when the functions of that Department are at an end correct as between proper parties errors of law committed in the administration of the land laws by the Department, it must follow unless it be that this case by some exception is taken out of the general rule that there was no power in the court below to control the action of the Secretary of the Interior and reversal therefore must follow. *United States* v. *Schurz*, 102 U. S. 378, 396; *Brown* v. *Hitchcock*, 173 U. S. 473; *Knight* v. *Lane*, 228 U. S. 6. But as the court below rested its conclusion of power solely upon the existence of an assumed exception to the general rule, and as the correctness of that view is the sole ground relied upon to sustain the judgment, that question is the single subject for consideration and we come to dispose of it.

The exception rests upon two considerations: (a) the want of power of the Secretary to re-open or reconsider the prior administrative order recognizing the relators as the heirs of the deceased allottee,—an absence of authority which it is deemed resulted from the provisions of the act of 1910 which we have previously quoted in the margin; and (b) the further absence of all authority of the Secretary to disregard the decree of adoption of the Nebraska court by collaterally questioning the same in order to deprive of the status of adoption which that decree it is insisted had conclusively fixed as against all the world under the law of Nebraska.

(a) The first proceeds upon the theory that the provision of the act of 1910 to the effect that the decision of the Secretary recognizing the heirs of a deceased allottee "shall be final and conclusive" caused the prior order of the Secretary recognizing the relators as heirs to completely exhaust his power and therefore to give a character of absolute finality to such order even although the prop-

erty to which it related was yet in the administrative control of the Department because of the trust imposed by the law of the United States until the expiration of the statutory period. But we are of opinion that this is a mistaken view. The words "final and conclusive" describing the power given to the Secretary must be taken as conferring and not as limiting or destroying that authority. In other words they must be treated as absolutely excluding the right to review in the courts, as had hitherto been the case under the act of 1887, the question of fact as to who were the heirs of an allottee, thereby causing that question to become one within the final and conclusive competency of the administrative authority. As it is obvious that the right to review on proper charges of newly discovered evidence or fraud a previous administrative order while the property to which it related was under administrative control, was of the very essence of administrative authority (*Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589), it must follow that the construction upheld would not only deprive the Secretary of the final and conclusive authority which the statute in its context contemplated he should have, but would indeed render the administrative power conferred wholly inadequate for the purpose intended by the statute. And it must be further apparent that the inadequacy of authority which the proposition if accepted would bring about could not be supplied, since it would come to pass that although the property was yet in the control of the United States to carry out the trust, there would be an absence of all power both in the administrative and judicial tribunals to correct an order once rendered, however complete might be the proof of the fraud which had procured it.

But it is said that the purpose of the statute was to give the recognized heir a status which would entitle him to enjoy the allotted land and not to leave all his rights of

enjoyment open to changing decisions which might be made during the long period of the trust term and thus virtually destroy the right of property in favor of the heir which it was the obvious purpose of the statute to protect. But in last analysis this is a mere argument seeking to destroy a lawful power by the suggestion of a possible abuse. We say this because although it be conceded for the sake of the argument only that an exercise of power which was plainly an abuse of discretion depriving of the right which the statute plainly gave would be subject to correction by the courts, such concession would be here without influence since there is no basis whatever upon which to rest an assumption of abuse of discretion.

(b) So far as the Nebraska decree is concerned the mistake upon which the proposition proceeds is obvious since, conceding the premise upon which it must rest to be well founded, it affords no ground for preventing by judicial action the exercise by the Secretary of his power to determine the legal heirs and in doing so to ascertain the existence of the Nebraska judgment, the jurisdiction *ratione materiæ* of the court by which it was rendered and the legal effect which it was entitled to receive under the law of Nebraska.

There was a suggestion in argument, which it was conceded was not made in the courts below, of an absolute want of jurisdiction upon the theory that as the title of the allotted property was yet in the United States for the purposes of the trust, there could in any event be no jurisdiction over the cause, since in substance and effect it was a suit against the United States. As, however, the considerations involved in this proposition were absolutely coincident with those required to be taken into view in order to determine the power of the Secretary, we have not deemed it necessary to specially consider the subject.

It follows from what we have said that the court below was without jurisdiction to control the conduct of the

Secretary concerning a matter within the administrative authority of that officer and therefore that the mandamus was wrongfully allowed and the judgment awarding it must be and it is reversed and the case remanded with directions to affirm the judgment of the Supreme Court of the District of Columbia dismissing the petition for a writ of mandamus.

Reversed.

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

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY *v.* BOMBOLIS, ADMINISTRATOR OF NANOS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 478. Argued April 19, 20, 1916.—Decided May 22, 1916.

The Seventh Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict.

The first ten Amendments are not concerned with state action and deal only with Federal action.

The Seventh Amendment applies only to proceedings in courts of the United States; it does not in any manner govern or regulate trials by jury in state courts, nor does it apply to an action brought in the state court under the Federal Employers' Liability Act.

A verdict in a state court in an action under the Employers' Liability Act, which is not unanimous, but which is legal under the law of the State, is not illegal as violating the Seventh Amendment.

While a state court may enforce a right created by a Federal statute,

such court does not, while performing that duty, derive its authority as a court from the United States but from the State, and the Seventh Amendment does not apply to it.

128 Minnesota, 112, affirmed.

THE facts, which involve the validity of a verdict and judgment under the Employers' Liability Act and the application and effect of the Seventh Amendment in suits in the state courts under that Act, are stated in the opinion.

Mr. Frederick M. Miner, with whom *Mr. William H. Bremner* was on the brief, for plaintiff in error: [1]

The right of trial by jury which is secured to all persons subject to the jurisdiction of the United States, by the pro-

[1] The question of the Seventh Amendment as affecting Federal Employers' Liability cases in state courts was involved in several cases which were simultaneously argued on April 19, 20, 1916 (see pp. 218, 219, *post*), and in which a joint brief was filed for the various plaintiffs in error by Mr. Jno. T. Shelby, Mr. E. L. Worthington, Mr. W. D. Cochran, Mr. Le Wright Browning, Mr. David H. Leake and Mr. Walter Leake for Chesapeake & Ohio Railway, Mr. W. F. Evans for St. Louis & San Francisco Railroad, Mr. William H. Bremner and Mr. Frederick M. Miner for Minneapolis & St. Louis Railway, Mr. Benjamin D. Warfield for Louisville & Nashville Railroad, and a joint brief was filed for the various defendants in error by Mr. Ed. C. O'Rear and Mr. B. G. Williams for Kelly, Adm'x, Mr. C. B. Stuart, Mr. A. C. Cruce and Mr. M. K. Cruce for Brown, Mr. R. S. Dinkle and Mr. George B. Martin for Gainey, Adm'r, Mr. George B. Leonard for Bombolis, Adm'r, Mr. B. F. Procter, Mr. George H. Lamar, Mr. C. U. McElroy and Mr. D. W. Wright for Stewart's Adm'r, Mr. C. W. Allen and Mr. H. W. Walsh for Carnahan.

The cases were orally argued by Mr. Benjamin D. Warfeld, Mr. David H. Leake and Mr. Frederick M. Miner for the various plaintiffs in error, and by Mr. Edward C. O'Rear and Mr. George H. Lamar for the various defendants in error.

These cases are as follows: *Minneapolis & St. Louis R. R.* v. *Bombolis; St. Louis & San Franciso Railroad* v. *Brown*, *post*, p. 223; *Chesapeake & Ohio Railway* v. *Carnahan*, *post*, p. 241; *Louisville & Nashville Railroad* v. *Stewart*, *post*, p. 261; *Chesapeake & Ohio Railway* v. *Kelly's Administrator*, *post*, p. 000; *Chesapeake & Ohio Railway* v. *Gainey*, *post*, p. 000.

visions of the Seventh Amendment, means a jury of twelve men who must, in finding facts, act unanimously. *Am. Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707; *Capital Traction Co.* v. *Hof*, 174 U. S. 1.

The "right," which is secured by the Seventh Amendment is not a matter of procedure but of substance, and one possessing such right cannot be deprived of it by any means short of an amendment to the Constitution. Cases, *supra*, and *Walker* v. *New Mexico &c. R. R.*, 165 U. S. 593; *Slocum* v. *N. Y. L. Ins. Co.*, 228 U. S. 364.

The Seventh Amendment is a limitation upon all of the powers delegated by the Constitution, to those agencies which comprise the government of the United States; therefore, not only the courts but the legislature of the United States is limited by this Amendment, and the right secured thereby enters into and controls all suits founded upon legislation enacted by Congress in whatever court the same may be brought, where such court sits and exercises power within the domain of the United States. Cases, *supra*, and *Walker* v. *Southern P. R. Co.*, 165 U. S. 595; *Bauman* v. *Ross*, 167 U. S. 592; *Thompson* v. *Utah*, 170 U. S. 343, 350; *Guthrie Bank* v. *Guthrie*, 173 U. S. 528–537; *Maxwell* v. *Dow*, 176 U. S. 581, 596; *Black* v. *Jackson*, 177 U. S. 349; *Downes* v. *Bidwell*, 182 U. S. 244, 270; *Rassmussen* v. *United States*, 197 U. S. 516, 526; *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Cent. Vermont R. R.* v. *White*, 238 U. S. 507; *Atl. Coast Line* v. *Burnette*, 239 U. S. 199.

A state court can derive no authority from the power which creates it to adjudicate controversies based upon the Federal act. *Ableman* v. *Booth*, 21 How. 506; *Levin* v. *United States*, 128 Fed. Rep. 826.

The principles of law comprised within the term comity, by which courts entertain controversies involving rights created by sovereign power, other than that which created such courts, do not afford the basis or ground upon which

state courts may exercise their powers in controversies founded upon the Federal act. *Claflin* v. *Houseman*, 93 U. S. 130; *Second Employers' Liability Cases*, 223 U. S. 1.

The dictum, to the effect that the principle of comity by analogy may be involved in this question, is inadmissible, and with due respect, seems to involve a contradiction. *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. Rep. 893.

When "comity" is the basis of judicial determination the court extending the comity out of favor and good will, extends to foreign laws an effect they would not otherwise have. *Stowe* v. *Belfast Bank*, 92 Fed. Rep. 90, 96. But its obligation is not imperative. *Mast, Foos & Co.* v. *Stover Mfg.*, 177 U. S. 485. See also *Hilton* v. *Guyot*, 159 U. S. 113; *People* v. *Martin*, 175 N. Y. 315.

Congress in the legitimate exercise of the power conferred upon it may withhold jurisdiction to try causes founded upon laws passed by it, or can confer exclusive jurisdiction with respect to such matters upon the Federal courts. *Claflin* v. *Houseman*, 93 U. S. 130; *The Moses Taylor*, 4 Wall. 411.

Congress may not, however, withhold from people subject to the jurisdiction of the United States, and whose rights are controlled by the Federal Employers' Liability Act, the protection offered by the Seventh Amendment.

State courts in deciding controversies founded upon this act are applying the judicial power of the United States, and if it be held that the Seventh Amendment is a limitation only upon that power, state courts could not enforce such power apart from the limitation of the said amendment. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Cohens* v. *Virginia*, 6 Wheat. 414.

The judicial power of the United States is co-extensive with its legislative power. *Cohens* v. *Virginia*, *supra*.

If a case is not within the judicial power of the United States an appeal would not lie to this court, for it is self-evident that one sovereign power cannot exercise super-

vision over the judiciary of another. *Martin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *Virginia, supra.*

A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of procedure. *Norfolk &c. R. R.* v. *Ferebee*, 238 U. S. 269. Nor can a right protected by the Constitution of the United States be lessened or destroyed by a state court, under the guise of procedure.

Mr. George H. Lamar, with whom *Mr. B. F. Proctor*, *Mr. C. U. McElroy* and *Mr. D. W. Wright* were on the brief, for defendant in error.

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

Counting upon the Employers' Liability Act of 1908 (c. 149, 35 Stat. 65) as amended by the act of 1910 (c. 143, 36 Stat. 291), the defendant in error sued in a state court to recover for the loss resulting from the death of Nanos, his intestate, alleged to have been occasioned by the negligence of the plaintiff in error while he, Nanos, was in its employ and engaged in interstate commerce.

Whatever may have been the controversies in the trial court prior to the verdict of the jury in favor of the plaintiff and the contentions which were unsuccessfully urged in the court below to secure a reversal of the judgment entered thereon, on this writ of error they have all but one been abandoned and hence have all but one become negligible. As the one question here remaining was also involved in five other cases pending under the Employers' Liability Act on writs of error to the courts of last resort of Virginia, Kentucky and Oklahoma, those cases and this were argued together. As the other cases however involve additional questions, we dispose separately of this case in order to decide in this the one question which is common to them all and thus enable the other cases,

if we deem it is necessary to do so, to be treated in separate opinions.

By the constitution and laws of Minnesota in civil causes after a case has been under submission to a jury for a period of twelve hours without a unanimous verdict, five-sixths of the jury are authorized to reach a verdict which is entitled to the legal effect of a unanimous verdict at common law. When in the trial of this case the court instructed the jury as to their right to render a verdict under such circumstances, the defendant company objected on the ground that as the cause of action against it arose under the Federal Employers' Liability Act—in other words, was Federal in character—the defendant was by the Seventh Amendment to the Constitution of the United States entitled to have its liability determined by a jury constituted and reaching its conclusion according to the course of the common law, and hence to apply the state statute would be repugnant to the Seventh Amendment. This objection which was overruled and excepted to was assigned as error in the court below, was there adversely disposed of (128 Minnesota, 112), and the alleged resulting error concerning such action is the one question which we have said is now urged for reversal.

It has been so long and so conclusively settled that the Seventh Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict (*American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707; *Capital Traction Co.* v. *Hof*, 174 U. S. 1), that it is not now open in the slightest to question that if the requirements of that Amendment applied to the action of the State of Minnesota in adopting the statute concerning a less than unanimous verdict or controlled the state court in enforcing that statute in the trial which is under review, both the statute and the action of the court were void because of repugnancy to the Constitution of the United States. The one

question to be decided is therefore reduced to this: Did the Seventh Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the State as to what was necessary to constitute a verdict?

Two propositions as to the operation and effect of the Seventh Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with Federal action. We select from a multitude of cases those which we deem to be leading. *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410, 434; *Twitchell* v. *Commonwealth*, 7 Wall. 321; *Brown* v. *New Jersey*, 175 U. S. 172, 174; *Twining* v. *New Jersey*, 211 U. S. 78, 93. And, as a necessary corollary, (b) that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Livingston* v. *Moore*, 7 Pet. 469, 552; *The Justices* v. *Murray*, 9 Wall. 274; *Edwards* v. *Elliott*, 21 Wall. 532; *Walker* v. *Sauvinet*, 92 U. S. 90; *Pearson* v. *Yewdall*, 95 U. S. 294. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning. Doubtless it was

this view of the contention which led the Supreme Court of Minnesota in this case and the courts of last resort of the other States in the cases which were argued with this to coincide in opinion as to the entire want of foundation for the proposition relied upon, and in the conclusion that to advance it was virtually to attempt to question the entire course of judicial ruling and legislative practice both state and National which had prevailed from the commencement. And it was of course presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts. Indeed, it may not be doubted that it must have been the same point of view which has caused it to come to pass that during the number of years which have elapsed since the enactment of the Employers' Liability Act and the Safety Appliance Act and in the large number of cases which have been tried in state courts growing out of the rights conferred by those acts, the judgments in many of such cases having been here reviewed, it never entered the mind of anyone to suggest the new and strange view concerning the significance and operation of the Seventh Amendment which was urged in this case and the cases which were argued with it.

Under these circumstances it would be sufficient to leave the unsoundness of the proposition to the demonstration to result from the application of the previous authoritative rulings on the subject and the force of the reasoning inherently considered upon which they were based, as also upon its convincing power so aptly portrayed by the opinions of the courts below in this and the other cases which we have said were argued along with this. *Ches. & Ohio Ry.* v. *Carnahan*, a Virginia case; *Ches. & Ohio*

Ry. v. *Kelly*, 160 Kentucky, 296; 161 Kentucky, 655; *Louis & Nash. R. R.* v. *Stewart*, 163 Kentucky, 823; *St. Louis & San Fran. R. R.* v. *Brown*, an Oklahoma case. (See note, p. 212, *ante*.) In view, however, of the grave misconception of the very fundamentals of our constitutional system of government which is involved in the proposition relied upon and the arguments seeking to maintain it, and the misapplication of the adjudged cases upon which the arguments rest, while not implying that the question is an open one, we nevertheless notice a few of the principal propositions relied upon.

1. It is true as pointed out in *Walker* v. *New Mexico & S. P. R. R.*, 165 U. S. 593, and in *Am. Publishing Co.* v. *Fisher*, 166 U. S. 464, that the right to jury trial which the Seventh Amendment secures is a substantial one in that it exacts a substantial compliance with the common-law standard as to what constitutes a jury. But this truth has not the slightest tendency to support the contention that the substantial right secured extends to, and is operative in, a field to which it is not applicable and with which it is not concerned. It is also true, as pointed out in the cases just cited, that although territorial courts of the United States are not constitutional courts, nevertheless as they are courts created by Congress and exercise jurisdiction alone by virtue of power conferred by the law of the United States, the provisions of the Seventh Amendment are applicable in such courts. But this affords no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law, in the teeth of the express and settled doctrine that the Amendment does not relate to proceedings in such courts.

2. The proposition that as the Seventh Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress and regulate the enforcement of

such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it.

Indeed, the truth of this view and the profound error involved in the contention relied upon is aptly shown by the further propositions advanced in argument and based upon the premise insisted upon. Thus, it is urged that if the limitation of the Amendment applies to Congress so as to prevent that body from creating a court and giving it power to act free from the restraints of the Amendment, it must also apply, unless the substance is to be disregarded and the shadow be made controlling, to the power of Congress to create a right and leave the power to enforce it in a forum to which the constitutional limitation is not applicable. But this again enlarges the Amendment by causing it not merely to put a limitation upon the power of Congress as to the courts, constitutional or otherwise, which it deems fit to create, but to engraft upon the power of Congress a limitation as to every right of every character and nature which it may create, or, what is equivalent thereto, to cast upon Congress the duty of subjecting every right created by it to a limitation that such right shall not be susceptible of being enforced in any court whatever, whether created by Congress or not, unless the court enforcing the right becomes bound by the restriction which the Amendment establishes. It is

true that the argument does not squarely face the contention to which it reduces itself since it is conceded that rights conferred by Congress, as in this case, may be enforced in state courts; but it is said this can only be provided such courts in enforcing the Federal right are to be treated as Federal courts and be subjected *pro hac vice* to the limitations of the Seventh Amendment. And of course if this principle were well founded, the converse would also be the case, and both Federal and state courts would by fluctuating hybridization be bereft of all real, independent existence. That is to say, whether they should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering.

But here again the error of the proposition is completely demonstrated by previous adjudications. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330; *Houston* v. *Moore*, 5 Wheat. 1, 27–28; *Ex parte McNiel*, 13 Wall. 236, 243; *Claflin* v. *Houseman*, 93 U. S. 130; *Robertson* v. *Baldwin*, 165 U. S. 275; *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1, 55–59. Moreover the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests, that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the State or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, State or nation, creating them. This principle was made the basis of the first Federal Judiciary Act and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legisla-

tive enactment, state or national. In fact this theory and practice is but an expression of the principles underlying the Constitution and which cause the governments and courts of both the Nation and the several States not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them. And it is a forgetfulness of this truth which doubtless led to the suggestion made in the argument that the ruling in *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1, had overthrown the ancient and settled landmarks and had caused state courts to become courts of the United States exercising a jurisdiction conferred by Congress, whenever the duty was cast upon them to enforce a Federal right. It is true in the *Mondou Case* it was held that where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States. On the contrary the principle upon which the *Mondou Case* rested, while not questioning the diverse governmental sources from

which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose.

Affirmed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 399. Argued April 19, 20, 1916.—Decided May 22, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that a verdict in an action under the Federal Employers' Liability Act which is not unanimous, but which is legal under the law of the State, is not violative of the Seventh Amendment, and that such Amendment has no application to proceedings in state courts.

The fact that after the close of the testimony a plaintiff suing under both the Employers' Liability Act and the Safety Appliance Act withdrew his claim under the latter act, *held* in this case not to amount to a withdrawal of the testimony in regard to defective condition of the appliances and entitle defendant to direction of verdict on the ground of assumption of risk as the testimony was admissible under the issues based on the former act.

The fact that the state appellate court may have inaccurately expressed in one respect its reasons for affirmance, does not require this court to reverse, if, in fact, no reversible error exists.

The trial court having instructed the jury that if they found the plaintiff guilty of contributory negligence they should reduce his damages

in proportion to the amount of negligence attributable to him, failure to define the word proportion *held* in this case, not error.

THE facts, which involve the validity of a verdict and judgment for damages under the Employers' Liability Act, are stated in the opinion.

Mr. C. B. Stuart, Mr. W. I. Cruce, Mr. L. S. Dolman, Mr. A. C. Cruce and *Mr. M. K. Cruce* were on the brief, for the defendant in error.[1]

Mr. W. F. Evans, Mr. R. A. Kleinschmidt and *Mr. J. H. Grant* were on the brief, for the plaintiff in error.[1]

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

Basing his cause of action upon the Federal Employers' Liability and Safety Appliance Acts, Brown, the defendant in error, sued to recover damages resulting from injuries alleged to have been occasioned by the negligence of the Railroad Company while he was in its employ and engaged in interstate commerce. At the close of the testimony the claim under the Safety Appliance Act was withdrawn and the case was submitted to the jury alone upon the Employers' Liability Act. There was a verdict and judgment for the plaintiff which was affirmed by the court below.

There was a sharp conflict between the testimony offered on behalf of the plaintiff and that on behalf of the defendant. The material facts disclosed by the plaintiff's testimony are as follows: Brown, a head brakeman and other members of a local freight train crew on the day in question were engaged in the yards at Ashdown, Arkansas, in making up an extra freight train to be taken out by an extra crew to Hugo, Oklahoma. The cars intended

[1] See note on p. 212, *ante*.

for the interstate train were placed on an east and west passing track east of a switch connecting a spur track which ran in a northeasterly direction past a stave mill. After placing some cars from the spur track on the passing track the engine returned to the spur track with several cars, some of which were to be left at the mill and the remainder brought out and coupled to those already collected for the train and standing on the passing track. Brown accompanied the cars and after cutting off those intended for the mill gave the engineer a signal to go ahead, the engine being headed west, and when the cars approaching the switch came opposite the car on the passing track to which the coupling was to be made, Brown crossed over from the spur track to the passing track to adjust the coupler on the car standing there. Finding the knuckle of the coupler closed, he attempted to open it with the lever at the side of the car, but it did not work. He then tried to manipulate the knuckle with his hand, but could get it only part way open and closing it, he stepped out to the north side of the track (the engineer's side). As the last car coupled with the engine was then just clearing the switch, he gave the engineer a stop signal and walked west to the switch stand to set the switch so that the engine and cars might be backed to make the coupling. By the time he had walked the short intervening distance and set the switch the engine had come to a stop with the rear car a few steps west of the switch. Intending then to adjust the coupler on the end of this car, Brown gave the engineer, who was watching him, a "spot" signal which indicated that he was not to move the engine until a further signal was given by Brown, and crossed over to the south side of the track in order to use the lifting pin to open the knuckle of the coupler. When the lever failed to work he stepped behind the car and was about to try to open the knuckle with his hand when he heard the cars ahead of him move. He at once turned to leave the

track, but was struck and knocked down by the car which was backed in disregard of the "spot" signal and his feet were caught under the wheels and crushed.

The assignments of error are numerous, but those requiring to be specially noticed may be disposed of under three headings:

1. The contention that rights of the Railroad Company guaranteed by the Seventh Amendment were violated because only nine of the twelve jurors concurred in the verdict is without merit. *Minneapolis & St. Louis R. R.* v. *Bombolis, ante*, p. 211.

2. A twofold contention is based upon rulings concerning the doctrine of the assumption of the risk. Upon the withdrawal by the plaintiff of his claim under the Safety Appliance Act the court charged the jury concerning assumption of the risk as follows:

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant."

(a) It is insisted that the abandonment of the claim as to a violation of the Safety Appliance Act necessarily withdrew all evidence tending to show that the couplers were defective and in the absence of such evidence the proof established as a matter of law that the plaintiff assumed the risk and the court should have directed a verdict in favor of the railroad. We think the proposition is plainly without merit. The testimony concerning

the condition of the couplers was clearly admissible under the issues based on the Employers' Liability Act as explaining the occasion for Brown's being on the track and as negativing negligence on his part. In so far as the contention implies that the withdrawal of the claim was a concession that the testimony relating to the couplers was false, we think the conclusion is wholly unwarranted. If we were to conjecture as to the reason for the abandonment of the claim under the Safety Appliance Act, we think it at least quite as probable that plaintiff's counsel were of opinion that in the situation disclosed by the plaintiff's testimony the Safety Appliance Act was inapplicable.

(b) In the court below it would seem that the correctness of the general instruction as to assumption of the risk which we have quoted as given by the trial court was challenged on a ground which has been abandoned because not here pressed. But it is said reversible error exists because the court below in passing upon such objection remarked that as the "defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress," assumption of the risk was not a defense. This it is said was erroneous, first, because so far as the Safety Appliance Act was concerned, it was inapposite, as reliance upon that law by the plaintiff had been disclaimed, and second, because, under the facts it was open to find the existence of assumption of the risk depending upon conditions of fact not involved in the Safety Appliance Act. But we fail to see the pertinency of this objection, as there is now no contention concerning the correctness of the charge as to assumption of the risk upon which the case was submitted to the jury for their verdict. At best therefore the error asserted simply amounts to contending that because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of

reversing the judgment although no reversible error exists.

3. It is contended that the court erred in charging the jury that in the event they found the plaintiff guilty of contributory negligence they should "reduce his damages in proportion to the amount of negligence which is attributable to him," since the court did not define the word proportion and hence failed to fix any standard by which the damages should be measured. The charge is clearly distinguishable from the instruction disapproved in *Seaboard Air Line* v. *Tilghman*, 237 U. S. 499, which is relied upon, since in that case the jury were in effect instructed to diminish the damages according to their conception of what was reasonable. The instruction given is almost in the identical language of the statute and while definition might have further conduced to an appreciation by the jury of the standard established by the statute, we think there was no error in the charge given, especially as the railroad company made no request for a charge clarifying any obscurity on the subject which it deemed existed. It is true the company made a request on the subject which the court declined to give, but that request, we are of opinion, taken as a whole instead of clarifying any ambiguity deemed to exist in the instruction which the court gave would have served to obscure it. There was no error therefore, leaving aside the question whether the requested instruction did not contain matters which if given would have been erroneous.

Although we have examined the whole record and as the result of that examination conclude there is no ground for reversal, we have not particularly noticed subjects embraced by some of the assignments but not pressed in argument and others not embraced by the assignments but indirectly referred to in the argument.

Affirmed.

JACOBS *v.* SOUTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 326. Argued April 27, 1916.—Decided May 22, 1916.

Under § 4 of the Employers' Liability Act assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees; in other cases therefore it is retained.

An experienced employee, admittedly knowing the material conditions and presence of a pile of cinders who attempts to board a moving engine with a vessel of water in his hand, must be considered as appreciating the danger and assuming the risk although at the time he may have forgotten the existence of the cinders; and this is so even if the employer was negligent in allowing the cinders to remain. There being no violation of any safety statute, the common-law defense of assumption of risk is not eliminated in such a case by the Employers' Liability Act.

116 Virginia, 189, affirmed.

THE facts, which involve the construction and application of the contributory negligence provisions of the Employers' Liability Act, are stated in the opinion.

Mr. Edward P. Buford for the plaintiff in error.

Mr. William Leigh Williams, with whom *Mr. L. E. Jeffries* was on the brief, for the defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action under the Federal Employers' Liability Act, as amended. April 22, 1908, c. 149, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291.

Plaintiff in error, who was also plaintiff in the trial court and we shall so designate him, was in the service of

the railway company, in interstate commerce, as a fireman. He received injuries while attempting to get on a moving locomotive. He charged negligence against the company and sued for the sum of $20,000 damages. The negligence charged was the causing and permitting to be within dangerous proximity to the tracks of the company a pile of loose cinders over which plaintiff stumbled and slipped and was drawn under the locomotive.

The railway company, among other defenses, pleaded the following:

"That the said plaintiff was guilty of gross contributory negligence in attempting to board the engine with a water cooler filled with water in his arms, and was also guilty of gross contributory negligence in attempting to board the engine from a pile of cinders along the track; and was also guilty of gross contributory negligence in running along the track and in attempting to board the engine without looking and seeing the pile of cinders, which could have been observed with any caution and care on his part; that the said pile of cinders had been allowed to accumulate in the same manner and in the same place as they were at the time of the accident for many years prior to the accident, and that these facts were well known to the plaintiff, and that he assumed the risk of danger from said pile of cinders, if there was any danger in allowing them to remain there."

There were two trials of the action. The first trial resulted in a verdict for plaintiff for $12,000, upon which judgment was entered. The judgment was reversed by the Supreme Court of Appeals for error in the instructions.

Upon the second trial the verdict was for defendant. The court refused to set it aside and grant a new trial, but ordered judgment in accordance therewith. The Supreme Court of Appeals refused a writ of error and supersedeas, the effect of which was to affirm the judgment of the trial court.

The facts are practically undisputed. Plaintiff was engaged with a crew in shifting cars in the railway company's yard at Lawrenceville, Virginia. He descended from the engine at the depot to get drinking water for himself and the engineer. He returned with a can of water to mount the engine and then as to what took place he testified as follows: "I came down the railroad road . . . and came across the track on the crossing. At the time the train was pulling out of the last track. So I waited until the train was pulling up there, and aimed to catch it, and when I aimed to catch it I made three or four steps to get on it, you know, and I got to the cinder pile before I knew it, and I tripped, and went under the engine. . . . The cinder pile tripped me." The train was moving "just about as fast as anybody could walk, that is pretty peart walking; not over three or four miles an hour at the most." He further testified that it had been customary ever since he had been on the road "for the trainmen to get on and off the engine when it was going that way;" had seen it done hundreds of times a day and had never seen any rule forbidding it. He was about seven feet from the cinder pile when he "aimed to" catch the engine and the cinder pile was about eighteen or twenty-four inches deep and he indicated its length to be about as long as the court room and as wide as the distance from himself to a person he indicated. Describing how the cinders caused him to fall, he said they were piled "right up against the rail" and "sloped from the rail up. As I caught the engine, I made several steps, and as I hit the cinder pile they commenced miring just like mud, and it caused me to fall, and when I fell in the cinder pile the journal box kept hitting and I couldn't get up. I tried, but I couldn't. . . . Every time I made an effort the cinder pile gave way with me. . . . I fell down behind the cinder pile. The cinder pile was sloping, and I fell down by the journal box, and the train

was passing, and I rolled down next to the rail." He further testified that if he had fallen from some other cause he could have got out of danger and that when he started to get on the engine he was not conscious of any danger from coming in contact with the pile of cinders, that it was not in his mind at all. But he testified, "I had knowledge of it, of the cinders being there, but I did not know that it was dangerous. I had forgotten them being there at the time. I was watching when I was going to step on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile. . . . It was not in my mind."

It is not disputed that it was customary and had been for eleven or twelve years for the ashpans of the engine to be cleaned upon the tracks and the ashes then drawn out from the tracks and, when a lot had accumulated, taken away. The piles were of irregular height.

Plaintiff contends that upon this evidence he was entitled to recover under proper instructions and that the trial court followed the decision of the Supreme Court of Appeals in giving an instruction at the second trial which it had refused to give at the first trial. The instruction is as follows:

"The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

This instruction, it is contended, became "the law of the case" by the decision of the Supreme Court of Appeals and precluded the instructions which plaintiff asked and which otherwise would have been correct, it is insisted, and should have been given.

The instructions refused presented these propositions: (1) The unsafe character or condition of the railway was of itself no defense to the injury caused thereby. (2) Knowledge of it by plaintiff might constitute contributory negligence and diminish the amount of recovery. (3) If the company suffered or permitted the cinders to be placed and to accumulate alongside of its main line in dangerous proximity to the railroad track or road and plaintiff's injury resulted in whole or in part from such negligence, or if the cinders constituted a defect or insufficiency in the railroad track, the verdict should be for plaintiff. (4) Knowledge of the existence of the cinders would not bar recovery but it might be considered with other evidence in determining whether plaintiff was guilty of contributory negligence and, if guilty, recovery would not be barred but the amount of recovery would be diminished in proportion to such negligence. (5) To charge plaintiff with contributory negligence he must not only have known of the cinders but also the danger occasioned by them or that the danger was so obvious that a man of ordinary prudence would have appreciated it and not have attempted to get upon the engine at the time and under the circumstances disclosed by the evidence.

The rulings of the trial court and Supreme Court of Appeals upon the instruction given and those refused make the question here and represent the opposing contentions of the parties. The railway company contends that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. The plaintiff, on the other hand, insists that such knowledge and conduct amounted, at the utmost,

to no more than contributory negligence and should not have barred recovery, though it might have reduced the amount of recovery. Indeed, plaintiff goes farther and contends that, whatever might have been the evidence respecting his knowledge or lack of knowledge of the danger, he did not assume the risk if the company was negligent; and, further, that employees' continuance in service with knowledge of a dangerous condition and without complaint does not bar recovery under the act of Congress. He concedes, however, that he encounters in opposition to his contentions the ruling in *Seaboard Air Line* v. *Horton*, 223 U. S. 492, and therefore asks a review of that case, asserting that "the considerations upon which the true construction of the act depends were not suggested to the court."

The argument to sustain the assertion and to present what he deems to be the true construction of the act is elaborate and involved. It would extend this opinion too much to answer it in detail. He does not express his contention in any pointed proposition. He makes it through a comparison of the sections of the act and insists that to retain the common-law doctrine of the assumption of risk is to put the fourth section in conflict with the other sections. The basis of the contention is that the act was intended to be punitive of negligence and does not cast on the employees of carriers the assumption of risk of any condition or situation caused by such negligence. This is manifest, it is insisted, from the provisions of the third section of the act which provides that the contributory negligence of the employee "shall not bar a recovery," and of the fifth section which precludes the carrier from exempting itself from liability. This purpose is executed and can only be executed, it is urged, by construing the words of § 4 (which we shall presently quote) to apply to "the ordinary risks inherent in the business—the unavoidable risks which are intrinsic not-

withstanding the performance by the carrier of its personal duties. They do not include the 'secondary and ulterior' risks arising from abnormal dangers due to the employer's negligence." And, further: "The object of this section was not to adopt by *implication* the common-law defense of assumption of risk of such abnormal dangers. Its object was in *express terms* to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the 'risks of his employment' assumed by the employee."

These, then, are the considerations which plaintiff says were not submitted to the court in the *Horton Case* and which he urges to support his contention that assumption of risk has been abolished absolutely.

We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language and makes it express one meaning when it intended another.

The language of § 4 demonstrates its meaning. It provides that in any action brought by an employee he "shall not be held to have assumed the risks of his employment in any case where the violation by said common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained. And such is the ruling in the *Horton Case*, made upon due consideration and analysis of the statute and those to which it referred. It was said: "It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." And there was a comparison made of § 4 with the other

sections and the relation and meaning of each determined and the preservation by the statute of the distinction between assumption of risk and contributory negligence, which was pronounced "simple" although "sometimes overlooked." Cases were cited in which the distinction was recognized and applied (p. 504).

It is, however, contended that the conditions of the application of assumption of risk were not established and that "to charge a servant with assumption of risk the evidence (1) must show that he was 'chargeable with knowledge of the material conditions which were the immediate cause of his injury,' and (2) must establish his 'appreciation of the dangers produced by the abnormal conditions.'" The testimony of plaintiff is adduced to show that these conditions did not exist in his case.

He admitted a knowledge of the "material conditions," and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding "not over a gallon" could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them. We think his situation brought him within the rule of the cases. *Gila Valley Ry.* v. *Hall,* 232 U. S. 94, 102.

It is objected, however, that instruction A, "viewed wholly with reference to common-law principles," is erroneous in that it omitted to state as an element the appreciation by plaintiff of the danger of the situation as necessary to his assumption of risk. But that objection was not made at the trial. The objection made was general, that the instruction did "not correctly state the common-law doctrine of assumption of risk." It was therefore very indeterminate, and we cannot say that the court considered that it was directed to the omission

to express or to bring into prominence the appreciation by plaintiff of the danger he incurred.

The instruction was refused by the trial court upon objection by plaintiff. It was considered by the Supreme Court of Appeals and plaintiff contended against it there only upon the ground that the assumption of risk was not available as a defense under the act of Congress. He made the contention there that he does here, and which we have already considered, that the act of Congress precludes the defense of assumption of risk of any condition or situation caused by the negligence of a carrier. And this was the full extent of plaintiff's contention. Had he made the specific one now made the Supreme Court of Appeals would have dealt with it, for the opinion of the court shows a clear recognition of the elements necessary to the doctrine of assumption of risk and the trial court as well must have understood them; and we cannot suppose that the court discerned in plaintiff's general objection the specification which he now contends was necessary and which it was error to refuse.

Judgment affirmed.

BAUGHAM, ADMINISTRATOR OF BAUGHAM, *v.* NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 327. Argued April 27, 1916.—Decided May 22, 1916.

Whether the injured employee knew of and assumed the risk of the danger resulting in his injury and death depends upon the evidence; and where, as in this case, the state courts, trial and appellate, have

decided against plaintiff's contentions and in so doing have in effect held that the conditions of assumption of risk were satisfied, this court, unless it finds such conclusion palpably erroneous, simply announces its concurrence.

Jacobs v. *Southern Railway*, *ante*, p. 229, followed to the effect that the contention that, as a matter of law, the common-law assumption of risk is not a defense in bar of an action under the Employers' Liability Act is untenable.

THE facts, which involve the construction and application of the contributory negligence provisions of the Employers' Liability Act, are stated in the opinion.

Mr. Edward P. Buford for plaintiff in error.

Mr. Thomas H. Willcox, with whom *Mr. Francis I. Gowen* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages under the Federal Employers' Liability Act, brought in the Circuit Court of Norfolk County, State of Virginia, by plaintiff in error (we shall call him plaintiff), administrator of the estate of Richard T. Baugham.

The ground of action was that the railroad company, an interstate carrier, caused by its negligence the death of plaintiff's intestate while he was employed and engaged in such commerce.

Richard T. Baugham was between the ages of eighteen and twenty years and was engaged by the railroad company to act as brakeman in its yard at Port Norfolk, Virginia. On the second day of his employment, while mounting a freight car that was being transferred from the wharf of the company to a barge moored at the wharf,

he was killed by being crushed between that car and other cars which were upon the barge.

There were four tracks on the barge. Between the outside and center tracks, of which there were two, there was sufficient space for an employee to mount in safety cars moving between those tracks. There was also sufficient space between the center tracks for some distance from where they entered the barge from the wharf. But these tracks gradually converged until the space between them so diminished that cars being moved on one center track would almost touch those standing on the other center track. The roofs of the cars would sometimes touch.

By reason of this proximity of the cars it is alleged that serious and deadly injury would be inflicted upon the servants and employees of the company if they should be caught between the cars. Plaintiff's intestate was so caught and received injuries from which he died.

It was the duty of the company, it was alleged, to have admonished and warned the deceased of the difficulties, dangers and perils attendant upon his service and duties as brakeman so that he might safely have performed them, but that the company wholly failed to do so, and that in consequence the deceased in the performance of his duties as brakeman on trains being transferred from the wharf to the barge and while ascending one of the cars was caught and confined between the eaves of the roof of the car which he was ascending and the eaves of the roof or roofs of another car or cars and fatally injured.

Damages were prayed in the sum of $50,000.

The company pleaded not guilty and, as special defenses, that the deceased was guilty of contributory negligence and that he "assumed, when he entered the employment of the company, the risk of being injured in the manner charged in the declaration."

The case was tried to a jury. Upon the conclusion of

the testimony the company demurred to the evidence and plaintiff joined in the demurrer, whereupon, the jury being required to say what damages the plaintiff sustained if judgment should be given for plaintiff upon the evidence, responded, "that if upon the demurrer to the evidence the law be for the plaintiff, then we find for the plaintiff and assess the damages which he ought to recover at ten thousand dollars."

The demurrer to the evidence was sustained and it was adjudged that plaintiff take nothing by his suit. The judgment was affirmed by the Supreme Court of Appeals.

The tracks on the barge and the operation of the cars can easily be visualized. There were four tracks, two center ones and two outside ones, the former converging as they approached until they came so close together that any one caught between cars moving upon them would be crushed. The deceased, while ascending a moving car, was caught between it and a car standing on the barge and fatally injured. The inquiry is—and upon it rests the determination of the case—What knowledge had the deceased of this situation and what was the effect of that knowledge upon the liability, if any, of the company?

Plaintiff makes two contentions: (1) That the company failed to warn deceased of the danger to which he was exposed and that such failure was negligence on the part of the company. (2) That the convergence of the tracks on the barge was a defect or insufficiency due to the negligence of the company in its track, road-bed, barge and equipment.

The railroad company opposes plaintiff's contentions and insists that the deceased assumed the risk of the danger which resulted in his injury and death. A determination of these contentions depends upon the evidence, and, considering it, the state courts, trial and appellate, decided against the contentions of plaintiff, and in so doing in effect held that the conditions of the assumption

of risk by deceased were satisfied. *Gila Valley Ry.* v. *Hall,* 232 U. S. 94, 102.

We have considered the evidence and we cannot say that the conclusion was palpably erroneous, and following the rule expressed in *Great Northern Ry.* v. *Knapp,* 240 U. S. 464, 466, and as having analogy, *Chicago Junction Ry.* v. *King,* 222 U. S. 222, we announce our concurrence without discussion.

It is further contended "that as a matter of law, the common-law assumption of risk is not a defense in bar of an action under the act of Congress." The contention is untenable. *Jacobs* v. *Southern Ry., ante,* p. 229.

Judgment affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* CARNAHAN.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 743. Argued April 19, 20, 1916.—Decided May 22, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis, ante,* p. 211, followed to effect that the contention that in trial of cases under the Employers' Liability Act the parties are entitled under the Seventh Amendment to a common-law jury of twelve men is untenable.

When the evidence shows that there will be future effects from an injury, an instruction which justifies their inclusion in the award for damages is not error.

Where the court explicitly enjoins the jury that there must be a proximate and causal relation between the damages and the negligence of the defendant and refers to the amount stated in the declaration as a limitation on the amount that can be awarded, and there is no misunderstanding as to the purpose of such reference, there is no error.

THE facts, which involve the validity of a verdict and judgment for personal injuries under the Employers' Liability Act, are stated in the opinion.

Mr. David H. Leake, with whom *Mr. Walter Leake* was on the brief, for the plaintiff in error.[1]

Mr. C. W. Allen and *Mr. H. W. Walsh* filed a brief for defendant in error.[1]

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment in favor of defendant in error for $25,000 damages for injuries sustained through the asserted negligence of plaintiff in error.

The action was at law under the Employers' Liability Act of Congress. April 22, 1908, c. 149, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291. In accordance with the state law it was tried to a jury of seven. This is assigned as error. The only other assignment is upon an instruction of the court as to the elements of damage. There is no dispute as to the fact of injury or that it was received in interstate commerce and by the negligence of plaintiff in error.

(1) The first assignment of error is based upon a challenge by the railway company to the array of jurors on the ground that the jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States. In other words, the contention is "that in the trial of cases under the Employers' Liability Act of Congress the parties are entitled to a common-law jury of twelve men, as provided for by the Seventh Amendment to the Constitution of the United States."

The assignment is without foundation. *Minn. & St. Louis R. R.* v. *Bombolis*, decided this day *ante*, p. 211.

[1] See note on p. 212, *ante*.

(2) The instruction which is the basis of the second assignment of error is as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, as to them may seem just and fair."

It is objected (a) that the instruction permitted a recovery in damages not only for those which proximately resulted from the injury but also for "its effects upon the future," which involved a consideration of consequences which might be essentially speculative and remote. (b) The instruction directed the jury that the damages might be in such sum not in excess of $35,000 as to them might seem just and fair. By the instruction the court called the attention of the jury to a certain sum and gave judicial approval of it, giving them to understand that they could give such sum as they might deem just and fair, without regard to the damages the evidence might prove.

The injury received is pertinent to the consideration of the instruction. In the collision of two trains defendant in error, who was a fireman, "was caught" (we quote from the opinion of the Supreme Court) "from his knee of his right leg down, between the tank on the tender and the boiler head in the cab of his engine, and remained pinned in that position for forty-five or fifty minutes before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for these injuries and his consequent sufferings that he sues to recover damages."

The Supreme Court expressed the view that the speculation of future results which the railway company professed to apprehend was not left by the instruction for the jury to indulge, nor did the instruction commit the amount of damages to the conjecture of the jury independently of the evidence in the case. The contention made here was explicitly rejected, viz., that the instruction permitted the jury to take into consideration the "'possible future physical effects from the injury, such as future suffering in the absence of evidence as to the probability of such.'" The court remarked that it would be a strained construction of the language of the instruction "to hold that it referred to future suffering and that damages not the proximate result of the injuries received were included under" it, and that, besides, such conclusion was precluded by an instruction given at the request of the railway company, which was "that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injuries he sustained were the direct and proximate result of the negligence of the defendant."

The comment of the court is accurate and we can add nothing to it. The principle is established that when the evidence in a case shows that there will be future effects from an injury an instruction which justifies an inclusion of them in an award of damages is not error. *Washington & Georgetown R. R.* v. *Harmon*, 147 U. S. 571; *McDermott* v. *Severe*, 202 U. S. 600.

It is also objected that the instruction "allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35,000 and allowed the jury to give such sum as damages as to them might 'seem just and fair' without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of."

The objection is untenable. As we have seen the court

explicitly enjoined upon the jury that there must be a proximate and causal relation between the damages and the negligence of the company and the reference to the sum of $35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction. *Norfolk & West. R. R.* v. *Earnest*, 229 U. S. 114, 119.

Judgment affirmed.

PACIFIC MAIL STEAMSHIP COMPANY *v.* SCHMIDT.

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

No. 323. Argued April 25, 26, 1916.—Decided May 22, 1916.

Where the writ of certiorari was granted to review the question of law, and evidently would not have been granted simply to reopen the inquiry into the facts, this court will assume the lower courts were right where they agreed upon the construction of the facts even though otherwise it might hesitate to do so.

This court will not assume that Congress intended to cut off an opportunity to revise doubtful questions of law and fact by imposing a penalty for reasonable delay in payment caused by an appeal based on sufficient cause.

Under § 4529, Rev. Stat., as amended December 1, 1898, a shipowner is not liable for the penalty for delay in payment of a seaman's wages during the period between judgment in the District Court and affirmance thereof by the Circuit Court of Appeals where, as in this case, there was reasonable cause for prosecuting the appeal.

214 Fed. Rep. 513, reversed.

THE facts, which involve the construction and application of Rev. Stat., § 4529, as amended by the Act of December 21, 1898, are stated in the opinion.

Mr. William R. Harr, with whom *Mr. Charles H. Bates*, *Mr. George A. Knight* and *Mr. Charles J. Heggerty* were on the brief, for the petitioner.

Mr. James W. Ryan, by special leave, with whom *Mr. John L. McNab* was on the brief, for the respondent:

Respondent rendered services as a seaman.

The respondent was under shipping articles, because the articles were for a definite time and the respondent's duties under the articles had not been completely performed.

The vessel was bound to a foreign port, because she was bound to any part of the world and was registered for the foreign trade, and Ancon, Canal Zone, is a foreign port.

The petitioner continuously refused, without any reasonable ground for dispute, to pay respondent the wages actually earned and could have prevented the wages from continuing.

The measure of damages decreed by the Court of Appeals is that provided by § 4529, Rev. Stat., and victualling money is a part of wages.

The Court of Appeals had power to give effect to the statute by making the rate of interest on the decree of the District Court such that the interest would equal the sum which the statute provided should be recoverable by the seaman.

The rate of interest in the admiralty is determinable at the discretion of the appellate court.

There was a manifest error of law apparent upon the face of the record in this case.

An appeal in admiralty from a District Court to the Circuit Court of Appeals opens the whole case for trial *de novo* in the appellate court.

The appellate jurisdiction of the Circuit Court of Appeals is the same as that of the Supreme Court from 1803 to 1875.

The appellate jurisdiction of the Circuit Court of Appeals is the same as that of the old Circuit Courts on appeals from the District Courts.

A seaman's wages continue until actually paid, notwithstanding intervening decrees of inferior courts.

The decree of the Court of Appeals should be modified so that the respondent may recover two days' pay for every day since November 4, 1915.

In support of these contentions, see *The Albert Dumois*, 177 U. S. 240; *The Argo*, 210 Fed. Rep. 872; *The Blenheim*, 18 Fed. Rep. 47; *Caine* v. *Palace Shipping Co.*, 10 Asp. M. C., N. S., 529; *Chicago Ins. Co.* v. *Graham*, 108 Fed. Rep. 271; *The Chieftan*, 8 L. T. 120; *City of Cleveland* v. *Chisholm*, 90 Fed. Rep. 431; *Dooley* v. *United States*, 183 U. S. 151; *Dower* v. *Richards*, 151 U. S. 658; *Downes* v. *Bidwell*, 182 U. S. 244; *The Express*, 59 Fed. Rep. 476; *Gilchrist* v. *Chicago Co.*, 104 Fed. Rep. 566; *Re Great Eastern S. S. Co.*, 5 Asp. M. C., N. S., 511; *Hemmenway* v. *Fisher*, 20 How. 255; *Henderson* v. *Kanawha Dock Co.*, 185 Fed. Rep. 781; *The Insular Cases*, in Volume 182 United States Reports; *Irvine* v. *The Hesper*, 122 U. S. 256; *The Minnie*, 225 Fed. Rep. 36; *Munson Line* v. *Miramar S. S. Co.*, 167 Fed. Rep. 960; *Nelson* v. *White*, 83 Fed. Rep. 215; *The North Star*, 62 Fed. Rep. 71; *The Nyack*, 199 Fed. Rep. 383; *Pettie* v. *Boston Towboat Co.*, 49 Fed. Rep. 464; *Queen* v. *S S. Michigan*, 25 L. R., Q. B. D., 339; *Reg.* v. *Lynch*, 8 Asp. Rep. M. C., N. S., 363; *Reid* v. *Fargo*, 213 Fed. Rep. 771; *The San Rafael*, 141 Fed. Rep. 270; *Schmidt* v. *Pacific Mail S. S. Co.*, 209 Fed. Rep. 264; *S. C.*, 214 Fed. Rep. 513; *The Scotland*, 118 U. S. 507; *The Sirius*, 54 Fed. Rep. 188; *The Maggie J. Smith*, 123 U. S. 349; *The State of California*, 49 Fed. Rep. 172; *The Tergeste*, 9 Asp. M. C., N. S., 356; *Thomson* v. *Hart*, 28 Scot. L. R. 28; *The Tokai Maru*, 190 Fed. Rep. 450; *The Umbria*, 59 Fed. Rep. 489; *Union Steamboat Co.* v. *Chaffin*, 204 Fed. Rep. 412; *The Western States*, 159 Fed. Rep. 354; Seamen's Act

of March 4, 1915, 38 Stat. 1164; English Merchant Shipping Acts; § 4511, Rev. Stat.; § 4529, Rev. Stat.; § 4612, Rev. Stat.; 23 Stats. L. 58; § 8301, U. S. Comp. Stats. 1913; Judicial Code, § 122; 26 Stats. L. 826; Dewhurst's Rules, U. S. Courts, p. 264; Rule 23, subd. 4, U. S. Sup. Ct.; Rules 24, subd. 4, and 30, subd. 4, C. C. A., 9th Circuit.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel *in personam* for $30.33, wages and victualling money from September 24 to October 1, 1913, and for a sum equal to one day's pay for every day during which payment had been or should be delayed. The libel was filed on October 20, 1913. On November 5, 1913, the District Court entered a decree for $151.59 with interest from the date of its decree and $36.25 costs. 209 Fed. Rep. 264. The libellee, the present petitioner, appealed, but without success, and on May 18, 1914, the decree was affirmed with directions to add one day's pay for every day since the former decree. On October 6, 1914, an order was made by the Circuit Court of Appeals that the petitioner should pay to the proctor for the appellee the amount of the judgment of the District Court with costs and proctor's fee as allowed, and should pay to the Clerk of the District Court the additional amount to the date of deposit of the penalty adjudged to be continuing; to abide the result of an application to this court for a writ of certiorari, and that upon such payment the running of the penalty should cease so far as the judgment of the Circuit Court of Appeals was concerned.

The facts are these: On July 24, 1913, the libellant shipped as chief steward, under articles, from San Francisco to Ancon, Canal Zone, and such other ports as the master might direct and back to a final port of discharge in San Francisco, for a term of time not exceeding six calendar months. The vessel returned to San Francisco

on September 23, and on September 24, 1913, the libellant was paid in full by the Shipping Commissioner and that date noted as the date of termination of voyage on the articles. As seems to have been usual, however, the libellant remained on board working and in the ordinary course probably would have signed new articles for the next voyage, but on October 1 was notified that he was discharged. On his demanding his wages for his services in port he was told that silverware to the amount of $32.90 was missing, that he was accountable for it and this sum offset his claim. There is no doubt that this offset, which was alleged again in the pleadings, was set up in good faith, but as both the courts below have found that it was not made out we assume that it was not proved.

The statute under which the penalty was imposed is Rev. Stat., § 4529, as amended by the act of December 21, 1898, c. 28, § 4; 30 Stat. 756. By that act "the master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or *vice versa*, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens. . . . Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods." We assume, not only as we have said that the claim of offset was not established, but the more doubtful proposition that it did not furnish sufficient cause for the delay. We assume therefore that the petitioner did not sufficiently justify putting the libellant to a suit.

But it is far less clear that the District Court was justified in treating the case as within the penalties of the act. The statute deals with voyages. The voyage for which the libellant shipped was at an end, viz., from San Francisco out and back to that port, or till the end of six months, whichever first happened. On the return to San Francisco within the time the libellant was paid all that was due to him, and he himself lays his employment as beginning in San Francisco on September 25 after the voyage described in the articles was at an end. No new articles had been signed and it would seem on the allegations of the libel coupled with the admitted facts that the libellant's legal standing was under an oral contract for a few days in port while hoping to be reshipped. It seems to us a very strong thing to say that any fair construction of the facts brings the case within the act. But as the two courts have agreed upon this proposition also and as the writ would not have been granted to reopen the inquiry into those particular facts we assume that upon this also they were right.

It is a very different thing, however, to say that the delay occasioned by the appeal was not for sufficient cause. Even on the assumption that the petitioner was wrong it had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is 'neglect . . . without sufficient cause.' The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the States. *Ex parte Young*, 209 U. S. 123. There was sufficient cause for the neglect to pay after the decree of the District Court, since the payment of

the original wages without the penalty that was reasonably in dispute would neither have been accepted nor allowed.

Not only so, but there was further reasonable cause for the delay by appeal in the fact that victualling money was included in the wages by which the penalty was measured. Seeing that the petitioner was held as if the articles still were in force the question arises how the wages could be estimated at more than the articles fixed. The so-called port pay which added a dollar a day for food was an arrangement altogether outside the articles, and the demand for it and the allowance of it not only raised a new question but intensified the doubt as to how it could be said that the voyage was not ended and that the penalty could be applied. See *Palace Shipping Co., Ltd.*, v. *Caine*, [1907] A. C. 386. We shall allow the decree of the District Court to stand, as we have stated, but there was ample justification for the appeal and on both the above grounds sufficient reason for the delay. We need not consider whether if there had been no such reason there would be any escape from *Massachusetts* v. *West. Un. Tel. Co.*, 141 U. S. 40, where under a similar statute it seems to have been held that the penalty stopped with the decree below.

Decree reversed.
Decree of District Court affirmed.

TERMINAL TAXICAB COMPANY, INCORPORATED, *v.* KUTZ, NEWMAN, AND BROWNLOW, COMMISSIONERS AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.

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

No. 348. Argued May 2, 3, 1916.—Decided May 22, 1916.

In determining whether a corporation is or is not a common carrier the important thing is what it actually does and not what its charter says it may do.

A corporation authorized by its charter to carry passengers and goods by automobiles, taxicabs and other vehicles, but not to exercise any of the powers of a public service corporation, and which does such business, including the carrying of passengers to and from railroad terminals and hotels under contracts therewith, and also does a garage business with individuals, *held*, in this case, to be a common carrier within the meaning of the District of Columbia Public Utility Act of 1913, and subject to the jurisdiction of the Public Utilities Commission, as to the terminal and hotel business, but not as to the garage business.

Such a corporation is bound under the Public Utilities Act to furnish information properly required by the Commission in regard to its terminal and hotel business, but not as to its private garage business; and an order of the Commission requiring information as to all classes of business should be so modified and limited as not to include an inquiry into such garage business.

In this case *held* that the omission from a general order of the Commission of concerns doing such a small volume of business as, in the opinion of the Commission, did not bring them within the meaning of the Act did not amount to such a preference as to deny those affected by the order the equal protection of the law.

43 App. D. C. 120, modified.

THE facts, which involve the construction and application of the provisions of the Act of March 4, 1913, creat-

ing the Public Utilities Commission of the District of Columbia, are stated in the opinion.

Mr. G. Thomas Dunlop for appellant.

Mr. Conrad H. Syme for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to restrain the Public Utilities Commission of the District of Columbia from exercising jurisdiction over the plaintiff. The Commission was created and its powers established by a section (§ 8) of an appropriation act, divided into numbered paragraphs. Act of March 4, 1913, c. 150, § 8. 37 Stat. 938, 974. By paragraph 2 of the section 'Every public utility is hereby required to obey the lawful orders of the Commission,' and by par. 1 public utility embraces every common carrier, which phrase in turn is declared to include 'express companies and every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire.' Steam railroads, some other companies, and the Washington Terminal Company are declared not to be within the words. The main question is whether the plaintiff is a common carrier under the definition in the act. The bill was dismissed by the Supreme Court and the decree was affirmed by the Court of Appeals. 43 App. D. C. 120.

The facts are agreed. The plaintiff is a Virginia corporation authorized by its charter, with copious verbiage, to build, buy, sell, let and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles; but not to exercise any of the powers of a public service corporation. It does business in the Dis-

trict, and the important thing is what it does, not what its charter says. The first item, amounting to about thirty-five hundredths of the whole, is done under a lease for years from the Washington Terminal Company, the owner of the Union Railroad Station in Washington, which we have mentioned as excluded from the definition of common carriers. By this lease the plaintiff has the exclusive right to solicit livery and taxicab business from all persons passing to or from trains in the Union Station, and agrees in its turn to provide a service sufficient in the judgment of the Terminal Company to accommodate persons using the Station, and is to pay over a certain percentage of the gross receipts. It may be assumed that a person taking a taxicab at the station would control the whole vehicle both as to contents, direction, and time of use, although not, so far as indicated, in such a sense as to make the driver of the machine his servant, according to familiar distinctions. The last facts however appear to be immaterial and in no degree to cast doubt upon the plaintiff's taxicabs when employed as above stated being a public utility by ancient usage and understanding, *Munn* v. *Illinois*, 94 U. S. 113, 125, as well as common carriers by the manifest meaning of the act. The plaintiff is 'an agency for public use for the conveyance of persons' &c.; and none the less that it only conveys one group of customers in one vehicle. The exception of the Terminal Company from the definition of common carriers does not matter. The plaintiff is not its servant and does not do business in its name or on its behalf. It simply hires special privileges and a part of the Station for business of its own.

The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about

the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389. The public does not mean everybody all the time. See *Peck* v. *Tribune Co.*, 214 U. S. 185, 190.

The rest of the plaintiff's business, amounting to four-tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service and no doubt would do so if the pay was uncertain, but it advertises extensively and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the Station and hotels. There is no contract with a third person to serve the public generally. The question whether as to this part of its business it is an agency for public use within the meaning of the statute is more difficult. Whether it is or not, the jurisdiction of the Commission is established by what we have said, and it would not be necessary to decide the question if the bill, in addition to an injunction against taking jurisdiction, did not pray that Order No. 44 of the Commission be declared void. That order,

after declaring that the plaintiff was engaged in the business of a common carrier within the meaning of the act and so was within the jurisdiction of the Commission, required the plaintiff to furnish the information called for in a circular letter of April 12, 1913. What this information was does not appear with technical precision, but we assume that it was in substance similar to a later requirement of a schedule showing all rates and charges in force for any service performed by the plaintiff within the District or any service in connection therewith. If we are right this demand was too broad unless the business from the garage also was within the act. There is no such connection between the charges for this last and the others as as there was between the facts required and the business controlled in *Int. Comm. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 211.—Although I have not been able to free my mind from doubt the Court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable. It follows that the plaintiff is not bound to give information as to its garage rates.

Complaint is made that jurisdiction has not been assumed over some other concerns that stand on the same footing as the plaintiff. But there can be no pretence that the act is a disguised attempt to create preferences or that the principle of *Yick Wo* v. *Hopkins*, 118 U. S. 356, applies. The ground alleged by the Commission is that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act. There is nothing to impeach the good faith of the Commission or to give the plaintiff just cause for complaint. The decree so far as it asserts the jurisdiction of the Commission is affirmed, but it must be modified so as to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same.

Decree modified as above set forth.

AMERICAN WELL WORKS COMPANY *v.* LAYNE AND BOWLER COMPANY.

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

No. 376. Argued May 5, 1916.—Decided May 22, 1916.

A suit for damages to business caused by a threat to sue under the patent law is not in itself a suit under the patent law, of which the state court cannot take jurisdiction.

Whether a wrong is committed by one making statements to effect that an article sold by another infringes the former's patent depends upon the law of the State where the act is done and not upon the patent law of the United States; and, in this case *held* that the state court had jurisdiction of a suit for libel or slander based on such statements.

THE facts, which involve the jurisdiction of the District Court, are stated in the opinion.

Mr. David A. Gates, for plaintiff in error, submitted.

Mr. Paul Synnestvedt, with whom *Mr. J. M. Moore* and *Mr. Coke K. Burns* were on the brief, for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit begun in a state court, removed to the United States Court, and then, on motion to remand by the plaintiff, dismissed by the latter court, on the ground that the cause of action arose under the patent laws of the United States, that the state court had no jurisdiction, and that therefore the one to which it was removed had none. There is a proper certificate and the case comes here direct from the District Court.

Of course the question depends upon the plaintiff's declaration. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. That may be summed up in a few words. The plaintiff alleges that it owns, manufactures and sells a certain pump, has or has applied for a patent for it, and that the pump is known as the best in the market. It then alleges that the defendants have falsely and maliciously libeled and slandered the plaintiff's title to the pump by stating that the pump and certain parts thereof are infringements upon the defendant's pump and certain parts thereof and that without probable cause they have brought suits against some parties who are using the plaintiff's pump and that they are threatening suits against all who use it. The allegation of the defendants' libel or slander is repeated in slightly varying form but it all comes to statements to various people that the plaintiff was infringing the defendants' patent and that the defendant

would sue both seller and buyer if the plaintiff's pump was used. Actual damage to the plaintiff in its business is alleged to the extent of $50,000 and punitive damages to the same amount are asked.

It is evident that the claim for damages is based upon conduct, or, more specifically, language, tending to persuade the public to withdraw its custom from the plaintiff and having that effect to its damage. Such conduct having such effect is equally actionable whether it produces the result by persuasion, by threats or by falsehood, *Moran* v. *Dunphy*, 177 Massachusetts, 485, 487, and it is enough to allege and prove the conduct and effect, leaving the defendant to justify if he can. If the conduct complained of is persuasion, it may be justified by the fact that the defendant is a competitor, or by good faith and reasonable grounds. If it is a statement of fact, it may be justified, absolutely or with qualifications, by proof that the statement is true. But all such justifications are defences and raise issues that are no part of the plaintiff's case. In the present instance it is part of the plaintiff's case that it had a business to be damaged; whether built up by patents or without them does not matter. It is no part of it to prove anything concerning the defendants' patent or that the plaintiff did not infringe the same—still less to prove anything concerning any patent of its own. The material statement complained of is that the plaintiff infringes—which may be true notwithstanding the plaintiff's patent. That is merely a piece of evidence. Furthermore, the damage alleged presumably is rather the consequence of the threat to sue than of the statement that the plaintiff's pump infringed the defendants' rights.

A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the damage is caused by a statement of fact—that the defendant has a

patent which is infringed. What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. A suit arises under the law that creates the cause of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. If the State adopted for civil proceedings the saying of the old criminal law: the greater the truth the greater the libel, the validity of the patent would not come in question at all. In Massachusetts the truth would not be a defence if the statement was made from disinterested malevolence. Rev. Laws, c. 173, § 91. The State is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States.

Judgment reversed.

Mr. Justice McKenna dissents, being of the opinion that the case involves a direct and substantial controversy under the patent laws.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* STEWART, ADMINISTRATRIX OF STEWART.

STEWART, AS ADMINISTRATRIX OF STEWART, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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

Nos. 485, 904. Argued April 19, 20, 1916.—Decided May 22, 1916.

A verdict and judgment thereon in a state court in a suit by an administrator under the Employers' Liability Act, based on an instruction that the jury should find, if anything, such a sum as will fairly compensate the intestate's estate for his death, and which has been set aside for error of such instruction by the state appellate court, cannot be reinstated by this court on a writ of error to the appellate court of the State after judgment for a lesser amount on the second trial has been affirmed by that court.

Quære, whether such a verdict and judgment could be reinstated had there been no error in law in the instructions given at the first trial.

Minn. & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that the verdict of a jury, legal under the state law but which would not be legal in a Federal court, is not a denial of Federal right under the Seventh Amendment in a suit brought in a state court under the Employers' Liability Act.

The due process provision of the Fourteenth Amendment does not require a State to provide for suspension of judgment pending appeal nor prevent its making it costly in case the judgment is upheld; nor is due process denied by adding ten per cent., as is done under the statute of Kentucky, on the amount of judgment if the same is affirmed.

The opinion of both courts below being against defendant's contention that this case should have been withdrawn from the jury, this court not disagreeing with them, affirms the judgment.

163 Kentucky, 823, affirmed.

THE facts, which involve the validity of a verdict and judgment in an action in the state court under the Employers' Liability Act, are stated in the opinion.

Mr. Benjamin D. Warfield, with whom *Mr. James C. Sims* and *Mr. John B. Rodes* were on the brief, for Louisville and Nashville Railroad.

Mr. George H. Lamar, with whom *Mr. B. F. Procter*, *Mr. C. U. McEllory* and *Mr. D. W. Wright* were on the brief, for Stewart.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, against the Railroad Company for negligently causing the death of the plaintiff's intestate, her husband. There were two trials. A verdict and judgment for the plaintiff at the first were set aside by the Court of Appeals. 156 Kentucky, 550; 157 Kentucky, 642. A judgment for a less amount at the second trial was sustained. 163 Kentucky, 823. The Railroad Company seeks to overthrow the last judgment; the plaintiff by her cross writ seeks to reinstate the first, but failing that contends that the last should be affirmed, denying, that is, that there are any grounds for the Railroad Company's writ.

The object of the plaintiff's writ of error was to go behind the second trial and reinstate the first judgment. But the verdict was found upon an instruction that the jury should find, if anything, 'such a sum as will fairly compensate his estate for his death,' given it would seem in forgetfulness that the case arose under the act of Congress. See 157 Kentucky, 642. This instruction was excepted to and neither justice nor law would permit the verdict and judgment based upon it to be reinstated after the state court had set it aside. We therefore examine the arguments in 904 no farther and do not consider whether if in our opinion there had been no error of Federal law at the first trial the plaintiff could have had the relief that she asks. *Fairfax* v. *Hunter*, 7 Cranch,

603, 628. *Jones National Bank* v. *Yates*, 240 U. S. 541, 563.

The Railroad Company had for its principal object in bringing the case here to set up the Seventh Amendment, and to deny jurisdiction in any state court where a verdict of nine or more out of the twelve men on the jury was allowed by the local law. The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another, at least as between the United States and a State, unless by procedure identical with that of the first is disposed of in *Minneapolis &c. R. R.* v. *Bombolis*, *ante*, p. 211.

The first of the other objections is that the Court of Appeals was not authorized to add ten per cent. damages on the amount of the judgment, as it did. But the Railroad Company obtained a supersedeas, and the law of the State makes ten per cent. the cost of it to all persons if the judgment is affirmed. There was no obligation upon the State to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So the State may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceedings and the judgment is affirmed, as but for such proceedings interest would run as of course until the judgment was paid.

The Railroad Company contends at some length that the case should have been taken from the jury by the direction of a verdict in its favor. As the opinion of both courts below and the jury were against it and as we agree with their judgment we shall not discuss this assignment of error at length. *Great Northern Ry.* v. *Knapp*, 240 U. S. 464, 466. The facts were these: Stewart, the deceased, was engineer on a north-bound freight train upon a single track, that had to go upon a siding to make way for a south-bound freight train. There were cars already on the siding which Stewart's train pushed ahead, and this

train and the cars more than filled the siding. Therefore they pushed forward onto the main track to the rear of the south-bound train and the latter went on its way. It still, however, was necessary to keep the main track clear for another south-bound train, and therefore Stewart's train began to back so as to free the main track north of the switch which would be the first point reached by the expected train. While it was backing and approaching the southerly end of the switch the rear brakeman suddenly applied the airbrakes and the sudden shock caused the engineer to strike his head against the cab, by reason of which he died. The conductor in charge of the movement testified that he intended not to cross the southerly point of the switch and it could be found that the brakeman's act was a breach of duty, that it manifestly would cause a sudden shock, and that although the particular position of, or specific damage to Stewart was unknown to the brakeman, generically it was the kind of thing that was likely to happen, and that he and his employers were liable for consequences of that sort. The jury was instructed that Stewart assumed the risks incident to his employment and that if the application of the airbrakes was made upon a reasonable belief that it was necessary to apply them in order to avoid injury to property, they should find for the defendant unless they found that the emergency was brought about by the defendant's servants in the negligent operation of the train before the brakes were applied. As an abstract proposition the qualification was correct, and the jury might have found that the conductor did not manage the train with due care and so made the application necessary. Whatever might have been our opinion had we been in the jury's place we do not feel warranted in saying that they had no evidence to go upon or that the instructions were wrong.

Judgment affirmed.

UNITED STATES *v.* COCA COLA COMPANY OF ATLANTA.

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

No. 562. Argued February 29, 1916.—Decided May 22, 1916.

Under the Food and Drugs Act of 1906, the fact that a formula has been made up and followed and a distinctive name therefor adopted does not suffice to take an article from § 7, subd. 5, of the Act. In such a case the standard by which the combination is to be judged is not necessarily the combination itself.

A poisonous or deleterious ingredient with the injurious effect stated by the statute may be an added ingredient in the statutory sense although it is covered by the formula and made a constituent of the article sold.

In construing § 7, subd. Fifth of the Food and Drugs Act *held* that the term adulteration is used in a special sense and its ordinary meaning is not controlling; that an article may be adulterated by the adding of an injurious ingredient including a component part of the article itself; that adulteration must not be confused with misbranding and provisions as to latter do not limit the explicit provisions of § 7 of adulteration; and that proprietary foods sold under descriptive names are within its provisions, including those which were in the market when the Act was passed.

It would reduce the Food and Drugs Act to an absurdity to so construe it as to regard a compound food product, the formula of which included a poisonous or deleterious ingredient, as adulterated within the meaning of § 7 if such ingredient were omitted.

Whether an added ingredient—such as caffeine—is poisonous or deleterious *held*, in this case, in view of decided conflict of competent evidence, to be a question for the jury.

While a distinctive name may be purely arbitrary it must be one that distinguishes the article; and where more than one name, each descriptive of an article, are united, it amounts to misbranding if the article sold does not contain any of the articles generally known individually by any of such names.

THE facts, which involve the construction and application of the adulteration and misbranding provisions of the Food and Drugs Act of 1906, are stated in the opinion.

Mr. Assistant Attorney General Underwood, with whom *Mr. Elliott Cheatham* was on the brief, for the United States.

Mr. Harold Hirsch and *Mr. J. B. Sizer*, with whom *Mr. A. W. Chambliss* and *Mr. W. D. Thomson* were on the brief, for the defendant in error:

In construing a statute, every section, provision and clause should be explained by reference to every other, and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature.

One portion of a statute should not be so construed as to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together. *Peck* v. *Jenness*, 7 How. 612, 623; *Montclair* v. *Ransdell*, 107 U. S. 147; *United States* v. *Lexington Mill*, 232 U. S. 399, 409; *Lake County* v. *Rollins*, 130 U. S. 662, 670; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112; *United States* v. *Antikamnia Co.*, 231 U. S. 654, 665; *Hall-Baker Grain Co.* v. *United States*, 198 Fed. Rep. 614.

Even if caffeine is a poisonous or deleterious substance, which might render the article in controversy injurious to health, its presence would not render the article subject to seizure and condemnation under the Act unless it constituted adulteration within the meaning of the Act.

For object of the Food and Drugs Act see *Savage* v. *Jones*, 225 U. S. 501, 530; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540; *United States* v. *65 Cases*, 170 Fed. Rep. 449; *McDermott* v. *Wisconsin*, 228 U. S. 115.

The cases referred to by the Government do not sustain any different proposition. The purpose of the Act is to secure the purity of foods and drugs, and to inform the purchasers of what they are buying. *United States* v. *Antikamnia Co.*, 231 U. S. 654, 665; and see Cong. Rec., Feb. 20, 1906, pp. 2786, 2787.

The statute contemplates a standard and the Government in the libel filed in this case set out the standard when it claimed to have seized a food product known and sold as Coca-Cola. In other words, the product known and sold as Coca-Cola is the standard; it is the product that must be adulterated. Gruley on Act, pp. 8, 22.

Where there is no standard fixed by any statute the court must and will fix for itself a proper standard based on the evidence. *Von Bremen* v. *United States*, 192 Fed. Rep. 905; *People* v. *Jennings*, 132 Michigan, 662. Such a standard is obtained from trade knowledge of the article. *McCord* v. *United States*, 182 Fed. Rep. 47; *United States* v. *St. Louis Coffee Mills*, 189 Fed. Rep. 193; *United States* v. *Frank*, 189 Fed. Rep. 195; *200 Chests of Tea*, 9 Wheat. 431; *Hudson Co.* v. *United States*, 192 Fed. Rep. 920; *Libby* v. *United States*, 210 Fed. Rep. 148; *United States* v. *Sweet Valley Wine Co.*, 208 Fed. Rep. 85; *United States* v. *75 Boxes*, 198 Fed. Rep. 934; *Weeks* v. *United States*, 224 Fed. Rep. 64; *Cadwalader* v. *Zeh*, 151 U. S. 171.

The Government has admitted that a standard must be established, and is to be established in finding out what is a given substance as recognized by reliable manufacturers and dealers. See Notices Judgm., 123, 130, 135.

The only standard in this case is a food product—Coca-Cola—which has always contained caffeine, *Washburn* v. *United States*, 224 Fed. Rep. 395, 398, and therefore caffeine in this product is not an "added" ingredient or an adulteration within the meaning of the Act.

"Adulterate" means to make impure by the admixture of other, or baser, or foreign ingredients; to render counter-

feit. *St. Louis* v. *Judd*, 236 Missouri, 1; *Commonwealth* v. *Kevin*, 202 Pa. St. 23, 29; *Hall-Baker Grain Co.* v. *United States*, 198 Fed. Rep. 614; *United States* v. *Lexington Mill*, 232 U. S. 399; *United States* v. *11,150 Pounds of Butter*, 195 Fed. Rep. 657, 661.

"Added ingredient" means something foreign to the article to which it is added, therefore an ingredient which is a constituent element and is not foreign is not an added one. *Weeks* v. *United States*, 224 Fed. Rep. 64, 67; *Curtice Bros. Co.* v. *Barnard*, 209 Fed. Rep. 591, 594; Cong. Rec. June 21, 1906, pp. 8891–2, 8900, and Feb. 21, 1906, pp. 2647–2750, Jan. 10, 1906, p. 987 and Feb. 20, 1906, p. 2729, Feb. 19, 1906, p. 2647; H. R. Rep. No. 2118, March 7, 1906, 59th Cong., 1st sess.

Even if the statute is one for the protection of the public health the bills show that Congress did not intend to condemn every article having a deleterious ingredient in it, even though it may have rendered the article injurious to health. It was necessary to prove further, that the deleterious ingredient was added. The word "ingredient" indicates Congress had in mind mixed and compound articles of food rather than simple ones.

Since Congress has permitted the use in articles of food of substances which are confessedly habit-forming and deleterious, it can be assumed that it intended to prohibit the use of caffeine, which is admitted to be far less harmful than any of those enumerated in the proviso referred to, and which was and had been for several hundred years prior to the passage of the Act, an ingredient in food articles of almost universal use.

The caffeine contained in the product Coca-Cola is not a poisonous ingredient, or a deleterious ingredient, which may render said product injurious to health, so as to constitute an adulteration within the purview of the Act.

The product is not misbranded within the meaning of

the Act. *Nashville Syrup Co.* v. *Coca-Cola Co.*, 215 Fed. Rep. 527; *Coca-Cola Co.* v. *Gay-Ola Co.*, 200 Fed. Rep. 720.

This name was registered by claimant under the Act of 1881, and again under the Act of 1905. While all distinctive names are not entitled to registration, no name is entitled to registration unless it is distinctive. It can be distinctive in its original signification, or it may have become so by association. *Canal Co.* v. *Clark*, 13 Wall. 311, 323; *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S. 51; *Lawrence Mfg. Co.* v. *Tennessee*, 138 U. S. 537; *United States* v. *Steffens*, 100 U. S. 82.

The use of a compound name does not necessarily, or even generally, indicate that the article to which the name is applied contains the substances whose names make up the compound.

A geographical or descriptive name or a symbol may be divested of its original signification. *In re Tolle*, 1872 C. D. 219; *Ex parte Van Eyck*, 1903 C. D. 43; *Ex parte Indiana Bicycle Co.*, 1895 C. D. 66; *Ex parte Jewell Bottling Co.*, 1904 C. D. 150; *Siegert* v. *Gandolfi*, 149 Fed. Rep. 100, 103; *Jacobs* v. *Beecham*, 221 U. S. 263; *Elgin Co.* v. *Illinois Watch Co.*, 179 U. S. 665; *La Republique Francaise* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427; *Baglin* v. *Cusiner*, 221 U. S. 580; *Montgomery* v. *Thompson*, 8 R. P. C. 361; *Wotherspoon* v. *Currie*, 5 H. L. 508; *Vinegar Co.* v. *Powell* (1897), A. C. 710; *Reddaway* v. *Banham*, 12 R. P. C. 83, and *House of Lords Dec.*, 13 R. P. C. 218.

Marks, although not susceptible of exclusive appropriation, at common law, frequently acquire a special significance in connection with particular commodities. *Davids* v. *Davids*, 233 U. S. 461, 466.

Use under this Act must, of necessity, make a mark distinctive. See cases in the English courts. *In re Crosfield*, 26 R. P. C. 846; *Re Registered Trademarks*, Nos. 538, 1807 and 158, 839, 32 R. P. C. 40, 50; *Slazengers, Ltd.*, 31 R. P. C. 501, 504. For "distinctive" as defined by the

English Trademark Act (5 Edw., 7, chap. 15); see *Application by Candbury Bros.*, 32 R. P. C. 9, 13; *Application by Berna Commercial Motors, Ltd.*, 32 R. P. C. 113, 118; *Woodward* v. *Boulton Macro Co.*, 32 R. P. C. 173, 198.

The name Coca-Cola is distinctive, and distinctive only of the goods of claimant. *United States* v. *30 Cases &c.*, 199 Fed. Rep. 932; *United States* v. *100 Barrels &c.* (Notice of Judgm., No. 300, Food and Drugs Act); *United States* v. *Von Bremen* (Notice of Judgm., 1949); as to Regulation 20, see *United States* v. *300 Cases of Mapleine* (Notice of Judgm., 163); *United States* v. *Qumpert* (Notice of Judgm., No. 806).

For other English cases directly in point, see *Lemy* v. *Watson*, 32 R. P. C. 508; *Fowler* v. *Cripps*, 1906, 1 K. B. 21; *Rex* v. *Butcher*, 99 L. T. 622; and see also *Keasby* v. *Brooklyn Chemical Works*, 142 N. Y. 467; *Carnrick Kidder & Co.* v. *Morson*, 1877, Law Journal Notes on Cases, 71; *La Societe Ferment*, 81 L. J. R. 724; *United States* v. *Two Cases of Chloro-Naptholeum*, 217 Fed. Rep. 477, 483; distinguished as being brought under the Insecticide Act; and see *Libby, McNeil & Libby* v. *United States*, 210 Fed. Rep. 148; *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516; *Manhattan Med. Co.* v. *Wood*, 108 U. S. 218; *Nashville Syrup Co.* v. *Coca-Cola Co.*, 215 Fed. Rep. 527.

Mr. Justice Hughes delivered the opinion of the court.

This is a libel for condemnation under the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768) of a certain quantity of a food product known as 'Coca Cola' transported, for sale, from Atlanta, Georgia, to Chattanooga, Tennessee. It was alleged that the product was adulterated and misbranded. The allegation of adulteration was, in substance, that the product contained an added poisonous or added deleterious ingredient, caffeine,

which might render the product injurious to health. It was alleged to be misbranded in that the name 'Coca Cola' was a representation of the presence of the substances coca and cola; that the product "contained no coca and little if any cola" and thus was an "imitation" of these substances and was offered for sale under their "distinctive name." We omit other charges which the Government subsequently withdrew. The claimant answered, admitting that the product contained as one of its ingredients "a small portion of caffeine," but denying that it was either an 'added' ingredient, or a poisonous or a deleterious ingredient which might make the product injurious. It was also denied that there were substances known as coca and cola "under their own distinctive names," and it was averred that the product did contain "certain elements or substances derived from coca leaves and cola nuts." The answer also set forth, in substance, that 'Coca Cola' was the 'distinctive name' of the product under which it had been known and sold for more than twenty years as an article of food, with other averments negativing adulteration and misbranding under the provisions of the Act.

Jury trial was demanded, and voluminous testimony was taken. The District Judge directed a verdict for the claimant (191 Fed. Rep. 431), and judgment entered accordingly was affirmed on writ of error by the Circuit Court of Appeals (215 Fed. Rep. 535). And the Government now prosecutes this writ.

First. As to '*adulteration.*' The claimant, in its summary of the testimony, states that the article in question "is a syrup manufactured by the claimant . . . and sold and used as a base for soft drinks both at soda fountains and in bottles. The evidence shows that the article contains sugar, water, caffeine, glycerine, lime juice and other flavoring matters. As used by the consumer, about one ounce of this syrup is taken in a glass mixed with

about seven ounces of carbonated water, so that the consumer gets in an eight ounce glass or bottle of the beverage, about 1.21 grains of caffeine." It is said that in the year 1886 a pharmacist in Atlanta "compounded a syrup by a secret formula, which he called 'Coca-Cola Syrup and Extract'"; that the claimant acquired "the formula, name, label and good will for the product" in 1892, and then registered "a trade-mark for the syrup consisting of the name Coca Cola" and has since manufactured and sold the syrup under that name. The proportion of caffeine was slightly diminished in the preparation of the article for bottling purposes. The claimant again registered the name 'Coca Cola' as a trade-mark in 1905, averring that the mark had been "in actual use as a trade-mark of the applicant for more than ten years next preceding the passage of the act of February 20, 1905," and that it was believed such use had been exclusive. It is further stated that in manufacturing in accordance with the formula "certain extracts from the leaves of the Coca shrub and the nut kernels of the Cola tree were used for the purpose of obtaining a flavor" and that "the ingredient containing these extracts," with cocaine eliminated, is designated as "Merchandise No. 5." It appears that in the manufacturing process water and sugar are boiled to make a syrup; there are four meltings; in the second or third the caffeine is put in; after the meltings the syrup is conveyed to a cooling tank and then to a mixing tank where the other ingredients are introduced and the final combination is effected; and from the mixing tank the finished product is drawn off into barrels for shipment.

The questions with respect to the charge of 'adulteration' are (1) whether the caffeine in the article was an added ingredient within the meaning of the Act (§ 7, subd. Fifth) and, if so, (2) whether it was a poisonous or deleterious ingredient which might render the article injurious to health. The decisive ruling in the courts below re-

sulted from a negative answer to the first question. Both the District Judge and the Circuit Court of Appeals assumed for the purpose of the decision that as to the second question there was a conflict of evidence which would require its submission to the jury. (191 Fed. Rep. 433; 215 Fed. Rep. 540.) But it was concluded, as the claimant contended, that the caffeine—even if it could be found by the jury to have the alleged effect—could not be deemed to be an 'added ingredient' for the reason that the article was a compound, known and sold under its own distinctive name, of which the caffeine was a usual and normal constituent. The Government challenges this ruling and the construction of the statute upon which it depends; and the extreme importance of the question thus presented with respect to the application of the Act to articles of food sold under trade names is at once apparent. The Government insists that the fact that a formula has been made up and followed and a distinctive name adopted do not suffice to take an article from the reach of the statute; that the standard by which the combination in such a case is to be judged is not necessarily the combination itself; that a poisonous or deleterious ingredient with the stated injurious effect may still be an added ingredient in the statutory sense, although it is covered by the formula and made a constituent of the article sold.

The term 'food' as used in the statute includes "all articles used for food, drink, confectionery, or condiment . . . whether simple, mixed, or compound" (§ 6). An article of 'food' is to be deemed to be 'adulterated' if it contain "any added poisonous or other added deleterious ingredient which may render such article injurious to health." (Sec. 7, subd. Fifth.[1]) With this

[1] Section 7, with respect to 'confectionery' and 'food' is as follows:

"Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

. . .

section is to be read the proviso in § 8, to the effect that "an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded" in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names," if the distinctive name of another article is not used or imitated and the name on the label or brand is accompanied with a statement of the place of production. And § 8 concludes with a further proviso that nothing in the Act shall be construed "as requiring or compelling proprietors or manufacturers of proprietary foods which

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"In the case of confectionery:

"If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

"Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding." [1]

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[1] Section 8 provides:

"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, . . .

"That for the purposes of this Act an article shall also be deemed to be misbranded:

* * * * * * * *

"In the case of food:

"First. If it be an imitation of or offered for sale under the distinctive name of another article.

"Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

"Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

In support of the ruling below, emphasis is placed upon the general purpose of the Act which it is said was to prevent deception, rather than to protect the public health by prohibiting traffic in articles which might be determined to be deleterious. But a description of the purpose of the statute would be inadequate which failed to take account of the design to protect the public from lurking dangers caused by the introduction of harmful ingredients, or which assumed that this end was sought to be achieved by simply requiring certain disclosures. The statute is entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors," etc. In the case of confectionery, we find that it is to be deemed to be adulterated if it contains certain specified substances "or other ingredient deleterious or detrimental to health." So, under § 7, subdivision Sixth, there may be adulteration of food in case the article consists in whole or in part of "any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." In *United States* v. *Lexington Mills Co.*, 232 U. S. 399, 409, it was said that "the statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transporta-

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding."

tion in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers." See also *United States* v. *Antikamnia Co.*, 231 U. S. 654, 665; H. R. Report, No. 2118, 59th Cong., 1st Sess., 6–9. It is true that in executing these purposes Congress has limited its prohibitions (*Savage* v. *Jones*, 225 U. S. 501, 529, 532) and has specifically defined what shall constitute adulteration or misbranding; but in determining the scope of specific provisions the purpose to protect the public health, as an important aim of the statute, must not be ignored.

Reading the provisions here in question in the light of the context, we observe:

(a) That the term 'adulteration' is used in a special sense. For example, the product of a diseased animal may not be adulterated in the ordinary or strict meaning of the word but by reason of its being that product the article is adulterated within the meaning of the Act. The statute with respect to 'adulteration' and 'misbranding' has its own glossary. We cannot, therefore, assume that simply because a prepared 'food' has its formula and distinctive name, it is not, as such, 'adulterated.' In the case of confectionery, it is plain that the article may be 'adulterated' although it is made in strict accordance with some formula and bears a fanciful trade name, if in fact it contains an 'ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.' And the context clearly indicates that

with respect to articles of food the ordinary meaning of 'adulteration' cannot be regarded as controlling.

(b) The provision in § 7, subdivision Fifth, assumes that the substance which renders the article injurious, and the introduction of which causes 'adulteration,' is an ingredient of the article. It must be an 'added' ingredient; but it is still an ingredient. Component parts, or constituents, of the article which is the subject of the described traffic are thus not excluded but are included in the definition. The article referred to in subdivision Fifth is the article sought to be made an article of commerce,—the article which 'contains' the ingredient.

(c) 'Adulteration' is not to be confused with 'misbranding.' The fact that the provisions as to the latter require a statement of certain substances if contained in an article of food, in order to avoid 'misbranding' does not limit the explicit provisions of § 7 as to adulteration. Both provisions are operative. Had it been the intention of Congress to confine its definition of adulteration to the introduction of the particular substances specified in the section as to misbranding, it cannot be doubted that this would have been stated, but Congress gave a broader description of ingredients in defining 'adulteration.' It is 'any' added poisonous or 'other added deleterious ingredient,' provided it 'may render such article injurious to health.'

(d) Proprietary foods, sold under distinctive names, are within the purview of the provision. Not only is 'food' defined as including articles used for food or drink 'whether simple, mixed or compound,' but the intention to include 'proprietary foods' sold under distinctive names is manifest from the provisos in § 8 which the claimant invokes. 'Mixtures or compounds' which satisfy the first paragraph of the proviso are not only 'articles of food,' but are to enjoy the stated immunity only in case they do "not contain any added poisonous or deleterious

ingredients." By the concluding clause of § 8, it is provided that nothing in the Act shall be construed to require manufacturers of 'proprietary foods' to disclose 'their trade formulas' except in so far as the provisions of the Act 'may require to secure freedom from adulteration or misbranding,' and the immunity is conditioned upon the fact that such foods 'contain no unwholesome added ingredient.' Thus the statute contemplates that mixtures or compounds manufactured by those having trade formulas, and bearing distinctive names, may nevertheless contain 'added ingredients' which are poisonous or deleterious and may make the article injurious, and, if so, the article is not taken out of the condemnation of § 7, subdivision Fifth.

(e) Again, articles of food including 'proprietary foods' which fall within this condemnation are not saved because they were already on the market when the statute was passed. The Act makes no such distinction; and it is to be observed that the proviso of § 8 explicitly refers to 'mixtures or compounds which may be now or from time to time hereafter known as articles of food.' Nor does the length of the period covered by the traffic, or its extent, affect the question if the article is in fact adulterated within the meaning of the Act.

Having these considerations in mind we deem it to be clear that, whatever difficulties there may be in construing the provision, the claimant's argument proves far too much. We are not now dealing with the question whether the caffeine did, or might, render the article in question injurious; that is a separate inquiry. The fundamental contention of the claimant, as we have seen, is that a constituent of a food product having a distinctive name cannot be an 'added' ingredient. In such case, the standard is said to be the food product itself which the name designates. It must be, it is urged, this 'finished product' that is 'adulterated.' In that view, there would

seem to be no escape from the conclusion that however poisonous or deleterious the introduced ingredient might be, and however injurious its effect, if it be made a constituent of a product having its own distinctive name it is not within the provision. If this were so, the statute would be reduced to an absurdity. Manufacturers would be free, for example, to put arsenic or strychnine or other poisonous or deleterious ingredients with an unquestioned injurious effect into compound articles of food, provided the compound were made according to formula and sold under some fanciful name which would be distinctive. When challenged upon the ground that the poison was an 'added' ingredient, the answer would be that without it the so-called food product would not be the product described by the name. Further, if an article purporting to be an ordinary food product sold under its ordinary name were condemned because of some added deleterious ingredient, it would be difficult to see why the same result could not be attained with impunity by composing a formula and giving a distinctive name to the article with the criticized substance as a component part. We think that an analysis of the statute shows such a construction of the provision to be inadmissible. Certain incongruities may follow from any definition of the word 'added,' but we cannot conclude that it was the intention of Congress to afford immunity by the simple choice of a formula and a name. It does not seem to us to be a reasonable construction that in the case of 'proprietary foods' manufactured under secret formulas Congress was simply concerned with additions to what such formulas might embrace. Undoubtedly, it was not desired needlessly to embarrass manufacturers of 'proprietary foods' sold under distinctive names, but it was not the purpose of the Act to protect articles of this sort regardless of their character. Only such food products as contain 'no unwholesome added ingredient' are within the saving clause and

in using the words quoted we are satisfied that Congress did not make the proprietary article its own standard.

Equally extreme and inadmissible is the suggestion that where a 'proprietary food' would not be the same without the harmful ingredient, to eliminate the latter would constitute an 'adulteration' under § 7, subdivision Third, by the abstraction of a 'valuable constituent.' In that subdivision Congress evidently refers to articles of food which normally are not within the condemnation of the Act. Congress certainly did not intend that a poisonous or deleterious ingredient which made a proprietary food an enemy to the public health should be treated as a 'valuable constituent,' or to induce the continued use of such injurious ingredients by making their elimination an adulteration subject to the penalties of the statute.

It is apparent, however, that Congress in using the word 'added' had some distinction in view. In the Senate bill (for which the measure as adopted was a substitute) there was a separate clause relating to 'liquors,' providing that the article should be deemed to be adulterated if it contained "any added ingredient of a poisonous or deleterious character"; while in the case of food (which was defined as excluding liquors) the article was to be deemed to be 'adulterated' if it contained "any added poisonous or other ingredient which may render such article injurious to human health." Cong. Rec., 59th Cong., 1st Sess., Vol. 40, p. 897. In explaining the provision as to 'liquors,' Senator Heyburn, the chairman of the Senate Committee having the bill in charge, stated to the Senate (*Id.*, p. 2647): "The word 'added,' after very mature consideration by your committee, was adopted because of the fact that there is to be found in nature's products as she produces them, poisonous substances to be determined by analysis. Nature has so combined them that they are not a danger or an evil—that is, so long as they are left in

the chemical connection in which nature has organized them; but when they are extracted by the artificial processes of chemistry they become a poison. You can extract poison from grain or its products and when it is extracted it is a deadly poison; but if you leave that poison as nature embodied it in the original substances it is not a dangerous poison or an active agency of poison at all.—So, in order to avoid the threat that those who produce a perfectly legitimate article from a natural product might be held liable because the product contained nature's poison it was thought sufficient to provide against the adding of any new substance that was in itself a poison, and thus emphasizing the evils of existing conditions in nature's product. That is the reason the word 'added' is in the bill. Fusel oil is a poison. If you extract it, it becomes a single active agency of destruction, but allow it to remain in the combination where nature has placed it, and, while it is nominally a poison, it is a harmless one, or comparatively so." For the Senate bill, the House of Representatives substituted a measure which had the particular provisions now under consideration in substantially the same form in which they were finally enacted into law. (Section 7, subd. Fifth; § 8, subd. Fourth, provisos.) And the Committee of the House of Representatives in reporting this substituted measure said (H. R. Report, No. 2118, 59th Cong., 1st Sess., pp. 6, 7, 11): "The purpose of the pending measure is not to compel people to consume particular kinds of foods. It is not to compel manufacturers to produce particular kinds or grades of foods. One of the principal objects of the bill is to prohibit in the manufacture of foods intended for interstate commerce the addition of foreign substances poisonous or deleterious to health. The bill does not relate to any natural constituents of food products which are placed in the foods by nature itself. It is well known that in many kinds of foods in their natural state some quantity of poisonous

or deleterious ingredients exist. How far these substances may be deleterious to health when the food articles containing them are consumed may be a subject of dispute between the scientists, but the bill reported does not in any way consider that question. If, however, poisonous or deleterious substances are added by man to the food product, then the bill declares the article to be adulterated and forbids interstate traffic."

This statement throws light upon the intention of Congress. Illustrations are given to show possible incongruous results of the test, but they do not outweigh this deliberate declaration of purpose; nor do we find in the subsequent legislative history of the substituted measure containing the provision any opposing statement as to the significance of the phrase. It must also be noted that some of the illustrations which are given lose their force when it is remembered that the statutory ban (§ 7, subd. Fifth) by its explicit terms only applies where the added ingredient may render the article injurious to health. See *United States* v. *Lexington Mills Co.*, 232 U. S. 399, *supra*. It is urged, that whatever may be said of natural food products, or simple food products, to which some addition is made, a 'proprietary food' must necessarily be 'something else than the simple or natural article'; that it is an 'artificial preparation.' It is insisted that every ingredient in such a compound cannot be deemed to be an 'added' ingredient. But this argument, and the others that are advanced, do not compel the adoption of the asserted alternative as to the saving efficacy of the formula. Nor can we accept the view that the word 'added' should be taken as referring to the quantity of the ingredient used. It is added ingredient which the statute describes, not added quantity of the ingredient, although of course quantity may be highly important in determining whether the ingredient may render the article harmful, and experience in the use of ordinary articles of

food may be of greatest value in dealing with such questions of fact.

Congress, we think, referred to ingredients artificially introduced; these it described as 'added.' The addition might be made to a natural food product or to a compound. If the ingredient thus introduced was of the character and had the effect described, it was to make no difference whether the resulting mixture or combination was or was not called by a new name or did or did not constitute a proprietary food. It is said that the preparation might be 'entirely new.' But Congress might well suppose that novelty would probably be sought by the use of such ingredients, and that this would constitute a means of deception and a menace to health from which the public should be protected. It may also have been supposed that, ordinarily, familiar food bases would be used for this purpose. But, however, the compound purporting to be an article of food might be made up, we think that it was the intention of Congress that the artificial introduction of ingredients of a poisonous or deleterious character which might render the article injurious to health should cause the prohibition of the statute to attach.

In the present case, the article belongs to a familiar group; it is a syrup. It was originally called 'Coca Cola Syrup and Extract.' It is produced by melting sugar,—the analysis showing that 52.64 per cent. of the product is sugar and 42.63 per cent. is water. Into the syrup thus formed by boiling the sugar, there are introduced coloring, flavoring, and other ingredients, in order to give the syrup a distinctive character. The caffeine, as has been said, is introduced in the second or third 'melting.' We see no escape from the conclusion that it is an 'added' ingredient within the meaning of the statute.

Upon the remaining question whether the caffeine was a poisonous or deleterious ingredient which might render the article injurious to health, there was a decided conflict

of competent evidence. The Government's experts gave testimony to the effect that it was, and the claimant introduced evidence to show the contrary. It is sufficient to say that the question was plainly one of fact which was for the consideration of the jury. See *443 Cans of Egg Product*, 226 U. S. 172, 183.

Second. As to '*misbranding*.' In the second count it was charged that the expression 'Coca Cola' represented the presence in the product of the substances coca and cola and that it contained "no coca and little if any cola." So far as 'cola' was concerned, the charge was vague and indefinite and this seems to have been conceded by the Government at the beginning of the trial. With respect to 'coca,' there was evidence on the part of the Government tending to show that there was nothing in the product obtained from the leaves of the coca plant, while on behalf of the claimant it was testified that the material called 'Merchandise No. 5' (one of the ingredients) was obtained from both coca leaves and cola nuts. It was assumed on the motion for a peremptory instruction that there might be a disputed question of fact as to whether the use of the word 'coca' is to be regarded "intrinsically and originally" as stating or suggesting the presence of "some material element or quality" derived from coca leaves, and it was also assumed that the evidence might be deemed to be conflicting with respect to the question whether the product actually contained anything so derived. 191 Fed. Rep. pp. 438, 439. But these issues of fact were considered not to be material. On this branch of the case, the claimant succeeded upon the ground that its article was within the protection of the proviso in § 8 as one known 'under its own distinctive name.' 215 Fed. Rep. p. 544.

Section 8 (*ante*, p. 275), in its Fourth specification as to 'food,' provides that the article shall be deemed to be 'misbranded' "if the package containing it or its label shall

bear any statement, design, or device regarding the ingredients or the substances contained therein, which . . . shall be false or misleading in any particular." Then follows the proviso in question that an article not containing any added poisonous or deleterious ingredients "shall not be deemed to be . . . misbranded" in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article," if the name is accompanied with a statement of the place where the article has been produced.[1]

A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g.,

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[1] Among the departmental regulations (adopted in October, 1906, pursuant to § 3, for the enforcement of the Act) is Regulation 20 with respect to 'distinctive names' under § 8, as follows:

" (a) A 'distinctive name' is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.

"(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

"(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

"(d) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product."

Regulation 27 is as follows:

"(a) The terms 'mixtures' and 'compounds' are interchangeable and indicate the results of putting together two or more food products.

"(b) These mixtures or compounds shall not be imitations of other articles, whether simple, mixt, or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

"(c) If the name of the place be one which is found in different States, Territories, or countries, the name of the State, Territory, or country, as well as the name of the place, must be stated."

coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda-water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either 'misleading' or 'false,' as it is in fact distinctive. But unless the name is truly distinctive, the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale 'under the distinctive name of another article.' Thus, that which is not coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called "X's Coffee." Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of "Y's Lemon Extract." The name so used is not 'distinctive' as it does not appropriately distinguish the product; it is an effort to trade under the name of an article of a different sort. So, with respect to 'mixtures or compounds,' we think that the term 'another article' in the proviso embraces different compounds from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound cannot secure protection as a 'distinctive name.'

A 'distinctive name' may also, of course, be purely arbitrary or fanciful and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive.

If, in the present case, the article had been named 'Coca' and it were found that the name was actually descriptive in the sense that it fairly implied that the article was derived from the leaves of the coca plant, it could not be said that this was 'its own distinctive name' if in fact it contained nothing so derived. The

name, if thus descriptive, would import a different product from the one to which it was actually affixed. And, in the case supposed, the name would not become the 'distinctive name' of a product without any coca ingredient unless in popular acceptation it came to be regarded as identifying a product known to be of that character. It would follow that the mere sale of the product under the name 'Coca,' and the fact that this was used as a trade designation of the product, would not suffice to show that it had ceased to have its original significance if it did not appear that it had become known to the public that the article contained nothing derived from coca. Until such knowledge could be attributed to the public the name would naturally continue to be descriptive in the original sense. Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists, for if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation. The same conclusion would be reached if the single name 'Cola' had been used as the name of the product, and it were found that in fact the name imported that the product was obtained from the cola nut. The name would not be the distinctive name of a product not so derived until in usage it achieved that secondary significance.

We are thus brought to the question whether if the names coca and cola were respectively descriptive, as the Government contends, a combination of the two names constituted a 'distinctive name' within the protection of the proviso in case either of the described ingredients was absent. It is said that 'coca' indicates one

article, and 'cola' another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument, it would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as 'Chocolate-Vanilla,' although it was destitute of either or both, provided the combined name had not been previously used. We think that the contention misses the point of the proviso. A mixture or compound may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it 'its own distinctive name'—which distinguishes it from other compounds—but to give it the name of a different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product contains both. But if the name was found to be descriptive, as charged, there was clearly a conflict of evidence with respect to the presence of any coca ingredient. We con-

clude that the court erred in directing a verdict on the second count.

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

It is so ordered.

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

SEABOARD AIR LINE RAILWAY *v.* RENN.

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

No. 773. Argued April 4, 1916.—Decided May 22, 1916.

Whether the state court, in permitting an amendment to the complaint in an action under the Employers' Liability Act, disregarded the provision in § 6 limiting the time to commence actions under the Act, is a Federal question, although the allowance of the amendment otherwise might rest in the discretion of the court and be a matter of local procedure.

An amendment which merely expands or amplifies what was alleged in support of the cause of action asserted in the original complaint relates back to the commencement of the action and is not affected by the intervening lapse of time.

An amendment which introduces a new or different cause of action is the equivalent of a new suit which would be barred by § 6 if made more than two years after the cause of action arose.

Although the original complaint in this case may not have distinctly shown that the cause of action arose under the Employers' Liability Act still as it did not allege that the cause of action arose under the law of the State where it occurred, and did allege that defendant was engaged in operating its railroad in that and other States, *held* that an amendment that plaintiff's employment and defendant's engagement were both in interstate commerce at the time of the

injury did not amount to the statement of a new cause of action, but merely amplified or expanded that already stated and related back to the commencement of the suit.

Both courts below having concurred against defendant's request for instruction that there was no evidence of actionable negligence and there being no clear error this court will not disturb such conclusions.

Where the charge as a whole was fair, objections made at the time, but which did not specifically draw the attention of the trial court to inaccuracies in portions of the charge respecting the measure of damages, cannot, where not dealt with by the appellate court, be pressed in this court.

86 S. E. Rep. 964, affirmed.

THE facts, which involve the validity of a verdict and judgment for damages for personal injuries in an action under the Employers' Liability Act, are stated in the opinion.

Mr. Murray Allen for plaintiff in error:

Plaintiff was at the time of his injury employed in interstate commerce and his complaint states a cause of action under the statute of North Carolina defining the liability of a railroad to its employés, and also under the common law.

The complaint does not state a cause of action under the Federal statute.

That the carrier was engaged in interstate commerce and the employé was employed in such commerce at the time of the injury are essential allegations.

The court will look only to pleadings to determine the basis of plaintiff's cause of action.

The cause of action created by the Federal statute is separate and distinct from the cause arising under the common law.

The plaintiff had the selection of the basis of his action.

The court had no power to allow an amendment stating for the first time a cause of action under the Federal act

after the expiration of the period fixed by the act for the commencement of such action.

The amendment allowed by the court states a new cause of action, which is barred by the expiration of the period of limitation fixed by the act creating the right of action.

State courts accept *Union Pacific R. R.* v. *Wyler*, 158 U. S. 285, as controlling and refuse to permit amendments stating a cause of action under the Federal act after the expiration of two years.

The points of difference in an action based upon the common law and the statute of North Carolina and an action based upon the Federal Employers' Liability Act are material.

The facts showing the injury sustained by plaintiff do not of themselves constitute a cause of action.

There is not sufficient evidence of negligence in this case to be submitted to the jury.

Plaintiff assumed the risk of injury from slipping on ice around the water tank.

Mr. Robert N. Simms and *Mr. Wm. C. Douglass*, with whom *Mr. Clyde A. Douglass* was on the brief, for defendant in error.

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

This was an action by an employé of a railroad company to recover from the latter for personal injuries suffered through its negligence. The plaintiff had a verdict and judgment under the Employers' Liability Act of Congress, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, the judgment was affirmed, 86 S. E. Rep. 964, and the defendant brings the case here.

The original complaint was exceedingly brief and did

not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the defendant sought some advantage from this and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both parties conceded that what was alleged in the amendment was true in fact and conformed to the proofs, and that point has since been treated as settled. The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in § 6 that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." Whether in what was done this restriction was in effect disregarded is a Federal question and subject to reëxamination here, however much the allowance of the amendment otherwise might have rested in discretion or been a matter of local procedure. *Atlantic Coast Line* v. *Burnette,* 239 U. S. 199. If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. *Texas and Pacific Ry.* v. *Cox,* 145 U. S. 593, 603–604; *Atlantic and Pacific R. R.* v. *Laird,* 164 U. S. 393; *Hutchinson* v. *Otis,* 190 U. S. 552, 555; *Missouri, Kansas & Texas Ry.* v. *Wulf,* 226 U. S. 570, 576; *Crotty* v. *Chicago Great Western Ry.,* 95 C. C. A. 91; *S. C.,* 169 Fed. Rep. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running

of the limitation was not theretofore arrested. *Sicard* v. *Davis*, 6 Pet. 124, 140; *Union Pacific Ry.* v. *Wyler*, 158 U. S. 285; *United States* v. *Dalcour*, 203 U. S. 408, 423. The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina and elsewhere, that the plaintiff was in its employ, that when he was injured he was in the line of duty and was proceeding to get aboard one of the defendant's trains, and that the injury was sustained at Cochran, Virginia, through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina when the causal negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter State was at least consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in States other than Virginia was superfluous if the right of action arose under the laws of that State, and was pertinent only if it arose in interstate commerce, and therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was before the limitation had expired.

Error is assigned upon a refusal to instruct the jury, as matter of law, that there was no evidence of actionable negligence on the part of the defendant, and that the evidence conclusively established an assumption by the plaintiff of the risk resulting in his injury. Both courts, trial and appellate, held against the defendant upon these

points. They involve an appreciation of all the evidence and the inferences which admissibly might be drawn therefrom; and it suffices to say that we find no such clear or certain error as would justify disturbing the concurring conclusions of the two courts upon these questions. *Great Northern Ry.* v. *Knapp*, 240 U. S. 464; *Baugham* v. *New York &c. Ry.* (decided this day, *ante*, p. 237).

Complaint also is made of the instructions given upon the measure of damages. The criticism is directed against mere fragments of this part of the charge, and the objections made at the time were not such as were calculated to draw the trial court's attention to the particular complaint now urged. The inaccuracies were not grave and the charge as a whole was calculated to give the jury a fair understanding of the subject. The defendant therefore is not in a position to press the complaint, especially as it was not dealt with in the opinion of the appellate court. See *Magniac* v. *Thompson*, 7 Pet. 348, 390; *McDermott* v. *Severe*, 202 U. S. 600, 610; *Illinois Central R. R.* v. *Skaggs*, 240 U. S. 66.

Judgment affirmed.

BANKERS TRUST COMPANY *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 889. Argued April 12, 13, 1916.—Decided May 22, 1916.

In a suit brought by a corporation existing under the laws of New York and therefore a citizen of that State, against the Texas & Pacific Railway Company, incorporated and existing under an act of Congress and certain supplemental and amendatory acts, *held* that:

The provision in § 1 of the act of 1871 under which the Texas & Pacific

Railway was incorporated, that such company may sue and be sued in all courts of law and equity within the United States, was not intended to confer jurisdiction upon any particular court, but merely to render the company capable of suing and being sued in any court whose jurisdiction as otherwise competently defined was adequate to the occasion.

It is reasonable to presume that if Congress has the purpose to take a class of suits out of usual jurisdictional restrictions relating thereto, it will make its purpose plain.

Under the Constitution, Congress possesses power to invest subordinate Federal courts with original jurisdiction of suits at law or equity arising under the Constitution, laws or treaties of the United States and this power has been exercised at various times. Such jurisdiction has by § 24, Judicial Code, been given to and is now vested in, the District Courts subject to a restriction as to the amount in controversy.

A corporation chartered by an act of Congress is not only a creature of that law, but all its rights are dependent thereon and a suit by or against such a corporation is one arising under a law of the United States.

Section 5 of the act of January 28, 1915, c. 22, 38 Stat. 583, providing that no court of the United States shall have jurisdiction of any suit by or against any railroad company on the ground that it was incorporated under an act of Congress, is amendatory of the Judicial Code and renders the fact of incorporation under an act of Congress a negligible factor in determining whether a suit by or against a railroad company is one arising under a law of the United States so as to give the District Court jurisdiction thereof.

A corporation, such as the Texas & Pacific Railway Company, incorporated under acts of Congress, and whose activities and operations are not by its charter confined to any State, but are intended to be, and are, carried on in different States, is not a citizen of a State within the meaning of the jurisdictional statute.

While such a corporation is a citizen of the United States in the sense that a corporation organized under the law of a State is a citizen of that State, it is not within the declaration of the Fourteenth Amendment that native born and naturalized citizens of the United States are citizens of the State in which they reside.

Congress has not clothed railroad corporations organized under acts of Congress with state citizenship for jurisdictional purposes as it has done in respect to National banks.

A suit by a citizen of a State against a railroad corporation organized

and existing under an act of Congress is not a suit between citizens of different States of which the District Court has jurisdiction under § 24, Judicial Code, as amended by the act of January 28, 1915.

THE facts, which involve the jurisdiction of the District Court of a suit against a corporation incorporated by a statute of the United States, are stated in the opinion.

Mr. Maurice E. Locke, with whom *Mr. William W. Green* was on the brief, for appellant:

Jurisdiction to hear and determine such suits as this against the Texas and Pacific Railway Company was expressly vested in the appropriate Federal courts by the act of Congress incorporating said company. Act of March 3, 1871, c. 122, § 1, 16 Stat. 573; Act of May 2, 1872, c. 132, § 1, 17 Stat. 59; *Smith* v. *Un. Pac. R. R.*, 2 Dillon, 278; *Bauman* v. *Un. Pac. R. R.*, 3 Dillon, 367; *Pac. R. R. Removal Cases*, 115 U. S. 1, 24; *Matter of Dunn*, 212 U. S. 374, 384; *Osborn* v. *Bank*, 9 Wheat. 738; *Magill* v. *Parsons*, 4 Connecticut, 317, 336.

The jurisdiction of this case expressly conferred by the act of March 3, 1871, has not been taken away by the act of January 28, 1915. Cases *supra* and *Magee* v. *Un. Pac. R. R.*, 2 Sawyer, 447; *Un. Pac. R. R.* v. *McComb*, 1 Fed. Rep. 799; *Tex. & Pac. Ry.* v. *McAllister*, 59 Texas, 349; *Myers* v. *Un. Pac. Ry.*, 16 Fed. Rep. 292; *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644; *Butler* v. *National Home*, 144 U. S. 64; *Wash. & Idaho R. R.* v. *Coeur d'Alene Ry.*, 160 U. S. 77; *Tex. & Pac. Ry.* v. *Cody*, 166 U. S. 606; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119; *Tex. & Pac. Ry.* v. *Archibald*, 170 U. S. 665; *Tex. & Pac. Ry.* v. *Barrett*, 166 U. S. 617; *Tex. & Pac. Ry.* v. *Behymer*, 189 U. S. 468; *Charnock* v. *Tex. & Pac. Ry.*, 194 U. S. 432; *Tex. & Pac. Ry.* v. *Dashiell*, 198 U. S. 521; *Tex. & Pac. Ry.* v. *Gentry*, 163 U. S. 353; *Tex. & Pac. Ry.* v. *Swearingen*,

196 U. S. 51; *Tex. & Pac. Ry.* v. *Watson*, 190 U. S. 287; *Tex. & Pac. Ry.* v. *Eastin*, 214 U. S. 153; *Tex. & Pac. Ry.* v. *Howell*, 224 U. S. 577; *Tex. & Pac. Ry.* v. *Harvey*, 228 U. S. 319; *Tex. & Pac. Ry.* v. *Stewart*, 228 U. S. 357; *Tex. & Pac. Ry.* v. *Rosborough*, 235 U. S. 429; *Tex. & Pac. Ry.* v. *Hill*, 237 U. S. 208; *Tex. & Pac. Ry.* v. *Bigger*, 239 U. S. 330.

As to construction of the statute, see Dwarris (2d ed.), 532; Sedgwick (2d ed.), 97; Maxwell on Interp. Stat. (5th ed.), 131, 285, 291; Beal's Rules of Legal Interp. (2d ed.), 463; Endlich on Interp., §§ 223, 228–9; 1 Sutherland on Stat. (2d ed.), §§ 274–5; Black on Interp. (2d ed.), 328; Broom's Legal Max. (8th ed.), 19; *Ex parte Crow Dog*, 109 U. S. 556; *Rodgers* v. *United States*, 185 U. S. 83; *United States* v. *Nix*, 189 U. S. 199.

The history of the passage of § 5 of the act of January 28, 1915, shows that Congress intended to take away from the Federal courts only their jurisdiction of the litigations of railroad companies resting upon the ground that such companies were incorporated under act of Congress, or in other words only such jurisdiction as was dependent upon the existence of a constructive Federal question arising from the mere fact of Federal incorporation.

For the purpose of ascertaining the intent of Congress it is proper to consider the development of the act itself, the reports of committees relative thereto, and other similarly definite and reliable indicia. *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Binns* v. *United States*, 194 U. S. 486; *United States* v. *Nakashima*, 87 C. C. A. 646, 160 Fed. Rep. 842; *Symonds* v. *St. Louis & S. E. Ry.*, 192 Fed. Rep. 335–6, 353.

It also is proper in interpreting a statute to consider the environment, the history of the times, and the particular evil which was pressing upon the attention of Congress, and for which it was seeking a remedy. For this purpose

the court may avail itself of all accessible sources of information, including the proceedings and debates in Congress. Cases *supra* and *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50; *United States* v. *Un. Pacific R. R.*, 91 U. S. 72, 79; *Taylor* v. *United States*, 152 Fed. Rep. 1; 52 Cong. Rec. 282, 283, 1544.

There is jurisdiction by reason of the Federal questions which exist and give rise to Federal jurisdiction, unless Federal jurisdiction has been taken away by the act of 1915 which has not been the case.

A suit to enforce a railroad mortgage given by a federally chartered company necessarily involves one or more Federal questions that are not merely constructive in their character.

A railroad company has only such power to mortgage its property essential to the performance of its public duties as its charter and other governing laws confer expressly or by necessary implication. Jones on Corporate Bonds, §§ 1–4; Baldwin on American R. R. Law, 463; *Commonwealth* v. *Smith*, 10 Allen, 448.

That this is a suit to enforce a railway mortgage is either shown by express averment or judicially noticed by the court and is an essential element of the plaintiff's bill. *Frye* v. *Bank of Illinois*, 5 Gilman (10 Ill.), 322; *Inter. & Great North. R. R.* v. *Underwood*, 67 Texas, 589; *East Line Ry.* v. *Rushing*, 69 Texas, 307.

A question determinable by the interpretation and application of an act of Congress is a Federal question. *Ames* v. *Kansas*, 111 U. S. 449; *Howard* v. *United States*, 184 U. S. 676; *Cummings* v. *Chicago*, 188 U. S. 410; *Male* v. *Atchison, T. & S. F. Ry.*, 240 U. S. 97; *Oregon* v. *Three Sisters Irrigation Co.*, 158 Fed. Rep. 346; *Bowers* v. *First National Bank*, 190 Fed. Rep. 676; *McGoon* v. *Nor. Pac. Ry.*, 204 Fed. Rep. 998.

The act of January 28, 1915, does not deprive the Federal courts of their jurisdiction of this case arising out of

the Federal questions therein involved. *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119; *Bowers* v. *First Nat. Bank*, 190 Fed. Rep. 676; *Walker* v. *Windsor Nat. Bank*, 5 C. C. A. 421, 56 Fed. Rep. 76; *Huff* v. *Union Nat. Bank*, 173 Fed. Rep. 333.

The validity and effect of the various provisions of the mortgage must be determined with reference to the acts of 1873 and 1874, which are not acts of incorporation.

The court has jurisdiction of this cause on the ground of diversity of citizenship, which is sufficiently shown by the record. The absence of a direct averment that it is a citizen of Texas is immaterial, since all the facts are alleged from which citizenship appears as the necessary legal intendment. *Sun Printing Assn.* v. *Edwards*, 194 U. S. 377; *Marshall* v. *Balt. & Ohio R. R.*, 16 How. 314; *Balt. & Ohio S. W. R. R.* v. *Davis*, 149 Fed. Rep. 191; *Mathieson Works* v. *Mathieson*, 150 Fed. Rep. 241.

The facts above stated with reference to the defendant The Texas and Pacific Railway Company constitute it a citizen of Texas for purposes of jurisdiction of the Federal courts in this cause. *Bank of United States* v. *Deveaux*, 5 Cranch, 61; *Railroad* v. *Letson*, 2 How. 497; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *St. Louis National Bank* v. *Allen*, 5 Fed. Rep. 551; *Manufacturers National Bank* v. *Baack*, 8 Blatchf. 137; *Orange Nat. Bank* v. *Traver*, 7 Fed. Rep. 146; *National Park Bank* v. *Nichols*, 17 Fed. Cas. 1224; *Main* v. *Second Nat. Bank*, 16 Fed. Cas. 509; *Union Pacific Ry.* v. *Harris*, 158 U. S. 326; *North. Pac. R. R.* v. *Amato*, 144 U. S. 465.

A citizen of the United States, residing in any State of the Union, is a citizen of that State. *Gassies* v. *Ballon*, 6 Pet. 761.

A corporation may, for the purposes of suit, be said to

be born where by law it is created and organized. *Railroad* v. *Koontz*, 104 U. S. 5; *Matter of Dunn*, 212 U. S. 374.

As it is a citizen of the United States and a resident of Texas, defendant is a citizen of Texas for jurisdictional purposes in this cause.

The act of January 28, 1915, does not deprive the Federal courts of their jurisdiction of this case arising out of diversity of citizenship.

Mr. George Thompson and *Mr. Henry C. Coke*, with whom *Mr. Thomas J. Freeman*, *Mr. Arthur J. Shores* and *Mr. Alexander S. Coke* were on the brief, for appellees.

Mr. Winslow S. Pierce and *Mr. Lawrence Greer* filed a brief for appellees as counsel for the Protective Committee of Stockholders of the Texas & Pacific Railway Company.

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

This is a suit to foreclose a railroad mortgage and for other incidental relief. It was brought in the District Court for the Northern District of Texas December 27, 1915, was dismissed by that court for want of jurisdiction and is here upon a direct appeal under § 238 of the Judicial Code.

The bill alleges that the plaintiff, the trustee under the mortgage, is a New York corporation and "a citizen of said State"; that the Texas and Pacific Railway Company, one of the defendants, is a corporation created and existing under the laws of the United States, has its principal place of business and its principal operating and general offices in the Northern District of Texas, and "is a resident and inhabitant" of that district; that the New Orleans Pacific Railway Company, the other de-

fendant, is a Louisiana corporation and "a citizen of said State"; that one of the acts of Congress under which the Texas and Pacific Railway Company was created and now exists (act March 3, 1871, c. 122, § 1, 16 Stat. 573) provides that such company "by that name . . . shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States"; that under that act and designated amendatory and supplemental acts of Congress (May 2, 1872, c. 132, 17 Stat. 59; March 3, 1873, c. 257, 17 Stat. 598; June 22, 1874, c. 406, 18 Stat. 197) said company came to own and hold on February 1, 1888, certain railroad properties and interests in Texas and Louisiana; that on that date said company, "acting in pursuance of due authority conferred upon it by said acts of Congress", the relevant portions of which are copied into the bill, and the New Orleans Pacific Railway Company, acting in pursuance of authority conferred upon it by the laws of Louisiana, executed and delivered the mortgage in suit covering these railroad properties and interests, a substantial part of which is situate in the Northern District of Texas; that the mortgage was duly filed and recorded in the Department of the Interior pursuant to such acts of Congress; that the mortgagors have defaulted in the performance of the terms and conditions of the mortgage, and that the suit involves the requisite jurisdictional amount and "arises under the Constitution and laws of the United States."

By a motion to dismiss the Texas and Pacific Railway Company challenged the jurisdiction of the District Court upon the grounds that the act of January 28, 1915, c. 22, § 5, 38 Stat. 803, provides: "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress," and that apart from the Texas and Pacific Rail-

way Company's incorporation under congressional enactments the suit is not one arising under the Constitution or any law of the United States, and is not one between citizens of different States. The motion was sustained and the bill was dismissed as to both defendants.

The plaintiff insists that in refusing to entertain the suit the District Court erred because (1) the provision before quoted from § 1 of the act of March 3, 1871, enables the Texas and Pacific Railway Company to sue and be sued in any court of law or equity within the United States; (2) the bill shows that the suit is one arising under the laws of the United States apart from the incorporation of the Texas and Pacific Railway Company under acts of Congress, and therefore the act of January 28, 1915, is not controlling, and (3) the bill shows that the suit is between citizens of different States.

1. Upon reading § 1 of the act of 1871 it is plain that the words "by that name . . . shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States" were not intended in themselves to confer jurisdiction upon any court. As the context shows, Congress was not then concerned with the jurisdiction of courts but with the faculties and powers of the corporation which it was creating; and evidently all that was intended was to render this corporation capable of suing and being sued by its corporate name in any court of law or equity—Federal, state or territorial—whose jurisdiction as otherwise competently defined was adequate to the occasion. Had there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy and the venue, it seems reasonable to believe that Congress would have expressed that purpose in altogether different words. The case of *Bank of the United States* v. *Deveaux*, 5 Cranch, 61, 85, is well in point. A

provision in the act incorporating the bank, c. 10, § 3, 1 Stat. 191, much like that here relied upon, was invoked as in itself entitling the bank to sue in a Circuit Court of the United States, but that view was rejected in an opinion by Chief Justice Marshall, wherein it was said:

"That act creates the corporation, gives it capacity to make contracts and to acquire property, and enables it 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever.' This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the same, if brought by individuals. If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be."

Afterwards, when the second bank of the United States was established, a provision was inserted in the incorporating act, c. 44, § 7, 3 Stat. 266, enabling the bank to sue and be sued "in all state courts having competent jurisdiction, and in any Circuit Court of the United States," and in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, it was held (pp. 816–818) that this provision, unlike that in the prior act, amounted to an express grant of jurisdiction to the Circuit Courts and (pp. 823, *et seq.*) was within the power of Congress under the Constitution. It was in the light of these differing precedents in legislation and of the resulting difference in their interpretation that Congress framed the act of 1871. While that act does not literally follow either precedent, its words have the same generality and natural import as did those in the earlier bank act, and this strengthens the conclusion that Congress intended thereby to give to the Texas and

Pacific Railway Company only a general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion, and not to establish an exceptional or privileged jurisdiction.

2. Under the Constitution Congress undoubtedly possesses power to invest the subordinate Federal courts with original jurisdiction of all suits at law or in equity arising under the Constitution, laws or treaties of the United States, and, if the act of February 13, 1801, c. 4, § 11, 2 Stat. 89, be not noticed because of its early repeal, c. 8, § 1, 2 Stat. 132, it is true, as sometimes has been said,[1] that this power was broadly exercised for the first time by the act of March 3, 1875, c. 137, § 1, 18 Stat. 470. By that act Congress in express terms gave the Circuit Courts original jurisdiction, concurrent with the courts of the several States, of all suits of that nature, where the value of the matter in dispute, exclusive of costs, was in excess of five hundred dollars, and this jurisdiction remained with the Circuit Courts until January 1, 1912, when they were abolished, save as the act of March 3, 1887, c. 373, § 1, 24 Stat. 552, required that the value of the matter in dispute, exclusive of interest and costs, be in excess of two thousand dollars. Upon the discontinuance of the Circuit Courts this jurisdiction was transferred to the District Courts by § 24 of the Judicial Code, subject to a restriction that thereafter the value of the matter in controversy should exceed three thousand dollars, exclusive of interest and costs.

As long ago as *Osborn* v. *Bank of the United States, supra*, it was settled that a suit by or against a corporation chartered by an act of Congress is one arising under a law of the United States, and this because, as was said in that case, pp. 823, 825: "The charter of incorporation

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[1] Tennessee *v.* Union and Planters' Bank, 152 U. S. 454, 459; Continental National Bank *v.* Buford, 191 U. S. 119, 122.

not only creates it [the corporation], but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank. . . . The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter."

After the act of March 3, 1875, extended the jurisdiction of the Circuit Courts to cases arising under the laws of the United States, the ruling just quoted was uniformly followed and applied in suits by and against Federal corporations (*Pacific Railroad Removal Cases*, 115 U. S. 1; *Petri* v. *Commercial National Bank*, 142 U. S. 644, 648; *Butler* v. *National Home*, 144 U. S. 64; *Northern Pacific R. R.* v. *Amato*, 144 U. S. 465, 471; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593, 601; *Washington & Idaho R. R.* v. *Coeur d'Alene Ry.*, 160 U. S. 77, 93; *Knights of Pythias* v. *Kalinski*, 163 U. S. 289, 290; *Texas & Pacific Ry.* v. *Swearingen*, 196 U. S. 51, 53; *Matter of Dunn*, 212 U. S. 374, 383–384), save where the particular suit was withdrawn or excluded from that jurisdiction by some specific enact-

ment, like that of July 12, 1882, c. 290, § 4, 22 Stat. 162, placing most of the suits by and against national banks in the same category with suits by and against banks not organized under the laws of the United States. *Leather Manufacturers' National Bank* v. *Cooper,* 120 U. S. 778, 781; *Continental National Bank* v. *Buford,* 191 U. S. 119, 122.

It results that if the general jurisdictional provision, now embodied in § 24 of the Judicial Code, respecting suits arising under the laws of the United States were alone to be considered, it would have to be held that the District Court had jurisdiction of the present suit as one falling within that class by reason of the incorporation of the Texas and Pacific Railway Company under a law of the United States. But § 5 of the act of January 28, 1915, must also be considered. It is a later enactment, is shown by the title to be amendatory of the Judicial Code, and, as has been seen, declares that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress." These are direct and comprehensive words and, when read in the light of the settled course of decision just mentioned, must be taken as requiring that a suit by or against a railroad company incorporated under an act of Congress be not regarded, for jurisdictional purposes, as arising under the laws of the United States, unless there be some adequate ground for so regarding it other than that the company was thus incorporated. Plainly, there was a purpose to effect a real change in the jurisdiction of such suits. Counsel for plaintiff concede that this is so. But they urge that all that is intended is to eliminate the mere creation of a railroad corporation under an act of Congress as a ground for regarding the suit as arising under the laws of the United States. In this there is an evident misapprehension of what constitutes incorporation, as

also of the real basis of the jurisdiction affected. A corporation is never merely created. Being artificial, possessing no faculties or powers save such as are conferred by law, and having in legal contemplation no existence apart from them, its incorporation consists in giving it individuality and endowing it with the faculties and powers which it is to possess. It is upon this theory that the decisions have proceeded. The ruling has been that a suit by or against a Federal corporation arises under the laws of the United States, not merely because the corporation owes its creation to an act of Congress, but because it derives all of its capacities, faculties and powers from the same source. This is shown in the quotation before made from *Osborn* v. *Bank of the United States*, *supra*, and also in the following excerpt from *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 509–510: "A corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States there is the primary question of the extent and meaning of that law. In other words, as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined a suit by or against the corporation is one which involves a construction of the terms of its charter; in other words, a question arising under a law of Congress." And so, when due regard is had for the terms of the amendatory section of 1915 and for the real basis of the jurisdiction affected, the conclusion is unavoidable that what is intended is to make the fact that a railroad company is incorporated under an act of Congress, that is to say, derives its existence, faculties and powers from such an act, an entirely negligible factor in determining whether a suit by or

against the company is one arising under the laws of the United States.

Upon examining the bill in the present suit, it is certain that it does not arise under those laws apart from the incorporation of the Texas and Pacific company under acts of Congress. We say "acts" of Congress, because the original act was amended and supplemented by three others, and the four constitute the company's charter. Portions thereof are copied into the bill as showing that the mortgage sought to be enforced was given under a power conferred by Congress, but this does not help the jurisdiction. As, under the amendatory section, the fact that the company derives its existence and all of its faculties and powers from a Federal charter cannot avail to give jurisdiction, it is obvious that to dwell upon the fact that any particular power comes from the common source must be equally unavailing.

The case of *Male* v. *Atchison, Topeka & Santa Fe Ry.*, 240 U. S. 97, does not make for a different conclusion, because it was not a suit by or against a railroad company incorporated under an act of Congress, and because it arose and was pending in this court prior to the amendatory act of 1915 and by § 6 of that act was excepted from its provisions.

3. Whether this is a suit between citizens of different States turns upon whether the Texas and Pacific Company is a citizen of Texas. It is doubtful that the pleader intended to state a case of diverse citizenship, but, be this as it may, we are of opinion that the company is not a citizen of any State. It was incorporated under acts of Congress, not under state laws; and its activities and operations were not to be confined to a single State, but to be carried on, as in fact they are, in different States. Of course it is a citizen of the United States in the sense that a corporation organized under the laws of one of the States is a citizen of that State, but it is not within the

clause of the Fourteenth Amendment which declares that native born and naturalized citizens of the United States shall be citizens of the State wherein they reside. Nor has Congress said that it shall be regarded as possessing state citizenship for jurisdictional purposes, as is done in respect of national banks by § 24, par. 16, of the Judicial Code. In short, there is no ground upon which the company can be deemed a citizen of Texas, and this being so, the suit is not one between citizens of different States.

Decree affirmed.

CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* DE ATLEY.

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

No. 274. Argued March 10, 1916.—Decided May 22, 1916.

The Employers' Liability Act abrogated the common-law fellow servant rule by placing negligence of a co-employee upon the same basis as negligence of the employer.

In saving the defence of assumption of risk in cases other than those where the carrier's violation of a statute enacted for the safety of employees contributed to the injury or death, the Employers' Liability Act places a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk.

A railroad employee having voluntarily entered an employment requiring him on proper occasions to board a moving train assumes the risk normally incident thereto other than such risk as may arise from the failure of the engineer to use due care to operate the train at a moderate rate of speed so as to enable his co-employee to board it without undue peril.

Such an employee may presume the engineer will exercise due care for his safety and does not assume the risk attributable to operation at unduly high speed until made aware of danger unless the undue

speed and consequent danger are so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger.

An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them.

Where an action under the Employers' Liability Act is tried in a state court local rules of practice and procedure are applicable, and if the state appellate court holds that the trial court failed to follow such a rule relating to an instruction, but affirmed on the ground that there was no question for the jury respecting the question on which the instruction was asked, and in fact there was such a question, it is incumbent on this court to review such decision.

159 Kentucky, 687, reversed.

THE facts, which involve the validity of a judgment in an action in the state court for personal injuries under the Employers' Liability Act, are stated in the opinion.

Mr. E. L. Worthington, Mr. W. D. Cochran and *Mr. Le-Wright Browning* for plaintiff in error, submitted.

Mr. Allan D. Cole, with whom *Mr. H. W. Cole* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

In this action, which was brought in a state court under the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65), the following facts appeared or might reasonably be inferred from the evidence most favorable to defendant in error (plaintiff below), in the light of which the initial question touching the validity of the judgment in his favor must be determined:

On January 22, 1911, plaintiff was in the employ of defendant and acting as head brakeman on train No. 95—a fast west-bound interstate freight train. When the

train reached a station called Springdale, about six miles east of Maysville, in Kentucky, the train engineer directed plaintiff to go to a nearby railway telephone, call up the operator, and ascertain the whereabouts of train No. 1, which was a fast west-bound passenger train; the object being to determine whether it was safe for No. 95 to proceed to Maysville ahead of it. Plaintiff was unable to understand the operator and so reported to the engineer. He then got into the cab of the locomotive and the train proceeded to the coal docks, about one mile east of Maysville and about 460 yards east of a telegraph station in a signal tower known as the F. G. Cabin, where it stopped for coal and water. Plaintiff was directed by the engineer to go forward to F. G. Cabin and ascertain from the operator the whereabouts of train No. 1. Plaintiff went to the tower, and was there advised that his train had time to reach Maysville. He immediately descended to the platform in front of the tower and beside the track, and saw that his train was approaching. He waited for it, and when it reached the platform he attempted to board the engine. He could not accurately judge the speed of the train, but it appeared to him to be going slowly enough for him to get aboard it. He caught hold of the grab iron and put one foot on the step, and then the speed of the train combined with his weight caused his foot to slip and loosened his hold, so that he fell beneath the wheels of the tender and his arm was cut off. He had been employed as brakeman for about six weeks, and before that had made two round-trips over the road for the purpose of becoming acquainted with his duties. During the time of his employment he had frequently been called upon, under orders of the train engineer, to leave the train and go forward to signal towers for orders or information and then mount the train as it came moving by. On the occasion of the accident the train was running about twelve miles per hour.

The case went to the jury under instructions making defendant's liability dependent upon whether the engineer, with knowledge of plaintiff's presence at the telegraph tower upon business connected with the operation of the train, and with knowledge of his purpose to board the train, negligently operated the train at such a rate of speed as to make plaintiff's attempt to board it unusually hazardous. There was a verdict for plaintiff and the resulting judgment was affirmed by the Court of Appeals of Kentucky. 159 Kentucky, 687.

Upon the present writ of error, it is not disputed that there was sufficient evidence of the negligence of the engineer to require the submission of the case to the jury. It is argued that there was no substantial evidence to support the conclusion that such negligence was the proximate cause of the injury; but this is so clearly untenable as to require no discussion. The remaining questions turn upon the application of the law respecting assumption of risk.

It is insisted that even conceding the train was operated at a negligent rate of speed in view of plaintiff's purpose to board it, yet he assumed the risk of injury involved in the attempt. The act of Congress, by making the carrier liable for an employee's injury "resulting in whole or in part from the negligence of any of the officers, agents or employees" of the carrier, abrogated the common-law rule known as the fellow-servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer. At the same time, in saving the defense of assumption of risk in cases other than those where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee (*Seaboard Air Line* v. *Horton*, 233 U. S. 492, 502), the Act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand

to the question whether a plaintiff is to be deemed to have assumed the risk.

On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other. *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 101; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

It is argued that so far as the question of assumed risks is concerned, it makes no difference, in the case of a brakeman about to board a moving train, whether it is operated at a low or at a high rate of speed; that if the train is moving slowly the risk is an ordinary one incident to the business of railroading; while if it is moving rapidly the risk is open, obvious and apparent. Were we to consider only extreme cases, such as were instanced in argument, the point might be conceded; that is, that mounting a train operated at one mile per hour is an ordinary risk, while mounting a train operated at fifty miles per hour presents a risk which, although extraordinary, is open, obvious and apparent. But these extremes do not present an apt illustration. A speed very much below fifty miles would endanger the brakeman's safety, at the same time being much less apparent. If those operating the train

in question knew that plaintiff intended to board it at that point—and the verdict is to that effect—the jury was warranted in finding that plaintiff had a right to expect that the train would be moving at a moderate rate of speed such as would enable an ordinarily careful brakeman to get on with reasonable safety; and this upon the ground that as head-brakeman plaintiff had the right—indeed, that it was his duty—to get upon the engine, since otherwise the train would be left without a head brakeman and the engineer without the information required for the safe operation of the train; and that plaintiff had no notice nor any opportunity to determine with reasonable certainty what the speed of the train was, or that it was too great for his safety, until the engine had practically reached him. It cannot be said, as matter of law, that a speed of twelve miles per hour would necessarily be obvious to him as a dangerous speed, before he made the attempt to board the train.

It is insisted that the true test is, not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. *Gila Valley Ry. Co.* v. *Hall*, *Seaboard Air Line* v. *Horton*, *ubi supra.*

We conclude that there was no error in refusing to peremptorily instruct the jury to return a verdict in favor of defendant.

Error is assigned to the refusal of the trial court to instruct the jury as follows: That when plaintiff entered defendant's service as brakeman he assumed all the ordinary risks and hazards of that employment, and if the jury should believe from the evidence that his injuries were the natural and direct result of any of such risks or hazards, they must find for the defendant. The instruction thus requested was defective, and there was no error in refusing to give it in this form, since it embodied no definition of "ordinary risks and hazards," nor any qualification appropriate to the particular facts of the case. The *gravamen* of plaintiff's complaint, as developed at the trial, and the sole theory upon which the case was submitted to the jury, was that the negligence of the engineer in operating the train at an unduly high rate of speed created an unusual and extraordinary hazard. An instruction upon the question of assumption of risk, dealing solely with the ordinary hazards of the employment, and not pointing out that a different rule must be applied with respect to an extraordinary risk attributable to the engineer's negligence, would probably have confused and misled the jury.

But it appears that in Kentucky there is an established rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, but they are incorrect in form or substance, it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in the place of the defective ones. *Louisville & Nash. R. R. Co.* v. *Harrod*, 115 Kentucky, 877, 882; *West Kentucky Coal Co.* v. *Davis*, 138 Kentucky, 667, 674; *Louisville, H. & St. L. Ry. Co.* v. *Roberts*, 144 Kentucky, 820, 824.

Although the present action was based upon a Federal

statute, it was triable and tried in a state court, hence local rules of practice and procedure were applicable. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, this day decided, *ante*, p. 211. The Kentucky Court of Appeals assumed for the purposes of the decision that the case was one where the trial court ought to have followed the local practice and prepared or directed the preparation of a proper instruction covering the question of assumption of risk, and it sustained the judgment only upon the ground that there was no question for the jury respecting it. Whether there was, is a question of law, and of course, in this case, a Federal question; and since the Court of Appeals assumed to decide it, it is incumbent upon us to review the decision. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 257.

We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive and appreciated the extraordinary danger, or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. The Court of Appeals reasoned that plaintiff's duties required him to be upon the passing train; that if he failed to board it he would be left behind; that he had a right to assume the engineer would run the train at a speed that would enable him to get on in safety;

that he was facing the train, which was going directly toward him; that, as a matter of common knowledge, one standing in that position cannot form an accurate judgment of its speed until it comes quite near to him; and that his opportunity to observe the speed was limited to the brief space of time that elapsed between the passing of the front end of the engine and the cab, where it was his purpose to get on; and the court determined that, under such circumstances, "it is well-nigh impossible to tell the difference between a rate of from four to six miles an hour, when an ordinarily prudent brakeman might get on with reasonable safety, and a rate of from ten to twelve miles an hour, when it would be dangerous for him to do so," and that "all the circumstances tend to show that knowledge of the speed of the train came to him so suddenly and unexpectedly that he did not have an opportunity to realize and appreciate the danger of getting on." Conceding the force of the reasoning, we are bound to say that, in our opinion, it cannot be said, as matter of law, to be so incontrovertible that reasonable minds might not differ about the conclusion that should be reached. We therefore hold that the question of assumption of risk was one proper for submission to the jury, and, assuming as the court assumed that the local practice required the preparation of a proper instruction covering the topic, in the place of the defective instruction that was offered, there was error in affirming the judgment of the trial court.

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

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY *v.* RANKIN.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 59. Argued November 5, 1915.—Decided May 22, 1916.

Where the state court has treated the instrument involved as properly in evidence and has undertaken to determine its validity and effect, this court need not consider mooted questions of pleading as to whether such instrument was properly before the court.

Rights and liabilities of parties to an interstate shipment by rail depend upon Acts of Congress, the bill of lading, and common-law principles as accepted and applied in Federal tribunals.

The interpretation and effect of a bill of lading of an interstate shipment may present a Federal question even though there is not affirmative proof that the carrier has filed tariff schedules in compliance with the Act to Regulate Commerce.

It will not be presumed, in absence of affirmative proof to the contrary, that an interstate carrier is conducting its affairs in violation of law. The presumption that all things required by law are rightly done applies unless the circumstances of the case overturn it.

Where a carrier by rail offers rates for interstate shipments fairly based upon valuation, it may limit its liability by special contract.

Recitals in a bill of lading, signed by both carrier and shipper, that lawful alternate rates based on valuations were offered, constitute admissions by the shipper and *prima facie* evidence of choice, and cast on the shipper the burden of proof to contradict his own admissions.

THE facts, which involve the construction of the Act to Regulate Commerce and the Carmack Amendment thereto, as applied to a shipment of cattle under a bill of lading containing stipulations for limited liability, are stated in the opinion.

Mr. James J. Lynch, with whom *Mr. Michael M. Allison*, *Mr. Isaac G. Phillips* and *Mr. Edward Colston* were on the brief, for plaintiff in error.

Mr. W. B. Miller and *Mr. Charles C. Fox* for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

Defendants in error, experienced shippers, on November 6, 1911, delivered to plaintiff railway at Danville, Kentucky, a car of mules, nineteen of which they owned, for transportation to Atlanta, Georgia. They signed and accepted a through bill of lading, the pertinent portions of which follow:

"*Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates.*"

"3. Limit of value. That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agent of the said carrier, viz:

That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

. . .

Horses or Mules, not exceeding $75.00 each

. . .

That the tariff regulations of said carrier provide that for every increase of one hundred per cent, or fraction thereof, in the above valuations, there shall be an increase of fifty per cent in the freight rate; and That the said shipper in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss

or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for."

"4. Guaranteed freight rate. That the rate of freight guaranteed by said carrier, in view of the above stipulated valuations is $—— per —— from —— —— to —— —— and that said shipper accepts this rate of freight, and agrees to pay same at destination in connection with the charges advanced by said carrier, as indicated above, and any other legitimate charges which said carrier may advance for account of said shipper between point of shipment and destination for feed, water, etc."

A wreck occurred at Dayton, Tennessee; some of the animals were killed; others were injured and afterwards sold by plaintiff in error; and shippers brought this suit in the Circuit Court, Hamilton County, Tennessee, to recover $4,750—$250 per head.

The declaration contains two counts. The first—a common law count on a general contract of affreightment—alleges delivery with agreement to pay full freight charges and that the carrier accepted and agreed to transport safely but failed so to do. The second sets up execution and delivery of the bill of lading annexed as an exhibit, but declares shippers knew nothing of the limited liability provision therein; and further "that the whole of said paper, and especially the $75 limitation, is void and of no effect and is not operative or binding on them or either of them," because (1) executed in Kentucky, under whose laws it is void, (2) unreasonable and unjust, (3) no other contract of transportation was offered and shippers were not aware that the transportation was to take place at reduced rates and under stipulations for limited liability, (4) there was no consideration, (5) the

parties were not on equal terms. It also denounces as untrue statements in clause 3 of the bill concerning published freight rates and tariff regulations.

The railway filed nine pleas, two general—"not guilty" and "that it did not breach the contract of carriage" as alleged—and seven special ones. Among other things, the company avers in the latter: That it had duly filed with the Interstate Commerce Commission and had published and kept open for inspection schedules of joint rates between Danville, Kentucky, and Atlanta; they contained classifications of freight in force and stated separately all terminal and other charges and provided that carload rates upon horses and mules where valued not above $75 each should be $95 per car and for every increase of one hundred per cent. or fraction thereof there should be an increase of fifty per cent. in rate; plaintiffs knew the company's freight rate was based upon specified values and that it stood ready to transport at increased valuation and rate, and, knowing these facts, they declared the value specified and thereby obtained the cheaper rate of $95 per car. That the receipt or bill of lading duly signed by shippers fixes a maximum value; contains definite recitals (set out above) in respect of rates, etc., and "with all the provisions thereof, is valid and binding upon the plaintiffs and the defendant when applied to interstate shipments which are governed by the Acts of Congress of February 4, 1887, and June 29, 1906, and defendant pleads and relies upon the same as a complete bar to any recovery (in excess of $75.00) for such mules as were actually killed and such ones as were actually damaged to the amount of $75.00."

Issue being joined the cause was tried to a jury. D. F. Rankin, testifying for himself, declared the mules were worth from $230 to $240 each; described the circumstances surrounding shipment, identified exhibited bill of lading as signed and accepted by him but stated he did not read

it and nothing was said about rates and that he was not aware of the $75 limitation; admitted he had shipped stock over same route before, paying $95 per car; and asserted he had seen no printed tariff rates from Danville to Atlanta. The bill so identified was treated throughout the trial as properly in evidence; but no duly filed and applicable rate schedules were presented, nor did the railway introduce any evidence to support its special pleas.

The trial judge held:

The one controlling point in this case is as to whether or not there is a presumption in favor of the defendant's compliance with the law whereby it seeks by its action to escape from liability."

"There is no doubt in the mind of the Court but that if the railroad were charged with a violation of the provisions of the Interstate Commerce Act, a presumption in favor of its compliance would arise; but where the railroad, as in this case sets up, as a matter of defense, its compliance with the provisions of that Act, the Court is of the opinion that there is no presumption in its favor and that the burden of proof is on the defendant to show a substantial compliance with the provisions of the Act."

"It therefore follows that under the facts in this case, the undisputed facts and the decisions of our courts on this subject, that the court is of the opinion that the contract in this case is invalid and the question goes to the jury as to the negligence of the defendant on this shipment of stock."

And he charged the jury:

"If you find from the proof in this case that the plaintiff did deliver in good condition 19 mules to the defendant to be transported to Atlanta, Ga., and that there was an accident, a collision on the railroad, then the burden is upon the Railway Company to show that it has not been guilty of any negligence.

'If the defendant company shows you by the greater weight or the preponderance of the evidence its freedom from negligence, then the plaintiff is not entitled to recover.

"If you reach the conclusion that the plaintiff has made out his case and is entitled to recover for the value of the 19 mules, then he would be entitled to recover the value of the mules at the place of their destination, in this case, Atlanta, Georgia, according to their value, at the time they would have been delivered but for the negligence of the carrier, less whatever transportation charges there would have been on this car of stock.

"It is also in the discretion of the jury to award interest on any recovery from the time of the loss up to the present time."

. . . "Negligence is the want or lack of exercise of that degree of care which the particular circumstances demands. In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

Judgment upon a verdict for $4,180—$220 per head—and $328.82 interest, was affirmed by the Court of Civil Appeals, and the Supreme Court approved this action without opinion.

The Court of Civil Appeals *inter alia* declared:

"It hardly appears debatable to us, that it was incumbent upon the railroad company, in this case, in the present state of the pleadings, to show by proof that it had met the requirements of the Interstate Commerce Act, and this burden it failed to carry, and having failed to do so it cannot rely upon presumption.

"Having reached this conclusion, it remains to be determined what are the rights and liabilities of these parties, under the contract of carriage in this case. There being nothing in the record to show that the rate of freight charged by the company was approved and authorized by the Interstate Commerce Commission, we must determine the rights of these parties upon the theory that no

such rate was ever filed with the Commission, or approved or authorized by it, and that the rate and contract made in this case was without the authority and outside of the act of Congress, invoked by this defendant; or, in other words, so far as the Interstate Commerce Act is concerned, this railroad company has made the contract in violation of its provisions. . . .

"There is no proof that the railroad company had any other rate than the one charged plaintiffs for this shipment between Danville, Ky., and Atlanta, Georgia. There is no proof that it offered to plaintiffs, at the time it issued to them its bill of lading, a contract with unlimited liability or, in other words, a common law liability. . . .

" . . . If the company had any other rate than the one it agreed for the transportation of this freight, it did not disclose that fact to the shipper nor did it have any rate whatever posted in, or about, its office. If it had a shipping contract with unlimited liability it did not choose between the two, and, from the undisputed facts developed in this record, it is clear to our minds this contract is void and the limited liability clause therein cannot be relied upon by the company as a bar to the recovery of full value of each animal shipped. If, however, the defendant had shown, by proof, that the rate charged by it for this freight had been filed with and approved by the Interstate Commerce Commission, and that it had posted the rate as required by the act of Congress, then a rate of freight based upon the valuation fixed in the bill of lading would have limited plaintiffs' right to recover to the value fixed in the contract."

Plaintiff in error maintains, first, that not having been negligent it is not liable for any sum; and, second, that in any event it is protected by a valid limitation in the bill of lading.

Counsel concede liability of a common carrier under the long recognized common law rule not only for negligence

but also as an insurer and that unless the Carmack Amendment (copied in margin) [1] has changed this rule the railway is responsible for damages not exceeding specified value. But they insist that in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, we held this amendment restricts a carrier's liability to loss "caused by it." And, consequently, they say, the trial court erred when it charged: "In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

Construing the Carmack Amendment, we said through Mr. Justice Lurton in the case cited, 226 U. S. pp. 506–507: "The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common law duty as a common carrier." Properly understood neither this nor any other of our opinions holds that this amendment has changed the common law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line.

The state courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill

[1] "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. . . ." (Ch. 3591, 34 Stat. 584, 595.)

of lading, and common law rules as accepted and applied in Federal tribunals. *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588; *Southern Express Co.* v. *Byers*, 240 U. S. 612, and cases cited; *Southern Ry.* v. *Prescott*, 240 U. S. 632.

We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the Interstate Commerce Act. It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law "presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.*" *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, 69–70; *Knox County* v. *Ninth National Bank*, 147 U. S. 91, 97; *Maricopa & Phoenix R. R.* v. *Arizona*, 156 U. S. 347, 351; *Sun Publishing Assn.* v. *Moore*, 183 U. S. 642, 649.

Under our former opinions the settled doctrine is that where alternate rates fairly based upon valuation are offered a railroad may limit its liability by special contract. *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 283.

The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability. And as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its

schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him. *York Co.* v. *Central R. R.*, 3 Wall. 107, 113; *The Delaware*, 14 Wall. 579, 601; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 337; *Cau* v. *Texas & Pacific Ry.*, 194 U. S. 427, 431; *Squire* v. *New York Central R. R.*, 98 Massachusetts, 239, 248; *Wabash R. R.* v. *Curtis*, 134 Ill. App. 409, 412; Hutchinson on Carriers, 3d ed., § 475.

The bill of lading in question is plainly entitled "Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates" and contains the conspicuous provisions concerning published rates, tariff regulations, choice offered the shipper and limit upon the carrier's liability, etc., above set out. In view of these recitals and admissions, the limitation of liability must be treated as *prima facie* valid, and, consequently, the trial court erred in holding it void as a matter of law and permitting a recovery for full value of the animals.

The judgment below is reversed and the cause remanded to the Supreme Court of Tennessee for further proceedings not inconsistent with this opinion.

Reversed.

DONALD, SECRETARY OF STATE OF WISCONSIN, v. PHILADELPHIA & READING COAL & IRON COMPANY.

FREAR, AS SECRETARY OF STATE OF WISCONSIN, v. WESTERN UNION TELEGRAPH COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Nos. 253, 254. Argued April 13, 1916.—Decided May 22, 1916.

The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which, therefore, the several States may not, by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. *Harrison* v. *St. Louis & San Fran. R. R.*, 232 U. S. 318.

A State may not prevent foreign commercial corporations doing local business from exercising their constitutional right to remove suits into Federal courts.

Section 1770 f, added June 20, 1905, to the Statutes of Wisconsin of 1898, providing for the revocation of the licenses of any foreign corporation to do business within the State in case it removes, or makes application to remove, any action commenced against it by a citizen of that State into a Federal court is unconstitutional as beyond the power of the State.

219 Fed. Rep. 199, affirmed.

THE facts, which involve the validity under the Federal Constitution of a statute of Wisconsin providing for revocation of licenses granted to corporations not organized under the laws of that State in case they remove into the Federal courts actions commenced against them by citizens of the State on causes of action arising in the State, are stated in the opinion.

Mr. J. E. Messerschmidt, with whom *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, was on the brief, for appellants in both cases:

The act is in accord with the policy of the State of Wisconsin concerning corporations and to hear domestic and foreign corporations alike.

The provision of the statute, that, if a foreign corporation shall remove or make application to remove into any District or Circuit Court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this State, the license issued to said corporation shall be void and the Secretary of State shall enter such forfeit in the records in his department, has not for its object to oust the Federal court of jurisdiction, but the primary purpose is the putting of foreign corporations on substantially the same footing as domestic corporations and such is the result.

The mandate of the Fourteenth Amendment that no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws, is applicable to remedial rights.

The rule of comity goes only so far as to place foreign corporations on an equal basis with domestic corporations, but never beyond.

The rule of the *Doyle* and *Prewitt Cases*, properly qualified and limited in its scope, is applicable to this statute and is sufficient to sustain its constitutionality.

A foreign corporation is not required by the statutes of Wisconsin, as a condition for receiving a license in the State of Wisconsin, to stipulate that it will not remove a case to the Federal court.

A stipulation required to be filed in the Secretary of State's office by a foreign corporation that it will not remove a case to the Federal court does not in any way change the effect of a statute of this nature.

The Wisconsin statutes relating to foreign companies do not in any way interfere with or affect interstate commerce.

The revocation of the license of the respondent does not deprive it of any constitutional rights.

Mr. M. H. Boutelle for appellee in Number 253.

Mr. Rush Taggart, with whom *Mr. Francis Raymond Stark* was on the brief, for appellee in Number 254.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

These appeals bring up for consideration the validity of a Wisconsin statute providing for revocation of licenses granted to corporations not organized under the laws of that State. They were heard together and to dispose of them by one opinion will be convenient.

Terms and conditions upon which foreign corporations might do local business and penalties for failure to comply therewith were first prescribed by the legislature of Wisconsin in 1898. Amendatory and supplemental statutes were enacted and finally the act of June 20, 1905, added four new sections to the statutes of 1898, one of which follows:

SEC. 1770*f*. "Whenever any foreign corporation doing business in this state shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

Since 1860 the Western Union Telegraph Company, a

New York corporation, has been continuously carrying on within Wisconsin both intra- and interstate commerce and for use therein has acquired and owns a large amount of property. In 1907 it filed with the secretary of state a copy of its charter, paid the prescribed fee and took out a license to do intrastate business.

The Philadelphia & Reading Coal & Iron Company, a Pennsylvania corporation, since prior to 1898, within Wisconsin has been continuously shipping and selling coal both in intrastate and interstate commerce, and for use therein has purchased at great expense docks and other properties. Having paid required fees and filed its charter with the secretary of state, it received a license, November 10, 1898.

The Western Union Telegraph Company removed to the United States District Court a civil suit begun against it in the Circuit Court, Dane County, Wisconsin, during 1911; and in 1912 an action against the Philadelphia & Reading Coal & Iron Company was likewise removed. Averring that so far as the same directs or attempts to direct annulment of its right to do business § 1770*f*, above quoted, is in conflict with the Federal Constitution, each of the appellees filed an original bill praying an injunction restraining the secretary of state from revoking its license because of such removal. The lower court sustained the claim of unconstitutionality (216 Fed. Rep. 199), granted preliminary injunctions and these direct appeals were taken.

Consideration of the Wisconsin statutes convinces us that they seek to prevent appellees and other foreign commercial corporations doing local business from exercising their constitutional right to remove suits into Federal courts. To accomplish this is beyond the State's power. The action of the court below in holding § 1770*f* inoperative and enjoining its enforcement as to appellees was correct and its decree must be affirmed.

We are asked in effect to reconsider the question discussed and definitely determined in *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318. We there said (p. 328): "The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* GRAY, ADMINISTRATRIX OF GRAY.

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

No. 355. Argued May 5, 1916.—Decided May 22, 1916.

Contradictory statements made by a witness prior to his examination in the case can have no legal tendency to establish the truth of their subject-matter.

Rights and obligations under the Federal Employers' Liability Act depend upon that Act and applicable principles of common law as interpreted and applied in Federal courts.

In an action under the Federal Employers' Liability Act, negligence by the employer is essential to a recovery, and where there is no evidence to show why a brakeman, sent to guard his train, should lie down and go to sleep on the track within a short distance of a curve, negligence cannot be imputed to the engineer of an approaching passenger train for not stopping his train before striking him, it appearing that the distance from the curve was less than that in which a train could be stopped even if a light could have been seen.

The engineer of an approaching train, on seeing the lights of a brakeman sent out to guard the latter's train, has a right to presume

that the brakeman is standing on guard and he does not owe such brakeman a duty to immediately stop his train so as to avoid hitting him.

167 Nor. Car. 433, reversed.

THE facts, which involve the validity of a verdict and judgment in an action under the Employers' Liability Act, are stated in the opinion.

Mr. L. E. Jeffries, with whom *Mr. H. O'B. Cooper* and *Mr. L. L. Oliver* were on the brief, for plaintiff in error.

Mr. Thomas H. Calvert, with whom *Mr. John A. Barringer* was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Kenneth L. Gray, an experienced brakeman, was of the crew in charge of plaintiff in error's north-bound interstate freight train which started from Spencer at 9:45 P. M. August 29, 1912. Seeking damages for his death, the administratrix brought this suit under the Federal Employers' Liability Act (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291) in the Superior Court, Randolph County, N. C. Among other things her amended complaint alleges:

"5. That on the 30th day of August, 1912, the intestate of the plaintiff was on a freight train running from Spencer in the State of North Carolina to Washington, D. C., through the State of Virginia, and when the freight train upon which the intestate of the plaintiff was operating in going north arrived at Dry Fork, in the State of Virginia, the intestate of the plaintiff was sent forward about three-quarters of a mile to signal a passenger train of defendant coming south; that the intestate of the plaintiff when he had gotten about three-quarters of a mile from Dry Fork, for some reason—loss of sleep or for some other

cause unknown to the plaintiff—laid down by the side of the track of the defendant with his head on the end of the cross-ties and went to sleep; that shortly thereafter passenger train No. 37, coming south as aforesaid, carelessly and negligently ran over the intestate . . .

* * * * * * * *

"7. That the death of the intestate of the plaintiff was caused without fault on his part and by the wrongful and negligent act of the defendant, in that both the engineer and the fireman upon the passenger train which killed the intestate of the plaintiff could have easily seen the intestate of the plaintiff lying in a helpless condition as aforesaid upon the track of the defendant, the track of the defendant being straight a sufficient distance upon which the said passenger train was running toward the intestate of the plaintiff to have stopped the train or slackened its speed sufficiently to have prevented the killing of the intestate of the plaintiff, ran their train onto the intestate of the plaintiff without ringing the bell, without blowing its whistle, without slackening its speed or without stopping the said train; in that the servants of the defendant did not keep proper lookout on the track in front of the engine and have the engine and train of the defendant in proper control so that they could stop the engine of the defendant in time to have prevented the wrongful killing of the intestate of the plaintiff; in that the servants of the defendant did not see the intestate of the plaintiff, which it was their duty to do and which they could have done by ordinary care until the train was so near the prostrate form of the intestate of the plaintiff that the servants of the defendant could not stop the train in time to save the life of the intestate of the plaintiff; in that the servants of the defendant wrongfully killed the intestate of the plaintiff upon the said occasion when they had the last clear chance to save his life, which they failed to do by the exercise of ordinary care."

The accident occurred at 5:14 A. M.—twenty minutes before sunrise—when it was somewhat foggy and ordinary objects on the ground could not readily be seen without artificial light. Approaching Dry Fork station the freight train stalled and having been divided into two sections these were hauled onto sidings there. After placing section one and as he returned by the main track to bring up section two, the freight engineer directed Gray to flag south-bound passenger train No. 37. It was the latter's duty, with a red and white lantern in hand, to go forward eighteen telegraph poles (half a mile) and lay a torpedo on the track; then to go nine poles further and place two torpedoes; then to return, stand near pole eighteen and await the expected train. No torpedo was put in place; but having advanced some three-quarters of a mile he set the lanterns on the track, lay down with his head on a crosstie and went to sleep. There is nothing to explain this action.

From Banister Hill two and one-fourth miles southward and almost to Dry Fork the track, following several curves, descends on a heavy grade. Commencing say three-fourths of a mile down this grade it runs in a straight line one-eighth mile; then around a sharp curve to the right, passing through a deep cut, to a point some six hundred feet from where the brakeman lay; then again in a straight line some four hundred feet; and thence around a moderate curve to the left perhaps a half mile.

On the west side of this last curve approximately 217 feet from its north end is the spot where Gray slept. Coming south along the track in broad daylight one can first see it when he reaches a point on the right-hand curve in the deep cut 1254 feet away.

Passenger train No. 37, properly equipped, 790 feet long, composed of ten cars—six steel sleepers and four other cars—a tender and engine, came down the long grade running fifty-five miles an hour. The engineer says

that approaching the right-hand curve he blew a station signal; when he reached point in the cut where it first became possible to see the lights he blew a flagman's signal; almost immediately thereafter, seeing the body, he put on brakes, turned off steam and did everything possible to check the train; before this could be done, a low step struck the brakeman's head. Just before No. 37 blew for that station (it was not scheduled to stop there) the freight engine, standing at Dry Fork, signaled for Gray's return.

Three engineers testified that in the circumstances the passenger train could not have been stopped in less than 1900 feet, and no other evidence was offered on this point. There is nothing indicating that after the engineer saw or could have seen the brakeman's body the train could have been stopped before reaching it.

In an effort to discredit the passenger engineer, only witness to some circumstances, he was asked on cross-examination concerning prior contradictory statements; but the exclusion of all or any part of his evidence would not change the result. Of course the contradictory statements can have no legal tendency to establish the truth of their subject-matter. *Donaldson* v. *N. Y., N. H. & H. R. R.*, 188 Massachusetts, 484, 486; *McDonald* v. *N. Y. C. &c. R. R.*, 186 Massachusetts, 474; *Commonwealth* v. *Starkweather*, 10 Cush. 59; *Sloan* v. *R. R.*, 45 N. Y. 125; *Purdy* v. *People*, 140 Illinois, 46.

Following local practice, at close of all the evidence a motion was made to dismiss as of non-suit, because negligence by the railroad had not been shown. The court denied this and submitted two issues to the jury—"whether the intestate of the plaintiff was killed by the negligence of the defendant, as alleged in the complaint" and "what damage, if any, is the plaintiff entitled to recover." In connection with these a lengthy and rather involved charge was given, the objections to which it is not now necessary for us to consider. Judgment upon a

verdict for the administratrix was affirmed by the Supreme Court. 167 N. Car. 433.

Plaintiff in error maintains that the trial court erred in overruling its motion to dismiss and also relies upon objections to the charge. Counsel for defendant in error claim all instructions were correct and insist that the verdict is adequately supported by evidence. Concerning the latter they say:

"On the testimony and the law applicable to the case the jury could have arrived at the following conclusions:

"1. That there was an unobstructed view of more than 1,200 feet from the danger signals and the place the intestate was struck.

"2. That the red and white lights were on the track. This was undisputed.

"3. That it was the duty of the engineer to keep a lookout for danger signals. . . .

"4. That the fact the train approached about 1,300 feet distant around a curve did not excuse the engineer from keeping a lookout down the track.

"5. That the lights on the track could in fact be more easily seen when they were in the darkness and out of the direct rays of the headlight as the train was entering the straight track from the curve.

"6. That in the exercise of ordinary care the engineer could have seen the lights at a point more than 1,200 feet distant. . . .

"7. That the engineer should have blown his signal as soon as he saw the danger signals, or by the exercise of ordinary care could have seen them, which was when he was more than 1,200 feet distant.

"8. That instead of bringing his train under control and trying to stop it as soon as he saw, or by the exercise of ordinary care could have seen, the lights the engineer waited until he saw the intestate lying beside the track."

As the action is under the Federal Employers' Liability

Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts. *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Central Vermont Ry.* v. *White*, 238 U. S. 507; *Great Northern Ry.* v. *Wiles*, 240 U. S. 444.

Negligence by the railway company is essential to a recovery; and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error. When it first became possible for the engineer to see signal lights 1254 feet away he had a right to suppose the brakeman was standing there on guard. Immediately, he says, the customary signal was sounded. No duty to the brakeman demanded an instant effort to stop the train—the indicated danger was more than half a mile away. Moreover, application of emergency apparatus on that moment, it appears, would not have caused a stop in time to prevent the accident. There is no evidence that the engineer could have seen the brakeman a single moment before he did or omitted thereafter to do all within his power.

We think the motion to dismiss should have been granted. The judgment below is accordingly reversed and the cause remanded to the Supreme Court of North Carolina for further proceedings not inconsistent with this opinion.

Reversed.

BRAZEE *v.* PEOPLE OF THE STATE OF MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 402. Argued April 6, 1916.—Decided May 22, 1916.

A State, exercising its police power, may require licenses for employment agencies and prescribe reasonable regulations in respect to them to be enforced according to the legal discretion of a commissioner.

The provisions in Public Act No. 301 of Michigan of 1913, imposing a license fee to operate employment agencies and prohibiting employment agents from sending applicants to an employer who has not applied for labor, are not unconstitutional as depriving one operating an employment agency of his property without due process of law or as denying him the equal protection of the laws.

Provisions in the statute limiting fees that may be charged by those licensed thereunder are severable, and might, if unconstitutional, be eliminated without destroying the statute.

The validity of severable provisions of the statute involved in this case not having been raised by the charge against one violating it, and not having been considered by the court below, has not been considered by this court.

183 Michigan, 259, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of Public Act No. 301 of 1913 of Michigan, imposing licenses on the conducting of employment agencies, are stated in the opinion.

Mr. Proctor Knott Owens for plaintiff in error:

The provision in § 5 of the statute is unconstitutional in that it abridges the right and liberty to contract, and is a denial of due process of law. The whole act is unconstitutional under the Fourteenth Amendment.

The penalty provisions of the statute are unconstitutional.

The facts are reviewable by this court.

The case is one of unjust discrimination.

For applicable cases on the Fourteenth Amendment see, *Dingeman* v. *Lacy*, 180 Michigan, 129; *Butchers Union* v. *Crescent Live Stock Co.*, 111 U. S. 746; *Chicago* v. *Umpff*, 45 Illinois, 90, 92; *Ex parte Dicky*, 144 California, 234; *In re Grice*, 79 Fed. Rep. 627; *In re Chaddock*, 75 Michigan, 527; *Kelleyville Coal Co.* v. *Harrier*, 207 Illinois, 624; *Leep* v. *Railway Co.*, 38 Arkansas, 407; *Brown* v. *Cook County*, 84 Illinois, 590; *Matthews* v. *The People*, 202 Illinois, 389; McQuinlan, Municipal Ordinance, 193; *Missouri* v. *Loomis*, 115 Missouri, 307; *Ohio Life Ins. Co.* v. *De Bolt*, 16 How. 431; *People* v. *Gilson*, 109 N. Y. 389; *Valentine* v. *Berrien County*, 124 Michigan, 664; *People* v. *Wilson*, 249 Illinois, 195; *Scowden's Appeal*, 96 Pa. St. 422; *Spring Valley Water Co.* v. *San Francisco*, 165 Fed. Rep. 667; *Maine* v. *Mitchell*, 97 Maine, 66; *State* v. *Moore*, 113 N. Car. 697; *State* v. *Sheriff*, 48 Minnesota, 236; *San Antonio* v. *McHaffy*, 96 U. S. 315; *Spokane* v. *Macho*, 51 Washington, 322; *Tugman* v. *Chicago*, 78 Illinois, 405; *Moore* v. *St. Paul*, 48 Minnesota, 332; *William* v. *Mayor*, 2 Michigan, 568; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Mr. Grant Fellows, Attorney General of the State of Michigan, with whom *Mr. David H. Crowley* was on the brief, for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

Brazee having taken out a license to conduct an employment agency in Detroit under Act 301, Public Acts of Michigan, 1913, was thereafter convicted upon a charge of violating its provisions by sending one seeking employment to an employer who had not applied for help. He claimed the statute was invalid upon its face because in

conflict with both state and Federal Constitutions, and lost in both trial and Supreme Courts. 183 Michigan, 259. Now he insists it offends that portion of the Fourteenth Amendment which declares, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The general purpose of the act is well expressed in its title—"An Act to provide for the licensing, bonding and regulation of private employment agencies, the limiting of the amount of the fee charged by such agencies, the refunding of such fees in certain cases, the imposing of obligations on persons, firms or corporations which have induced workmen to travel in the hope of securing employment, charging the Commissioner of Labor with the enforcement of this act and empowering him to make rules and regulations, and fixing penalties for the violation hereof." It provides: Sec. 1. No private employment agency shall operate without a license from the Commissioner of Labor, the fee for which is fixed at $25 per annum except in cities over two hundred thousand population, where it is $100; this license may be revoked for cause; the Commissioner is charged with enforcement of the act and given power to make necessary rules and regulations. Sec. 2. A surety bond in the penal sum of one thousand dollars shall be furnished by each applicant. Sec. 3. Every agency shall keep a register of its patrons and transactions. Sec. 4. Receipts containing full information regarding the transactions shall be issued to all persons seeking employment who have paid fees. Sec. 5. "The entire fee or fees for the procuring of one situation or job and for all expenses, incidental thereto, to be received by any employment agency, from any applicant for employment at any time, whether for registration or other

purposes, shall not exceed ten per cent. of the first month's wages;" no registration fee shall exceed one dollar and in certain contingencies one-half of this must be returned. Sec. 6. "No employment agent or agency shall send an applicant for employment to an employer who has not applied to such agent or agency for help or labor;" nor fraudulently deceive any applicant for help, etc. Sec. 7. No agency shall direct any applicant to an immoral resort or be conducted where intoxicating liquors are sold. Sec. 8. Violations of the act are declared to be misdemeanors and punishment is prescribed.

The Supreme Court of Michigan held "the business is one properly subject to police regulation and control;" the prescribed license fee is not excessive; provisions of the state constitution in respect of local legislation are not infringed; and no arbitrary powers judicial in character are conferred on the Commissioner of Labor. But it did not specifically rule concerning the validity of limitations upon charges for services specified by § 5.

Considering our former opinions it seems clear that without violating the Federal Constitution a State, exercising its police power, may require licenses for employment agencies and prescribe reasonable regulations in respect of them to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them. *Williams* v. *Fears*, 179 U. S. 270, 275; *Gundling* v. *Chicago*, 177 U. S. 183, 188; *Lieberman* v. *Van de Carr*, 199 U. S. 552, 562, 563; *Kidd, Dater Co.* v. *Musselman Grocer Co.*, 217 U. S. 461, 472; *Engel* v. *O'Malley*, 219 U. S. 128, 136; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 365; *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 513. See *Moore* v. *Minneapolis*, 43 Minnesota, 418; *Price* v. *People*, 193 Illinois, 114; *Armstrong* v. *Warden*, 183 N. Y. 223. In its general scope and so far as now

sought to be enforced against plaintiff in error the act in question infringes no provision of the Federal Constitution. The charge relates only to the plainly mischievous action denounced by § 6. Provisions of § 5 in respect of fees to be demanded or retained are severable from other portions of the act and, we think, might be eliminated without destroying it. Their validity was not passed upon by the Supreme Court of the State and has not been considered by us.

The judgment of the court below is

Affirmed.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY *v.* UNITED STATES.

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

No. 136. Submitted December 15, 1915.—Decided June 5, 1916.

Exceptions from the general policy which the law embodies are to be strictly construed, and are to be so interpreted as not to destroy the remedial purpose intended.

The exception contained in § 6 of the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, exempting from its operation cars which are used upon street railways, does not exempt cars used in regular interstate traffic which are also to some extent used on street railways. Such cars are covered by the general provisions of the statute.

Cars used on an electric railway doing an interstate business on a standard gauge track according to standard railroad rules *held*, in this case, to be subject to the Safety Appliance Acts in regard to grab-irons and hand-holds, notwithstanding they were used at the terminals of the roads upon street railways.

The Safety Appliance Acts may not be violated with impunity by omitting grab-irons and hand-holds from cars because the railroad

company operating them deems the provisions of the act onerous or because it considers that it has adopted methods to protect the employees in coupling the cars that are more expedient than those required by the statute.

Whether methods substituted for grab-irons and hand-holds in coupling cars used in interstate commerce other than those prescribed by the Safety Appliance Acts offer the same, or better, or adequate protection to employees, is not a question for expert testimony.

210 Fed. Rep. 243, affirmed.

THE facts, which involve the construction of the Safety Appliance Act and its application to suburban electric Railroads, are stated in the opinion.

Mr. Will G. Graves, Mr. F. H. Graves and *Mr. B. H. Kizer* for plaintiff in error.

Mr. Assistant Attorney General Underwood and *Mr. John C. Brooke* for the United States.

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

The United States brought this suit against the Railroad Company to recover penalties for fifteen alleged violations of the Safety Appliance Act. The violations consisted in hauling in interstate commerce on October 23, 1911, twelve cars which were not provided with hand-holds or grab-irons at the ends, as required by the act, and three cars which were not equipped with automatic couplers. The answer admitted that at the time named all fifteen cars had been used in interstate commerce and that three of them were not equipped with automatic couplers, but denied that the other twelve were not provided with hand-holds or grab-irons as required by the act and denied that it had in any respect violated the act because all fifteen cars were used by the company upon its line of street railway and were therefore expressly excepted from the operation of the act. A verdict and judgment against

the company on all fifteen charges was affirmed by the court below.

We briefly state the material facts. The Railroad Company operated a street railway system in Spokane, Washington, and several interurban electric lines, one of which extended from Spokane to Cœur d'Alene, Idaho, a distance of about forty miles. Over this line passenger trains composed of two or more cars were operated starting at a station near the center of Spokane and running for a mile and a quarter on the street railway tracks to the company's yards near the city limits and thence over its private right of way to Cœur d'Alene. The road was standard gauge, with rails of standard weight and the passenger trains were made up according to standard railroad rules with markers to designate the trains and were run on schedules and by train orders. Passengers traveled on tickets entitling them to ride to and from designated stations at which regular stops were made and express matter and baggage were carried on the passenger trains. The street-car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to or from stations outside the city. In addition to its passenger trains the interurban line also operated freight trains which, however, started from the company's yards and ran directly to Cœur d'Alene and did not therefore enter upon the street railway tracks.

The fifteen cars here in question were passenger cars and on the day named were used in passenger trains which were run from the station in Spokane to the city limits and thence over the company's right of way to Cœur d'Alene. Twelve of them (those which it was charged were not equipped at the ends with grab-irons or hand-

holds) were cars regularly used on the interurban lines and were rounded at the ends and equipped with radial couplers to enable the trains to make sharp turns. As the swinging of these couplers from one side to the other across the ends of the cars would break off grab-irons of the type ordinarily used on the ends of cars they were not used. It was claimed, however, that the requirements of the Safety Appliance Act with respect to hand-holds or grab-irons were in substance complied with by a different and what was asserted to be an equivalent appliance, that is, openings in the top of the buffer or sill extending across the ends of the cars just above the couplers. To support this claim the company offered testimony of experienced railroad men to the effect "that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the Safety Appliance Act requiring hand-holds or grab-irons to be placed upon the ends of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce." The United States objected to the introduction of the testimony and it was excluded on the ground "that it was not a question for expert testimony, but was a matter of common knowledge." During the trial, (at whose request it does not appear) the jury were taken to inspect the openings in some of the cars.

The other three cars were large street cars which were regularly used only on the street railway tracks, but which because of unusually heavy traffic on the day named were coupled together with link and pin couplers and operated as a train to Cœur d'Alene.

The assignments of error present two questions which we consider separately.

1. It is urged that error was committed in construing the Safety Appliance Act since, when correctly interpreted, the fifteen cars in question were expressly excepted from its requirements. To appreciate the contentions based upon this proposition it is necessary to recur to the text of the original act and the amendments thereto. By the act of March 2, 1893, (c. 196, 27 Stat. 531) it was made unlawful for any common carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact," (§ 2) or "to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars," (§ 4), with the proviso (§ 6) that the prohibitions of the act should not apply to "trains composed of four-wheel cars or to locomotives used in hauling such trains." By the act of April 1, 1896 (c. 87, 29 Stat. 85), the proviso of § 6 was amended as follows: "That nothing in this act contained shall apply to trains of four-wheel cars or to trains composed of eight-wheel standard logging cars . . . or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs." By the amendment of March 2, 1903 (c. 976, 32 Stat. 943) the provisions of the act relating to automatic couplers, grab-irons, etc., were extended and made applicable to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," and to the exceptions from the requirements of the original act and the Amendment of 1896 were added "trains, cars, and locomotives . . . which are used upon street railways."

The contention is that as the trains in which the fifteen cars were hauled were operated over the street railway

tracks from the station in Spokane to the yards of the company, they were "used upon street railways" and were hence expressly exempted from the requirements of the act by the amendment of 1903. This, it is said, results from the unambiguous text of the exception contained in that amendment and is from a two-fold point of view made additionally certain by the context of the act which we have quoted. The argument is that the word "used" in the amendment of 1903 excepting cars, etc., "used upon street railways" must be construed as having the same significance as the same word in the amendment making the act applicable to all cars, etc., "used on any railroad engaged in interstate commerce." From this premise it is insisted that as the latter provision has been construed as enlarging the scope of the act by causing it to embrace all cars used on interstate commerce railroads although at the particular time the cars are employed in intrastate commerce (*Southern Railway* v. *United States*, 222 U. S. 20), it must follow that the word "used" in the street railway excepting clause under consideration must have the same construction and therefore exclude from the operation of the act all cars used upon street railways, however temporary such use and however frequent or material may be their use in interstate commerce on other than street railways. Again it is urged that the judgment of the court below can be affirmed only by construing the word "used" in the exception as meaning exclusively used,—a construction which, it is said, would be wholly unwarranted in view of the amendment of 1896 excepting from the act certain cars, etc., "exclusively used for the transportation of logs" and the demonstration thereby afforded that if such a meaning had been contemplated by Congress in the amendment of 1903, the word "exclusively" would have been employed. But we think the want of merit in the contentions is clear and the unsoundness of the argument ad-

vanced to sustain them apparent. We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment. That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad by operating a train for a trifling distance over tracks within the exception to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling. And this reasoning disposes of the contention deduced from the use of the word "exclusively" in the provision excepting cars used on logging railroads and its absence in the street railway clause, since on the face of the statute the object of both provisions was to exempt both the logging and street railway cars from the operation of the act only when used for logging on the one hand and on street railways on the other, and not to exempt them when not so used.

The suggestion is made in argument that in any event the railroad company was not liable for the penalties because of the difficulty of equipping the twelve cars with grab-irons which would not interfere with the lateral movement of the radial couplers and because the other three cars were so constructed that they could not be

provided with automatic couplers and were used only on the one day because of unusually heavy traffic. But this merely asserts that the statute may be violated with impunity if only the railroad finds its provisions onerous or deems it expedient to do so.

2. It is contended that error was committed in rejecting the testimony of experts offered by the Railroad Company as to the protection afforded to employés by the openings in the buffers at the ends of the twelve cars. Without stopping to point out the inappositeness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts and that the jury after hearing the testimony and inspecting the openings were competent to determine the issue, particularly in view of the full and clear instruction given on the subject concerning which no complaint is made.

Affirmed.

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

CUBBINS *v.* MISSISSIPPI RIVER COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 299. Argued April 24, 1916.—Decided June 5, 1916.

Quære, Whether a suit against the members of the Mississippi River Commission to enjoin them from constructing levees is not really a suit against the United States of which the courts have no jurisdiction without its consent.

An owner of land fronting on the Mississippi River has no right to

complain of the overflow of his land caused by the building of levees along the banks of the river for the purpose of confining the water in times of flood within the river and preventing it from spreading out from the river into and over the alluvial valley through which the river flows to its destination, although keeping the water within the river is to so increase its volume as to raise its level and cause the overflow complained of.

The general right to an unrestrained flow of rivers and streams and the duty not to unduly deflect or change the same by works constructed for individual benefit, qualified by a limitation as to accidental and extraordinary floods, prevail under the Roman Law and also exist in England, and, notwithstanding some contrariety and confusion in adjudged cases, also in this country.

The overflows of the Mississippi River, which the levees objected to by the complainant are designed to prevent, are accidental and extraordinary, and justify the construction of the levees for the purpose of preventing destruction to the valley of the river.

The conditions existing in the valley of the river demonstrate that the work of the Mississippi River Commission, and of the various state commissions, in constructing the series of levees from Cairo to the Gulf is for the purpose of prevention of destruction and improvement of navigation by confining the river to its bed and is not for purposes of reclamation.

Congress had power to create the Mississippi River Commission and through it to build levees to improve the navigation of the Mississippi River, and the Government does not become responsible to riparian owners for the deflection of water by reason of such levees.

The rights of riparian owners on opposite sides of a stream embrace the authority of both, without giving rise to legal injury to the other, to protect themselves from the harm resulting from the accidental or extraordinary floods, such as occur in the Mississippi River, by building levees if they so desire. *Jackson* v. *United States*, 230 U. S. 1.

There is no identity between the great valley of the Mississippi and the flood bed of that river, but the bank of that river is where it is found and does not extend over a vast and imaginary area. *Hughes* v. *United States*, 230 U. S. 24.

THE facts, which involve the rights of riparian owners on the Mississippi River and the power of the Federal and state Governments to construct levees along the same and liability resulting therefrom, are stated in the opinion.

Mr. Barnette E. Moses for appellant:

The right of the Levee District, for the reclamation of lands, to construct levees which have the effect of obstructing the natural flow and turning the water upon the lands of an owner on the opposite side of the river, is not a local question; but is one of general law, on which decisions of the state courts are not binding on the Federal courts. *Cairo & Chicago Ry.* v. *Brevoort*, 62 Fed. Rep. 129; *Hollingsworth* v. *Tensas Commissioners*, 17 Fed. Rep. 115.

The construction of works, for the improvement of navigation, is an exercise of the power of eminent domain, and the owner of private property taken for that purpose must be compensated. *United States* v. *Lynah*, 188 U. S. 445; *Armond* v. *Green Bay Co.*, 31 Wisconsin, 316; *King* v. *United States*, 59 Fed. Rep. 9; *Williams* v. *United States*, 104 Fed. Rep. 50; *Carlson* v. *St. Louis River Co.*, 73 Minnesota, 1128; *Velte* v. *United States*, 76 Wisconsin, 278; Desty, Fed. Const. 322.

The construction of levees for reclamation of lands from overflow, although referable in a certain sense to the police power, is likewise an exercise of the power of eminent domain, and the owner of property taken for such purpose must be compensated therefor. *Reelfoot Levee* v. *Dawson*, 97 Tennessee, 172; *Chicot County Levee* v. *Crittenden*, 94 Fed. Rep. 613; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Hughes* v. *Levee Commissioners*, 27 So. Rep. 744; *Ex parte Martin*, 13 Arkansas, 198; *Carlson* v. *St. Francis Levee*, 59 Arkansas, 513. See also *Eldrige* v. *Trezevant*, 160 U. S. 452; *Bass* v. *State*, 43 La. Ann. 494.

An owner of land on one side of a stream has no right to build levees upon his side which will prevent the escape of flood water, in times of ordinary flood, over his side and cast them upon land on the opposite side. Cases *supra* and see also *Rex* v. *Trafford*, 20 Eng. C. L. R. 498; *Paine Lumber Co.* v. *United States*, 55 Fed. Rep. 854; *Woodruff* v. *N. B. G. M. Co.*, 18 Fed. Rep. 782, 797; *Jones* v. *United*

States, 48 Wisconsin, 385; *Burwell* v. *Hobson*, 12 Gratt. 322; *O'Connell* v. *E. T. Va. & Ga. R. R.*, 87 Georgia, 246, 261; *Garrish* v. *Clough*, 48 N. H. 9; *Parker* v. *Atchison*, 48 Pac. Rep. 631, 632; *Shane* v. *Kans. City, St. Jos. R. R.*, 71 Missouri, 237; *Gulf R. R.* v. *Clark*, 2 Ind. Ter. 319; *Barden* v. *Portage*, 79 Wisconsin, 126; *Crawford* v. *Rumbo*, 44 Oh. St. 279; *Sullivan* v. *Dooley*, 31 Tex. Civ. App. 589; *Byrd* v. *Blessing*, 11 Oh. St. 362; *Myers* v. *St. Louis*, 8 Mo. App. 266; *Menzies* v. *Breadalbane*, 3 Bligh, N. S. 414, 423; *Rix* v. *Johnson*, 5 N. H. 520; *Jones* v. *Soulard*, 24 How. 41; *Adams* v. *Frothingham*, 3 Massachusetts, 352; *Rex* v. *Yarborough*, 3 B. & C. 91; *Scranton* v. *Brown*, 4 B. & C. 485; Gould on Waters, § 209.

For what constitutes a "taking" of property see *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *Boston & R. M. Co.* v. *Norman*, 12 Pick. 467; *Hooker* v. *N. H. & M. Co.*, 14 Connecticut, 146, 160; *King* v. *United States*, 59 Fed. Rep. 9; *Lowndes* v. *United States*, 105 Fed. Rep. 836; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 326; *Paine Lumber Co.* v. *United States*, 55 Fed. Rep. 854; *Jones* v. *United States*, 48 Wisconsin, 385; *Velte* v. *United States*, 76 Wisconsin, 278; *United States* v. *Welch*, 217 U. S. 333; *Grizzard* v. *United States*, 219 U. S. 180; *United States* v. *Sewell*, 217 U. S. 601; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *Scranton* v. *Wheeler*, 179 U. S. 141, 153; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 70; *Jackson* v. *United States*, 234 U. S. 115; *C., B. & Q. R. R.* v. *Illinois Drainage Commrs.*, 200 U. S. 593; *McKenzie* v. *Miss. & R. Boom Co.*, 29 Minnesota, 288; *Manigault* v. *Spring*, 199 U. S. 485; *Bierer* v. *Hurst*, 155 Pa. St. 523; 26 Atl. Rep. 742.

The term, natural conditions, is applicable to and should be considered in connection with the ordinary high water stage of the river, as well as the low water

stage thereof, in determining the questions in the cases at bar. *Burwell* v. *Hobson*, 12 Gratt. 322; *S. C.*, 65 Am. Dec. 247; Angell, Water Courses, § 333; *Rex* v. *Trafford*, 20 Eng. C. L. 726; *Cairo, V. & C. R. R.* v. *Brevoort*, 62 Fed. Rep. 129.

Those who were the first to disturb natural conditions, by building a levee cannot recover when a levee was built by others on the opposite bank, even though the Jackson levee and land were thereby destroyed. *Avery* v. *Empire Co.*, 82 N. Y. 582; *Menzies* v. *Breadalbane*, 3 Bligh, N. S. 421; *Wilhelm* v. *Burleyson*, 106 N. Car. 381; *Davis* v. *Munro*, 66 Michigan, 485; *Harding* v. *Whitney*, 40 Indiana, 379; Am. & Eng. Enc. of Law, Vol. XXX, 2d ed., page 387.

The term consequential damages has been used in applying the comprehensive rule stated by counsel, to designate injuries which, in fact, did not amount to a "material impairment" of the value of land. *Gibson* v. *United States*, 166 U. S. 269; *Transportation Co.* v. *Chicago*, 99 U. S. 635.

The permanency of the injury has been expressly treated as one of the determining factors in considering this question. *Hollingsworth* v. *Tensas Comms.*, 17 Fed. Rep. 115; *Cumberland Co.* v. *Hitchings*, 55 Maine, 140; *Bedford* v. *United States*, 192 U. S. 225.

As a matter of law, injuries resulting from work done by the Government, for which immunity from liability was claimed, regardless of the facts as to proximate cause, or the nature of the injury, has been expressly repudiated by this court. *United States* v. *Lynah, supra; Monongahela Nav. Co.* v. *United States, supra; Scranton* v. *Wheeler, supra.*

Intervention of natural forces, as the direct causes of the injuries, made those injuries remote or consequential, in so far as the work of the Government was concerned and there was, therefore, no liability on its part. *Barnes* v.

Marshall, 10 Pac. Rep. 115; *Bedford* v. *United States*, 192 U. S. 225; *Gulf, C. & C. Ry.* v. *Clarke*, 101 Fed. Rep. 678.

No provision for compensation is made by the state acts for the land of appellant; and such provision is an indispensable requisite to their constitutionality. *Sweet* v. *Rechel*, 159 U. S. 380; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Adirondack R. R.* v. *New York*, 176 U. S. 335; *Cherokee Nation* v. *So. Kans. Ry.*, 135 U. S. 541; *Benedict* v. *City*, 39 C. C. A. 290; *Gardner* v. *Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Ex parte Martin*, 13 Arkansas, 198; *Bloodgood* v. *M. & H. Ry.*, 18 Wend. (N. Y.) 9; *Meriwether* v. *St. Francis Levee*, 91 C. C. A. 285.

Compensation must be paid before the property is taken or within a reasonable time thereafter.

The constitutional provision requiring compensation is merely declaratory of the common law, and the right to compensation was recognized before the Constitution. *Staton* v. *N. & C. R.*, 17 L. R. A. 839; *Gardner* v. *Newburgh*, *supra*; *Withers* v. *Buckley*, 20 How. 84; *Kaukena &c. Ry.* v. *Canal Co.*, 142 U. S. 254; *Sinnickson* v. *Johnson*, 17 N. J. L. 129.

Taking private property without compensation is a deprivation thereof without due process of law. Cooley, Const. Lim., p. 357; *Muhlker* v. *New York & H. R. R. R.*, 197 U. S. 544; *Pumpelly* v. *Green Bay & M. Co.*, *supra*; *Scott* v. *Toledo*, 39 Fed. Rep. 385.

Under such conditions the Statute of Limitations does not begin to run until the injury has been consummated. *King* v. *United States*, 59 Fed. Rep. 9; Rev. Stat., § 1069; *Sloggy* v. *Dilworth*, 8 A. S. R. 658; *Del. & Rariton Land* v. *Wright*, 21 N. J. L. 469; Gould on Waters, §§ 412, 414.

Appellant has not been guilty of such laches that a court of equity would deny him relief on that ground. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *Harlow* v. *C. & W. Canal*, 18 Oh. St. 179; *New York* v. *Pine*, 185 U. S. 93, 97.

Appellant had no knowledge or reason to believe that the injury would occur, in the case at bar, until it actually happened and this suit was filed within one year thereafter.

There can be no legislation by estoppel. Estoppel cannot give validity to void acts. *Ottawa* v. *Perkins*, 94 U. S. 267; *O'Brien* v. *Wheelock*, 184 U. S. 489.

Equity will enjoin a trespass or nuisance, such as is alleged, where the injury is irreparable and the remedy at law is inadequate, without regard to the solvency of the wrongdoer.

Various contingencies may arise in particular cases, to render the injury irreparable and the remedy at law inadequate.

The injury may be destructive of the very substance of the estate. It may not be susceptible of estimation in terms of money.

It may be vexatiously repeated or continuous, necessitating a multiplicity of suits.

The suit is not a suit against the State, within the meaning of the Eleventh Amendment. *Osborn* v. *Bank*, 9 Wheat. 738; *Hopkins* v. *Clemson College*, 221 U. S. 646; *Smyth* v. *Ames*, 169 U. S. 466.

Public policy, though favoring the construction of levees for the purposes of the appellees, is not opposed to the compensation of appellants for the taking of his property as a direct and proximate result of such improvements.

Public policy is determined, primarily, by the Constitution. *Vidal* v. *Girard*, 2 How. 127; *Missouri* v. *Illinois*, 180 U. S. 208.

Mr. Gerald FitzGerald for Yazoo-Mississippi Delta Levee Board, appellee.

The Solicitor General, with whom *Mr. Robert Szold* was on the brief, for Mississippi River Commission, appellee:

Complainant's bill is altogether lacking in equity.

If plaintiff is entitled to any relief his remedy at law is adequate. *United States* v. *Lynah*, 188 U. S. 445.

The suit is brought against the United States without its consent. *Louisiana* v. *McAdoo*, 234 U. S. 627.

The great public interests involved require denial of the injunction. *Beasley* v. *Tex. & Pac. Ry.*, 191 U. S. 492, 497, 498.

Complainant is entitled to no recovery at law, because his damages are remote and consequential. The authorities are conclusive. *Bedford* v. *United States*, 192 U. S. 217; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24.

In support of the contentions of the Government, see also *Crozier* v. *Krupp*, 224 U. S. 290; *Gibson* v. *United States*, 166 U. S. 269; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; *Manigault* v. *Springs*, 199 U. S. 473; *New York* v. *Pine*, 185 U. S. 93; *Scranton* v. *Wheeler*, 179 U. S. 141; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Williams* v. *Parker*, 188 U. S. 491; *Willink* v. *United States*, 240 U. S. 572.

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

The conditions out of which this controversy arises are substantially the same as those which we relied upon in *Jackson* v. *United States*, 230 U. S. 1. We therefore here make a briefer statement of the topography of the country with which the case is concerned and of the other general conditions involved than we would do if such were not the case, since if a fuller statement as to any particular aspect is desired, it can be readily found by a reference to the report of that case.

The complainant as the owner of a piece of land on the east bank of the Mississippi River adjacent to Memphis,

Tennessee, on his own behalf and on behalf of others owning similar land in the same locality, commenced this suit against the Mississippi River Commission and fifteen local State Levee Boards operating on the river between Cape Girardeau, Missouri, and the mouth of the river at the Gulf of Mexico, three of these boards being organized under the laws of Missouri, four under the law of Arkansas, one under that of Tennessee, one under the law of Mississippi and six under the law of Louisiana.

It was alleged that in flood seasons when the water in the Mississippi River rose above its natural low water banks, such water would flow out and over the vast basins in which the alluvial valley between Cape Girardeau and the gulf formed itself and would then either by percolation gradually flow back into the river or be carried over and through the basins by the streams flowing through them into the Gulf of Mexico where such streams emptied. It was further alleged that the land of the complainant, when the river in the flood periods was thus permitted to discharge its waters, was so situated that it was beyond the reach of overflow from the river. It was then alleged that in 1883 the Mississippi River Commission acting under the authority of Congress had devised a plan known as the Eads Plan by which it was contemplated that on both banks of the river, except at certain places which were stated, a line of embankment or levees would be built which in times of high water or flood would hold the water relatively within the lines of the low water banks, thus improving navigation by causing the water to deepen the bed, and saving the country behind the levees from inundation. It was averred that to further this plan the various state levee boards which were made defendants were organized and that all of them within the scope of their power and the limits of their financial ability had aided in carrying on this work and that as the result of their work and of the levees built by the Mississippi

River Commission it had come to pass that from Cairo to the Gulf, a distance of about 1,050 miles, on both sides of the river, except at points which were stated, there was a continuous line of levees restraining the water from flowing out into the basins as above stated and which in many instances cut off the outlets connecting the streams which drained the basins and ultimately carried off the water to the Gulf. It was charged that this line of levees as a whole had been virtually adopted by the Mississippi River Commission, which body had assumed control of the whole subject, and that such body and all the state agencies coöperating were engaged in strengthening, elevating, renewing, repairing and increasing the lines of levee so as to more effectually accomplish the purpose in view.

It was charged "that the effect of the closing by the defendants of the natural outlets along the said river, and the confining of the flood waters between the levee system as a whole is to obstruct the natural high water flow of the water of said river in and along its natural bed for its entire length, thereby raising the level of the water to such an extent that said flood waters, within the last five years, have attained a sufficient height to flow over complainant's land, and when there is now a high water stage in said river, the waters of said river accumulate, flow over and remain standing upon and over said lands of complainant to a depth of from four to eight feet, so that complainant is now being interrupted in the profitable use, occupation and enjoyment of his said land." And it was further alleged that "said land is being covered with superinduced additions of sand, silt and gravel, now from six inches to three feet in depth; the houses and fences thereon are being washed away, rendering the said land and the houses thereon unfit for occupancy, driving away the tenants, doing irreparable harm and injury to said land, impairing its usefulness,

causing the practical destruction thereof, and destroying its market value."

It was averred that to obstruct the river as alleged was a violation of the legal rights of the complainant since he was entitled to the natural flow of the river within its natural high or low water bed free from interference by the acts of the defendants. Averring that no proceedings had been taken to expropriate the land and that no offer to pay for the same had been made and that the acts complained of constituted a taking without compensation in violation of due process of law under the Constitution of the United States, and that there was no adequate remedy at law, the prayer was for an injunction against the Mississippi River Commission and all its officers, employees, agents and contractors, wherever found, and against all the local levee boards and their officers, employees, agents and contractors, perpetually prohibiting them from further building any levees, from enlarging, strengthening, repairing or doing any act to maintain the levees already built and for general relief.

The bill was amended by alleging that the overflow of complainant's land as averred instead of having happened within five years had occurred within one year, and the original prayer was added to by asking that if it was found that the injunction prayed could not be granted, the case be transferred from the equity to the law side and be converted into a law action to recover from the Yazoo-Mississippi Delta Levee Board, the local Mississippi board which alone of the defendants had been served, the sum of five hundred thousand dollars as the value of the plantation alleged to have been wrongfully taken.

A motion by that corporation was made to dismiss the bill on the ground that it stated no basis for relief, and in any event it alleged no ground for equitable jurisdiction since at best upon the theory that a cause of action was

stated, there was plainly an adequate remedy at law. On the hearing the motion to dismiss was joined in by the Mississippi River Commission, and the case is here as the result of the action of the court below in dismissing the bill for want of equity.

At the threshold we put out of view as primarily negligible contentions as to whether in any event, in view of the vast public interests which would have been detrimentally affected, the injunction prayed could have been granted, and whether the suit should not have been dismissed so far as the Mississippi River Commission was concerned on the ground that it was really a suit against the United States without its consent and not a mere action against individuals acting as officers to prevent them from violating the rights of the complainant by taking his property without compensation. We say these contentions are negligible because underlying them all is the fundamental issue whether under the averments of the bill there was any right to relief whatever, and to that decisive question we come. Its solution involves deciding whether the complainant as an owner of land fronting on the river had a right to complain of the building of levees along the banks of the river for the purpose of containing the water in times of flood within the river and preventing it from spreading out from the river into and over the alluvial valley through which the river flows to its destination in the Gulf, even although it resulted that the effect of thus keeping the water within the river was by increasing its volume to so raise its level as to cause it to overflow the complainant's land.

While we are of the opinion that in substance a negative answer to the proposition must follow from applying to this case the doctrines which were upheld in *Jackson* v. *United States*, 230 U. S. 1, and *Hughes* v. *United States*, *id.*, p. 24, as the unsoundness of the distinctions attempted in the argument to be drawn between those cases and this,

and the decisive application of those cases to this, will be more readily appreciated by a recurrence to the legal principles by which the controversy is to be governed, we address ourselves to that subject, looking at it in a two-fold aspect: First, with reference to the rights and obligations of the land owners and the power of the State to deal with the subject; and Second, with reference to the power of the United States to erect levees to confine the water for the purpose of improving navigation as superimposed on the right of the land owners or that of the state authorities to construct such levees, if such right obtains, and if not, as independently existing in virtue of the dominant power to improve navigation vested in Congress under the Constitution.

1. Without seeking to state or embrace the whole field of the Roman law concerning the flow of water, whether surface or subterranean, or to trace the general differences between that law, if any, as it existed in the ancient law of the Continent of Europe whether customary or written, or as it prevailed in France prior to, and now exists in, the Code Napoleon, one thing may be taken as beyond dispute, that not only under the Roman law, but under all the others the free flow of water in rivers was secured from undue interruption, and the respective riparian proprietors in consequence of their right to enjoy the same were protected from undue interference or burden created by obstructions to the flow, by deflections in its course, or any other act limiting the right to enjoy the flow or causing additional burdens by changing it. But while this was universally true, a limitation to the rule was also universally recognized by which individuals in case of accidental or extraordinary floods were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby because all, as the result of the

accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection.

Demolombe after commenting upon Article 640 of the Code Napoleon generally dealing with the servitudes arising from the flow of water, and pointing out that under the Roman law as well as under the ancient French law and the Code Napoleon it was the duty of proprietors whose lands bordered upon or were traversed by rivers to permit the water of such rivers to flow their natural course unimpeded and quoting the Roman law, "*fluminis naturalem cursum non avertere*" (L. 1, Cod. de Alluvionibus), additionally states that under both the Roman and ancient law and under the Code Napoleon such proprietors were bound "to undertake to do no work the result of which would be to change the direction of the stream or enlarge its bed or to injure in any manner other proprietors whose lands border upon or are traversed by the stream," (Demolombe, vol. 11, No. 30, p. 36). But the author at once proceeds to add that the principles thus stated in no way serve to prevent or to limit the right of proprietors whose lands border on or are traversed by rivers "from guaranteeing themselves against damage by defensive works constructed either upon the border of the rivers or in the interior of their property against either the permanent and insensible action of the rivers or streams or particularly against the damage caused by the accidental or extraordinary overflow of their banks; '*Ripam suam adversus rapidi amnis impetum munire prohibitum non est.*' (L. 1 Cod de Alluv.)" And proceeding, the author states that this right of the proprietors undoubtedly exists "even when the effect of the dykes or other works done will be, as is nearly always the case, to render the waters of the river more hostile and damaging to other properties, the owners of which would have no cause of complaint because each one is entitled to do the same in his own behalf,

as the right of preservation and of legitimate defense is reciprocal since it is impossible to conceive that the law would impose upon the proprietors bordering upon streams an obligation to suffer their property to be devoured [by accidental or extraordinary overflows] without the power on their part to do anything to protect themselves against the disaster." Proceeding to elucidate and state the limitations by which the right thus universally recognized is safeguarded, the author says: "It is necessary, however, that the works constructed [for the purposes stated] do not encroach upon the natural bed of the water courses, that they should be of course constructed in conformity to the police regulations, if any exist, and finally that they are in fact constructed by those who build them for the defense of their own property, because constructions would not be tolerated which had been erected by a proprietor upon his own land without any necessity whatever for his own protection, but with the only and disloyal purpose of injuring the property of others." Demolombe further states: "What I have just said of streams and rivers is equally applicable to accidental torrents of water which like avalanches may sometimes precipitate themselves upon certain properties. Such a case is likewise one of *vis major* against which each one has a right by the natural law on his own behalf to seek to protect himself as best he may,—a right which, as well said by the Court of Aix is like that which obtains to resist the incursion of an enemy, without being preoccupied as to what may be the result or the wrong suffered by a neighbor who may not have had the foresight to successfully avoid the disaster." The author then proceeds: "These principles which are sustained both by reason and by conceptions of equity, have been for all time recognized both in the Roman law and in our ancient French jurisprudence. They are to-day supported by the unanimous accord of the decided cases and of the opinions of authors (comp. L. 2,

§ 9, ff. *de aqua de aquae;* L. unic., ff. *de ripa munienda;* L. 1, ff. *ne quid in flum. publ.;* Coepolla, tract. 2 cap. XXXVIII, n° 2; Troncon, sur l'art. 225 de la cout. de Paris; Henrys, liv. IV, tit. II, quaest. 75; Domat, Lois civiles, liv. II, tit. VIII, sec. III, n° 9; Aix, 19 mai, 1813, Raousset, Sirey, 1814, II, 9; Duranton, t. V, n° 162; Pardessus, t. I, n° 92; Garnier, t. III, n° 677; Daviel, t. I, n^{os} 384–386, et t. II, n^{os} 697, 698; Taulier, t. II, p. 361).

See *Mailhot* v. *Pugh*, 30 La. Ann. 1359, where some of the authors referred to by Demolombe and others are quoted and one or more of the adjudged French cases enforcing the limitation are stated and commented upon.

That the general right to an unrestrained flow of rivers and streams and the duty not to unduly deflect or change the same by works constructed for individual benefit as qualified by the limitation as to accidental and extraordinary floods which prevailed in Rome and on the Continent and which to-day govern in France as stated by Demolombe, also obtained in Scotland, was recognized in 1741 in the case of *Farquharson* v. *Farquharson*, Morr. Dic. 12,779. And the character of the limitation of the rule is well illustrated by *Menzies* v. *Breadalbane*, 3 Bligh, (N. S.) 414, (H. L.), where it was held that it did not apply to a case where a structure was erected in the established high water channel of a stream. It is apparent also from the opinions in *Nield* v. *London and Northwestern Ry.*, L. R. 10 Ex. 4; 44 L. J. Ex. 15; and the statement found in Coulson on the Law of Waters (3rd Ed.), pages 177 *et seq.*, that the limitation as to accidental and extraordinary overflows likewise exists in England.

In this country it is also certain without going into a review of decided cases that the limitation is recognized, although it is true to say that much contrariety and confusion exist in the adjudged cases as to when it is applicable, some cases extending the rule so far as to virtually render the limitation inoperative, others extending the

limitation to such a degree as really to cause it to abrogate the rule itself. But into these differences and contrarieties it is not at all necessary to enter, since there is no decided case, whatever may be the difference as to the application of the limitation, holding that it does not exist, and when in fact the very statement of the general rule requires it to be determined whether that rule as correctly stated would include situations which the limitation if recognized would exclude. We place in the margin a few of the many adjudged cases from which the situation just stated will be made manifest.[1]

Were the overflows in this case accidental and extraordinary, is then the proposition to which the case reduces itself. That the volume of water from the vast watershed which the Mississippi River drains and which by means of percolation and tributaries reach that river, is susceptible now and again of being so simultaneously drained off from the watershed into the river and thus so vastly increasing the amount of water to be carried off in a given time as to cause the overflow of the valley which the river traverses and to thereby endanger the enormous interests concerned, is too well known to require anything but statement. But that the possibilities of such a result do not when such overflows occur cause them to be not accidental is to say the least persuasively established by the ruling in *Viterbo* v. *Friedlander*, 120 U. S. 707. And leaving aside this view, it is obvious from the situation and the causes which in the nature of things may accidentally bring about the emptying into the river at one and the same time of the volumes of water from all the vast sources of supply which drain the expansive watershed

[1] *Burwell* v. *Hobson*, 12 Gratt. (Va. 322); *Cairo &c. R. R.* v. *Brevoort*, 62 Fed. Rep. 129; *Crawford* v. *Rambo*, 44 Oh. St. 279; *O'Connell* v. *East Tennessee &c. R. R.*, 87 Georgia, 246; *Taylor* v. *Fickas*, 64 Indiana, 167; *Shelbyville Turnpike* v. *Green*, 99 Indiana, 205; *Mailhot* v. *Pugh*, 30 La. Ann. 1359.

into the river, in the absence of which accidental unison there could be no flood, that the accidental character of the unity of the conditions upon which the flood depends serves to affix that character to the result—the flood itself. But assuming, as we think it must be assumed, that the words accidental and extraordinary are to be taken as relating to the river, that is, as alone embracing conditions not usually there occurring and not ordinary to the stream in its usual condition having regard to the flow through its natural bed, whether in high or low water, that view would be here irrelevant, since there is no suggestion of any bed of the river in high or low water except the space between the natural banks along which the levees were built unless the whole valley be considered as such bed. Indeed from the face of the bill it is apparent that the rights relied upon were assumed to exist upon the theory that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its town, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads—some of them transcontinental, are virtually to be considered from a legal point of view as constituting merely the high water bed of the river and therefore subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks. In fact the nature of the assumption upon which the argument rests, is shown by the contention that the building of the levees under the circumstances disclosed was a work not of preservation but of reclamation, that is, a work not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks, but to reclaim all the vast area of the valley from the peril to which it was subjected by being situated in the high water bed of the river. If it were necessary to say anything more to demonstrate the unsoundness of this view,

it would suffice to point out that the assumption is wholly irreconcilable with the settlement and development of the valley of the river, that it is at war with the action of all the state governments having authority over the territory, and is a complete denial of the legislative reasons which necessarily were involved in the action of Congress creating the Mississippi River Commission and appropriating millions of dollars to improve the river by building levees along the banks in order to confine the waters of the river within its natural banks, and by increasing the volume of water to improve the navigable capacity of the river.

2. Although in view of the conclusion just stated it is unnecessary to refer to the power of Congress to build the levees under the paramount authority vested in it to improve the navigation of the river, we cannot fail to point out the complete demonstration which that power affords of all want of legal responsibility to the complainant for the building of the levees complained of. In this connection it is to be observed that the complete application of this power is in the reason of things admitted by the erroneous assumption upon which alone the arguments proceed in seeking to avoid the effect of the well defined limitation as to accidental and extraordinary floods, that is, the erroneous contention as to the high water bed of the river which we have disposed of. We say this since it is apparent that if the property in the valley were to be treated as in the bed of the river, that would be true also of the property of the complainant, hence causing it to come to pass that as to such property so situated there would be no possible lawful ground of complaint to arise from the action of Congress in exerting its lawful power over the bed of the river for the improvement of navigation.

These conclusions dispose of the case without the necessity of recurring, as we proposed at the outset to do,

to the rulings in the *Jackson* and *Hughes Case* (230 U. S. 1, *Id.* 24), but in the light of the principles we have stated, we direct attention to the fact that the attempt to distinguish the *Jackson Case* upon the ground that relief was there denied because the proprietor on one side of the river, who complained of the increase of the flood level and injury to his land from the levees erected on the other side or from the levee system as a whole, had himself erected a levee to protect his property and therefore was estopped, is without foundation. It is plain when the context of the opinion in the *Jackson Case* is considered that the denial of the right to relief in that case was rested not upon the conception that a right existing on one side of the river was destroyed by estoppel and a right not existing on the other was conferred by the same principle, but upon the broad ground that the rights of both owners on either side embraced the authority without giving rise to legal injury to the other, to protect themselves from the harm to result from the accidental and extraordinary floods occurring in the river by building levees if they so desired. Additionally when the principle laid down in the *Jackson Case* is illustrated by the ruling which was made in the *Hughes Case*, it becomes apparent that the contention here urged as to the identity between the great valley and the flood bed of the river was adversely disposed of, since under no view could the ruling in the *Hughes Case* have been made except upon the theory that the bank of the river was where it was found and did not extend over a vast and imaginary area.

Affirmed.

MR. JUSTICE PITNEY concurs in the result.

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

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 347. Argued May 2, 1916.—Decided June 5, 1916.

Although the original interstate bill of lading of a car shipment was surrendered for an intrastate bill while the car was still in transit, if the car moved in a continuous interstate commerce shipment from its departure to its destination, a delivery at an intermediate point and substitution of an intrastate bill of lading is not such a new and distinct shipment as takes the car out of interstate commerce.

Although the Federal question may not have been asserted until the application for rehearing, if the state court then considered and disposed of it adversely to plaintiff in error, this court has jurisdiction under § 237, Judicial Code.

The Kansas courts, in determining the responsibility of the carrier under the bill of lading of an interstate shipment, having applied a local rule investing an innocent holder of a bill of lading with rights not available to the shipper, *held* that such rule is in direct conflict with the general commercial law on the subject, and applying the same to an interstate shipment was reversible error.

Quære, Whether attributing such characteristics to an interstate bill of lading in conflict with the general commercial rule would not, even in the absence of legislation by Congress, constitute a direct burden on interstate commerce.

The Carmack Amendment to the Act to Regulate Commerce, being an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder, was action by Congress in regard thereto and necessarily excludes state action in regard thereto.

The prime object of the Carmack Amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading.

The principal subject of responsibility in regard to a matter within its exclusive control embraced by an Act of Congress, necessarily carries with it the incidents thereto.

93 Kansas 456, reversed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, and the construction of interstate bills of lading under the Act to Regulate Commerce, are stated in the opinion.

Mr. Alfred A. Scott, with whom *Mr. Robert Dunlap* and *Mr. William R. Smith* were on the brief, for plaintiff in error.

Mr. Ray Campbell, with whom *Mr. W. A. Ayers* and *Mr. J. Graham Campbell* were on the brief, for defendant in error.

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

We are of the opinion that a motion to dismiss is without merit but the reasons which lead us to that conclusion will be more clearly appreciated after we have made a statement of the case. Until that is done we hence postpone the subject.

J. Bell & Son, having sold a carload of bulk corn to the C. V. Fisher Grain Company residing and doing business at Kansas City, Missouri, on September 21, 1910, shipped the same from Yanka, Nebraska, over the Union Pacific Railroad. The bill of lading identified the car as L. W. No. 33791 containing 100,420 pounds of corn, and the same was consigned to Topeka, Kansas, to the order of the consignors (Bell & Son) with a direction, however, in the bill of lading to "notify C. V. Fisher Grain Company, care of Santa Fe for shipment." A draft for the purchase price of the corn was mailed to Kansas City, Missouri, accompanied with the bill of lading endorsed over to the order of the Fisher Grain Company and on the presentation of this draft to the Grain Company at Kansas City, Missouri, while the car was yet in transit it

paid the same and became the possessor and owner of the bill of lading. On September 24 the Grain Company surrendered to an agent of the Santa Fe at Kansas City, Missouri, the Yanka bill of lading which it had thus acquired and took in exchange for it another bill consigning the identical car to their own order at Elk Falls, Kansas, a place on the Santa Fe road, with a direction, however, to notify at Elk Falls the Nevling Elevator Company. This bill of lading was dated the same day as the original bill for which it was exchanged, that is, September 21, although it was in fact only signed and issued on the twenty-fourth of that month; and although on its face it treated the car as being at Kansas City, in reality the car was in transit from Yanka, not having yet reached Topeka.

Harold, the defendant in error, a grain dealer at Wichita, Kansas, who had sold on September 15 a carload of corn to Shoe & Jackson at Elk Falls to be shipped or delivered in a stated number of days, bought the carload of corn described by the bill of lading issued at Kansas City, and, paying a draft for the purchase price drawn by Fisher Grain Company with the bill annexed, he became the owner of the bill and directed that delivery of the corn be made to Shoe & Jackson. The car from Yanka had then not yet been delivered to the Santa Fe at Topeka, having reached that point only on September 28, on which day it was offered to the Santa Fe for carriage and delivery at Elk Falls. Finding that the car was in bad order the delivery was declined and the car turned back to the Union Pacific. That road discovering that the damage was such that the car could not be repaired while it was loaded, sent it to an elevator, transferred the grain to another car, S. P. No. 85721, and turned that car over to the Santa Fe. The new car, however, did not contain the exact quantity of grain originally shipped from Yanka as one of the defects in the old car was a leaky door and

several hundred pounds of the corn had been lost in transit. The car was promptly carried by the Santa Fe to Elk Falls and offered for delivery, but as the period for the fulfillment by Harold of his contract with Shoe & Jackson had elapsed and there had been a decline in the market price of corn, the latter refused to take the car. Thereupon this suit against the Santa Fe was commenced by Harold to recover the loss which he had suffered by the alleged unreasonable delay in delivery at Elk Falls consisting of three items: First, the difference between the price at which the corn had been contracted to be sold to Shoe & Jackson and the market price at the date the car was offered for delivery; Second, the amount of the freight paid on the corn which had been lost; and Third, a reasonable attorney's fee which it was alleged a statute of the State of Kansas authorized to be recovered in case of delay of a carrier in the delivery of grain.

In its defense the company alleged the shipment over the Union Pacific from Yanka, averred that the corn was received by it at Topeka in order to complete the transportation to Elk Falls, and charged that by a condition of the bill of lading issued at Kansas City as the delay had been wholly caused by the Union Pacific, there was no liability on the part of the Santa Fe, and that besides that company was not liable because of a failure to give a notice of claim in compliance with a condition which was also contained in the Kansas City bill of lading. There was judgment in the trial court for the plaintiff and the judgment of the court below affirming such action is the one now under review.

The court after referring to the bill of lading sued on (the one issued at Kansas City), and after stating that "the shipment intended to be described in the bill of lading originated at Yanka, Nebraska, on the Union Pacific Railway," proceeded to state the facts which we have recapitulated and which had been admitted in

evidence without objection. In substance conceding that if the facts stated were made the test of the rights of the parties the judgment under review was wrong because there had been as a matter of fact no unreasonable delay in delivering the corn by the Santa Fe, it was held that the judgment rendered was right since the plaintiff below as the purchaser of a bill of lading for value had a right to rely upon the face of the bill, to treat the corn as having been received by the carrier at Kansas City on the date the bill of lading was issued, and therefore to recover for the unreasonable delay in delivery which necessarily would result from excluding from view the facts concerning the movement of the corn from Yanka, Nebraska, and the date of its delivery at Topeka to the Santa Fe. The essence of the opinion, 93 Kansas, 456, was aptly summed up in the syllabus which preceded it drawn by the court which is as follows:

"1. The rule which invests the innocent holder of a bill of lading with rights not available to the shipper, declared in *Savings Bank* v. *A., T. & Santa Fe. R. R.*, 20 Kansas, 519; *Railway Co.* v. *Hutchings*, 78 Kansas, 758, 99 Pac. Rep. 230; and *Hutchings* v. *Railway Co.*, 84 Kansas, 479, 114 Pac. Rep. 1079, is followed in a case where the plaintiff purchased corn described in a bill of lading, and paid the shipper's draft attached to the bill in the usual course of business."

In addition the allowance of the attorney's fees under the Kansas statute was upheld on the ground that the statute was within the legitimate police power of the State to enact and not repugnant to the state or Federal Constitution.

The motion to dismiss referred to at the outset is based on the ground that the action of the court involved no question of interstate but purely one of intrastate commerce. But this disregards the fact that the bill of lading which was sued upon was an interstate commerce bill

covering a shipment from Kansas City, Missouri, to Elk Falls, Kansas. True it is urged that that bill of lading is not the test of whether there is jurisdiction because it was shown that in reality the shipment was an intrastate one from Topeka, Kansas, to Elk Falls in that State. But this assumes that although the judgment rests upon the conception that the previous movement of the corn from Yanka could not be considered as against the plaintiff because he was an innocent third holder of the bill of lading issued at Kansas City, nevertheless for the purpose of determining whether jurisdiction exists the facts as to the shipment from Yanka must be treated as relevant. Leaving aside, however, this contradiction and considering the facts as to the movement of the grain from its inception, we are of opinion that from that point of view it was clearly established that the grain moved in a continuous interstate commerce shipment from the date of its departure from Yanka to the termination of the transit at Elk Falls and that the delivery of the car to the Santa Fe at Topeka for further movement was therefore not a new and distinct shipment in intrastate commerce. We reach this conclusion in view of the place of business of the Fisher Grain Company (Kansas City, Missouri), of the fact that there was no person at Topeka to whom the grain was consigned, of the endorsement of the bill of lading to the Fisher Grain Company and the annexing to it of a draft drawn on that company at Kansas City for the purchase price, and because the order on the face of the bill of lading to "notify C. V. Fisher Grain Company, care of Santa Fe for shipment" made it apparent that it was not contemplated that the interstate shipment should terminate at Topeka, but that the car should move on as the result of such direction as might be given while it was in transit by the Fisher Grain Company at Kansas City, Missouri.

But further it is said that granting there was a Federal

question, as it was not asserted or relied upon until application for a rehearing, it is not open for consideration. The answer, however, is that the court considered and disposed of the question by holding that the facts which were otherwise pertinent and controlling must be put out of view because the interstate commerce bill of lading in the hands of Harold, the purchaser, was in fact negotiable paper giving greater rights to such purchaser than could be enjoyed by the shipper or by the one from whom he had acquired the bill. It is obvious, therefore, that this was a decision of a Federal question which we have power to dispose of as such, and we come to consider it.

That the local rule applied by the court below was in direct conflict with the general commercial law on the subject as repeatedly settled by this court, is plain. *Shaw* v. *Railroad Co.*, 101 U. S. 557; *Pollard* v. *Vinton*, 105 U. S. 7; *Iron Mountain Ry.* v. *Knight*, 122 U. S. 79; *Friedlander* v. *Tex. & Pac. Ry.*, 130 U. S. 416; *Mo. Pac. Ry.* v. *McFadden*, 154 U. S. 155; *The Carlos F. Roses*, 177 U. S. 655, 665.

Nothing could better point out the irreconcilable conflict between the local doctrine applied by the court below and the general law as illustrated in the cases cited than does the following statement in the opinion in the *Roses Case* last cited (p. 665):

"A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it."

Whether in the absence of legislation by Congress the attributing to an interstate bill of lading of the exceptional and local characteristic applied by the court below in

conflict with the general commercial rule constituted a direct burden on interstate commerce and was therefore void need not now be considered. This is so because irrespective of that question and indeed without stopping to consider the general provisions of the Act to Regulate Commerce it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (act of June 29, 1906, c. 3591, § 7, 34 Stat. 593) was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder, which in the nature of things excluded state action. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 505–506; *Mo., Kan. & Tex. Ry.* v. *Harriman Bros.*, 227 U. S. 657, 671–672; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 110; *Atchison, Topeka & Santa Fe Ry.* v. *Robinson*, 233 U. S. 173, 180; *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588; *Georgia, Florida & Alabama Ry.* v. *Blish Milling Co.*, *ante*, p. 190.

Indeed in the argument it is frankly conceded that as the subject of a carrier's liability for loss or damage to goods moving in interstate commerce under a bill of lading is embraced by the Carmack Amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment because "Congress has legislated relative to the one, but not relative to the other." But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading,—a purpose which would be wholly frustrated if the proposition relied upon were upheld. The principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents thereto. See the subject aptly and clearly illustrated by *St. Louis & San*

Francisco R. R. v. *Woodruff Mills*, 105 Mississippi, 214, where a statute of the State of Mississippi accomplishing the very result applied by the court below was decided to be no longer applicable to interstate commerce because of the taking possession by Congress of the field by virtue of the amendment referred to.

As it follows from what we have said that the court below erred in applying the local law to the interstate commerce shipment under consideration, its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

UNITED STATES *v.* HEMMER.

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

No. 86. Submitted May 5, 1916.—Decided June 5, 1916.

Where there are no repealing words in a later act, a former act relating to the same or a similar subject is repealed only by implication; and repeal by implication is not favored.

Section 15 of the act of March 3, 1875, c. 131, 18 Stat. 402, permitting Indians under specified conditions to make homestead entries of the public lands, was not repealed or superseded by the Act of July 4, 1884, c. 180, 23 Stat. 96, permitting Indians then located on the public lands to make such entries.

An Indian who made his homestead entry prior to passage of the act of 1884, but who did not make his final proof until thereafter *held* to have made such entry under the act of 1875, and not under the act of 1884, and the period of inalienability was limited to five years under the act of 1875, and not to twenty-five years under the act of 1884.

While Congress has power to, and may if so advised, exercise control over lands to which claims have attached under existing statutes,

the rule has been established that such lands are not regarded as public lands under acts of Congress passed thereafter.

Nothing in the legislative history of the act of July 4, 1884, indicates that it was passed as an amendment to the act of March 3, 1875, or that Congress deemed the earlier act did not sufficiently protect the Indians in their retention of homesteads entered thereunder.

204 Fed. Rep. 898, affirmed.

THE facts, which involve the construction of statutes relating to the right of Indians to make homestead entries on the public lands, are stated in the opinion.

Mr. Ernest Knaebel for the United States.

Mr. Lewis Benson and *Mr. George Rice* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was brought in the Circuit Court of the United States, Eighth Judicial Circuit, District of South Dakota, Southern Division, by the United States to remove clouds from the title to certain described lands and to cancel certain instruments purporting to convey the lands and praying that a certain judgment against the lands be declared no lien thereon, the ground of suit being that the conveyances and the judgment were obtained in opposition to the restrictions upon the alienation or encumbrance of the lands imposed by Congress.

After issue joined and hearing had, the District Court, successor of the Circuit Court, entered a decree in accordance with the prayer of the bill. 195 Fed. Rep. 790. The decree was reversed by the Circuit Court of Appeals and the case remanded to the District Court with directions to dismiss the bill. 204 Fed. Rep. 898. This appeal was then prosecuted.

The facts are the following: One Henry H. Taylor,

known and designated sometimes as Henry Taylor, is and was during the times with which the suit is concerned a Sioux Indian of the full blood, belonging to and a member of the Santee Sioux Band of Indians and is not a member of and has never had any connection with the Winnebago Band of Indians.

On October 7, 1878, Taylor entered upon the lands as a homestead, they being part of the public domain and subject to entry under the homestead laws of the United States then in force. He established and continued his residence and made satisfactory proof of all facts required by law.

On June 6, 1890, a patent was issued to him which recited among other things that it was granted upon the express condition that the title conveyed thereby should not be subject to alienation or encumbrance either by voluntary conveyance or by judgment, decree or order of any court or subject to taxation of any character, but should remain inalienable and not subject to taxation for the period of twenty years from the date thereof, as provided by act of Congress approved January 18, 1881, c. 23, 21 Stat. 315. This act applied only to Winnebagoes.

Taylor continued to own the land until August 8, 1908, when he and his wife made a contract with J. E. Peart, one of the appellees, by which they agreed to convey the land to Peart in fee simple by warranty deed for the sum of $2,400, certain land to be accepted in payment of $550 of such consideration. Time was made the essence of the contract and it was made binding upon the heirs, executors, administrators and assigns of the parties.

September 8, 1908, Peart assigned the contract to William W. Fletcher, also one of the appellees herein. After this contract Taylor and wife took possession of the land taken in part payment of the consideration and Peart took possession of the homestead land and paid the consideration in full.

Taylor and his wife refused to convey the homestead land to either Peart or Fletcher, and the latter instituted suit against them to compel specific performance, which suit resulted in a decree compelling such performance, and a deed was executed to Fletcher by a commissioner appointed by the court.

February 5, 1909, Fletcher conveyed the land by warranty deed to Louis Hemmer who, in April, 1909, denied possession to Taylor, who attempted to remove with his family back on the land, and has since denied possession to him.

June 10, 1909, the United States issued a patent to Taylor which recited that he had established a homestead upon the land in conformity with the act of Congress of July 4, 1884 (hereinafter set out), and that therefore the United States, in consideration of the premises and in accordance with the provisions of said act of Congress, did and would hold the land (it was described) for the period of twenty-five years in trust for the sole use and benefit of Taylor, or, in case of his decease, of his widow and heirs, according to the laws of the State where the land was located, and at the expiration of that period would convey the same by patent to Taylor, or his widow and heirs, in fee, discharged of the trust and free of all charge or encumbrances whatsoever. It was declared that the patent was issued in lieu of one containing the twenty-year trust clause dated June 6, 1890, which had been canceled.

In 1894 and in every year since the county treasurer of Moody County (appellee Henderson), its auditor (appellee Hornby), and board of county commissioners have assessed the land for taxation and levied taxes against it and have caused it to be sold and are asserting the right to tax the same. The other appellees assert interest in the land under tax sales.

It will be observed that Taylor made his preliminary

homestead entry October 7, 1878, by virtue of the provisions of the act of March 3, 1875, c. 131, 18 Stat. 402, 420.[1] The act gave Taylor, as an Indian having the qualifications it described (that is, who was born in the United States, was twenty-one years of age, the head of a family and who had abandoned his tribal relations) the benefits of the homestead law and provided that the title acquired by virtue of its provisions should not be subject to alienation or encumbrance, either voluntarily made or through proceedings in court, and should "remain inalienable for the period of five years from the date of the patent issued therefor."

Taylor, however, did not make his final proof until December 11, 1884, when he paid the final fees and received his final receipt and certificate. Prior to such final proof and compliance with the homestead laws Congress passed the act of July 4, 1884, c. 180, 23 Stat. 96. It provided "that such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws . . . ; but no fees or commissions shall be

[1] "SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: *Provided, however*, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: . . ."

charged on account of such entries or proofs. All patents therefor shall be of the legal effect and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever."

Whether the patent to Taylor should have issued under that act and subject to its restriction of twenty-five years, or under the act of 1875 and with a limitation upon alienation of five years, is the controversy in the case. The Government contends for the act of 1884 and the contention had the support of the District Court. Appellees contend for the application of the act of 1875 and the Circuit Court of Appeals approved the contention. We put to one side the act of 1881, which prescribes a period of non-alienation of twenty years, as it is conceded that the act applied only to Winnebagoes, and Taylor is a Sioux.

The question in the case, then, is the simple one: Which act applied to and determined Taylor's rights? Or, to state the question differently and at the same time give the test of its solution, Was the act of 1875 repealed or superseded by the act of 1884? There are no repealing words in the latter act and if it repealed the other act it must have done so by implication. The implication of such an effect is not favored and the character of the act rejects it. Unquestionably the act of 1884 is the more general and it has criteria of application different from that of the act of 1875. The acts, therefore, have different objects. Under the act of 1884 Indians located on the

public lands at the passage of the act or that might under the direction of the Secretary of the Interior, or otherwise, thereafter so locate, might avail themselves of the provisions of the act.

The act of 1875 was more circumscribed. It did not apply to Indians generally but to those of special qualifications, those who had separated themselves from their tribes and the influence of their tribes, who had advanced, therefore, to a higher status and were better prepared to manage their affairs than Indians in general. And it might well have been considered that a five-year restriction upon the alienation of their titles, added to their five years' residence, would give them an appreciation of values sufficient to protect them against the improvidence of their race and the imposition of others.

Therefore, the acts had no repugnancy but had different fields of application, and this, it might be contended, even considering their future operation. Of this, however, we need not express opinion. The act of 1884 applied to Indians then located on the public lands. Regarding Taylor simply as an Indian those words might be considered to be applicable to him; regarding the purpose of the act, which was to confer a benefit, not confirm one, they did not apply to him or to Indians in his situation, for he, and Indians such as he, were the beneficiaries of the prior act and he and other Indians, it may be,—but certainly he—had substantially performed its conditions. What remained to be done, and could have been done before the act of 1884 was passed, was not much more than ceremony.

Nor does the fact that the act of 1884 applied to such Indians as might then be *located upon the public lands* broaden it so as to include Indians who were proceeding under the act of 1875. The rule is established that under acts of Congress concerning the public lands those are not

regarded as such to which a claim has attached, though Congress may, if it be so advised, exercise control over them. *Hastings & Dakota Ry.* v. *Whitney*, 132 U. S. 357, 361, 364; *Hodges* v. *Colcord*, 193 U. S. 192, 196; *Bunker Hill Co.* v. *United States*, 226 U. S. 548, 550. Homestead entries under the act of 1875 cannot, therefore, be considered as having been referred to.

Taylor and those in like situation did not need the aid of the act of 1884. Its language was not of confirmation of rights but was permissive and prospective and related to the initiation and acquisition of rights by a different class. And having this definite purpose, it would be difficult to suppose that, besides, rights acquired under prior laws were intended to be limited without reference to such laws. This view makes it unnecessary to inquire whether Taylor's rights had progressed beyond the point of subjection to the power of Congress, he having, as we have said, completed his residence upon the land, and nothing remaining but to make final proof and receive the assurance of his title, which, we have seen, was his situation nearly a year before the passage of the act of 1884.

Congress has undoubtedly by its legislation indicated a policy to protect Indians against a hasty and improvident alienation of their lands, and the Government has cited a number of statutes. But, as we have pointed out, such policy was satisfied by the act of 1875 and we do not think there is anything in the history of the act of 1884 which sustains the contention that it was intended to be an amendment of the act of 1875 or to indicate that the latter act was not sufficiently potent for the purposes of protection. The recommendation of the Interior Department was for the remission of fees and this was responded to, but confined as we have indicated; and the Interior Department considered it to be so confined, for fees were exacted from Taylor upon his final proof, manifesting

opinion, within a few months after the passage of the act of 1884, that it did not apply to him.

Decree affirmed.

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

MERRILL-RUCKGABER COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 281. Argued March 17, 1916.—Decided June 5, 1916.

In construing a contract the court must at first resort to its words, but not to one or a few of them, but to all of them as associated, and as well to the conditions to which they were addressed and intended to provide for; one word cannot be made dominant, controlling all others, and putting out of view the demands of physical conditions.

In this case *held* that a contractor was bound to underpin the walls of both of two buildings on the line of the Government's property, notwithstanding the specification referred to building in the singular and not plural, and the wall of one of the buildings was only a light or curtain wall.

Under the contract involved in this case, the decision of the supervising architect was made final upon any dispute regarding the proper interpretation of the specifications, and as the Secretary of the Treasury sustained the decision, and no foundation appears in the record for charges of unfairness on the part of the latter, such decision is final.

49 Ct. Cl. 553, affirmed.

APPELLANT is a New York corporation. It filed a petition in the Court of Claims for the recovery from the United States of the sum of $4,475.90 for extra work performed in the construction of the foundation for the

extension and remodeling of the United States assay office in New York. Issue was joined on the petition and the Court of Claims, after hearing, dismissed it. 49 Ct. Cl. 553.

The facts pertinent to the questions presented, collated from the findings, are as follows:

The appellant entered into a contract with the United States through the proper officers of the latter for the construction of such foundation for the sum of $79,400.00 in accordance with specifications and drawings prepared in the office of the Supervising Architect.

The specifications required bidders to visit the site and fully inform themselves of the character of the same and the conditions under which the work would have to be performed and failure to do so, it was provided, would not relieve the successful bidder from the necessity of furnishing material or performing any labor that might be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government.

The specifications, it was provided, should supplement the drawings, and specifications and drawings were to be reciprocally explanatory and the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications was to be final.

Under the heading "Excavation" it was provided that "certain portions of old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included . . . The walls, etc., will have to be removed and the excavation made in such manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all neces-

sary shoring and underpinning, etc., in connection therewith must be done."

Subsequently the Supervising Architect sent to all parties from whom proposals had been solicited the following addendum amending the foregoing paragraph of the specifications:

"Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'In the case of the building joining the north line of the site, the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.'"

A detailed contract was entered into providing that the work was to be done in accordance with the specifications and the addendum thereto and the requirements of certain specified drawings and such other detail drawings and models as might be furnished to appellant by the Supervising Architect.

It was further provided that changes might be made in the work and materials when required by the United States, the value of such work and materials to be determined on the basis of the contract unit of value, at prevailing market rates, such rates, in case of dispute, to be determined by the Architect, whose decision should be binding on both parties, and that no claim for damages on account of such changes or for anticipated profits should be made or allowed. No claim for extra materials or work was to be made or allowed unless specifically agreed upon in writing or directed in writing by the United States.

The assay office extension was located practically in the middle of the block bounded by Wall, Nassau, Pine and William Streets and among the buildings surrounding the site were two on Pine Street numbered 25, 27 and 29. Number 25 was ten stories and Nos. 27 and 29 (being one

building) was thirteen stories above the street, and each was one story higher at the line of the assay office extension.

Appellant submitted detail drawings showing its proposed method of underpinning and protecting the walls of the Pine Street buildings. Referring to the drawings the Architect telegraphed the inquiry why they did "not show underpinning 25 Pine Street extending to rock," to which appellant replied that in accordance with the addendum to the specifications it understood that the building referred to meant 27–29 Pine Street as No. 25 Pine Street had no rear wall but simply a light metallic curtain wall supported on the side walls, and that appellant did not consider there was any rear wall in the building and, therefore, it (appellant) showed the side walls to be taken care of in the usual manner and believed its method so provided.

Much correspondence ensued, and finally appellant was told that it was the opinion of the Architect's office that its letter of the 2nd instant (October, 1909) correctly set forth the position of the office and that it was of the opinion the work as therein set forth was required by the contract and that appellant was not entitled to extra therefor, and appellant was directed to carry out its contract without further delay in accordance with that letter. To which appellant replied that the cost of the underpinning to rock of the walls of No. 25 Pine Street would be $4,800 in addition to the price named in the contract and concluded as follows:

"'As the contract does not expressly or impliedly require us to underpin to rock premises 25 Pine Street, we shall proceed with the work under the contract, taking necessary steps to protect said premises, but will not underpin any portion thereof to rock except upon the understanding that we are to be paid the reasonable cost thereof, as indicated above.'

"To which the Supervising Architect replied, on October 30, 1909: 'Your statements are noted and you are now directed to proceed without further delay to complete the work in line with office letters of the 2d, 20th and 26th instants, and without expense to the Government. And you are advised that unless you take action along this line within a reasonable time consideration will be given to serving the eight days' notice preparatory to the Government assuming charge of the work and completing it at your expense.'

"Upon appeal to the Secretary of the Treasury the action of the Supervising Architect was ratified, and the claimant was directed in writing by the Secretary to proceed with said underpinning in accordance with the requirements of the Supervising Architect, otherwise the contract would be completed at claimant's expense. The claimant did the work under protest, and completed it and all of the work under said contract within the time stipulated in the contract. The actual cost of underpinning to rock said building No. 25 Pine Street was $4,450. The contractor was paid the full amount of the contract price, $79,400."

The use of the word "building" in the addendum to the specifications was the result of a clerical error in the office of the Supervising Architect. But before submitting a proposal for the work appellant through its president and agent made an investigation of the site of the work and the buildings surrounding the site and ascertained that the rear of both the buildings on Pine Street adjoined the site on the north.

Mr. John S. Flannery, with whom *Mr. Frederic D. McKenney* was on the brief, for appellant.

Mr. Assistant Attorney General Huston Thompson for the United States.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The case is in narrow compass. It involves for its solution the construction of a contract, and the rules to guide such construction we need not rehearse. To its words we at first resort, but not to one or a few of them but to all of them as associated, and as well to the conditions to which they were addressed and intended to provide for. The argument of appellant ignores this rule. As we shall see, it makes one word dominant, controls all others by it, and puts out of view the demands of the physical conditions.

The contract provided that whatever walls would have to be removed and excavations made would have to be done in such manner as not to endanger adjoining property, and that all necessary shoring and underpinning, etc., in connection therewith had to be done. To this provision there was subsequently added that "in the case of the *building* [italics ours] joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect."

But there were two buildings "joining the north line of the site," and appellant selected one as the full measure of its obligation to carry the underpinning to rock as required by the specifications, giving as a reason, in a communication to the Architect's office, that it did not consider that there was any rear wall in No. 25 Pine Street, but only a metallic curtain wall.

The Architect's office was not impressed with the distinction between walls and the selection of one building joining the north line of the site but insisted that the underpinning of the main rear walls of both of the buildings joining such line must be carried to rock by a method satisfactory to the Supervising Architect. Appellant

filed its appeal to the Secretary of the Treasury, who affirmed the action of the Architect.

Counsel intimates unfairness on the part of the Supervising Architect, but there is no just foundation for it; and, besides, there is no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect, and the contract explicitly provides that "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final." If we may concede to appellant an ambiguity in the specifications arising from the use of the singular word "building" instead of the plural word "buildings" against the material conditions which appellant's officers had inspected and knew of and against as well the other parts of the specifications which among other things call for "rear walls" instead of a "rear wall," seemingly implying two buildings and not one only, at the utmost it could only be said that there was ground for dispute, and under the contract the decision of the Architect upon the dispute was final.

Judgment affirmed.

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

UNITED STATES *v.* JIN FUEY MOY.

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

No. 525. Argued December 7, 1915.—Decided June 5, 1916.

A statute must be so construed, if fairly possible, as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

This court cannot assume to know judicially that no opium is produced in this country; nor is it warranted in so assuming when construing a statute itself purporting to deal with producers of that article.

When Congress contemplates the production of an article within the United States, this court must construe the act on the hypothesis that such production takes place.

An attempt of Congress to make possession of an article—in this case opium—produced in any of the States a crime, would raise the gravest question of power. *United States* v. *De Witt*, 9 Wall. 41.

In construing a statute which calls itself a registration or taxing act and does not purport to be in execution of a treaty and which contains a provision not required by any treaty, a grave doubt arises whether such a statute is entitled to the supremacy claimed for treaties on the ground that it does in effect carry out existing treaty obligations on the general subject of both treaty and statute.

While the Opium Registration Act of December 17, 1914, may have a moral end, as well as revenue, in view, this court, in view of the grave doubts as to its constitutionality except as a revenue measure, construes it as such.

Every question of construction is unique, and an argument that might prevail in one case may be inadequate in another.

Only definite words will warrant the conclusion that Congress intended to strain its powers, almost, if not quite, to the breaking point, to make a great proportion of citizens *prima facie* criminals by mere possession of an article.

The words "any person not registered" in § 8 of the Opium Registration Act of 1914 do not mean any person in the United States, but refer to the class dealt with by the statute—those required to register—and one not in that class is not subject to the penalties prescribed by the statute.

225 Fed. Rep. 1003, affirmed.

THE facts, which involve the construction and application of the act of December 17, 1914, relating to registration of, and tax on, persons producing and dealing in opium and other specified drugs, are stated in the opinion.

Mr. Assistant Attorney General Wallace, with whom *Mr. William C. Herron* was on the brief, for the United States:

Section 8 of the act should not be restricted to those persons who are required to register and to pay the tax. *United States* v. *Portale*, 235 U. S. 27.

The decision of the court below goes only to the construction and not the constitutionality of the act; hence, the only question open on this writ of error is that of the construction of the act. *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mescall*, 215 U. S. 31; *United States* v. *Portale*, 235 U. S. 31; see also *United States* v. *Barnow*, 239 U. S. 74; *United States* v. *Blunt* (Nor. Dist. Ill., not yet reported); *United States* v. *Brown*, 224 Fed. Rep. 135; *United States* v. *Wilson*, 225 Fed. Rep. 82; *United States* v. *Woods*, 224 Fed. Rep. 278.

The act is not exclusively a revenue measure, but is also one to comply with treaty obligations; see Treaty of 1912 and President's message of April 21, 1913.

The bill originated from the State, and not the Treasury, department.

The two acts of January 27, 1914, and this act were all enacted to comply with the treaty; see President's message of August 9, 1913. The Harrison Act was to cure conditions existing just before the passage of this bill.

The assertion that the acts were not passed pursuant to any treaty is erroneous as reports of committees show that purpose. Even without them, however, the court could not infer that revenue was the sole reason for the bill.

The act, particularly § 8, is not limited to those required to register.

The constitutionality of the act is not here involved, nor is the constitutional reading of the act a feature. Considerations favor the Government's reading *e. g.*, contrast of language in § 1 from that in § 8 and contrast of language in § 1 from that in § 4.

Without such contrast, some could not read the words "required to register" into § 8.

The language of § 8 is self-interpreting.

Specific exceptions show the act is not so limited.

The reading of defendant in error emasculates the act.

A draftsman seeking to accomplish the Government's theory of the act would have so worded it; see *Lapina* v. *Williams*, 232 U. S. 78; *Newell* v. *People*, 7 N. Y. 9, 97; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 612; *United States* v. *Bennett*, 232 U. S. 304; *United States* v. *Goldenburg*, 168 U. S. 95; *United States* v. *Portale*, 232 U. S. 27, 30; Black on Const. Law, § 49.

The Harrison law is meant to comply with treaty obligations. It is valid as in aid of the treaty.

This act is a legitimate regulation in aid of a proper subject of treaty-making power. Exports and imports are such a proper subject as is also interstate movement, manufacture, and jobbing of the drug, as all are reasonably related to the treaty object.

In support of these contentions see *Adams* v. *New York*, 92 U. S. 585; *Baker* v. *Portland*, 5 Sawy. 566; *Carneal* v. *Banks*, 10 Wheat. 181; *C., B. & Q. Ry.* v. *Drainage Comm'rs*, 200 U. S. 561; *Chirac* v. *Chirac*, 2 Wheat. 259; *Clerke* v. *Harwood*, 3 Dall. 342; *Compagnie Francaise* v. *Brd. of Health*, 186 U. S. 380; *Dick* v. *United States*, 208 U. S. 340; *Downes* v. *Bidwell*, 182 U. S. 244, 313; *Geofroy* v. *Riggs*, 133 U. S. 258; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Hughes* v. *Edwards*, 9 Wheat.

489; *In re Ah Chung*, 6 Sawy. 451; *In re Parrott*, 1 Fed. Rep. 481; *In re Ross*, 140 U. S. 453; *License Cases*, 5 How. 504; *Leisy* v. *Hardin*, 135 U. S. 100; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Mackenzie* v. *Hare*, 239 U. S. 299; *Maiorano* v. *R. R. Co.*, 213 U. S. 268; *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35; *New York* v. *Miln*, 11 Pet. 102; 22 Ops. A. G. 214; *Passenger Cases*, 7 How. 283; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Queue Cases*, 5 Sawy. 552; *Succession of Robasse*, 49 La. Ann. 1405; *Tellefsen* v. *Fee*, 168 Massachusetts, 188; *United States* v. *43 Gals. Whisky*, 93 U. S. 188; *United States* v. *Portale*, 235 U. S. 27; *Ware* v. *Hylton*, 3 Dall. 199; *Weber* v. *Freed*, 239 U. S. 325; *Worcester* v. *Georgia*, 6 Pet. 515; *Wyman, Petitioner*, 191 Massachusetts, 275; Anderson on Treaty Making Power; Devlin on Treaty Power; Calhoun on the Constitution; III Elliott's Debates; I & II Farrand; Federalist, No. 22, p. 134; Moore's Dig. of Int. Law, Vol. 5, p. 178; 1 Richardson's M. & P. of the Presidents; Tucker on Const. Law.

Mr. H. Ralph Burton and *Mr. Levi Cooke*, with whom *Mr. George X. McLanahan* and *Mr. William Strite McDowell* were on the brief, for defendant in error:

Acts of Congress must be construed to avoid absurdities. The Harrison Drug Act does not apply to mere consumers or possessors.

The words "any person" in § 8 can only apply to the persons upon whom the act intended to operate; to wit: those mentioned in title and previous sections.

There is no basis for argument that such words should be construed to mean "every other person."

Section 8 is only intended "to create a statutory rule of evidence"; it is only auxiliary to § 1 and it does not enlarge the class of unlawful acts.

Presumed crime cannot be the basis of valid legislation and by judicially determining a certain drug to be an "out-

law of commerce" proceed to punish every person who touches or possesses it.

The act was not passed pursuant to treaty obligations or under power to regulate commerce. *United States* v. *Portale*, 235 U. S. 27, does not furnish a rule for interpretation of the act in question.

The act is a revenue act and cannot apply by construction to a class of persons who are not permitted to comply therewith or otherwise affect the revenue, but is limited in scope to requiring persons specified to register and pay the tax imposed; requiring the use of official order forms upon which a tax is imposed; requiring a record to be kept, and certain provisions and authorized regulations complied with to prevent evasion of the tax, or to aid in detection and proof of violations of said act; regulating said drugs in interstate commerce.

The act must be construed so as not to violate the constitution, if possible.

It is a revenue act and in so far as it is, it does not violate the Constitution, but to construe said act as a police regulation to suppress the traffic in opium and other drugs, within the several States, would be to render it unconstitutional.

The presumption is against unwarranted exercise of legislative authority.

In this case the Government seeks to amend the act by construction and by adding additional purposes and thus including other persons.

It sets up an intention of Congress different from the plain and ordinary meaning of words used.

It makes presumption of "No legitimate occasion for possession of said drugs" and asks conviction under said presumption.

The Government is trying to introduce into modern jurisprudence the ancient and dishonored custom of "outlawry."

Section 8 prescribes and punishes a crime and therefore partakes of the nature of a penal act, instead of a revenue act; see *Andrew* v. *United States*, 2 Story, 203; *Granada County Supervisors* v. *Brogden*, 112 U. S. 261; *Hadden* v. *Collector*, 5 Wall. 107; *Martin* v. *Ford*, 1 Term Rep. 101; *Parsons* v. *Bedford*, 3 Pet. 433; *United States* v. *Brown*, 224 Fed. Rep. 135; *United States* v. *De Witt*, 9 Wall. 41; *United States* v. *Kirby*, 7 Wall. 482; *United States* v. *Jin Fuey Moy*, 225 Fed. Rep. 1003; *United States* v. *Wilson*, 225 Fed. Rep. 82; *United States* v. *Woods*, 224 Fed. Rep. 278.

Mr. Justice Holmes delivered the opinion of the court.

This is an indictment under § 8 of the act of December 17, 1914, c. 1; 38 Stat. 785, 789. It was quashed by the District Court on the ground that the statute did not apply to the case. 225 Fed. Rep. 1003. The indictment charges a conspiracy with Willie Martin to have in Martin's possession opium and salts thereof, to wit, one dram of morphine sulphate. It alleges that Martin was not registered with the collector of internal revenue of the district, and had not paid the special tax required; that the defendant for the purpose of executing the conspiracy issued to Martin a written prescription for the morphine sulphate, and that he did not issue it in good faith, but knew that the drug was not given for medicinal purposes but for the purpose of supplying one addicted to the use of opium. The question is whether the possession conspired for is within the prohibitions of the act.

The act is entitled "An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes." By § 1 the persons mentioned in the title are required to register, and to pay

a special tax at the rate of $1 per annum, with certain exceptions, and it is made unlawful for the persons required to register to produce, etc., the drugs without having registered and paid the special tax. All provisions of law relating to special taxes are extended to this tax. By § 2 it is declared unlawful for any person to sell or give away the drugs mentioned without a written order, provided for, excepting deliveries by physicians, &c., or on their order, and certain other cases. Then after provision for returns it is made unlawful by § 4 for any person who shall not have registered and paid the special tax to send, carry or deliver the drugs in such commerce as Congress controls, again with exceptions. By § 6 preparations containing certain small proportions of the drugs are excluded from the operation of the act, under conditions. By § 7 internal revenue tax laws are made applicable, and then comes § 8 under which the indictment is framed.

By § 8 it is declared unlawful for 'any person' who is not registered and has not paid the special tax to have in his possession or control any of the said drugs and 'such possession or control' is made presumptive evidence of a violation of this section and of § 1. There is a proviso that the section shall not apply to any employee of a registered person and certain others, with qualifications, or to the possession of any of the drugs which have been prescribed in good faith by a physician registered under the act, and to the possession of some others. And finally it is provided that the exemptions need not be negatived in any indictment, etc., and that the burden of proving them shall be upon the defendant. The district judge considered that the act was a revenue act and that the general words 'any person' must be confined to the class of persons with whom the act previously had been purporting to deal. The Government on the other hand contends that this act was passed with two others in order

to carry out the International Opium Convention; 38 Stat., Part 2, 1929; that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature and that § 8 means all that it says, taking its words in their plain literal sense.

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408. If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress, at all events, contemplated production in the United States and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the States obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. *United States* v. *De Witt*, 9 Wall. 41. The Government invokes Article VI of the Constitution, that treaties made under the authority of the United States shall be the supreme law of the land. But the question arises under a statute not under a treaty. The statute does not purport to be in execution of a treaty but calls itself a registration and taxing act. The provision before us was not required by the Opium Convention, and whether this section is entitled to the supremacy claimed by the Government for treaties is, to say the least, another grave question, and, if it is reasonably possible, the act should be read so as to avoid both.

The foregoing consideration gains some additional force from the penalty imposed by § 9 upon any person who violates any of the requirements of the act. It is a fine of not more than $2,000 or imprisonment for not more than

five years, or both, in the discretion of the court. Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least *prima facie* criminal and subject to the serious punishment made possible by § 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.

Approaching the issue from this point of view we conclude that 'any person not registered' in § 8 cannot be taken to mean any person in the United States but must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by § 1. It is true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument taken by itself for a broader meaning. But every question of construction is unique, and an argument that would prevail in one case may be inadequate in another. This exemption stands alongside of one that saves employees of registered persons as do §§ 1 and 4, and nurses under the supervision of a physician &c., as does § 4, and is so far vague that it may have had in mind other persons carrying out a doctor's orders rather than the patients. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of the proviso is not enough to overcome the dominant considerations that prevail in our mind.

Judgment affirmed.

MR. JUSTICE HUGHES and MR. JUSTICE PITNEY dissent.

RUSSO-CHINESE BANK *v.* NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON.

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

No. 244. Argued April 13, 14, 1916.—Decided June 5, 1916.

In an action by a bank in Port Arthur to recover money, remitted by it to a bank in Seattle for a draft secured by shipping documents sent to it for collection by the Seattle Bank, and which the Port Arthur Bank declared had not been paid, but for which it remitted on agreement of the Seattle bank to refund in case non-payment was proved, the jury found a general verdict in favor of the Seattle Bank and also a special finding to the effect that the Port Arthur Bank did receive payment for the draft in question; such special finding was based on testimony to effect that the Port Arthur Bank permitted the consignee to take possession of the goods covered by the documents attached to the draft on his agreeing to deposit the proceeds thereof as sold, and an instruction to the effect that such action on the part of a bank receiving a draft for collection constituted a payment in law; judgment being entered thereon and affirmed by the Circuit Court of Appeals, this court reviewing on certorari *held* that:

The fair import of the instructions of the trial judge in their entirety, being that the finding of payment was to be reached only in case the value of the goods was not less than the amount of the draft, there was no error therein.

Where a bank, holding a draft for collection with documents annexed and with instructions to deliver the documents only on payment, allows the drawee to take the goods covered by the documents on his promises to sell and account for proceeds, it amounts to a misappropriation of the property and liability to account for its value immediately arises.

There was no error in charging that the collecting bank became invested with the ownership of the goods and could not be excused from obligation to account by declaring that the goods had disappeared without its knowledge, the charge not being to effect that the relation of vendor and vendee did exist, but that the relation of principal and agent did exist, and, as such agent, the col-

lecting bank was obligated to act in good faith to protect the rights of the owner of the draft.

The special finding being supported by adequate evidence is controlling.

Even if a bank, sending a draft for collection, suffers no loss on account of its guaranty from the original owner, it may, in view of its relation to commercial paper, demand, as principal, an accounting from its correspondent, and resist an action to recover back the money which it received upon the draft.

206 Fed. Rep. 646, affirmed.

THE facts, which involve questions relating to a transaction between two banks, regarding drafts and documents annexed thereto, are stated in the opinion.

Mr. Warren Gregory, with whom *Mr. W. H. Chickering* and *Mr. George H. Whipple* were on the brief, for petitioner:

The instruction that permission given Clarkson & Co. to take the flour constituted a payment of the draft is manifestly erroneous.

The court in declaring that certain acts would constitute payment of the draft practically directed a special verdict.

The trial court proceeded upon the assumption that there was a novation; and the pleadings do not count on a novation nor was the case tried on the theory of novation.

The conduct of the parties is inconsistent with such theory.

If the Port Arthur branch did, contrary to instructions, permit Clarkson to take over the flour, it may have been responsible to the extent of the security released, but the jury is entitled to pass upon the question as to the value of the flour taken and there is no evidence that any of the flour was actually taken.

The only fair intendment of the instruction leads to an absurdity.

The trial court had in mind that it was not the release of the security that would pay the debt *pro tanto*, but the application of the proceeds.

The error of the trial court was only emphasized by another instruction given and the special verdict did not cure the error, but was authority for the special verdict.

The instruction that the collecting bank became invested with title and ownership of the flour, and its obligation in this regard, is erroneous. The refusal to charge that the duty of collecting bank was one of agent was error.

The Port Arthur branch was not the owner of the flour but its relationship was principal and agent, as is shown by the documents.

The instructions of the trial court placed on the Port Arthur bank the same obligations as if it had agreed to buy the flour from the Seattle bank.

The instructions of the trial court would place on the Port Arthur branch a responsibility foreign to banks handling documents for collection.

The draft in question was accepted by Clarkson & Co., and they became the principal debtors.

The court erred in permitting evidence of a so-called custom concerning the duties of a collecting bank.

Usage or custom cannot be invoked in contradiction of an express contract.

Certain of the testimony of witnesses Davidson and Short was prejudicial to petitioner.

The respondent has not been damaged by any acts of negligence on the part of petitioner.

In support of these contentions see *Alden* v. *Camden Anchor-Rockland Mach.*, 78 Atl. Rep. 977; *American Thresherman* v. *Motor Co.*, 141 N. W. Rep. 210; *Armour & Co.* v. *Russell*, 144 Fed. Rep. 614–616; *Atchison, T. & S. F. Ry.* v. *McClurg*, 59 Fed. Rep. 860; *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675; *Bancroft* v. *Bancroft*, 110 California, 374; *Bank* v. *Monongahela Bank*, 126 Fed. Rep. 436; *Barton Seed Co.* v. *Mercantile Bank*, 160 S. W. Rep. 848; *Boston & Albany R. R.* v. *O'Reilly*, 158 U. S. 334; *Charles* v. *Carter*, 36 S. W. Rep. 396; *Commercial Bank* v.

First State Bank, 153 S. W. Rep. 1175; *Commercial Nat. Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Deery* v. *Cray*, 5 Wall. 795; *Dickerson* v. *Wason*, 47 N. Y. 439; *Elm Lumber Co.* v. *Childerhose*, 83 S. E. Rep. 22; *Gregg* v. *Bank of Columbia*, 52 S. E. Rep. 195; *Hambro* v. *Casey*, 110 U. S. 216; *Hunt* v. *Nevers*, 32 Massachusetts, 504; *Hyde* v. *Booraem*, 16 Pet. 169; *Ladd Bank* v. *Commercial Bank*, 130 Pac. Rep. 975; *LeCoux* v. *Eden*, 2 Doug. 594; *Midland Nat. Bank* v. *Brightwell*, 49 S. W. Rep. 994; *Nat. Bank* v. *Merchants' Bank*, 91 U. S. 92; *Nebraska &c.* v. *First Nat. Bank*, 110 N. W. Rep. 1019; *Pac. Brokerage Co.* v. *Rushfeldt*, 171 S. W. Rep. 976; *Scott* v. *Ocean Bank*, 23 N. Y. 289; *Second Nat. Bank* v. *Bank of Alma*, 138 S. W. Rep. 472; *Smith* v. *Nat. Bank*, 191 Fed. Rep. 226; *Tyson* v. *Western Nat. Bank*, 26 Atl. Rep. 520; *Union Bank* v. *Stafford*, 12 How. 327; *Warren* v. *Suffolk Bank*, 10 Cushing, 582; *Wharton* v. *Walker*, 4 B. & C. 164; *Wisconsin Bank* v. *Bank of North America*, 21 Upper Canada Rep. 284; 21 Amer. & Eng. Enc. of Law, p. 661; Grant on Banking, 6th ed., p. 53; Morse on Banking, 4th ed., §§ 217, 223; Randolph on Commercial Paper, 2d ed., § 795; Cal. Civil Code, § 1531.

Mr. E. S. McCord, with whom *Mr. J. A. Kerr* was on the brief, for respondent.

Mr. Justice Hughes delivered the opinion of the court.

The Russo-Chinese Bank brought this action to recover back money which it had paid to the National Bank of Commerce of Seattle. Judgment of non-suit was entered on the first trial and was reversed by the Circuit Court of Appeals. 187 Fed. Rep. 80. On the second trial, there was a verdict for the defendant and the judgment entered accordingly was affirmed. 206 Fed. Rep. 646. The case comes here on certiorari.

The facts are these: In December, 1903, the Centennial Mill Company, of Seattle, shipped by the steamship 'Hyades' of the 'Puget Sound-Oriental Line' 35,312 quarter sacks of flour to be transported to Port Arthur, or Dalny, and to be there delivered "unto shipper's order or to his or their assigns (Notify Clarkson & Co.)." In accordance with the usual course of business the Centennial Mill Company drew its draft, dated December 11, 1903, on Clarkson & Co., for $36,194.80, payable ninety days after sight, to the order of the National Bank of Commerce (with exchange and collection charges) and, attaching thereto the original and duplicate of the bill of lading for the shipment above described, (which was endorsed in blank) the policy of insurance, and bill of sale to Clarkson & Co., delivered the draft of the National Bank of Commerce, of Seattle, which paid the amount of the draft to the Mill Company. This bank then forwarded the draft, with the documents, to the Port Arthur branch of the Russo-Chinese Bank for collection, stating in the letter of transmittal: "Documents are to be delivered on payment." The letter, with the draft and documents, was received on January 22, 1904.[1] In acknowledging receipt, the Russo-Chinese Bank used the usual form of letter which stated that specific instructions must be given concerning disposition of bills and documents, and storage of goods, in case the draft were dishonored. No such instructions were given. The draft was presented for acceptance on January 23, 1904, and was accepted on January 30, 1904 by Clarkson & Co., and the Seattle bank was notified accordingly. The acceptance fixed April 30, 1904, as the due date, according to the tenor of the draft, and on the expiration of two days' grace allowed by the Russian law it was protested on May 3, 1904. There was evidence that the draft with

[1] For convenience, we give the dates 'New Style.'

deed of protest was mailed to the Seattle bank on May 26, 1904; and there was counter testimony that it never was received.

The Russo-Japanese War was formally declared on February 10, 1904. From February 9 there was a stringent water blockade of Port Arthur and about May 3 the investment was made complete by the Japanese land forces. Port Arthur fell on January 2, 1905, and thereupon the Japanese authorities took possession of all the books and documents of the Russo-Chinese Bank at Port Arthur; these were retained until March, 1906, when they were returned to the bank and taken to its home office at St. Petersburg.

Clarkson & Co., an importing firm having its principal place of business at Vladivostok and a branch office at Port Arthur, were also the agents at the latter place of the steamship company which carried the flour. On April 29, 1904, the Port Arthur branch of the Russo-Chinese Bank wrote to the Shanghai branch of the bank (in answer to an inquiry requested by a representative of the Centennial Mill Company) that the bank had "all shipping documents" and added: "The flour relative to the first three bills" (including the one in question) "is in the hands of Clarkson & Co. and has been sold by them. They promised to take up the bills as soon as they get the money of their sale . . . Bill No. 1559/7035" (that is, the draft here involved) "is due tomorrow and shall be protested if not paid." It was further stated that the fact that Clarkson & Co. had obtained possession of the goods, although the bill of lading was held by the bank, was due to their being the steamship agents, and could not be prevented. On July 7, 1904, the Seattle bank wrote to the Russo-Chinese Bank at St. Petersburg that Clarkson had advised the drawer that this draft, and others, had been paid before maturity. The Russo-Chinese Bank replied, in substance, that it was not in a

position to trace the matter but would investigate it as soon as possible. There was further correspondence in which the Seattle bank set forth its information as to the payment of the draft and the Russo-Chinese Bank reiterated its inability to ascertain the facts. Finally, in response to the demand of the Seattle bank for the return of the bill of lading attached to the draft, or a remittance of its amount, the Russo-Chinese Bank, St. Petersburg, under date of November 9, 1904, forwarded to the Seattle bank a cheque for $36,013.70 (being $36,194.80 the face of the draft less commission and charges) and added: "It remains, of course, however understood that in case your above remittance proves not to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our today's cheque." The Seattle bank (December 5) acknowledged receipt pointing out that a balance of $2,298.49 was still needed to make payment of principal and interest in full, and stating: "We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur Branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company." On December 29, 1904, the Russo-Chinese Bank, St. Petersburg, enclosed cheque for the balance requested, and said: "It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these $2,298.49 with the $36,013.70, sent on 27/9 November plus accrued interest." And in reply the Seattle bank agreed "that guarantee contained in our letter of December 5 shall also cover this amount."

When the Russo-Chinese Bank obtained from the Japanese authorities the books and documents, it ascertained that the draft in question had been protested for non-

payment, and had been mailed to the Seattle bank. Thereupon, on June 27, 1906, the Russo-Chinese Bank demanded the refunding of the money paid to cover the draft. The demand was refused and this action was brought.

It was alleged in the complaint that the payment to the Seattle bank had been made upon condition that "if it should thereafter be ascertained that said draft had not been paid," the money should be refunded, and that there had been no payment in fact. The defendant denied that the condition was as stated and alleged that it had agreed to reimburse the plaintiff upon the return 'of both sets of bills' and a showing that the draft 'had not been paid,' provided the defendant was in no wise injured by the negligence of the plaintiff in the performance of its duties. It was further averred, among other things, that the draft had been paid in full by Clarkson & Co.; that it was the duty of the plaintiff not to permit the flour represented by the bill of lading to be appropriated by Clarkson & Co.; and that if the proceeds of the sale of the flour were not applied to the payment of the draft the failure was due to the plaintiff's carelessness and breach of duty. The plaintiff in its reply denied these averments and alleged affirmatively that Clarkson & Co. were the agents of the steamship company and that it was well known to the defendant that upon arrival the flour would be delivered into their keeping as such agents whether the draft was paid or not, and that the appropriation of the flour by them before payment was a matter not within plaintiff's control.

The judgment of non-suit on the first trial, because of a failure to show the return of the draft and accompanying documents and thus to prove the breach of an express promise, was reversed upon the ground that the complaint stated a cause of action upon an implied agreement to restore money paid under mistake of fact. 187 Fed. Rep., p. 86.

On the second trial the jury found a general verdict in favor of the defendant and also returned a special finding as follows:

"We . . . find that the Port Arthur Branch of the Russo-Chinese Bank did receive the payment of the draft dated December 11, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint."

The Court of Appeals held that, notwithstanding the protest of the draft and the other evidence introduced by the plaintiff to show that it had not been paid, this special finding had sufficient support. In its succinct review of the evidence the court said, 206 Fed. Rep. 651:

"The flour in question was carried to Port Arthur by the ship Hyades, which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Co. were large customers of the bank. The succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of February, 1904. Short" (assistant manager of Clarkson & Co. until, as he said, February 4, 1904) "testified, among other things, that when the Hyades arrived with the 35,312 quarter sacks of flour in question, there were but from 6,000 to 8,000 sacks in Clarkson & Co.'s warehouse, and that when that shipment arrived he went to the Port Arthur bank on behalf of Clarkson & Co. to accept the draft drawn for the purchase price of it, and did so; that when he accepted the draft Mr. Ofsiankin," (manager of the Russo-Chinese Bank at Port Arthur) "on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that he (Short) on behalf of that firm gave the bank what he designates as a 'letter of guaranty,' and what Davidson" (then, as he testified, manager of Clarkson & Co. at Port Arthur) "in his deposition designates as one of 'hypothecation,' recognizing the flour as the property of the bank until paid for, and

agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was 'the regular form of bank guaranty; it was a printed form,' said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long-established custom between the Port Arthur bank and Clarkson & Co.; Short testifying that: 'From the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo, and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Co. got it in.'—Davidson in his deposition corroborates the testimony of Short in that regard,— . . . Short testified that upon the acceptance by Clarkson & Co. of the draft in question, and the delivery by that firm to the Port Arthur bank of the documents mentioned, Clarkson & Co. took possession of the 35,312 quarter sacks of flour, and that they thereupon commenced selling it, and paying into the bank the proceeds thereof, is a fair inference from his testimony, as well as that of Davidson.—It appears from the latter's testimony that by reason of orders of the Russian military authorities he was compelled to leave Port Arthur, and did so on the 17th of February, 1904." After referring to the fact that Davidson was evidently confident that the steamer that brought the flour was the 'Pleiades' (the steamer that arrived in February after the 'Hyades') the court continued, p. 652:—"but the flour itself, the witness distinctly testified, was sold by him before leaving Port Arthur to the firm of Ginsburg & Co., which he testified was a large Russian firm doing an extensive business with the Port Arthur bank, and with its principal place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Co. against the war conditions then prevailing. His testimony is, in

part, that he arranged with Ginsburg & Co. to pay a part of the money for which he sold the flour into the Port Arthur bank, and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkson & Co.'s branch at that place, and that he took the head of the firm, Ginsburg, to the Port Arthur bank, and explained to the manager of that bank the terms of the sale, to which he agreed.—Short testified that the Pleiades arrived at Port Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1,500 or 2,000 sacks of flour were landed at Port Arthur from that ship, so that the jury might well have concluded that the 35,000 or 40,000 sacks of flour which Davidson thought were brought by the Pleiades was the consignment of flour that the Hyades carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all of the facts and circumstances of the case. Moreover, there was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port Arthur bank 126,928 rubles and 97 kopeks." 206 Fed. Rep., pp. 651–653.

We agree with the Court of Appeals that the special finding of the jury was adequately supported. Error is assigned with respect to the following instruction to the jury:

"If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in ques-

tion and the plaintiff cannot recover and your verdict must be for the defendant."

It is said by the petitioner that "if we assume that the Port Arthur branch did, contrary to its instructions, permit Clarkson to take over the flour, then to the extent of the value of the security that was thereby released it may have been responsible." But, it is argued that "although the bank did without warrant release the security," still no damage resulted to the Seattle bank if Clarkson & Co. were in fact able to pay their draft, and that there was abundant evidence that Clarkson's financial standing in Port Arthur at this time was good; and that in any event the debt could not be deemed to be paid to a greater extent than the value of the property. The trial court, it is insisted, in effect directed a finding of payment, if the jury found that the agreement was made as described, regardless of this value.

This criticism of the instruction fails, we think, to take proper account of its context. Immediately following the words quoted, the court said:

"It is a general rule of law that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is *de facto* paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to Clarkson taking over the flour in question and consented to the sale of the same by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question,—provided the proceeds

of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment *pro tanto*—that is a payment of so much of the said draft as the proceeds of the sale of the flour would pay of the same; and this is the law, notwithstanding the fact that plaintiff may have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank, and permitted Clarkson & Company to use said funds for other purposes."

In this, the trial judge made his meaning sufficiently clear. If the proceeds of the sale under the agreement were to be payment only if they 'equaled the amount of the draft' and otherwise were to be 'payment *pro tanto*,' plainly the agreement itself was not to be treated as constituting payment regardless of the value of the flour. Taking the instructions on this point in their entirety we think that their fair import was that the finding of payment in consequence of the stated arrangement was to be reached only in case the value of the flour was not less than the amount of the draft.

Moreover, the record does not disclose a controversy as to the value of the flour. The evidence as to this amply supported a finding that the flour was at least worth the amount of the draft, and indeed it could not be said that a different conclusion would have had adequate support in the proof. Mr. Friedburg, officer of the Russo-Chinese Bank, testified that he did not know 'the price of the flour,' but that so far as he knew "during the siege of Port Arthur the price of flour was a little higher than before the outbreak of the war, but there was a lot of flour in the go-downs of the Government and no scarcity was felt of it." Mr. Clarkson testified, referring to the Ginsburg sale: "The first I heard was that the flour had been sold at two roubles a sack. I firmly believe at that time, that as war had broken out, the flour that

was in Port Arthur at the time was worth fully Rbls. 3.00 a sack, consequently I considered that any sale made at Rbls. 2. was at least one rouble below the market value. To the best of my knowledge and belief the selling price before hostilities commenced was from Rbls. 2.50 to Rbls. 2.60 a sack. . . . Acting under instructions from me, the bank in Port Arthur refused to let Ginsburg & Company have the flour at Rbls. 2.00, whereupon Ginsburg & Company agreed to pay Rbls. 2.40." Mr. Short when asked 'the market price of the flour' at the time he left said "it was selling from two forty to two sixty-five roubles a sack." Mr. Davidson testified that there was "no market price of flour at that time," but when asked whether "there were not two separate bills of sale" made by him to Ginsburg & Company for that flour, "one at 2. roubles and the other at 2.40 roubles" he answered that it was "quite true there were two prices" arranged by him and that "the lower price was sufficient to meet the draft." He added: "I made the sale to Ginsburg & Company at what I considered a fair market value under the circumstances, namely, that I had to leave Port Arthur and that there was no one there I considered eligible to succeed me. The profit was 20 to 25 per cent., as near as I can remember." It cannot be said that the evidence warranted a finding that the value of the flour was less than the amount of the draft.

The Russo-Chinese Bank received the draft, with documents attached, for collection. It was instructed that "Documents are to be delivered on payment." It was on these terms that it was entrusted with the bill of lading, endorsed in blank, which represented the flour. It was its plain duty not to permit Clarkson & Co., upon whom the draft was drawn, to have the control and disposition of the flour until the draft was paid. See *National Bank* v. *City Bank*, 103 U. S. 668, 670, 671. It is no answer to say that Clarkson & Co. were the agents of the steamship

company, for, while they might be able to obtain custody of the flour, it would only be in their capacity as such agents and without the right of disposition. Nor was the case altered by the acceptance of the draft, for the condition attached to the delivery of the flour with the *jus disponendi* was payment, not acceptance. If, in these circumstances, the bank entered into an agreement with Clarkson & Co., as was testified, that the latter were to take over the flour and sell it, promising to account for the proceeds, this was manifestly a misappropriation of the property and there arose in consequence liability to account for its value. This action was brought by the Russo-Chinese Bank to recover money which it had paid to the Seattle bank, and, with respect neither to the express promise to refund nor the promise implied in law, can it be said that the plaintiff was entitled to succeed if at the time of the payment to the Seattle bank it paid merely what it owed. There is no theory which permits it to recover, save that it paid under a mistake of fact, that is, that upon the actual facts it was not liable to make the payment it did make. If, however, it appeared that the value of the flour was equal to the amount of the draft, and it was found that the bank contrary to its instructions had permitted Clarkson & Co. to take and dispose of the flour, it would necessarily follow that the Russo-Chinese Bank was accountable to the Seattle bank to the amount of the draft and was in the same position, so far as the right of the Seattle bank against it was concerned, as if it had received the avails of the draft. It could not by an agreement in violation of its duty, invest Clarkson & Co. with the right of disposition, without accountability. The instruction, to which we have referred, affords no ground for reversal.

Error is also assigned with respect to the instruction to the jury that the Russo-Chinese Bank became invested with the title and ownership of the flour and that it could

not be excused from an obligation to account by saying that the flour had disappeared without its knowledge. It is argued that the relation between the banks was that of principal and agent, not of vendor and vendee; that it took the draft for collection. But the charge, as we view it, was not to the effect that the relation of vendor and vendee was created, but on the contrary it was distinctly stated to the jury that the Russo-Chinese Bank 'was obligated as an agent to act in good faith and protect the rights of the National Bank of Commerce in the collection of the draft,' and that as 'the agent' for the owner it 'was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted.' In view of the special finding that the draft had been paid it is not necessary to inquire as to whether there would otherwise have been liability on the part of the plaintiff because of a failure to exercise reasonable care. The special finding, supported by adequate evidence, was based under the instructions of the court upon the transaction with Clarkson & Co. to which we have referred, and it must be deemed controlling. We find no instruction with reference to that transaction, or its legal effect if found to be as testified, which was prejudicial to the plaintiff.

Complaint is also made with respect to certain requests for instructions and rulings on the admission of evidence, but they are wholly without merit and it is unnecessary to review them. It is said that the Seattle bank suffered no loss because it had a guaranty from the Centennial Mill Company, but the Seattle bank in view of its relation to the commercial paper involved was entitled to demand an accounting from its correspondent, and on the same ground to resist this action for the recovery back of the money which it had received upon the draft.

As we discover no error in the record, the judgment must be affirmed.

Judgment affirmed.

ST. LOUIS AND KANSAS CITY LAND COMPANY *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 261. Argued March 7, 1916.—Decided June 5, 1916.

The extent of the authority conferred upon a city by its charter, the construction of such charter, and the validity, scope and effect of ordinances adopted by the city and of proceedings thereunder and the rights of parties thereto under state law, are matters of state law as to which the decision of the state court is controlling.

A ruling as to the effect, with respect to supplemental proceeding, of the decree in a court of the same State holding a prior assessment void as to certain parties for want of required notice, does not present a Federal question.

An owner of property, which may be assessed for benefits in order to pay an award for property condemned, is not entitled, under the due process provision of the Fourteenth Amendment, to be made a party to the condemnation proceeding or to be heard as to the amount of the awards; due process of law requires only those whose property is to be taken for public improvement to have prior notice.

The question under the Fourteenth Amendment is one of state power and not of state policy; of what the State must accord—not what it may grant or withhold in its discretion.

Differences due to voluntary action and diverse individual choice may arise under equal laws and not amount to denial of equal protection of the law within the meaning of the Fourteenth Amendment.

While all taxes and assessments are necessarily laid by some rule of apportionment, and a scheme of distribution which is palpably arbitrary and constitutes a plain abuse may be condemned as violating the Fourteenth Amendment, the mere fact that there may be inequalities is not enough to invalidate the action of a State.

Where assessments are made by a political subdivision according to special benefits, the property owner is entitled to be heard as to the amount of his assessment and all matters properly entering into that determination, but he is not entitled to be heard not only as to the assessment on his property but also as to the assessments on all other property owners.

Where a state statute provides for a supplemental proceeding to correct errors in an assessment proceeding, nothing in the Federal Constitution prevents the inclusion in the supplemental proceeding of properties omitted from the original proceeding.

The Seventh Amendment has no application to an assessment or condemnation proceeding in a state court.

260 Missouri, 395, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of proceedings for condemnation of land for a street widening and assessments for benefits in Kansas City, Missouri, are stated in the opinion.

Mr. I. N. Watson, Mr. Kenneth Mc C. DeWeese and *Mr. H. M. Langworthy,* with whom *Mr. Edward White,* and *Mr. E. M. Jones* were on the brief, for plaintiffs in error.

Mr. Jesse C. Petherbridge and *Mr. Arthur F. Smith,* with whom *Mr. Andrew F. Evans* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This was a supplemental proceeding to assess certain parcels of land in Kansas City, Missouri, for benefits. The assessments were for the purpose of meeting an unpaid portion of damages which had been awarded for property condemned in widening Sixth street. Judgment for the assessments was entered on the verdict of a jury and was affirmed by the Supreme Court of Missouri, *in banc.* 260 Missouri, 395. This writ of error is prosecuted by owners of property thus assessed.

In October, 1909, the Common Council of Kansas City passed an ordinance providing for the condemnation of property within specified limits and for the raising of the amount of the award by special assessments against property within a described benefit district in accordance with Article 6 of the City's charter. Proceedings ac-

cordingly were then brought in the Municipal Court of Kansas City resulting in an award of $166,299.57 for property taken and in the making of assessments of like amount for benefits. There were over 13,000 different tracts within the benefit district. No appeal was taken from the judgment. The City collected on the assessments about $89,000. It was discovered that the publication of the required notice of the proceeding was defective and in an appropriate suit in equity, brought by the Union Pacific Railroad Company, a decree was obtained in favor of that company, and of certain intervenors, annulling the assessments against their properties; and no appeal was taken from that decree.

Thereupon, Kansas City attempted to repeal the original ordinance, presumably—as the state court suggests—for the purpose of abandoning the proceeding and returning the assessments paid. At the suit of owners of the land condemned—who were entitled to the awards—decree was entered enjoining the City from abandoning the condemnation proceedings. The City then enacted a 'supplemental or curative ordinance' basing its action on the authority of § 23[1] of Article 6 of the City's charter.

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[1] Section 23 is as follows:

"SECTION 23. Defective Proceedings—Supplemental. When by reason of any error, defect, or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this Article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceeding, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper

"The object of said sensible charter provision," it is said by the state court, "was to afford a remedy when by any error, defect or omission in condemnation proceedings, assessments made against private property cannot be enforced or collected or where property in the benefit district is omitted, etc. In such case it was provided that the city may by ordinance institute and carry on supplemental proceedings to make a proper assessment against any parcel of property in the benefit district erroneously omitted or erroneously made in the first proceeding, etc." 260 Missouri, p. 406.

Under this ordinance the supplemental proceeding was instituted in the Municipal Court. The notice required by the charter was given and the plaintiffs in error (with the exception of the Union Depot Bridge & Terminal Railroad Company) appeared. The jury returned a verdict which was "the same as to the amount of benefits as the verdict returned in the original proceeding." *State ex rel. Graham* v. *Seehorn*, 246 Missouri, 541, 552; see 260 Missouri, p. 406. An appeal was taken from the judgment to the Circuit Court of Jackson County. While

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amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this Article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings."

the case was pending in that court, the presiding judge having announced that he purposed to "try out the question of the amount of damages awarded to property owners whose property was taken or damaged under the original proceeding as well as the question of assessing benefits over non-paying properties within the benefit district," two prohibition suits were brought in the Supreme Court of the State. The one was brought by owners of property in the benefit district who contended that the Municipal Court had no jurisdiction of either the original or the supplemental proceedings, and hence that the Circuit Court had no jurisdiction on appeal. This contention was overruled and the writ denied. *State ex rel. Graham* v. *Seehorn, supra;* see 260 Missouri, p. 407. The other prohibition suit was brought by the owners of property which was sought to be taken for public use. They urged that there was no provision for an appeal in a supplemental proceeding begun in the Municipal Court, and that, in any event, the Circuit Court had no jurisdiction to award damages. The court sustained the right of appeal, but it was held that the verdict and judgment in the original proceedings were valid "as to those who appeared and accepted them"; that the original proceedings, unappealed from, became *res judicata.* The jury were not to include in their verdict "assessments of benefits and damages upon property properly included in the first verdict." In answer to the contention that property owners in the benefit district were entitled to be heard on the question of the amount to be paid for the property taken in condemnation, the court ruled that, while it was entirely proper as a matter of grace to permit such owners to aid the city in preventing an unduly high valuation of the property condemned, they were not necessary parties in the determination of that issue and that this question was not open to retrial in the supplemental proceedings where the owners of the property condemned

had acquiesced in the awards. Accordingly, a writ issued prohibiting the Circuit Court from retrying the question of the amount of damages awarded to the owners of property condemned. *State ex rel. Tuller* v. *Seehorn*, 246 Missouri, 568; see 260 Missouri, 407–409.

The Circuit Court then resumed the trial of the appeal in the supplemental proceeding. The plaintiffs in error appearing (with the exception of the Union Depot Bridge Company) challenged the validity of the proceedings under the state law and each company also claimed protection under the due process and equal protection clauses of the Fourteenth Amendment from any assessment of benefits until it had "opportunity to be heard upon the amount of damages that shall be awarded to property owners and the benefits assessed against it as provided by the charter of Kansas City in the original proceedings" and that it was entitled to notice of those proceedings. The right to retry the amount of the award in condemnation was frequently reiterated during the progress of the cause and denied. It was also unsuccessfully contended that the decree in favor of the Union Pacific Railroad Company, and intervenors, annulling the former assessments as to them was a bar. The court further ruled, over exceptions, that under the decision of the Supreme Court the jury was concluded from changing the assessments on the property of those owners who had paid under the original proceedings; and a general offer of testimony assailing such assessments was rejected. It appeared that, after deducting from the total awards of damages for property condemned the amount which had already been paid by property owners, there remained a balance of $76,981.98. Among the instructions given to the jury (and to each of which a general exception was taken) were the following:

"This balance you may assess against the city generally, including any benefit to any property of the city

within the benefit district, and against such of the remaining private property, lots, tracts and parcels of land, exclusive of the improvements thereon, in the benefit district, as you may deem is benefited, if any, and in the proportion which you may deem the same benefited, by the opening and widening of Sixth Street, and upon which no assessments have been paid under the original proceedings."

"If the jury find and believe from the evidence that the benefits to the city at large and the special benefits to all the property within the benefit district does not equal the damages heretofore awarded for the proposed taking of property for widening 6th Street from Broadway to Bluff Street or if the jury find that the damages so awarded exceeds in amount all such benefits as would accrue from such widening of 6th Street—then the jury will so state in their verdict and will assess no benefits in these proceedings."

"The jury are instructed that in determining the special benefit, if any, to be assessed against any piece of property, they are not allowed to assess any sum against any piece of property except such sum as they may find said property is actually and specially benefited and enhanced in value, as distinguished from any general benefit such property may receive, if any, in common with other property of the city, by reason of the widening of 6th Street."

"In passing upon the issue as to whether or not the damages in this case exceed the benefits, the jury should not and must not be influenced by the fact that the damages have been determined by another jury in another proceeding. Private property must not be assessed in excess of the actual benefits accruing thereto, if any, as distinguished from the benefits accruing to the city in general."

"Upon your request for further instruction in regard

to your duties as to assessing benefits in this proceeding, you are instructed that you may not assess any benefits in this supplemental proceeding against any property in the benefit district which was adjudged in the original proceeding to have been damaged by reason of a part thereof being taken for the widening of Sixth Street from Broadway to Bluff Street."

Among the instructions refused was one (apparently asked by a party not one of the plaintiffs in error, but in whose exception the others joined) to the effect that the property owner was entitled under the Fourteenth Amendment "to introduce evidence and be heard upon the questions (a) of the cost of the improvement in question to pay which such benefits are to be assessed and (b) of what proportion of the total benefit, if any, of said improvement should be assessed against other property in the benefit district, that upon the plat of which is marked the word 'paid' as well as all other property," and that inasmuch as the alleged right had been denied the jury should not assess any benefit.

The jury rendered a verdict laying assessments upon the properties of the plaintiffs in error, and motions for a new trial were denied. The Union Depot Bridge Company was assessed with two others, jointly, and appeared and objected to the verdict. Thereupon, the court recalled the jurors and directed separate assessments which were made. The Union Depot Bridge Company asked for an instruction to the effect that a portion of its property had been assessed in the original proceeding, that the assessment had been paid, and that the remainder of the lands were then found not to be benefited and should not be assessed. This instruction was refused. This company also moved for a new trial, insisting that it was deprived of its property without due process of law and denied the equal protection of the laws in violation of the Fourteenth Amendment.

On appeal the Supreme Court of the State entered judgment of affirmance, and it is to review that judgment that this writ of error has been sued out.

The extent of the authority conferred upon the City by its charter, the construction of the various provisions of the charter, the validity, scope and effect under the state law of the ordinances adopted by the City, and the scope and effect of the original and supplemental proceedings, and the rights of the parties thereto, under the state law, are state questions as to which the decision of the state court is controlling. *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 685; *Castillo* v. *McConnico*, 168 U. S. 674, 683; *King* v. *Portland*, 184 U. S. 61; *Willoughby* v. *Chicago*, 235 U. S. 45. So, the ruling as to the effect, with respect to the supplemental proceeding, of the decree in a court of the same State holding the prior assessments void for want of the required notice, as to the complainant in that suit and certain intervenors, does not present a Federal question. *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 174, 185.

It is also well settled that an owner of property which may be assessed for benefits in order to pay an award for property condemned, is not entitled by virtue of the Fourteenth Amendment to insist upon being made a party to the condemnation proceeding or to be heard with respect to the amount of the award. He may not demand, as a Federal right, that the power of eminent domain shall not be exercised save upon notice to him. *Voigt* v. *Detroit*, 184 U. S. 115, 122; *Goodrich* v. *Detroit*, 184 U. S. 432, 437, 438; *Londoner* v. *Denver*, 210 U. S. 373, 378. As well might it be argued, as was suggested in *Goodrich* v. *Detroit*, *supra*, that whenever the city contemplated a public improvement of any description, it would be necessary to give notice to all those who might be taxed to pay for it. The established rule is "that it is only those whose property is proposed to be taken for a public improvement

that due process of law requires shall have prior notice." (*Id.*)

Nor is there ground for a distinction because the charter of Kansas City provided a single proceeding, embracing both the proposed condemnation and assessment for benefits, and required notice to the property owners within the benefit district. The question under the Fourteenth Amendment is one of state power, not of state policy; of what the State must accord, not of what it may grant or withhold in its discretion. *Castillo* v. *McConnico, supra; Willoughby* v. *Chicago, supra.* With respect to neither proceeding, original or supplementary, was it essential to due process of law in making assessments that the assessed owners should be heard on the amount of the awards in condemnation. Nor was there a denial of the equal protection of the laws because in the original proceeding there was such an opportunity, together with a right of appeal. The asserted inequality sprang solely from the fact that certain assessed owners, despite the defective publication of notice, appeared and acquiesced in the proceedings. There is no ground for the charge of a denial of equal protection because some owners were willing to waive defects in procedure and others were not. Differences due to voluntary action and diverse individual choices constantly arise under equal laws. We conclude that the contention based on the refusal to reopen the case as to the damages awarded is wholly without merit.

With respect to the amount of the assessments to pay these damages, it is apparent that the question presented relates solely to the right to insist upon a re-determination of the assessments laid upon the properties of other owners, which those owners had accepted and paid. Under the rulings of the court, none of the plaintiffs in error were assessable except for benefits actually and specially accruing to their respective properties; they were heard as

to these benefits and as to the amount of their own assessments. Their objection, as to the matter of apportionment, struck at the finality of the other assessments. In the only instance in which it could be said that any right under the Federal Constitution was specially and appropriately set up as to apportionment it was urged that these owners were entitled to be heard upon "what proportion of the total benefit, if any, of said improvement should be assessed against other property in the benefit district, that upon the plat of which is marked the word 'paid' as well as all other property"; and because this was not allowed, and the assessments which had been acquiesced in and paid by other owners were held to be final, a peremptory instruction was asked that the jury should assess no benefits. It is apparent that this objection goes directly to the validity of the supplemental proceeding as such and denies the power of the State to authorize it. It means that the only proceeding that could constitutionally be taken in such a case would be to have a trial *de novo* as to all the assessments; and thus, where as in this instance thousands of tracts are involved, if a defect is found in the publication of the notice in the original proceeding and a property owner challenges his assessment upon that ground, it would not be sufficient to give him a hearing as to the amount of his own assessment but he could demand as a constitutional right a re-determination of the assessments of all others.

This contention is inadmissible. It is true that all taxes and assessments are laid by some rule of apportionment. Where the scheme of distribution is palpably arbitrary and constitutes a plain abuse it may be condemned as violative of the fundamental conceptions of justice embodied in the Fourteenth Amendment. The principles involved in such cases have recently been discussed and need not be restated. *Wagner* v. *Baltimore*, 239 U. S. 207; *Houck* v. *Little River District*, 239 U. S. 254, 265;

Myles Salt Co. v. *Commissioners*, 239 U. S. 478, 485; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 58, 59; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 250, 251. But the mere fact that there may be inequalities is not enough to invalidate state action. *Davidson* v. *New Orleans*, 96 U. S. 97, 105; *Walston* v. *Nevin*, 128 U. S. 578, 582; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 176, 177; *Houck* v. *Little River District*, *supra*. Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessment and upon all questions properly entering into that determination. "If the legislature," as has frequently been stated, "provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *Spencer* v. *Merchant*, 125 U. S. 345, 355, 356; *Paulsen* v. *Portland*, 149 U. S. 30, 41; *Bauman* v. *Ross*, 167 U. S. 548, 590; *Goodrich* v. *Detroit*, *supra*. What is meant by his "proportion of the tax" is the amount which he should be required to pay or with which his land should be charged. As was said in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. p. 175, when it is found that the land of an owner has been duly included within a benefit district "the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay." See, also, *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 341. It is a very different thing to say that an owner may demand as a constitutional privilege, not simply an inquiry as to the amount of the assessment with which his own property should rightly be charged in the light of all relevant facts, but that he should not be assessed at all unless the assessments of other owners who have paid without

question and are not complaining shall be re-opened and re-determined. The Fourteenth Amendment affords no basis for a demand of that sort.

The separate contention of the Union Depot Bridge Company is, as the state court said, virtually one of *res judicata*. It was insisted that as a portion of its property was assessed in the original proceeding, and the assessment had been paid, it could not be assessed on other portions in the supplemental proceeding; that it must be concluded that the jury in the original proceeding had found that the other tracts were not benefited. The question whether the first judgment had this effect was a matter of state law; there is nothing in the Federal Constitution to prevent the assessment in the supplemental proceedings of properties omitted from the first proceeding. *Phœnix Insurance Co.* v. *Tennessee*, *supra*. The Seventh Amendment, invoked in this connection, has no application. *Minneapolis & St. Louis R. R.* v. *Bombolis*, decided May 22, 1916, *ante*, p. 211. The company appeared in the supplemental proceeding and was heard, and so far as any Federal question is concerned, does not appear to be in a different case from that of the other property owners.

We find no error in the decision of the Federal questions and the judgment is affirmed.

Judgment affirmed.

LEVINDALE LEAD AND ZINC MINING COMPANY *v.* COLEMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 322. Argued April 25, 1916.—Decided June 5, 1916.

A statute should, if possible, be construed in the light of its obvious policy; and as restrictions against alienation of Indian allotments evince a continuance of the policy of guardianship over Indians which does not embrace persons not of Indian blood, it would require clear language to show an intent to impose restriction on allotted lands of non-Indians even if inherited from Indians.

Restrictions, such as those contained in the Osage Indian Allotment Act of 1906, do not run with the land until they attach, and then only in accord with the intendment of the Act.

A legislative declaration of the intent of a previous act is not absolutely controlling; and in this case *held*, that later acts of Congress in regard to Osage Indian allotments did not attempt to import into the earlier act a restriction which lay wholly outside of its express terms and the policy it was intended to execute.

The restriction on alienation provisions of the Osage Indian Allotment Act of June 28, 1906, c. 3572, 34 Stat. 539, do not apply to lands, or interests in lands, coming lawfully into ownership of white men who are non-members of the Osage tribe.

43 Oklahoma, 13, reversed.

THE facts, which involve rights of a white heir of an Osage Indian to the allotment of the latter, and the construction of the Act of June 28, 1906, under which the allotment was made, are stated in the opinion.

Mr. H. P. White for plaintiff in error.

Mr. Preston A. Shinn for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

Charles Coleman, the defendant in error, brought this suit to set aside a conveyance of an undivided interest in lands inherited from his Indian wife and child who were members of the Osage Tribe. Judgment was entered annulling the conveyance upon the ground that it was executed in violation of restrictions imposed by Congress. The judgment was affirmed by the Supreme Court of the State (43 Oklahoma, 13), and this writ of error has been sued out.

The case was decided upon a motion for judgment on the pleadings, and there were special findings of the facts which the pleadings disclosed. It appears that the plaintiff, Charles Coleman, was a white man, lawfully married to an Indian woman, Mary Chesewalla; that their child, Joseph Coleman, was born on February 27, 1906, and died on the same day, leaving his father and mother his sole heirs; that his mother died intestate on February 28, 1906, leaving as her sole heirs Charles Coleman, Herbert Chesewalla and Floyd Chesewalla; that both decedents were duly enrolled as members of the Osage Tribe and were entitled to allotments under the act of Congress of June 28, 1906, c. 3572, 34 Stat. 539; and that, after their death, allotments were made in their right to the heirs of each respectively, the allotment deeds being approved by the Secretary of the Interior and recorded in the year 1909. By the death of his wife and child the plaintiff took title as heir to an undivided one-half interest in the lands allotted in the right of the former, and to an undivided three-fourths interest in lands allotted in the right of the latter. These lands have not been partitioned. In February, 1909, Charles Coleman conveyed by warranty deed his undivided interest to the defendant (plaintiff in error) The Levindale Lead and Zinc Mining Company. It is further set forth that his wife had not received

a certificate of competency. There was no finding and no basis in the record for a finding that Charles Coleman was a member of the Osage Tribe by adoption, enrollment or otherwise.

The lands prior to the allotment were Indian lands (Act of June 5, 1872, c. 310, 17 Stat. 228) and there is no controversy as to the power of Congress in providing for allotments to impose restrictions upon alienation. The question is as to the construction of the provisions of the allotment act of June 28, 1906.

That act provided, 34 Stat. 539, 540, that the roll of the Osage Tribe as it existed on January 1, 1906, with the additions specified, should be the roll of the tribe and constitute its 'legal membership.' Children born between January 1, 1906, and July 1, 1907, to persons whose names were on the roll on the first mentioned date, "including the children of members of the tribe who have, or have had, white husbands," were to be recognized as members for the purposes of the division. (§ 1.) All lands were to be divided "among the members of said tribe, giving to each his or her fair share thereof in acres" as specifically set forth; that is, "each member" as shown by the roll was to be allowed to make three selections of 160 acres each in the manner described. (§ 2.) Restrictions were imposed as follows:

"Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided." (§ 2, Fourth.)

After 'each member' had made the three selections, the

remaining lands of the tribe, except as stated, were to be divided "as equally as practicable among said members by a commission to be appointed." (§ 2, Fifth.) The Secretary of the Interior in his discretion, at the request of any "adult member of the tribe" was to issue "to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee," if upon investigation "he shall find any such member fully competent" to care for his affairs. It was provided that upon the issuance of such a certificate of competency the lands of such 'member,' except homestead lands should "become subject to taxation" and that "such member," except as provided, should have the right to "manage, control and dispose of his or her lands the same as any citizen of the United States." It was further provided that the surplus lands should be "nontaxable" for the period of three years from the approval of the act "except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress." (§ 2, Seventh.) Oil, gas, coal or other minerals "covered by the lands" were "reserved to the Osage tribe for a period of twenty-five years." (*Id.;* § 3.) All funds belonging to the tribe, and moneys accruing to it were to be "held in trust by the United States for the period of twenty-five years" from January 1, 1907, except as provided. The funds of the tribe, and moneys accruing from the sale of Kansas lands together with those due upon claims against the United States, were to be segregated and placed to the credit of the "individual members" of the tribe "on a basis of a *pro rata* division" or "to their heirs as hereinafter provided," and such credit was to draw interest to be "paid quarterly to the members entitled thereto"; and the disposition of royal-

ties from mineral leases was specially prescribed. (§ 4.) At the expiration of twenty-five years from January 1, 1907, the lands, mineral interests, and moneys held in trust by the United States were to be the absolute property of the "individual members" of the tribe, according to the roll, "or their heirs, as herein provided" and deeds were to be issued accordingly. (§ 5.) Sections 6 and 7 are as follows:

"Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests, must go to the mother and father equally.

"Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided*, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further*, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Deeds to the Osage lands were to be executed by the Principal Chief, but were not to be valid until approved by the Secretary of the Interior (§ 8), and it was further provided that whatever was necessary to carry into effect the provisions of the Act should be done under the au-

thority of this officer (§ 12). Regulations have been adopted by the Secretary of the Interior governing the leasing (under §§ 7, 12) of lands "allotted to Osage Indians." These provide among other things that "lands of deceased allottees may be leased by the heirs jointly," as stated. (Regulations 11, 12, approved October 25, 1910; 8, approved June 17, 1913.)

The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians,—wards of the United States. The establishment of restrictions against alienation "evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning." *Heckman* v. *United States*, 224 U. S. 413, 436; *United States* v. *Kagama*, 118 U. S. 375, 384; *United States* v. *Rickert*, 188 U. S. 432, 437, 438; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 316; *Williams* v. *Johnson*, 239 U. S. 414, 420. This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions.

Taken in their natural sense, the provisions of the fourth paragraph of § 2 apply only to allotments made to members of the tribe. There is nothing to suggest that a non-member should designate a 'homestead,' and unless lands were thus segregated the restrictions as to 'homesteads' would not apply. With respect to 'surplus lands' it will be observed that it is only selections of each 'member,' and the share of remaining lands 'allotted to the member,' which constitute lands so described and thus come under the stated restrictions. It was early ruled administratively that under § 6 the right to the member's share, though unallotted in his lifetime passed to his legal heirs as there

defined and this we assume to be the meaning of the statute. But the fact that the non-member takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (*Bowling* v. *United States*, 233 U. S. 528), but restrictions would not run with the land unless they had attached. And, even where they had attached, they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe. Emphasis is placed by the defendant in error on the provisions of § 7 as to leases; but it would be an inadmissible construction of this section to say that the word 'heirs' was there used in contradistinction to 'members.' This provision as to leases, in the light of the purpose of the act, had reference we think to the 'individual members' who received allotments and the Indian heirs of such members.

The view we have taken of the inapplicability of the restrictions upon alienation in a case like the present finds support in the fact that there was no provision for giving to non-members certificates of competency. Under the seventh paragraph of § 2, any 'adult member' of the tribe, although a full-blood Indian, who could satisfy the Secretary of the Interior of his ability to transact his own business might obtain a certificate and thus be enabled to dispose of his 'surplus land'; but a competent white man, not a member, could not be relieved. It would seem to be evident that such an incongruous result was not intended, the language plainly showing that Indians alone were deemed to be subjected to the restrictions.

It is insisted that subsequent legislation *in pari materia* indicates the contrary. Reference is made to the acts

of March 3, 1909, c. 256, 35 Stat. 778, and of April 18, 1912, 37 Stat. 86. The former does not aid this contention, but is rather opposed to it. The statute authorized the Secretary of the Interior to sell "part or all of the surplus lands of any member" of the Osage tribe but contained no authority to deal with lands of non-members. It will also be observed that prior to this act there was a joint resolution of February 27, 1909, No. 19, 35 Stat. 1167, providing that "homesteads of members of the Osage tribe" may consist of land designated from any one or more "of their first three allotment selections"; this does not suggest that non-members were supposed to designate 'homesteads.' But it is the act of 1912 upon which chief reliance is placed. This was "supplementary to and amendatory of" the act of 1906, and provides, among other things, in § 6 relating to the lands "of deceased Osage allottees" that "when the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed." We lay aside the suggestion that "deceased Osage allottees" may be taken to mean only members who received allotments in their own right while living, expressing no opinion upon that point. For not only is a legislative declaration of the intent of a previous act not absolutely controlling, but we think that in the present instance the purpose of Congress is manifest. This suit had been decided in the District Court of the State in December, 1910, and it had been there held that the restriction applied to non-members. The case had been appealed, but it may well be supposed that Congress intended to remove the restriction upon a non-member if such a restriction could be deemed to exist. That, we are satisfied, was the object of the provision, and it was not an attempt to import into the earlier act a restriction which lay wholly outside its express terms and the policy of guardianship it was intended to execute.

We confine ourselves to the single point presented. There is no controversy whatever as to the authority of the Secretary of the Interior, where there are undivided interests belonging to Indians, adequately to protect those interests according to the statutory provisions to this end. Our conclusion simply is that the act of 1906 placed no restrictions upon the alienation of land, or undivided interests in land, of which white men who were not members of the tribe became owners.

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

It is so ordered.

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

PACIFIC LIVE STOCK COMPANY *v.* LEWIS, ET AL., CONSTITUTING THE STATE WATER BOARD OF THE STATE OF OREGON.

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

No. 300. Argued March 16, 1916.—Decided June 5, 1916.

Nothing is accomplished by an unsuccessful attempt to remove an administrative proceeding into the Federal court where the District Court has by its remanding order adjudged that the removal is not authorized.

Under § 28, Judicial Code, the order of the District Court remanding a proceeding to the state court is final and conclusive; it is not subject to review either directly or indirectly.

The rule of retention of a cause by the first of two courts of concurrent jurisdiction to the exclusion of other courts and the protection of its

jurisdiction by injunction, applies only where there is substantial identity in the rights asserted and purposes sought in the several suits; the rule does not apply where the earlier suit is a mere private effort to restrain encroachments on plaintiff's individual rights and the later suit is a *quasi*-public proceeding set in motion by a public agency to determine the rights of all parties in interest.

Where the decision by the state court, that a statutory proceeding before a state board is preliminary and administrative and not judicial, is the necessary result of that court's construction of the statute, this court accepts it as correct.

A State may, without violating due process of law, require all claimants to the same water to submit their claims to an administrative board and to pay a reasonable fee for the expenses of such board in determining the relative rights of the various claimants; and an opportunity to be heard is not denied by accepting *ex parte* sworn statements if all testimony is to be subsequently reviewed by the court in a proceeding wherein testimony may be taken; nor is it a denial of due process of law to make the preliminary order of such a board effective pending final determination by the court, where provision is made for a stay on giving suitable bond for damages that may accrue; such requirements are not arbitrary and are a proper exercise of governmental protection of the water which in its absence might pass on and be lost.

The statutes of Oregon, 3 Lord's Laws, chap. 6 and chaps. 82, 86 and 97 of Laws of 1913, establishing proceedings before the State Water Board for ascertainment and adjudication of the relative rights of various claimants to the same water, do not deny due process of law because they require a claimant to assert his right and to pay fees for its consideration, or because they allow the board to accept and consider sworn statements taken *ex parte* without opportunity for cross-examination, or because they allow administrative orders to be followed and given effect before final action of the courts thereon.

THE facts, which involve the constitutionality, under the Fourteenth Amendment, of the statute of Oregon relating to appropriation and distribution of water, and the validity of proceedings thereunder, are stated in the opinion.

Mr. Edward F. Treadwell, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. F. W. Clements* were on the brief, for appellant.

Mr. George M. Brown, Attorney General of the State of Oregon, *Mr. George T. Cochran* and *Mr. Will R. King*, with whom *Mr. J. O. Bailey*, *Mr. James T. Chinnock* and *Mr. Percy A. Cupper* were on the brief, for appellees.[1]

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

This is a bill in equity to enjoin a proceeding before the State Water Board of Oregon looking to the ascertainment and adjudication of the relative rights of the various claimants to the waters of Silvies River in that State, the grounds upon which such relief is sought being (a) that it is essential to protect a jurisdiction previously acquired by the District Court, and (b) that the local statute, 3 Lord's Oregon Laws, Title XLIII, chap. 6; Laws 1913, chaps. 82, 86 and 97, authorizing and controlling the proceeding, is repugnant to the due process of law clause of the Fourteenth Amendment. An interlocutory injunction was denied by the District Court, three judges sitting, 217 Fed. Rep. 95, and motions to dismiss the bill as disclosing no right to relief were afterwards sustained.

The plaintiff, a California corporation, owns large tracts of land along the river and claims a vested right to use upon these lands a portion of the waters of the stream for irrigation and other beneficial purposes. The defendants are the members of the State Water Board and a few out of many persons and corporations claiming similar rights in the waters of the river. The statute under which the proceeding assailed is being conducted was enacted in 1909 and amended in 1913, and most of the rights affected by the proceeding are claimed to have arisen prior to the

[1] The briefs in this case are elaborate and exhaustive and too lengthy to permit abstracts to be included in the Reports; they cite several hundred authorities, state and Federal, on the questions involved and discussed.

statute—the plaintiff's as much as thirty years before. All claimants to the waters of the river, including the plaintiff, were brought into the proceeding by due notice and in conformity with the statute.

A general outline of the statute, as it has been construed by the Supreme Court of the State,[1] will serve to simplify the questions to be considered. It recognizes that in Oregon rights to use the waters of streams for irrigation and other beneficial purposes may be acquired by appropriation, adopts a comprehensive scheme for securing an economical, orderly and equitable distribution of the waters among those entitled to their use, incidentally prescribes a mode of determining the relative rights of the various claimants to the waters of each stream, and in large measure commits the administration of the scheme to the State Water Board and officers acting under the supervision of its members. When one or more users of water from any stream request it the board, if finding that the conditions justify it, is required to set in motion a proceeding looking to an ascertainment and adjudication of all rights to the waters of that stream. Every material step in the proceeding is to be attended with notice and an opportunity to be heard, the adequacy of which is manifest. In the beginning each claimant is required to present to the division superintendent a sworn statement of his claim showing its nature, inception and extent and all the particulars upon which it is based. These statements are to be exposed to public inspection, so that every claimant may determine whether there is occasion for him to oppose or contest the claims of others. The State Engineer, or a qualified assistant, is to measure the flow of the stream, the carrying capacity of the several ditches taking water

[1] See *Wattles* v. *Baker County*, 59 Oregon, 255; *Pringle Falls Power Co.* v. *Patterson*, 65 Oregon, 474, 484; *Claypool* v. *O'Neill*, *ibid.* 511; *Pacific Live Stock Co.* v. *Cochran*, 73 Oregon, 417; *In re Willow Creek*, 74 Oregon, 592; *In re North Powder River*, 75 Oregon, 83.

therefrom, and the land irrigated or susceptible of irrigation from each ditch, and also to take such other observations as may be essential to a proper understanding of the claims involved, a report of all of which is to be made in writing. Any claimant desiring to contest the claim of another may present to the division superintendent a sworn statement showing the grounds of contest and obtain a hearing before that officer at which the parties may present whatever evidence they have and may secure the attendance of witnesses by compulsory process. After the evidence in the contests is taken, it and the sworn statements of the several claimants, with the report of the engineer's measurements and observations, are to be laid before the board,—the statements and the report both being regarded as evidence appropriate to be considered. The board is then to examine all the evidence, make findings of fact therefrom, enter an order embodying the findings and provisionally determining the relative rights of the several claimants, and transmit the evidence and a copy of the order to the circuit court of the county wherein the stream or some part of it lies. Exceptions to the board's findings and order may be presented to the court and in disposing of them the court is to follow as near as may be the practice prevailing in suits in equity. All parties in interest, including the board as representing the State, are to be fully heard. Further evidence may be taken by the court, or the matter may be remanded with directions that additional evidence be taken and that the matter be again considered by the board, in which event the evidence and a copy of the further order of the board are to be transmitted to the court as in the first instance. In short, upon exceptions the court may re-examine the whole matter and enter such decree as the law and the evidence may require, whether it be an affirmance or a modification of the board's order. And even where no exceptions are presented a decree giving effect

to the order is to be entered, that is to say, the matter is not to be left as if the order in itself constituted an effective adjudication. An appeal from the court's decree may be taken to the Supreme Court of the State "as in other cases in equity," except that the time therefor is substantially shortened. When the rights involved are adjudicated the decree is to be "conclusive as to all prior rights and the rights of all existing claimants," and the right of each claimant as so settled is to be appropriately entered and shown upon the records of the board and upon those of the proper county. Each claimant also is to receive from the board a certificate setting forth the priority, extent and purpose of his right, and, if it be for irrigation purposes, a description of the land to which it is appurtenant. That the statute is not intended to take away or impair any vested right to any water or to its use is expressly declared in its first and seventieth sections, 3 Lord's Oregon Laws, Tit. XLIII, c. 6, §§ 6594, 6595.

At the time the statute was adopted, and continuously until this suit was begun, there were pending undetermined in the District Court [1] two suits in equity brought by the present plaintiff, one against two Oregon corporations and the other against another corporation of that State, in each of which suits the relative rights of the parties thereto in the waters of Silvies River were in controversy. These rights are reasserted and again brought in controversy in the proceeding before the board.

When that proceeding was first set in motion, the Pacific Live Stock Company, the plaintiff in this suit, presented to the board a petition and bond for the removal of the proceeding, or a part of it alleged to involve a separable controversy, to the District Court of the United States

[1] The suits were begun in the Circuit Court and when it was abolished were transferred to the District Court.

upon the ground that it was a suit between citizens of different States. But the attempted removal was not sustained, for the District Court remanded the proceeding and in that connection held that while it was pending before the board it was essentially preliminary and administrative, and not a suit at law or in equity within the meaning of the removal statute. *In re Silvies River*, 199 Fed. Rep. 495.

Thereafter the plaintiff presented to the division superintendent a sworn statement of its claim, accompanied by the fee prescribed,—at the same time protesting that the fee was extortionate, that the matter should be adjudicated in the Federal court and that the local statute was repugnant to the Fourteenth Amendment. More than two hundred other claimants also appeared and submitted statements of their claims, all being described as higher up the stream than that of the plaintiff. When the statements were opened to public inspection many contests were initiated. Several of these were against the plaintiff's claim; a large number were by the plaintiff against other claims, and there were others in which, it is said, the plaintiff was not directly concerned. It was at this stage of the proceeding, and before any evidence was taken in any of the contests, that this suit was brought.

Upon the assumption (1) that the removal proceedings were effective, (2) that the proceeding before the board is substantially identical with the pending suits, and (3) that that proceeding is essentially judicial in its nature, the plaintiff insists that the continued prosecution of the proceeding before the board constitutes an inadmissible interference with the District Court's jurisdiction and that this jurisdiction should be maintained and protected by an appropriate injunction.[1] The insistence must

[1] See Rev. Stat., § 720; *Taylor* v. *Taintor*, 16 Wall. 366, 370; *French* v. *Hay*, 22 Wall. 250, 253; *Rickey Land Co.* v. *Miller & Lux*, 218 U. S. 258, 262; *Ches. & Ohio Ry.* v. *Cockrell*, 232 U. S. 146, 154.

be overruled, because the assumption upon which it rests cannot be indulged.

Nothing was accomplished by the removal proceedings. The District Court did not take jurisdiction under them, but, on the contrary, by its remanding order adjudged that they were unauthorized. That order is not subject to review, either directly or indirectly, but is final and conclusive. Jud. Code, § 28; *Missouri Pacific Ry.* v. *Fitzgerald,* 160 U. S. 556, 580–583; *McLaughlin Bros.* v. *Hallowell,* 228 U. S. 278, 286. In so holding it is not intimated that the result would be different if the order were now open to review. See *Upshur County* v. *Rich,* 135 U. S. 467, 474, *et seq.* and cases cited.

The rule that where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, and will maintain and protect its jurisdiction by an appropriate injunction, is confined in its operation to instances where both suits are substantially the same, that is to say, where there is substantial identity in the interests represented, in the rights asserted and in the purposes sought. *Buck* v. *Colbath,* 3 Wall. 334, 345; *Watson* v. *Jones,* 13 Wall. 679, 715; *Rickey Land Co.* v. *Miller & Lux,* 218 U. S. 258, 262. This is not such an instance. The proceeding sought to be enjoined, although in some respects resembling the prior suits, is essentially different from them. They are merely private suits brought to restrain alleged encroachments upon the plaintiff's water right, and, while requiring an ascertainment of the rights of the parties in the waters of the river, as between themselves, it is certain that they do not require any other or further determination respecting those waters. Unlike them, the proceeding in question is a *quasi* public proceeding, set in motion by a public agency of the State. All claimants are required to appear and prove their claims; no one can refuse without

forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end; First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties, and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

Referring to a situation resembling that to which this proceeding is addressed, the Supreme Court of Maine said in *Warren* v. *Westbrook Manufacturing Co.*, 88 Maine, 58, 66: "To make the water power of economic value, the rights to its use, and the division of its use, according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty,—to leave one to encroach upon the other,—to leave each to use as much as he can, and leave the other to sue at law after the injury,—is to leave the whole subject matter to possible waste and destruction." In considering the purpose of the State in authorizing the proceeding the Supreme Court of Oregon said in *In re Willow Creek*, 74 Oregon, 592, 613, 617: "To accelerate the development of the state, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the rights of the various claimants to the use of the water of a stream or other source of supply at a reasonable expense, the state enacted the law of 1909, thereby

to a limited extent calling into requisition its police power. . . . Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public." The District Court, when making the remanding order, said (199 Fed. Rep. 502): "The water is the *res* or subject matter of the controversy. It is to be divided among the several claimants according to their respective rights. Each claimant is therefore directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims." And that court further said that what was intended was to secure in an economical and practical way a determination of the rights of the various claimants to the use of the waters of the stream "and thus [to] avoid the uncertainty as to water titles and the long and vexatious controversies concerning the same which have heretofore greatly retarded the material development of the state." In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined. As against other claimants and the public the determination would amount to nothing. And so, upon applying the test before indicated, it is apparent that the assumed substantial identity between the proceeding and the pending suits does not exist.

The Supreme Court of the State holds that while the proceeding is pending before the board it is merely pre-

liminary and administrative, not judicial, and as this holding is a necessary result of that court's construction of the statute we accept it as correct. The question was first suggested in *Pacific Livestock Co.* v. *Cochran*, 73 Oregon, 417, and the court then said, p. 429: "It is not necessary here to decide whether the proceeding by the board to determine water rights is judicial or administrative. To a large extent it is administrative, but like many proceedings of that character, the board must also act in a *quasi* judicial capacity. A determination of the water rights to a stream finally ends as a report to the Circuit Court, and a decree of final determination by that court." Afterwards the question was both raised and determined in *In re Willow Creek*, 74 Oregon, 592. The court there reviewed the several provisions bearing upon the duties and powers of the board and said, pp. 610, 612, 614: "Their duties are executive or administrative in their nature. In proceedings under the statute the board is not authorized to make determinations which are final in their character. Their findings and orders are *prima facie* final and binding until changed in some proper proceeding. The findings of the board are advisory rather than authoritative. It is only when the courts of the State have obtained jurisdiction of the subject-matter and of the persons interested and rendered a decree in the matter determining such rights that, strictly speaking, an adjudication or final determination is made. It might be said that the duties of the water board are *quasi* judicial in their character. Such duties may be devolved by law on boards whose principal duties are administrative. . . . The duties of the board of control are similar to those of a referee appointed by the court. . . . By proceeding in accordance with the statute, when the matter is presented to the court for judicial action, it is in an intelligible form. The water board and state may then be represented by counsel."

As an alternative to its first contention, which we hold untenable, the plaintiff insists that the statute is repugnant to the due process of law clause of the Fourteenth Amendment; First, because it requires a claimant, at his own expense, to assert and prove his claim before the board, and to pay an extortionate fee for having it considered,—all under penalty of forfeiting his claim if he refuses,—notwithstanding the board acts only administratively and its findings and order are not conclusive; Second, because it permits the board to accept and act upon the sworn statements of claimants taken *ex parte* and upon the data set forth in the unsworn report of the engineer, without, as is asserted, affording any opportunity for showing their true value, or the want of it, by cross examination or otherwise; and, Third, because it requires that the board's findings and order, although only administrative in character, be followed and given effect in the distribution of the water pending the action of the Circuit Court upon them.

A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence and making an advisory report the board merely paves the way for an adjudication by the court of all the rights involved. As the Supreme Court of the State has said, the board's duties are much like those of a referee. (And see *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 526–527.) All the evidence laid before it goes before the court, where it is to be accorded its proper weight and value. That the State, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court is not de-

batable. And so, the fact that the board acts administratively and that its report is not conclusive does not prevent a claimant from receiving the full benefit of submitting his claim and supporting proof to the board. That he is to do this at his own expense affords no ground for objection; on the contrary, it is in accord with the practice in all administrative and judicial proceedings. The fee alleged to be extortionate is a charge graduated according to the amount of land irrigated under the claim submitted, and is fifteen cents per acre for the first one hundred acres, five cents per acre for the next nine hundred acres, and one cent per acre for any excess over one thousand acres. The purpose with which it is exacted is explained in the following excerpt from the opinion of the Supreme Court of the State in *Pacific Livestock Co.* v. *Cochran*, 73 Oregon, 417, 429, 430: "The board is required to take testimony which consumes the time of a stenographer paid by the State; to make, through the state engineer, an examination of the stream and the works diverting water therefrom, including the measurement of the discharge of the stream and of the capacity of the various ditches and canals; to examine and measure the irrigated lands and to gather such other data as may be necessary; to reduce the same to writing and make it a matter of record in the office of the state engineer; to make maps and plats of the various ditches and of the stream—all at the expense of the State. That these services are beneficial to the claimant and necessary to the preservation of his rights in the stream and the protection and assurance of his title goes without saying. . . . it is reasonable to assume that the expense to the State of the investigation, mapping, taking testimony and other acts involved in the determination of the claimant's rights will equal and in many cases exceed the amount of the fee charged; and that the method indicated by the act by which the amount is determined is

eminently fair." In our opinion, the charge is not extortionate and its exaction is not otherwise inconsistent with due process of law.

Upon examining the statute and the decisions of the Supreme Court of the State construing and applying it we are persuaded that it is not intended that the board shall accept and act upon anything as evidence that is devoid of evidential value or in respect of which the claimants concerned are not given a fair opportunity to show its true value, or the want of it, in an appropriate way. On the contrary, the statute discloses a fixed purpose to secure timely notice to all claimants of every material step in the proceeding and full opportunity to be heard in respect of all that bears upon the validity, extent and priority of their claims. And while it is true, according to the concessions at the bar, that the sworn statements of claim are taken *ex parte* in the first instance, it also is true that they are then opened to public inspection, that opportunity is given for contesting them and that upon the hearing of the contests full opportunity is had for the examination of witnesses, including those making the statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken *ex parte* becomes of no moment. And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examinations shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office, and that timely notice of the date when they are to begin is given to all claimants. The report becomes a public document accessible to all and is accepted as *prima facie* evidence, but not as conclusive. *In re Willow Creek*, 74 Oregon, 592, 628. Of the occasion for such a report, the Supreme Court of the State says in that case, p. 613: "In a proceeding

before the board, provision is made for an impartial examination and measurement of the water in a stream, of the ditches and canals, and of the land susceptible of irrigation, and for the gathering of other essential data by the state engineer, including the preparation of maps, all to be made a matter of record in the office of the state engineer, as a foundation for such hearing and to facilitate a proper understanding of the rights of the parties interested. Under the old procedure such information was often omitted. When measurements were made by the various parties to a suit they were nearly always made by different methods and were conflicting. The other evidence in regard thereto, being mere estimates, rendered a determination extremely difficult for the court and of questionable accuracy and value when made." Considering the nature of the report and that claimants may oppose it with other evidence, it is plain that its use as evidence is not violative of due process. *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 412, 430.

The provision that the water shall be distributed in conformity with the board's order pending the adjudication by the court has the sanction of many precedents in the legislation of Congress and of the several States, notably in the provision in the Interstate Commerce Act directing that the orders of the commission shall be effective from a date shortly after they are made, unless their operation be restrained by injunction. These legislative precedents, while not controlling, are entitled to much weight, especially as they have been widely accepted as valid. Although containing no provision for an injunction, the statute under consideration permits the same result to be reached in another way, for it declares that the operation of the board's order "may be stayed in whole or in part" by giving a bond in such amount as the judge of the court in which the proceeding is pending may prescribe, conditioned for the payment of such dam-

ages as may accrue by reason of the stay. It is not, therefore, as if the requirement were absolute. As has been seen, the order is made only after adequate notice and full opportunity to be heard, and when made is, with reason, deemed *prima facie* correct. It relates to flowing water, to the use of which there are conflicting claims. Unless diverted and used the water will pass on and be lost. No claimant is in possession and all assert a right to take from the common source. In this situation we think it is within the power of the State to require that, pending the final adjudication, the water shall be distributed, according to the board's order, unless a suitable bond be given to stay its operation. Such a requirement is not arbitrary, does not take from one and give to another and is not otherwise offensive to a right conception of due process. *Detroit and Mackinac Ry.* v. *Michigan Railroad Commission*, 240 U. S. 564; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 660; *Montezuma Canal* v. *Smithville Canal*, 218 U. S. 371, 385.

Decree affirmed.

MONTELIBANO Y RAMOS *v.* LA COMPANIA GENERAL DE TABACOS DE FILIPINAS.

APPEAL FROM AND ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 217. Submitted March 8, 1916.—Decided June 5, 1916.

In an action of an equitable nature the proper method of review by this court of the judgment of the Supreme Court of the Philippine Islands under the act of July 1, 1902, § 10, is by appeal and not by writ of error.

Where both courts below concurred in findings of fact and conclusions of law, it is the duty of this court to affirm their judgment unless it appears that they clearly erred; and so *held* in a case involving the

construction of, and transactions under, an agreement special in form, whose true construction was in controversy.

THE facts, which involve the jurisdiction of this court to review judgments of the Supreme Court of the Philippine Islands and the validity of a judgment of that court in an action on contract between private parties, are stated in the opinion.

Mr. Harry W. Van Dyke for appellants and plaintiffs in error.

Mr. C. L. Bouvé for appellees and defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was commenced by appellants on the fourth day of March, 1911, in the Court of First Instance of the City of Manila. It was in its nature a suit in equity. The whole controversy turns upon the construction of certain instruments in writing, the provisions of which will be outlined in stating the case. The complaint averred that on October 25, 1905, the parties entered into a written contract whereby the Tobacco Company, through a representative, "delivers to Don Alejandro Montelibano for the purpose of collection, under the conditions hereinafter expressed, the following credits." There followed a detailed statement of the credits, mentioning the names of the debtors and the amount due from each, the aggregate being P.179,177.86. The company guaranteed the existence and legitimacy of the credits, but not the solvency of the debtors. Montelibano obligated himself to pay to the company as the value of the credits the sum P.130,000 in instalments of P.20,000 in the month of December in each of the years 1906, 1907, 1908, and 1909, and the balance of P.50,000 in December, 1910. It was agreed that if he should pay the P.130,000 at the times provided "all the credits and documents of the debtors

which are now delivered to him as specifically stated in paragraph one, will be transferred to him, and consequently Don Alejandro Montelibano agreed to pay in cash to the Compania General de Tabacos de Filipinas in the instalments set out the sum of one hundred and thirty thousand pesos, in order to acquire the ownership of the rest of the credits." All cancellations of credits were to be made by the company upon the proposal of Don Alejandro, "the latter, however, being authorized to issue partial receipts for whatever sums he may collect." The company was not to advance to him any sum for use in the collection of the credits, nor to accept responsibility for actions instituted by him for their collection, "said party accepting whatever responsibilities may arise by reason of his negotiations." The company conferred upon him authority to conduct upon his own responsibility all negotiations by him deemed requisite for the collection of the credits; "and in the event of any judicial action being instituted, the company shall sell to Mr. Montelibano the credit which is the object of such litigation." The contract was publicly ratified by Montelibano and his wife, who is the other appellant, on the tenth day of November following its date, and in the ratification the instrument, besides being copied at large, was described as the document "in which the said company ceded to the said Mr. Montelibano all the credits set forth in the same to the end that the cessionary might carry into effect the collection from all the debtors of the company of the debts set forth in the inserted document, the total amount of which aggregates the sum of one hundred and seventy-nine thousand one hundred and seventy-seven pesos and eighty-six centavos, by means of the authority conferred by said company upon said Mr. Montelibano to enable him to carry out upon his own responsibility all the negotiations he might deem necessary for the collection of the credits mentioned, and that in the event

of any judicial action being instituted the company would cede in sale to Mr. Montelibano the credit which was the object of said litigation." The wife joined in the contract and the ratification in order to pledge certain real estate owned by her as security for the performance of the contract by her husband.

The complaint averred that appellants had taken all steps possible to carry into effect the collection of the credits, but had only been able to collect amounts aggregating P.29,491.04; that the remaining credits set forth in the first clause of the contract did not exist in the amount therein stated, and were not legitimate in their nature, and for this reason, in spite of plaintiff's efforts to collect them it had been impossible to do so. Plaintiffs claimed that defendant company was responsible to the plaintiffs for damages in the sum of P.129,734.29, and prayed that they might recover this amount, and that the contract of October 25, 1905, and the mortgages given to secure it might be cancelled.

The appellee filed an answer and a cross-complaint setting up the contract of October 25, 1905, and the ratification of November 10, and also an agreement afterwards made between the parties under date December 7, 1908, supplemental to and modifying in certain respects the previous contract; setting up that defendant had complied with all the terms and conditions of these contracts on its part to be performed; that Montelibano had paid defendant only P.20,736.95 on account of the instalments agreed to be paid "under the provisions of said contracts whereby the said plaintiff had the option of purchasing and acquiring the ownership of said credits for the sum of P.130,000"; that after the expiration of the term of the option, when he was by the terms and conditions of the contracts obligated to account for all sums of principal and interest collected on account of said credits and to return to defendant all credits remaining

uncollected, defendant demanded of said plaintiff an accounting of his transaction in connection with the credits as agent of the defendant and payment of all sums of principal and interest collected, but he refused to comply with the demand to pay over any sum collected by him, to render accounts, or in any manner to comply with his obligations under the contracts. Defendant prayed that the action of plaintiffs be dismissed; that the plaintiff Alejandro Montelibano be required to render an accounting of the sums collected by him, of the credits remaining uncollected, and of all his transactions under the contracts, and that judgment be rendered in favor of defendant and against the plaintiff Alejandro for the sum found to be due; that a receiver be appointed to care for the uncollected credits and the mortgaged property; and for other relief.

Before trial plaintiffs asked for a dismissal of the action. Their motion to this effect was denied, and the case came on for hearing upon defendant's prayer for affirmative relief and for an accounting and damages. The trial court treated the contract as turning over the credits to Montelibano for collection for defendant's account, subject to an option to purchase the entire amount of credits for the sum of P.130,000, payable in instalments strictly as prescribed by the contract; found that he had not only failed to pay the stipulated instalments in order to avail himself of the option, but had not turned over or accounted for the amount actually collected by him; that he had collected P.61,715.98, and paid over only P.20,736.95, leaving a balance collected by him and undelivered to the defendant of P.40,979.03, in addition to which certain claims against Emilio Escay and Quirino Gamboa had been prosecuted to judgment and execution and the property of the debtors acquired by Montelibano through the execution sales, and that these properties were held by Montelibano in trust for the

company. "The conclusions are that the plaintiff having failed to perform the contract on his part the defendant is entitled to a return of his [its] property in so far as it can be returned and to judgment for the value of the balance which can not be returned, which value must be determined as the proceeds which the plaintiff received from such claims, together with legal interest upon the amount of cash received by the plaintiff upon such claims from the time of the commencement of this action, which was by filing the complaint herein on the 4th day of March, 1911."

Judgment was therefore entered in favor of the defendant and against the plaintiff Montelibano for the sum of P.40,979.03, less P.22,086.43 (the amount of the Escay debt) if defendant should seek to recover the Escay property from plaintiff, with interest from March 4, 1911, the date of the commencement of the action; also for the possession and delivery of certain enumerated credits aggregating P.103,645.70; also for the Escay property, and in case delivery thereof could not be had, the sum of P.40,000, the value thereof, provided defendant did not elect to take the full judgment for money collected as above stated, and if such election should be made then this clause in relation to the return of the property to be annulled; also for the property known as the Gamboa property, or in case delivery thereof could not be had, the sum of P.6,178.10; and for the costs.

The Supreme Court of the Philippine Islands affirmed this judgment, holding that the title to the credits never passed to the plaintiff Alejandro Montelibano; that they were delivered into his possession for collection, with an agreement that he could become the owner thereof by paying P.130,000 in the manner specified; that none of these payments having been made as agreed, the credits remained the property of the defendant company, and a refusal to deliver them was properly the basis of a demand for affirmative relief.

The case comes to this court under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 691, 695, on account of the amount in controversy. The action being of an equitable nature, the proper method of review is by appeal, and the writ of error will be dismissed. *De la Rama* v. *De la Rama*, 201 U. S. 303, 309; *Gsell* v. *Insular Customs Collector*, 239 U. S. 93; *De la Rama* v. *De la Rama, ante*, pp. 154, 160.

The principal contention of appellants, and the one upon which all others turn, is that the Court of First Instance and the Supreme Court of the Islands erred in holding that, under the terms of the contracts of October 25, 1905, and December 7, 1908, the credits involved were delivered to the appellant Alejandro Montelibano not as purchaser but merely as agent for purposes of collection, with an option to purchase that was not carried out, and that therefore the Tobacco Company was entitled to the proceeds so far as collected and a return of the uncollected credits or their value. In support of this there is an elaborate argument respecting the construction of the instruments in question. It concedes that many of their clauses are consistent with the view that Montelibano had but an option to purchase the credits, and that if this option were not accepted he was to account to the company for all that he collected; but it is argued that other clauses and the general intent of the agreements are to the contrary. It would be tedious to recite the argument in detail, and we content ourselves with saying that it has not convinced us that the courts below clearly erred; and since they concurred in their findings both upon questions of fact and upon questions of law, it is our duty to affirm their judgment. *Ker* v. *Couden*, 223 U. S. 268, 279; *Villanueva* v. *Villanueva*, 239 U. S. 293, 299.

Writ of error dismissed.
Decree affirmed on the appeal.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* PROFFITT.

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

No. 273. Argued March 10, 1916.—Decided June 5, 1916.

The danger to a brakeman at work in switching at one end of a "manifest" train, arising from switching operations conducted by another crew at the other end, is not among the ordinary risks of a brakeman's employment; and, in the absence of notice or knowledge, such brakeman cannot be held to have assumed it.

To subject an employee without warning to unusual danger, not normally incident to the employment, is itself an act of negligence.

While an employee assumes risks and dangers ordinarily incident to the employment, so far as they are not attributable to the negligence of the employer or those for whom the latter is responsible, the employee has a right to assume that the employer has exercised proper care to provide a safe place and method of, work.

An employee is not to be regarded as having assumed a risk attributable to the employer's negligence until he becomes aware of it, unless it is so plainly observable that he must be presumed to have knowledge of it.

An employee is not obliged to exercise care to discover dangers resulting from the employer's negligence and which are not ordinarily incident to the employment.

Even if an employee knows and assumes the risk of an inherently dangerous method of work, he does not assume the increased risk attributable, not to such method, but to negligence in pursuing it.

In the absence of knowledge of a custom of the employer in making up trains, a brakeman is not bound by such a custom, unless it is one that a reasonably careful employer would adopt.

A request to charge that the jury find for defendant if the usual method of doing work was pursued irrespective of the question of negligence of other employees was, in this case, properly modified by the court to the effect that the method adopted must be one that reasonably prudent men would adopt and that the injured employee only assumed the risks reasonably and usually incident to such method.

218 Fed. Rep. 23, affirmed.

THE facts, which involve the validity of a judgment for damages for personal injuries in an action under the Employers' Liability Act, are stated in the opinion.

Mr. Walter Leake and *Mr. David H. Leake*, with whom *Mr. Henry Taylor, Jr.*, was on the brief, for plaintiff in error.

Mr. C. V. Meredith and *Mr. Hill Carter* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action brought in the United States District Court under the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65).

Plaintiff was a brakeman in defendant's employ and, during the night of July 2, 1912, was called for duty at Gladstone, Virginia, to take his place as head brakeman on a fast interstate freight train, known as a "manifest train," comprising about forty cars, which had just come into the division terminal yard at Gladstone and was about to be taken forward. He got upon the road engine and this was attached to the train, plaintiff making the coupling. Just after this he met the yardmaster, who had charge of all the work done in the yard, whose orders plaintiff was bound to obey, and who told plaintiff, according to his testimony, to "cut out three cars at the head end of the train [numbers 2, 3 and 4] and switch them off on a side track and come back and couple up, and they would be ready to go." Plaintiff proceeded with the road engine and crew to take out the three cars, returned to the main track with the engine and car number one, coupled the latter to the forward end of the train, and was in the act of coupling up the air hose, an operation that required him to step between the rails. While

he was in this position, a collision took place, caused by the acts of the yard crew, who (unknown to plaintiff) under orders of the yardmaster, and with the aid of the yard engine, were engaged in switching cars at the rear end of the train, and who, negligently, as the jury doubtless found, drove a cut of twenty-nine cars into the standing cars (about eight in number) with undue violence. According to the testimony of the road engineer and fireman the jar of the impact was such that, although their engine was standing, with its independent brakes set, it was thrown forward twenty feet along the track. Naturally plaintiff was knocked down and run over, and he sustained serious personal injuries, including the loss of an arm.

In view of the character of the question that is to be passed upon, a somewhat particular recital of the evidence is necessary. There was testimony that when a manifest train came into a terminal yard such as Gladstone, destined to points further along the line, the engine and caboose were changed and sometimes cars were taken out and others brought into the train; and that in order to save time it was customary to have such shifting operations, when necessary, done at both ends of the train, the road engine and road crew operating at the front, the yard engine and yard crew at the rear. Whether plaintiff knew of this custom was, under the evidence, open to dispute. He at one time denied that he knew it was customary for both ends of a manifest train to be "worked" at the same time; and while this was afterwards qualified, it appears not to have been withdrawn. He admitted that it was customary to follow the instructions of the yardmaster, but denied that on this occasion the yardmaster told him anything to the effect that the rear end of the train was to be worked. He testified that he had no notice that anything was to be done at that end of the train beyond attaching the caboose, and that

after putting the second, third and fourth cars upon the side track and coming back to the train he looked up the track, which was straight, saw no lamp or other signal, and then proceeded with his coupling operations, with the result already mentioned. Whether it was usual, in conducting such switching operations, to have a man at the forward end of the moving cut of cars, was in dispute. Plaintiff testified that "it is the custom to have a man on the front end of a cut of cars that is being switched into other cars, who looks out for that and runs and stops the engine just before they get there, in making the coupling." Two of defendant's witnesses contradicted this; one in terms denying the custom of giving a warning as stated by plaintiff; the other declaring that "all the warning he knew of being given, or the practice, was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given"; while another and experienced witness, called by defendant, being asked if it was customary when running in a cut of cars to have a man on the front end with a light, replied: "Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car." Whether there was a man at the forward end of the cut of cars that produced the collision in question was in controversy. As to plaintiff's opportunity to gain knowledge of the alleged custom, it did not distinctly appear that he had previously worked on a manifest train. He testified that he had been employed as brakeman something more than five years, part of the time as an extra man and part of the time as a regular man; that he was an extra man when hurt; had been a regular brakeman until about three weeks before the accident, when he was "pulled off the local freight."

Plaintiff recovered a verdict for substantial damages,

and the judgment was affirmed by the Circuit Court of Appeals. 218 Fed. Rep. 23.

There are numerous assignments of error, but most of them are manifestly unfounded. The only ones requiring notice are based upon the refusal of the trial court to instruct the jury in accordance with defendant's Request B, and the modified instruction that was given in its stead. The requested instruction was, in substance: That if the jury believed from the evidence that the method adopted by defendant in making up the train on the occasion in question was the usual and ordinary method of doing this work, then plaintiff assumed all the risks incident to that method, and they should not find a verdict in his favor because of any injury received on account of said method of doing the work, even though it was the direct and proximate cause of his injury. The instruction given was, in substance: That defendant had the right to adopt reasonable rules and regulations for the conduct and method of handling its trains in its yards, and of making up trains for their departure therefrom, and that if the jury believed from the evidence that the custom prevailed in the Gladstone yard of making up the train from both ends at the same time, that is to say, by working the train engine and crew at the forward end and the yard engine and its crew at the rear end, and that such method was one that reasonably prudent and careful men would have adopted in the conduct of the business, then the plaintiff assumed the risks reasonably and usually incident to and arising from such method of making up trains, and they should not find a verdict in his favor because of any injury received solely on account of said method of making up the train, although they believed from the evidence that the method adopted was the proximate cause of the injury.

The argument for plaintiff in error is that an employee assumes the risks arising from the employer's method of

doing the work, where the dangers are open, obvious or known to the employee, even though they be due to the employer's negligence in establishing the method or system; that the customary method of shifting and coupling cars at both ends of a manifest train at the same time, without notice or warning to those working at the other end, was open, obvious, and known to plaintiff; and that he therefore assumed the risk of any injury from that source.

It appears to have been conceded by plaintiff in the Circuit Court of Appeals that the attaching and detaching of cars by working on both ends of the train at the same time, was customary at the Gladstone yard; but it does not appear to have been conceded in that court or in the trial court that plaintiff knew of this custom or had had such opportunity for knowledge as to be charged with notice of it. Nor was it conceded that the custom included the pushing in of a cut of cars without a man at their head to give warning to other workmen and to signal the engineer to slacken speed. As already shown, the evidence left these matters open to dispute.

There are several reasons why error cannot be attributed to the trial court for refusing the requested instruction B.

(a) The evidence left it in doubt what method was adopted in making up the train in question and what was the usual and ordinary method, and the request therefore failed to define what state of facts should charge plaintiff with an assumption of the risk.

(b) The request ignored the question whether plaintiff had knowledge or was chargeable with notice of the customary method. The argument in effect concedes, what is plainly inferable from the evidence, that the danger to a brakeman at work in switching at one end of a manifest train, arising from switching operations conducted by another crew at the other end, is not among the ordinary

risks of a brakeman's employment. But, if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence. *Tex. & Pac. Ry.* v. *Archibald*, 170 U. S. 665, 671, 672; *Choctaw, Oklahoma &c. R. R.* v. *McDade*, 191 U. S. 64, 68; *Tex. & Pac. Ry.* v. *Harvey*, 228 U. S. 319, 321; *Gila Valley Ry.* v. *Hall*, 232 U. S. 94, 101; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

(c) The request required defendant to be acquitted if the usual method of doing the work was pursued, irrespective of the question of the negligence of the yard crew in carrying it out. Negligence in the doing of the work was the *gravamen* of plaintiff's complaint, in his declaration as in his evidence, and defendant was not entitled to an instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself. Even if plaintiff knew and assumed the risks of an inherently

dangerous method of doing the work, he did not assume the increased risk attributable not to the method but to negligence in pursuing it. Had the instruction been given in form as requested, the jury, in view of the issue and the evidence, might easily have interpreted it as meaning that if defendant's employees usually and customarily made up trains in such a manner that by a violent collision produced by negligent switching operations at the rear end of a long train a brakeman engaged in the performance of his duties at the forward end, and having no notice or warning of the rear-end switching, was in danger of serious personal injury, there was no liability. This, of course, is not the law.

Nor is the modification of the requested instruction a matter of which defendant may complain. The court evidently understood the request as meaning no more than what it said, and as not intended to embrace the hypothesis that plaintiff knew or had notice that the usual method of making up trains was that adopted on the occasion in question. In the absence of such knowledge or notice, the custom could not be made binding upon plaintiff; certainly not without a finding that it was one that a reasonably careful employer would have adopted. It was this finding that the modification called for.

Judgment affirmed.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* BOWER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 301. Argued March 16, 17, 1916.—Decided June 5, 1916.

While the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, he is not required to furnish the latest, best, and safest, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable.

Subject to this rule, the question whether the appliance which caused the injury in this case, and which was not of the latest type, was reasonably safe and suitable, was properly submitted to the jury.

Assumption by a locomotive engineer of the ordinary risk of using a lubricator glass when subjected to a normal bursting strain, does not import assumption of an increased and latent danger attributable to the employer's negligence in maintaining the appliance upon an engine carrying an undue pressure.

96 Nebraska, 419, affirmed.

THE facts, which involve the validity of a judgment for damages for personal injuries in an action under the Employers' Liability Act, are stated in the opinion.

Mr. A. A. McLaughlin with whom *Mr. William G. Wheeler*, and *Mr. Wymer Dressler* were on the brief, for plaintiff in error.

Mr. Michael F. Harrington for the defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here under review a judgment of the Supreme Court of Nebraska affirming a judgment in favor of de-

fendant in error in an action based upon the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65), for the loss of an eye caused by the breaking of a lubricator glass on a locomotive engine upon which he was at work as engineer in the employ of plaintiff in error. 96 Nebraska, 419.

No question is made but that the cause of action arose in interstate commerce so as to bring the case within the Federal act. The facts upon which the question of liability depends are these: The plaintiff in the action (defendant in error) was an experienced locomotive engineer. At the time of his injury, which occurred at night in the month of November, 1910, he had just oiled his engine, taken it from the round-house, and placed it upon the outgoing track in readiness for his run. The engine was equipped with a Nathan lubricator, an appliance containing oil for the steam cylinders and the air pump, the oil being conducted to and within the parts where needed under steam pressure from the boiler. In order to give the engineer a view of the interior of the apparatus, and thus enable him to see that the oil was dropping, three cylindrical glass tubes were attached, one carrying the oil for each steam cylinder and one for the air pump. Each of these glasses was surrounded with a shield of perforated metal in two parts hinged together and lightly clamped upon the glass tube by means of a spring to hold it in place. When the lubricator was in operation, the tubes were required to sustain the same steam pressure as the boiler. These tubular glasses would sometimes break. This was most liable to occur: (1) when a glass was newly installed and before it had been properly tempered; (2) when it was subjected to a sudden change of temperature, as when steam was admitted to it while cold; and (3) they would after six or seven weeks' use sometimes "wear thin" and break for this reason. The metal shield was designed in part at least to prevent injury to the

engineer from flying pieces in case the glass should break. This type of lubricator had been in use for over twenty years and had been used upon all defendant's engines down to a time between three and four years prior to the accident. Then a new type known as the Bull's Eye came into use and was recognized as a better appliance because, being unbreakable, it was safer for the engineer, and at the same time obviated the loss of time and delay of trains attributable to breakage of lubricators of the Nathan type; and defendant began to instal Bull's Eye lubricators in place of the older type upon engines already in use and to place them upon all new engines. During the earlier period of the use of the Nathan and before the construction of locomotives of classes Q and R, the engines carried only 140 to 150 pounds boiler pressure, while engines of the classes mentioned carried 190 pounds. An experienced witness called by defendant testified that at the time of the trial (about a year after the accident), approximately 25 per cent. of the engines were still using the Nathan lubricator and 75 per cent. were equipped with the Bull's Eye; that the Bull's Eye was and had been for three or four years recognized as "the proper appliance"; that the Nathan was dangerous to the men, and that the change was being made partly because of this and partly because the breaking of the old style lubricator sometimes delayed trains.

Plaintiff testified that during most of the time for the past 20 years he had operated locomotives equipped with Nathan lubricators having tubular glasses, but not all of these were high-pressure engines. The engine on which he was injured was of Class R, and carried a boiler pressure of 190 pounds. He had operated it for about two months prior to the time of his injury. During his experience of 20 years, lubricator glasses had broken with him on three previous occasions, the last being about three weeks before the occurrence in question. At this

time he asked that a Bull's Eye be substituted on his engine. He testified that this was not because he considered the old lubricator dangerous, but because he wanted to save time on the road in the event of a breakdown. He also testified that he knew that when a new glass was put into a Nathan lubricator it was liable to burst if the steam was turned on suddenly, or if steam was turned on quickly in cold weather, and that on the occasion in question, following the correct practice, he first partially opened the throttles, admitting the steam to the tubes to warm them, afterwards fully opening the throttles, and that it was about seven minutes after this was done that the explosion occurred.

The trial court submitted the case to the jury with instructions to the effect that the burden of proof was upon plaintiff to show that defendant had carelessly and negligently maintained the shield and spring and glass in the lubricator in a weak and dangerous condition, that the lubricator glass was not of sufficient strength for use upon the engine in question or any other engine carrying 190 pounds of steam, and that this fact was known to defendant, or that its experience with said glass and lubricator had been such that it ought to have known that the same was insufficient and dangerous; and that if they believed from a preponderance of the evidence that defendant was thus negligent, and that plaintiff was injured as a result of it, they should find for the plaintiff, otherwise for the defendant.

The principal controversy is as to whether the evidence was sufficient to go to the jury upon the question of defendant's negligence in furnishing the locomotive in question with a lubricator having tubular glasses as described.

The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the em-

ployee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. *Washington &c. R. R.* v. *McDade*, 135 U. S. 554, 570; *Patton* v. *Tex. & Pac. Ry.*, 179 U. S. 658, 664. In our opinion, a correct application of this rule required the present case to be submitted to the jury. Properly limiting the inquiry (and, as we have seen, the trial court did so limit it,) there was no question of attributing negligence to an employer for merely failing to promptly instal the latest, best, and safest appliance; it was a question of keeping an older type of appliance in use after its insufficiency had been demonstrated by experience, and perhaps under conditions materially different from those which had obtained when its use began, in the face of notice that it was not reasonably safe and suitable. It was reasonably inferable from the evidence that defendant's experience had shown that a glass tube capable of withstanding the lower pressures of 140 to 150 pounds could not be relied upon to withstand a pressure of 190 pounds, and that the difficulty could not be obviated, as was attempted, by using thicker glass for the tubes, because its very thickness increased the danger of bursting when steam was first admitted; there being evidence from a witness called by defendant that the older type of lubricator was a dangerous instrument to be used upon a high-pressure boiler and that they broke rather frequently; that it was for this reason, in part, that defendant had introduced the Bull's Eye, beginning three or four years before the accident, installing them first upon high-pressure engines of the Q and R classes, and having already placed them upon a majority of defendant's engines of all sizes. In this state of the evidence it could not be said, as matter of law, that defendant was free from negligence in delaying so long to instal a Bull's Eye lubricator upon the engine in question.

The only other question relates to whether plaintiff assumed the risk of performing his duty upon a locomotive equipped with the Nathan lubricator. Instructions were given to the jury upon the subject, but they are open to some criticism which perhaps can be obviated only by holding, as the Supreme Court of Nebraska held, that there was nothing in the evidence that would sustain a finding that plaintiff assumed the risk.

The crucial question is whether he knew or had sufficient notice of the increased danger attributable to the employer's negligence. Plaintiff testified without contradiction that it was his understanding—he had been "always taught to believe"—that the Nathan lubricator would stand the boiler pressure of 190 pounds. Assuming, as the undisputed evidence shows he had a right to assume, that the glass was being subjected to no greater bursting strain than it was designed to withstand, he still knew that, under special circumstances that have been pointed out, there was danger of a glass bursting unless precautions were taken. Any risk of this character, unaffected by his employer's negligence, he undoubtedly assumed, as a risk ordinarily incident to the occupation he pursued. But this throws no light upon his right to recover, because if he was subjected to no greater risk than that just now indicated, the employer was not negligent and there was no ground of recovery. Under the trial court's instructions, the jury must be presumed to have found that the Nathan lubricator glasses had been shown by experience to be incapable of withstanding a pressure of 190 pounds, that defendant knew of this, and nevertheless negligently maintained such glasses upon plaintiff's engine. There was present, therefore, an extraordinary danger, not normally incident to plaintiff's employment; it was in its nature latent, and not obvious; and there is no evidence in the record that plaintiff had received any notice or warning of the increased hazard attributable to his employer's

negligence. In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk. *Gila Valley Ry.* v. *Hall*, 232 U. S. 94, 101; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

Judgment affirmed.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY *v.* WAGNER.

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

No. 311. Submitted April 14, 1916.—Decided June 5, 1916.

Where the highest court of the State refuses to review the judgment of the intermediate appellate court of the State, it is to the latter court that the writ of error runs from this court.

Omission to plead or prove that plaintiff's injury occurred in interstate commerce not having been made the basis of any assignment of error, *held*, in this case, in view of the state of the record, not to be a ground for reversal.

Amendment to the Safety Appliance Act of March 2, 1903 enlarged the scope of the act so as to embrace all vehicles used on any railway that is a highway of interstate commerce whether employed at the time or not in interstate commerce.

The Safety Appliance Act requires locomotives to be equipped with automatic couplers and its protection extends to employees when coupling, as well as uncoupling, cars. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1.

Quære, whether the failure of a coupler to work at any time does not sustain a charge that the Safety Appliance Act has been violated. See *Chicago & Rock Island Ry.* v. *Brown*, 229 U. S. 317.

The Employers' Liability Act and the Safety Appliance Act are *in pari materia*, and where the former refers to any defect or insufficiency, due to the employer's negligence, in its cars, engines, appliances, etc., it is clearly the legislative intent to treat a violation of the Safety Appliance Act as negligence—negligence *per se*.

Even if the injury of an employee, suing under the Employers' Liability Act, resulted from his improper management of a defective appliance covered by the Safety Appliance Act, such misconduct would only amount to contributory negligence which is, by express terms of the Liability Act, excluded from consideration in such a case.

166 S. W. Rep. 24, affirmed.

THE facts, which involve the validity of a judgment for damages for personal injuries in an action under the Employers' Liability Act, are stated in the opinion.

Mr. R. J. Boyle, Mr. A. B. Storey, Mr. Samuel Herrick and *Mr. Rufus S. Day* for the plaintiff in error.

Mr. Perry J. Lewis, Mr. H. C. Carter and *Mr. John Sehorn* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The judgment that is brought under review by this writ of error is the outcome of an action begun in the District Court of Bexar County, Texas, by defendant in error against plaintiff in error, resulting in a judgment in his favor. This was affirmed by the Court of Civil Appeals, a rehearing was denied (166 S. W. Rep. 24, 28), and our writ of error is directed to that court because the Supreme Court of Texas refused to review the judgment.

We shall describe the parties according to their attitude in the trial court. Plaintiff's petition alleged that on October 18, 1911, he was employed as a brakeman by defendant, a common carrier by railroad engaged in both interstate and intrastate commerce; that defendant had in use in both kinds of commerce a certain engine and a

certain car, and it became plaintiff's duty to couple them together; that the couplers would not couple automatically by impact, as required by law, "and for the purpose of making said coupling it became necessary for the plaintiff to stand upon the footboard of said engine, between said engine and car, and to shove the knuckle of the coupler on said engine so as to bring it into proper position to make the coupling as aforesaid;" that plaintiff placed his left foot against the knuckle of the coupler of the engine for the purpose of pushing it into position, when he lost his balance, slipped and fell, and his left foot was caught between the couplers and crushed. Defendant interposed a general denial and certain special defenses, which latter were struck out on demurrer. They set up that defendant was a common carrier engaged in interstate commerce, and invoked the provisions of the Federal Safety Appliance Act of March 2, 1893 (c. 196, 27 Stat. 531), and the amendment of March 2, 1903 (c. 976, 32 Stat. 943), averring that all couplers attached to railroad engines, tenders, or cars must have sufficient lateral motion to permit trains to round the curves, and must be provided with adjustable knuckles which can be opened and closed, and such couplers must be adjusted at times in order that they may couple automatically by impact, and that there is no kind of automatic coupler constructed or that can be constructed which will couple automatically at all times without previous adjustment, because of the lateral play necessary to enable coupled cars to round curves; that the engine and car upon which plaintiff was employed at the time of his injury were engaged in interstate commerce, and were equipped with automatic couplers which would couple automatically by impact as required by the acts of Congress, but an adjustment was necessary for this purpose, and could have been made by the plaintiff going between the cars while they were standing but without going between the ends of the cars while in motion or

between a moving engine and cars, and without kicking the coupling or in any manner endangering his own personal safety; with more to the same effect.

At the trial the evidence tended to show that plaintiff was engaged in switching at one of defendant's yards and was riding upon the footboard at the rear of the engine in order to make a coupling between it and a box car; that at the first impact—to use plaintiff's words—"the coupling wouldn't make; I coupled up against them but it wouldn't make." He then signaled the engineer to draw ahead, and this having been done, he adjusted the knuckle and pin upon the box car, and "I gave the engineer a back-up signal to couple in again, and I got back on the footboard of the engine; when I got on the footboard I looked down and I seen the drawhead on the engine was shifted way over to my side, and I reached up with my left foot to shift the drawhead over so it would couple, and my right foot slipped on the wet footboard;" as a result of which his left foot was caught between the drawheads and crushed. He testified that at the first impact the drawhead on the engine was in line with that on the box car, and that the only thing that prevented the coupling at this time was the failure of the pin on the box car to drop. And further: "When the coupling apparatus of these automatic couplers are in proper condition and they are properly connected, they couple by impact automatically; . . . when the brakeman couples a car he pulls a lever on the outside of the car, that opens the knuckle—that raises the pin and opens the coupler up, then all he has to do is to give a signal and they back right up. He has nothing to do with reference to fixing the knuckle or anything of that sort." He testified in effect that the coupler was out of order. The Court of Civil Appeals held that so far as this was opinion evidence it was admissible as the opinion of a qualified expert, plaintiff having been employed by defendant as a brakeman for eight years, and being acquainted with the

operation of couplers. A witness called by defendant testified: "These couplers are made to couple automatically by impact—they are supposed to be in such condition as that, so when they come together they will couple without the necessity of men going in between the cars to couple or uncouple, and should be in that condition. If they do not couple with the automatic impact, they are not in proper condition."

The trial court instructed the jury that if the locomotive and car in question were not equipped with couplers coupling automatically by impact without the necessity of plaintiff going between the ends of the cars, and by reason of this and as a proximate result of it plaintiff received his injuries, the verdict should be in his favor, otherwise in favor of defendant, and that the burden of proof was upon plaintiff to establish his case by a preponderance of the evidence.

The Court of Civil Appeals treated the case as coming within the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65), and the assignments of error in this court and the argument thereon proceed upon that basis. We shall decide the case upon that assumption, although we find nothing in the record to show that, in fact, plaintiff was employed in interstate commerce at the time he was injured. We are asked to take notice of the omission of pleading and proof of the fact as a "plain error" and deal with it, although not assigned, under paragraph 4 of our Rule 21. We must decline to do this, principally for two reasons: (a) The omission may have been due to an oversight that would have been corrected if the point had been properly raised by the present plaintiff in error in the state courts. (b) Since the Safety Appliance Acts are in any event applicable—defendant's railroad being admittedly a highway of interstate commerce—whether plaintiff was employed in such commerce or not (*Tex. & Pac. Ry.* v. *Rigsby*, *ante*, pp. 33,

42), the only materiality of the question whether the Employers' Liability Act also applies is in its bearing upon the defense of contributory negligence; the former act leaving that defense untouched (*Schlemmer* v. *Buffalo &c. Ry.*, 220 U. S. 590, 596), while the latter (§ 3; 35 Stat. 66) abolishes it in any case where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee, and in other cases limits its effect to the diminution of the damages. Now, an examination of the record discloses that defendant at the trial raised no question of contributory negligence. Such negligence was averred in the special defenses that were struck out, but not as constituting a defense against a violation of the Safety Appliance Acts; and the special defenses contained an allegation to the effect that at the time of his injury plaintiff was engaged in interstate commerce. In this state of the record, we do not deem it proper to consider the omission to plead or prove that plaintiff's injury occurred in interstate commerce, as a ground for reversing the judgment, it not having been made the basis of any assignment of error.

In the Court of Civil Appeals, as in this court, error was assigned upon the action of the trial court in striking out the special defenses. The appellate court held, however, that under the general denial defendant was at liberty to show all that had been averred in the special defenses respecting the couplers, and that it was permitted to prove all that it offered upon that subject. It is insisted here, and the insistence is many times repeated, that the trial court refused to admit in evidence testimony offered to show that all automatic couplers necessarily require adjustment at times in order that they may operate automatically upon impact, and that the adjustment is accomplished by means of hand levers fitted to the cars and operated by the trainmen without going between the cars; the object being to show that the engine and car

were equipped as required by law, and that the draw-bar on the engine was thrown out of line by reason of plaintiff's failure to use the hand lever on the box car in preparation for the first impact. It is insisted, also, that certain testimony with reference to adjusting couplers on engines and cars, made necessary by lateral play, in order that they might couple automatically by impact, having been admitted, was afterwards excluded as inadmissible. There is nothing in the certified transcript to sustain either of these contentions. There is an assertion to the same effect in the motion for rehearing filed in the Court of Civil Appeals, where it was stated that the exclusion of the testimony would be made to appear by reference to the stenographer's official report of the trial. The Court of Civil Appeals declared, however, that no such document had been filed or would be filed in that court; proceeding thus: "This cause has been considered on the agreed statement of facts, approved by the trial judge, and the effect of such statement of facts cannot be impaired or destroyed by a document not filed among the papers, and which has no place among the papers. The statement of facts bears out the statement of this court that appellant was permitted to introduce all the testimony it desired on the subject of the coupler on the engine. The record fails to show that any testimony offered by appellant was withdrawn by the court from the jury."

Eliminating, therefore, because unsupported by anything in the record, the insistence that appellant was deprived of the opportunity of presenting at the trial the matters that had been set up in the special defenses, the remaining questions are few and easily disposed of.

There was sufficient evidence to warrant the jury in finding that the coupler upon the box car or that upon the engine, or both, were in bad repair, and that for this reason they did not measure up to the standard prescribed by the act of March 2, 1893, for such equipment,

viz.: "Couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." This standard was by the first section of the 1903 amendment made to apply "in all cases, whether or not the couplers brought together are of the same kind, make, or type;" and was extended to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, . . . and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," subject to an exception not now material. As has been held repeatedly, this amendment enlarged the scope of the original Act so as to embrace all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, whether the particular vehicles are at the time employed in interstate commerce or not. *Southern Railway* v. *United States*, 222 U. S. 20, 26; *Tex. & Pac. Ry.* v. *Rigsby*, *ante*, pp. 33, 37.

That the act requires locomotives to be equipped with automatic couplers, and that its protection extends to men when coupling as well as when uncoupling cars, are points set at rest by *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 15, 18.

It is insisted that neither the original Act nor the amendment precludes adjustment of the coupler prior to or at the time of impact, or treats a drawbar out of alignment as a defect in the automatic coupler, or as evidence that the cars are not equipped with couplers measuring up to the statutory standard. The evidence of bad repair in the automatic equipment was not confined to the fact that the drawbar on the engine was out of line; the fact that the coupling-pin on the box car failed to drop as it should have done at the first impact, and required manipulation in preparation for the second impact, together with the fact that the draw-bar on the engine was so far out of line as to require adjustment in preparation for the second

impact, and the opinion evidence, being sufficient to sustain a finding that the equipment was defective. The jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves, or, if not, that an adjusting lever should have been provided upon the engine as upon the car, and that there was none upon the engine. We need not in this case determine, what was conceded in *Chicago, R. I. & Pac. Ry.* v. *Brown*, 229 U. S. 317, 320, that the failure of a coupler to work at any time sustains a charge that the Act has been violated.

It is argued that in actions based upon the Employers' Liability Act the defendant can not be held liable without evidence of negligence, *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 501, being cited. But in that case, as the opinion shows (p. 507), there was no question of a violation of any provision of the Safety Appliance Act; and in what was said (p. 501) respecting the necessity of showing negligence, reference was had to causes of action independent of that Act. The Employers' Liability Act, as its § 4 very clearly shows, recognizes that rights of action may arise out of the violation of the Safety Appliance Act. As was stated in *Tex. & Pac. Ry.* v. *Rigsby*, *ante*, pp. 33, 39,—"A disregard of the command of the statute [Safety Appliance Act] is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." If this Act is violated, the question of negligence in the general sense of want of care is immaterial. 241 U. S. 43, and cases there cited. But the two statutes are *in pari materia*, and where the Employers' Liability Act refers to "any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances," etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as "negligence"—what is sometimes called negligence *per se*.

In various forms plaintiff in error raises the contention that it was plaintiff's improper management of the coupling operation that was the proximate cause of his injury. But any misconduct on his part was no more than contributory negligence, which as already shown, is by the Employers' Liability Act excluded from consideration in a case such as this.

Judgment affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* KELLY, ADMINISTRATRIX OF KELLY.

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

No. 321. Argued April 19, 20, 1916.—Decided June 5, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to the effect that the Seventh Amendment does not apply to actions under the Employers' Liability Act brought in the state courts.

While the Employers' Liability Act does not require the damages to be apportioned among the beneficiaries, *quære*, and not now decided, whether such an apportionment is prohibited by the Act.

Damages under the Employers' Liability Act should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased employee.

A given sum of money in hand is worth more than the like sum payable in the future; and where a verdict is based upon the deprivation of future benefits, the ascertained amount of these should ordinarily be discounted so as to make the verdict equivalent to their present value.

In an action brought in a state court under the Employers' Liability Act, questions of procedure and evidence are to be determined according to the law of the forum; but the question of the proper measure of damages is inseparably connected with the right of action, and must be settled according to general principles of law as administered in the Federal courts.

160 Kentucky, 296; 161 Kentucky, 655, reversed.

THE facts, which involve the application of the Seventh Amendment to cases in the state court under the Employers' Liability Act, the construction and application of that Act, and the validity of a judgment in an action thereunder, are stated in the opinion.

Mr. David H. Leake, with whom *Mr. John T. Shelby*, *Mr. E. L. Worthington*, *Mr. W. D. Cochran*, *Mr. Le Wright Browning* and *Mr. Walter Leake* were on the brief, for plaintiff in error.[1]

Mr. Edward C. O'Rear, with whom *Mr. B. G. Williams* and *Mr. F. W. Clements* were on the brief, for defendant in error:

The verdict was sustained by the preponderance of evidence. Civil Code (Ky.), §§ 340–341; *Hurt* v. *L. & N. R. R.*, 116 Kentucky, 553; *L. & N. R. R.* v. *Chambers*, 165 Kentucky, 703.

Instruction B offered by plaintiff in error was erroneous. *Railroad Co.* v. *Steinburg*, 17 Michigan, 99; 60 Cong. Record, 1st Sess., p. 4527; Sen. Rep. 432, 61st. Cong. 2d Sess., March 22, 1910, p. 2. As to present value theory see *C. & O. Ry.* v. *Dixon*, 104 Kentucky, 613; *L. & N. R. R.* v. *Morris*, 14 Kentucky L. R. 466; *L. & N. R. R.* v. *Graham*, 99 Kentucky, 688; *L. & N. R. R.* v. *Trammell*, 93 Alabama, 354; *L. & N. R. R.* v. *Orr*, 91 Alabama, 548; *C. & O. Ry.* v. *Long*, 100 Kentucky, 221; *L. & N. R. R.* v. *Simrall*, 127 Kentucky, 55.

MR. JUSTICE PITNEY delivered the opinion of the court.

In this action, which was founded upon the Employers' Liability Act of Congress of April 22, 1908 (c. 149, 35 Stat. 65), as amended by act of April 5, 1910 (c. 143, 36 Stat. 291), defendant in error, as administratrix of Matt Kelly, deceased, recovered a judgment in the Mont-

[1] See note on p. 212, *ante*.

gomery Circuit Court for damages because of the death of the intestate while employed by plaintiff in error in interstate commerce. The verdict was for $19,011, which was apportioned among the widow and infant children of the deceased, excluding a son who had attained his majority. The Court of Appeals of Kentucky affirmed the judgment, and denied a rehearing. 160 Kentucky, 296; 161 Kentucky, 655.

Upon the present writ of error the first contention is that the limitation of the Seventh Amendment to the Federal Constitution preserving the common law right of trial by jury inheres in every right of action created under the authority of that Constitution, and that because, as is said, the courts of Kentucky are unable to secure that right to litigants by reason of a law of the State passed pursuant to a provision of its constitution, by the terms of which in all trials of civil actions in the circuit courts three-fourths or more of the jurors concurring may return a verdict, those courts are without jurisdiction of actions arising under the Federal Employers' Liability Act. This contention has been set at rest by our recent decision in *Minneapolis & St. Louis R. R.* v. *Bombolis*, *ante*, p. 211.

The only other matter requiring consideration is the instruction of the trial court, affirmed by the Court of Appeals, respecting the method of ascertaining the damages. We may say in passing that while the act of Congress does not require that in such cases damages be apportioned among the beneficiaries (*Central Vermont Ry.* v. *White*, 238 U. S. 507, 515), it is not in the present case insisted that the Act prohibits such an apportionment, and if there be any question about this it is not now before us.

Respecting the matter with which we have to deal, the trial court, after stating that if the jury should find for the plaintiff they should fix the damages at such sum

as would reasonably compensate the dependent members of Kelly's family for the pecuniary loss, if any, shown by the evidence to have been sustained by them because of Kelly's injury and death; and that in fixing the amount they were authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, and probable duration of life, and also the pecuniary loss, if any, which the jury might find from the evidence that the dependent members of his family had sustained because of being deprived of such maintenance or support or other pecuniary advantage, if any, which the jury might believe from the evidence they would have derived from his life thereafter; proceeded as follows: "If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant which must not exceed the probable earnings of Matt Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sums which the jury may find from the evidence and fix as the pecuniary loss above described, which each dependent member of Matt Kelly's family may have sustained by his death;" following this with an instruction respecting the apportionment, with which, as we have said, we are not now concerned. Defendant requested an instruction that the jury should "fix the damages at that sum which represents the present cash value of the reasonable expectation of pecuniary advantage . . . to said Addie Kelly during her widowhood and while dependent, and pecuniary advantage to said infant children while dependent and until they become twenty-one years of age." This was refused.

Laying aside questions of form, the Court of Appeals treated the instruction given and the refusal of the requested instruction as raising the question "that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of de-

pendency, but the present cash value of such aggregate amount." Defendant's contention was overruled upon the ground that the whole loss of the beneficiaries is sustained at the time of the death of the party in question, the court saying: "While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average juryman is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value of such loss to each dependent is more than ought to be asked of anyone less qualified than an actuary."

We are constrained to say that in our opinion the Court of Appeals erred in its conclusion upon this point. The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 70, 71; *American R. R. of Porto Rico* v. *Didricksen*, 227 U. S. 145, 149; *Gulf, Colorado &c. Ry.* v. *McGinnis*, 228 U. S. 173, 175. So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future. Ordinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages. *Wicker* v. *Hoppock*, 6 Wall. 94, 99; *The Baltimore*, 8 Wall. 377, 387; *United States* v. *Smith*, 94 U. S. 214, 218; *Warren* v. *Stoddart*, 105 U. S. 224, 229; *United States* v. *Fidelity Co.*, 236 U. S. 512, 526. And

the putting out of money at interest is at this day so common a matter that ordinarily it can not be excluded from consideration in determining the present equivalent of future payments, since a reasonable man, even from selfish motives, would probably gain some money by way of interest upon the money recovered. Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available.

Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

We do not mean to say that the discount should be at what is commonly called the "legal rate" of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing

the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return.

We are not in this case called upon to lay down a precise rule or formula, and it is not our purpose to do this, but merely to indicate some of the considerations that support the view we have expressed that, in computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.

We are aware that it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments, with annual rests, and reach a present cash value. Whether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.

But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts.

We are not reminded that in any previous case in this court the precise question now presented has been necessarily involved. But in two cases the applicability of present values has been recognized.

Vicksburg &c. R. R. v. *Putnam*, 118 U. S. 545, was a

review of a judgment recovered in a Circuit Court of the United States in an action for personal injuries where the damages claimed included compensation for the impairment of plaintiff's earning capacity. Assuming for purposes of illustration that plaintiff's expectancy of life was thirty years, the trial judge instructed the jury (p. 551) that it would not be proper to allow him in gross the sum of the annual losses during his expectancy, "for the annuity will be payable one part this year and another part next year, and each of the thirty parts payable each of the thirty years. You must have a sum such that when he dies it will all be used up at the end of thirty years." Having called attention to certain tables that were in evidence, he proceeded to say: "Add that to the present worth of annuity if you find he was damaged." The judgment was reversed, not because of the recognition of the rule of present values, but because of the conclusive force that was given by the trial judge to the life and annuity tables. In the course of the opinion the court, by Mr. Justice Gray, said (p. 554) that the compensation should include "a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity for earning by the wrongful act of the defendant. . . . In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. . . . But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury."

In *Pierce* v. *Tennessee Coal &c. Railroad Co.*, 173 U. S. 1, which was an action founded upon defendant's breach and abandonment of a contract of employment construed by this court to be limited only by plaintiff's life, the trial court ruled (p. 6) that no recovery could be allowed be-

yond the instalments of wages due up to the date of the trial, refusing to charge, as requested by plaintiff, that he was "entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent," etc. This court held (p. 10) that the Circuit Court had erred in restricting the damages as mentioned and in declining to instruct the jury in accordance with plaintiff's request; citing *Vicksburg &c. R. R.* v. *Putnam, ubi supra*, and quoting the reference to the "present value of a life annuity"; and also citing (p. 13) *Schell* v. *Plumb*, 55 N. Y. 592, and making the following quotation from the opinion of the Court of Appeals of New York in that case: "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract."

That where future payments are to be anticipated and capitalized in a verdict the plaintiff is entitled to no more than their present worth, is commonly recognized in the state courts. We cite some of the cases, but without intending to approve any of the particular formulæ that have been followed in applying the principle; since in this respect the decisions are not harmonious, and some of them may be subject to question. *Louis. & Nash. R. R.* v. *Trammell*, 93 Alabama, 350, 355; *McAdory* v. *Louis. & Nash. R. R.*, 94 Alabama, 272, 276; *Central R. R.* v. *Rouse*, 77 Georgia, 393, 408; *Atlanta & W. P. R. R. Co.* v. *Newton*, 85 Georgia, 517, 528; *Kinney* v. *Folkerts*, 78 Michigan, 687, 701; 84 Michigan, 616, 624; *Hackney* v. *Del. & Atl. Tel. Co.*, 69 N. J. Law, 335, 337; *Gregory* v. *N. Y., Lake Erie & West. R. R.*, 55 Hun (N. Y.), 303, 308; *Benton* v. *Railroad*, 122 N. Car. 1007, 1009; *Poe* v. *Railroad*, 141 N. Car. 525,

528; *Johnson* v. *Railroad*, 163 N. Car. 431, 452; *Goodhart* v. *Pennsylvania R. R.*, 177 Pa. St. 1, 17; *Irwin* v. *Pennsylvania R. R.*, 226 Pa. St. 156; *Reitler* v. *Pennsylvania R. R.*, 238 Pa. St. 1, 7; *McCabe* v. *Narragansett Lighting Co.*, 26 R. I. 427, 435; *Houston & T. C. R. R.* v. *Willie*, 53 Texas, 318, 328; *Rudiger* v. *Chicago &c. R. R.*, 101 Wisconsin, 292, 303; *Secord* v. *John Schroeder Co.*, 160 Wisconsin, 1, 7. See also *St. Louis, I. M. & S. Ry.* v. *Needham* (C. C. A. 8th), 52 Fed. Rep. 371, 377; *Balt. & Ohio R. R.* v. *Henthorne* (C. C. A. 6th), 73 Fed. Rep. 634, 641.

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

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* GAINEY, ADMINISTRATOR OF DWYER.

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

No. 453. Submitted April 19, 20, 1916.—Decided June 5, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to the effect that the Seventh Amendment does not apply to actions brought in the state courts under the Federal Employers' Liability Act.

Chespeake & Ohio Ry. v. *Kelly*, *ante*, p. 485, followed to the effect that in estimating the amount of damages recoverable under the Employers' Liability Act, the interest bearing capacity of a present award must be considered; and the whole loss sustained by the beneficiaries during the period that the benefits cover cannot be included in the verdict without rebate or discount.

162 Kentucky, 427, reversed.

THE facts, which involve the application of the Seventh Amendment to cases in the state court under the Employers' Liability Act, the construction of that act, and the validity of a judgment thereunder, are stated in the opinion.

Mr. E. L. Worthington, Mr. W. D. Cochran, Mr. Le-Wright Browning and *Mr. P. K. Malin* for plaintiff in error.[1]

Mr. R. S. Dinkle and *Mr. Watt M. Prichard* for defendant in error:

Complaint that certain phraseology used in the measure of damage instruction was misleading is without merit, because it is evident that plaintiff in error was not prejudiced thereby.

Present cash value theory is not correct in principle and has never been sanctioned by the Supreme Court of the United States or lower Federal courts. *C. & O. Ry. Co.* v. *Kelly's Admr.*, 160 Kentucky, 296.

There was no substantial error in the measure of damage instruction, as a consideration of it as a whole shows clearly that the jury were limited to finding the "pecuniary loss" to the dependent beneficiary.

If errors were in the measure of damage instruction, same were invited by plaintiff in error and were not properly preserved as ground of error either under the state practice or the practice of this court. *L. & N. Ry. Co.* v. *Woodford*, 153 S. W. Rep. 722; 156 Kentucky, 398; *Patterson* v. *Moss*, 97 S. W. Rep. 397; 30 Ky. L. R. 10; *L. & N. Ry. Co.* v. *Wilkin's Guardian*, 136 S. W. Rep. 1024; *L. & N. Ry. Co.* v. *Simrall's Admr.*, 127 Kentucky, 55; 104 S. W. Rep. 1011; *Loughridge* v. *Baugh*, 118 S. W. Rep. 321; *Burdette* v. *Mullin's Exr.*, 110 S. W. Rep. 855; *Ill. Central Ry.* v. *Skaggs*, 240 U. S. 66.

Mr. Justice Pitney delivered the opinion of the court.

This was an action under the Employers' Liability Act of Congress of April 22, 1908, as amended April 5,

[1] See note on p. 212, *ante*.

1910 (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291). It was brought to recover damages for the death of Richard Dwyer, caused by the negligence of the railroad company, while he was in its employ in interstate commerce. The sole beneficiary was decedent's widow, who originally qualified as administratrix and brought the action, but has died since the allowance of the present writ of error.

Laying aside a contention based upon the Seventh Amendment to the Federal Constitution, which has been disposed of in *Minneapolis & St. Louis R. R.* v. *Bombolis*, *ante*, p. 211, the only question raised relates to the method adopted in ascertaining the damages. The jury returned a verdict for $16,000. On appeal to the Kentucky Court of Appeals it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the verdict of $16,000 if placed at interest would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of her death. The court overruled this contention, on the authority of *Ches. & Ohio Ry.* v. *Kelly's Admx.*, 160 Kentucky, 296, where the same court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included in the verdict without rebate or discount. A reading of the opinion of the Court of Appeals in the present case (162 Kentucky, 427) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict. Since we have held, in *Ches. & Ohio Ry.* v. *Kelly, Admx.*, this day decided, *ante*, p. 485, that the theory is erroneous, it results that the judgment here under review must be

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY *v.* CAMPBELL.

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

No. 325. Argued April 26, 1916.—Decided June 12, 1916.

In an action under the Employers' Liability Act brought by an engineer of an interstate electric road, for injuries resulting from a collision the jury found a general verdict for plaintiff; and, in accordance with the practice of the State, made special findings that the violation by plaintiff of orders received before starting was the proximate cause of the collision and that immediately before the collision the brakes on the train were insufficient to enable him to control the speed of the train. *Held* that:

On the record the jury must have found that the defective air brakes were a proximate cause of the collision.

Under the Safety Appliance Act, if the equipment was defective or out of repair the question of whether it was attributable to the company's negligence or not is immaterial.

An electric interstate road is not exempted from the requirements of the Safety Appliance Act because its terminals run over street railways. *Spokane &c.* v. *United States, ante,* p. 344.

The fact that an employee may have violated an order does not take him from the protection of the Safety Appliance Act; if, as an actual fact, the brakes were defective and such defectiveness was a proximate cause of the injury.

Proof that an employee violated an order is not proof that he did so wilfully; and where wilfulness is not found such violation is only negligence and not a departure from the course of employment.

The right of an employee of an interstate carrier by rail to recover for an injury depends upon the Acts of Congress, to which all state legislation affecting the subject-matter yields.

Where the contributory negligence of the injured employee and the defendant's violation of the Safety Appliance Act are concurrent proximate causes the Employers' Liability Act requires the former to be disregarded.

Quære whether under the conformity act (Rev. Stat. 914) the Federal trial court is required to adhere to the state practice governing the effect of a general verdict and special findings.

217 Fed. Rep. 518, affirmed.

THE facts, which involve the construction and application of the Employers' Liability Act and the Safety Appliance Act and the validity of a judgment for damages for personal injuries against a company operating an interstate electric railway, are stated in the opinion.

Mr. W. G. Graves, with whom *Mr. F. H. Graves* and *Mr. B. H. Kiser* were on the brief, for the plaintiff in error.

Mr. H. Lowndes Maury, with whom *Mr. E. H. Belden*, *Mr. W. C. Losey* and *Mr. H. R. Newton* were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought by Campbell in the United States District Court for the Eastern District of Washington to recover damages for personal injuries, and was based upon the Federal Employers' Liability Act of April 22, 1908 (c. 149; 35 Stat. 65), and the Safety Appliance Act of March 2, 1893, as amended March 2, 1903 (c. 196; 27 Stat. 531; c. 976; 32 Stat. 943). A judgment in plaintiff's favor was affirmed by the Circuit Court of Appeals (217 Fed. Rep. 518), and the case comes here on writ of error.

At the time of Campbell's injury, July 31, 1909, the company was operating a single track electric railway between the city of Spokane in the State of Washington and the town of Cœur d'Alene in the State of Idaho. It was operated under standard railroad rules. The running time of regular trains was fixed by a time table, upon which they were designated by numbers. Special trains were run by telegraphic orders given by a train dispatcher, whose office was in Spokane. Under the rules, regular trains were superior to special trains, and specials were required to look out for and keep out of the way of

the regulars. Unless a special train had orders from the train dispatcher fixing a meeting point with the regular train, or in some other way giving it a right to disregard the time when the latter was due according to the time table, it was required to be clear of the main line at any point five minutes before the regular train was due at that point according to the time table. Campbell was an experienced motorman, had been in the company's employ for several years, and was conversant with its rules and its methods of train operation. On the day he was injured he was the motorman in charge of a special train running between Spokane and Cœur d'Alene, made up of a combined motor and passenger car and two trailers, and referred to in the train orders as Motor 5, that being the number of the motor car. The train was equipped with Westinghouse air brakes. After several trips between the *termini*, it was at Cœur d'Alene about 4.30 o'clock in the afternoon, ready to start for Spokane when ordered to do so. Regular train No. 20 was about due to arrive. Under orders presently to be mentioned, the nature of which was in dispute, Campbell started his train west from Cœur d'Alene, and had proceeded some distance when he discovered a train approaching on the same track from the opposite direction. Upon seeing this he applied the brakes, without success, and there was a collision, in which he received serious personal injuries. The train with which he collided was regular No. 20.

His complaint in the action counted upon two grounds of recovery: (a) That the company, through its agents and employees, negligently instructed him to proceed with his train from Cœur d'Alene to Spokane, and to meet and pass No. 20 at the town of Alan, a station west of the point of collision; and (b) That the collision was directly due to the failure of the company to furnish him with a motor and train supplied with proper air brakes

in working condition. The action was tried before the District Court and a jury, when evidence was introduced to the following effect:

Campbell testified that having arrived in Cœur d'Alene with his train about 4.20 p. m., and brought it into position to return to Spokane, he received through the conductor, Whittlesey, orders both written and oral for the running of the train; that the written order said that "Motor 5 would run special Cœur d'Alene to Spokane and would meet Number 20 at Alan;" that when the written order was received Campbell was in his cab, ready to start, and that the conductor on delivering the order to him, said: "All right, go ahead; get out of town." Campbell was unable to produce the written order. If its contents were as he testified, he was justified in at once leaving Cœur d'Alene and running to Alan, the order giving him a right of way over all trains to that point. But defendant's evidence was to the effect that the written order actually read: "Motor 5 will run spl. C. d'Alene to Spokane, meet spl. 4 east at Alan." Campbell admitted that if this was in fact the order it did not authorize him to leave Cœur d'Alene before No. 20 came in, for it made no mention of that train, and did not supersede the right given to it by rules and time table. Nor was it contended in his behalf that the conductor's verbal order could in any way modify the written order. It appeared that there was a land registration in progress at Cœur d'Alene, and because of the resulting rush of travel incoming trains stopped at the west end of the yard and went on a Y switch, where the train was turned and then backed down to the Cœur d'Alene station, while trains ready to leave Cœur d'Alene upon the arrival of an incoming train would run to the end of the yard between the legs of the Y, wait there for the incoming train, and pull out as soon as it headed in on the Y. Whittlesey testified that he intended the train to go to the Y and

wait there for No. 20. Because, as Campbell testified, his orders were to go to Alan to meet No. 20, he did not stop at the Y. He testified that soon after passing this point, and while running at about 30 miles per hour (there was a slight descending grade), he saw an eastbound train (it was proved to be No. 20), coming on the same track at a distance which from his testimony and that of others might have been found to be upwards of 800 feet. He immediately shut off the power, and then "dynamited her," that is, threw his air brake into emergency so as to apply the air pressure upon the train brakes to the full capacity. He testified in effect that the brakes took hold properly, and held for approximately 35 or 40 feet, when the air released (another witness said it "leaked off"), and after that there was nothing he could do to stop the train except to reverse, which he endeavored to do but without success. There was no hand brake. He testified that if the air brakes had worked properly he could have stopped his train and avoided a collision; that when they took hold they reduced the speed to about 20 miles per hour; that when released the train shot forward at approximately 18 or 20 miles an hour; "then I stopped it a little bit with my reverse, so that at the moment of collision I think we were going about fifteen miles an hour." No. 20 meanwhile had been brought almost if not quite to a stop.

Under instructions from the trial court the jury, besides returning a general verdict, which was in favor of the plaintiff with $7,500 damages, made three special findings in writing: (1) That Campbell before leaving Cœur d'Alene received a train order reading as follows: "Motor 5 will run Spl. C. d'Alene to Spokane, meet special 4 east at Alan;" (2) that the air brakes on Campbell's train immediately before the collision were insufficient to enable him to control the speed of the train; (3) that Campbell's leaving Cœur d'Alene in violation of

his orders was the proximate cause of the accident. There was a motion for judgment in favor of defendant on the special findings notwithstanding the general verdict, which was denied, and it is to this ruling as well as to certain instructions given and refused to be given that the assignments of error are addressed.

The general verdict and the special findings were taken pursuant to the state practice prescribed by certain sections of the Code permitting the trial judge to instruct the jury, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and providing that "When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." 1 Rem. & B. Ann. Code, §§ 364, 365. The rule established by decisions of the Supreme Court of the State is that where the general verdict and the special findings can be harmonized by taking into consideration the entire record of the cause including the evidence and the instructions to the jury, and construing it liberally for that purpose, it is the duty of the court to harmonize them, and that where a special finding is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction shall be adopted which will support the general verdict. *Pepperall* v. *City Park Transit Co.*, 15 Washington, 176, 180, 183; *Mercier* v. *Travelers Ins. Co.*, 24 Washington, 147, 153, 154; *McCorkle* v. *Mallory*, 30 Washington, 632, 637; *Crowley* v. *Nor. Pac. Ry.*, 46 Washington, 85, 87, 88; *Sudden & Christenson* v. *Morse*, 55 Washington, 372, 375; *Cameron* v. *Stack-Gibbs Lumber Co.*, 68 Washington, 539, 544.

Whether under the Conformity Act (Rev. Stat., § 914) the trial court was required to adhere to the state practice governing the effect of the general verdict and the special findings may not be free from doubt. See *Nudd* v. *Bur-*

rows, 91 U. S. 426, 441; *Indianapolis &c. R. R.* v. *Horst*, 93 U. S. 291, 300; *Mutual Accident Ass'n* v. *Barry*, 131 U. S. 100, 119, 120; *Lincoln* v. *Power*, 151 U. S. 436, 442; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 554; *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Bond* v. *Dustin*, 112 U. S. 604, 609; *Glenn* v. *Sumner*, 132 U. S. 152, 156; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 40; *Knight* v. *Illinois Cent. R. R.*, 180 Fed. Rep. 368, 372.

The Court of Appeals held (217 Fed. Rep. 523) that the Federal courts are not bound by local rules of practice with respect to submitting special findings along with a general verdict, or with respect to interpreting such verdicts; and that in this case it must be determined, as matter of law, and without reference to the testimony, whether the special findings entitled defendant to judgment notwithstanding the general verdict.

We find it unnecessary to decide the question of practice, and laying aside all technicalities will assume, in favor of plaintiff in error, that the verdict is to be interpreted according to the local rule—that is, by reading the special findings in the light of the issues and the evidence, but in the light also of the general verdict, so as to arrive at the true intent and meaning of the jury. So considered, the findings establish that there was no negligence on the part of the company in giving Campbell his running orders; that he received the order to meet Special 4 east at Alan, which, according to the admitted effect of the rules of the company, meant that he should not leave Cœur d'Alene until the arrival of regular No. 20; that he left Cœur d'Alene in disregard or violation of his orders, and that this was "the proximate cause" of the accident. At the same time, the special findings establish that the air brakes on his train immediately before the collision were insufficient to enable him to control the speed of the train. And the general verdict, so far as

it is supported by the evidence, must be taken as establishing every other fact in issue, not eliminated by the instructions of the trial court, that may be necessary to sustain the recovery. To quote from the brief of plaintiff in error: "The special findings establish that the general verdict was based solely upon the theory of negligence in the air brake equipment of the train." But the general verdict, interpreted in the light of the instructions given by the trial court to the jury, means not merely that the braking equipment was defective, but that this was a proximate cause of the collision. The instruction upon this point was: "If . . . you find from a preponderance of the testimony that the air brakes on the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was the direct and proximate cause of the collision, or contributed directly and proximately to the collision, and to the injury to the plaintiff, your verdict will be for the plaintiff. . . . And before you can return a verdict for the plaintiff based on the allegation that the brakes were defective and out of repair, you must be satisfied from a preponderance of the testimony not only that the brakes were in fact defective or out of repair, but that their defective condition was the direct or proximate cause of the collision, as I have defined that term to you." It is true that other parts of the charge indicate that the trial court entertained the view that the proximate cause must be either Campbell's disobedience of orders or the defective air brake equipment, and that these two things could not concur as proximate causes. But he did not bind the jury by instructions to that effect; and viewing the general verdict and the special findings together, in the light of the issues, the evidence, and the entire charge, it is evident, we repeat, that the jury must have found that the defective air brakes were a proximate cause of

the collision. In view of the testimony already mentioned, to the effect that Campbell, after discovering train No. 20, would have had ample time to avoid the collision had the train brake equipment been adequate, the conclusion of the jury was in this respect not unreasonable.

It is insisted that there was no evidence that the provision of the Safety Appliance Act respecting train brakes was violated. It is of course settled that if the equipment was in fact defective or out of repair, the question whether this was attributable to the company's negligence is immaterial. *St. Louis &c. Ry.* v. *Taylor*, 210 U. S. 281, 294; *Chicago &c. Ry.* v. *United States*, 220 U. S. 559, 575; *Tex. & Pac. Ry.* v. *Rigsby*, *ante*, pp. 33, 43. Hence the argument is that, according to all of the evidence, the equipment was not defective or out of repair. It appeared without dispute that it consisted of the Westinghouse standard automatic air brake, such as is in general use throughout the country upon passenger trains. A witness in defendant's employ testified that shortly before Campbell took the train out from Cœur d'Alene on the trip in question he inspected the air brakes and found them in perfect order. But there was much evidence besides that of Campbell himself to the effect that when he applied the emergency the brakes took hold and then leaked off so as to release the brakes. The jury was warranted in finding from the testimony as a whole that Campbell properly applied the air when 600 feet or more from the place where the collision occurred, and that the brakes refused to work. Expert witnesses called by defendant testified in effect that the train could have been stopped inside of 300 feet if the brakes had been in proper order. The air brake equipment was wrecked in the collision, so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some defect or want of repair in the valves or packing.

Next, it is insisted that Campbell's train was not such as the Safety Appliance Acts require to be equipped with air brakes. In *Spokane & Inland Empire R. R. Co.* v. *United States*, decided June 5, 1916, *ante*, p. 344, we held that this same railroad, with respect to its interurban traffic, is subject to the provisions of those Acts respecting automatic couplers, and hand-holds or grab-irons at the ends of the cars. In that case the particular reliance of the company was upon the concluding clause of the first section of the 1903 amendment (32 Stat. 943), which excepts trains, cars, etc., "which are used upon street railways." In the present case a distinction is sought to be drawn between steam and electric roads, the argument being that the provision requiring power brakes, when read in connection with the context, indicates that trains drawn by steam locomotives and operated by a locomotive engineer were alone within the contemplation of Congress. It is true that in the Act of 1893 the provision was closely associated with the mention of a locomotive engine as the motive power; the words of § 1 being:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic [after a specified date] that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." Section 6, prescribing penalties, also uses the words "locomotive engine" and "locomotives." But the 1903 amendment, which, as frequently pointed out, was enacted for the purpose of enlarging the scope of the Act (*Southern Ry.* v. *United States*, 222 U. S. 20, 26; *Southern Ry.* v. *Crockett*, 234 U. S. 725, 735), in its first section declares

that the provisions relating to train brakes (among others) shall be held to apply to "all trains, locomotives, tenders, cars, *and similar vehicles* used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, *and similar vehicles* used in connection therewith," subject to exceptions not now pertinent. The second section declares that whenever any train is operated with power or train brakes, "not less than fifty per centum of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train." Of course, an important object of having a train equipped with a system of brakes under the single control of the engineer is to permit of a prompt and effective reduction of speed when the man driving the train is notified of danger. The importance of this is precisely the same whatever be the motive power, and, in view of the beneficial purpose of the Act and the evident intent of Congress to enlarge its scope so far as necessary to guard against the dangers in view, the term "similar vehicles" must be held to have the effect of bringing electric motors and trains drawn by them within the provision respecting power or train brakes. The very exemption of trains, cars, and locomotives "used upon street railways" indicates that electric cars were in contemplation. And see *Omaha Street Ry.* v. *Interstate Com. Comm.*, 230 U. S. 324, 337; *Kansas City Ry.* v. *McAdow*, 240 U. S. 51, 54.

It is said that, conceding the power brake provision applies to electric trains, the duty imposed was not owed to Campbell under the special circumstances established by the jury's findings. The argument is that the purpose of the brake requirements is to place control of the train in the hands of the engineer so that the safety of passengers and employees may be conserved, not that the engineer should be able to escape injury from peril to which he had wrongfully exposed himself; and that Campbell cannot

bring himself within the class intended to be protected by pointing out that the situation created by his disobedience of orders was one that Congress contemplated as possible and the consequences of which it desired to guard against. This gives altogether too narrow a meaning to the Safety Appliance Act, and is inconsistent with the provisions of the Employers' Liability Act, as we shall see.

It is most earnestly insisted that the findings establish that Campbell was not in the course of his employment when he was injured, and consequently that judgment could not properly be entered in his favor upon the cause of action established by the general verdict. This invokes the doctrine that where an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee and puts himself in the attitude of a stranger or a licensee. The cases cited are those where an employee intentionally has gone outside of the scope of his employment or departed from the place of duty. The present case is not of that character; for Campbell, as the jury might and presumably did find, had no thought of stepping aside from the line of his duty. From the fact that he disregarded and in effect violated the order as actually communicated to him it of course does not necessarily follow that he did this willfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment.

To hold otherwise would have startling consequences. The running of trains on telegraphic orders is an every-day occurrence on every railroad in the country. Thousands of cases occur every day and every night where a failure by conductor or engineer to comprehend or to remember the message of the train dispatcher may endanger the lives of employees and passengers. We are not aware that in any case it has been seriously contended that because an engineer violated the orders he went outside of the scope of the employment. If he did so, in the sense of absolving the employer from the duty of exercising care for his safety, it is not easy to see upon what principle the employer's liability to passengers or to fellow employees for the consequences of his negligence could be maintained. The unsoundness of the contention is so apparent that further discussion is unnecessary.

Plaintiff in error refers to the fact that the wreck occurred in Idaho, and cites two sections of the Criminal Code of that State, one rendering a willful violation or omission of duty on the part of one in Campbell's position, whereby human life or safety is endangered, punishable as a misdemeanor; the other making willful or negligent conduct which causes a collision of trains, and the resulting death of a human being, a criminal offense. 2 Idaho Rev. Code, §§ 6926, 6909. Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield. *Tex. & Pac. Ry.* v. *Rigsby*, *ante*, pp. 33, 41.

Upon the whole case, we have no difficulty in sustaining his right of action under the Employers' Liability Act. That Act (§ 1; 35 Stat. 65) imposes a liability for injury to an employee "resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due

to its negligence in its cars, engines, appliances, . . . or other equipment." As was held in *San Antonio & Aransas Pass Ry.* v. *Wagner*, decided June 5, 1916, *ante*, p. 476, a violation of the Safety Appliance Act is "negligence" within the meaning of the Liability Act. And by the proviso to § 3 of the latter Act, no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the Safety Appliance Act "*contributed to* the injury or death of such employee." It is too plain for argument that under this legislation the violation of the Safety Appliance Act need not be the sole efficient cause, in order that an action may lie. The Circuit Court of Appeals (217 Fed. Rep. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, it is plain that the Employers' Liability Act requires the former to be disregarded.

The assignments of error that are based upon the instructions given and refused to be given to the jury raise no question other than those which have been disposed of.

Judgment affirmed.

BINGHAM *v.* BRADLEY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 592. Submitted April 4, 1916.—Decided June 5, 1916.

This court will not presume that the demanding government will suffer a person surrendered pursuant to treaties of 1842 and 1889, with Great Britain to be tried for any offense other than that for which he is surrendered.

Where the commissioner had jurisdiction, the offense is within the treaty, and if he acts upon competent and adequate evidence, his finding cannot be reversed on *habeas corpus*.

One of the objects of § 5271, Rev. Stat., providing for admission in evidence in extradition proceedings of properly authenticated copies of depositions and proceedings, is to obviate the necessity of confronting the accused with the witnesses against him; and neither that section, nor Article X of the Treaty of 1842, should be so construed as to require the demanding government to send its citizens to the country where the fugitive is found to institute legal proceedings: such a construction would defeat the object of the treaty.

A fair observance of the extradition treaties with Great Britain requires in this case that the accused be surrendered, all the objections being technical; and, as the order was made by a commissioner having jurisdiction, on evidence furnishing reasonable ground for belief that the accused had committed a crime in Canada which is an offense within the treaty both there and in Illinois where he was found, it should be affirmed.

THE facts, which involve the validity of an order of an United States Commissioner holding a person for extradition under the Treaties of 1842 and 1889 with Great Britain, are stated in the opinion.

Mr. William Dillon for appellant.

Mr. Benjamin S. Minor, Mr. Almon W. Bulkley, Mr. Clair E. More, Mr. Hugh B. Rowland and *Mr. Colley W. Bell* for appellee.

Mr. Justice Pitney delivered the opinion of the court.

This is an appeal from a final order of the District Court denying an application for a writ of *habeas corpus* in an extradition case. The facts are to be gathered from the petition for the writ and the exhibits therein referred to and made a part of it, which include a sworn complaint by the British Consul General at Chicago, applying on behalf of the Government of the Dominion of Canada for the extradition of appellant to Montreal, certain *ex parte* affidavits taken in Montreal and a complaint made and warrant issued against appellant in that city, an abstract of the oral testimony taken before the United States Commissioner at Chicago, and the warrant of commitment issued by the Commissioner, under which appellant is held in custody.

The complaint of the Consul General sets forth on information and belief that appellant, in the month of February, 1915, was guilty of the crime of receiving and retaining in his possession money to the amount of $1,500 in bills of the Bank of Montreal, the property of that bank, knowing the same to have been stolen; that a warrant has been issued by the police magistrate of the City of Montreal for the apprehension of appellant for the crime mentioned; that appellant is guilty of the indictable offense of receiving money knowing it to have been stolen, and is a fugitive from justice from the District of Montreal, Province of Quebec, and Dominion of Canada, and is now within the territory of the United States; that the offense of which he is charged is an offense within the treaties between the United States and Great Britain; and that deponent's information is based upon duly au-

thenticated copies of a warrant issued by the police magistrate of Montreal and of the complaint or information upon which that warrant was issued, and upon certain depositions of witnesses submitted to be filed with the present complaint. The reference is to the Montreal affidavits, which set forth in substance that in the month of September, 1911, a branch of the Bank of Montreal at New Westminster, British Columbia, was broken into and a large sum of money ($271,721) stolen from the bank, including a considerable number of $5 bills of the Bank of Montreal, seventy-eight of these being identified by their numbers; that on February 10, 1915, in the City of Montreal, appellant purchased a diamond ring from one Eaves, a jeweler, and paid for it $250, of which $245 was composed of new Bank of Montreal $5 bills, more than thirty of these being identified by the numbers as among those stolen; that on February 9, 1915, one Wakefield purchased in Montreal some travelers' checks, paying for them in part with fifty new $5 bills of the Bank of Montreal, of which twenty or more were identified as being a part of the stolen money; and that on February 10, 1915, Wakefield procured from a firm of bankers in Montreal an exchange of Canadian bills for American currency, the exchange including fifty new $5 bills of the Bank of Montreal, of which fifteen or more were identified as being a part of those stolen.

Appellant having been apprehended, a hearing was had before the United States Commissioner, at which the above-mentioned documents were introduced and testimony was given tending to show that appellant and Wakefield were together in Montreal on the ninth and tenth of February, 1915, coöperating in the exchange of the stolen bills for travelers' checks and United States currency; and that on the evening of February 10 they left Montreal together in a manner indicating an intent to evade detection, and went to Chicago, where almost

immediately they began systematic efforts to procure the exchange of Bank of Montreal bills for United States currency.

The Commissioner deeming the evidence sufficient to sustain the charge, the warrant of commitment was issued, the proceedings and evidence being certified in due course to the Secretary of State, pursuant to § 5270, Rev. Stat.

Under the applicable provisions of our treaties with Great Britain (Treaty of Aug. 9, 1842, Art. X; 8 Stat. 572, 576; Treaty of July 12, 1889, Art. I; 26 Stat. 1508, 1509), there is included among the extraditable offenses that of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained."

In behalf of appellant it is objected that while the criminal code of Canada defines as indictable offenses (a) the receiving *or* retaining in possession anything obtained by any offense punishable on indictment, knowing it to have been so obtained, and (b) the receiving *or* retaining in possession any money or valuable security or other thing, the stealing whereof is declared to be an indictable offense, knowing the same to have been stolen, the offense charged in the complaint filed and in the warrant issued in Montreal and in the Consul General's complaint is that of receiving *and* retaining in his possession money, etc., knowing it had been stolen. The argument is that the Canadian statute treats receiving and retaining as distinct offenses, connecting them with the disjunctive "or," while the complaints treat the two acts as together constituting one offense. Properly interpreted, however, they charge the commission of both offenses; and if only one, that of receiving, etc., is extraditable by the treaty, this does not render appellant's detention unlawful, since it is not to be presumed that the demanding government will suffer him to be tried or punished for any offense other than that for which he is surrendered, in violation

of Article III of the Treaty of 1889. *Kelly* v. *Griffin*, *ante*, pp. 6, 15.

It is insisted that the Consul General's complaint does not allege that the offense was committed in Canada, that the evidence relied upon raises no presumption that appellant committed anywhere the offense of *receiving* stolen property knowing it to be stolen (the offense specified in the treaty), and that it raises no presumption that appellant committed the offense in Montreal or anywhere in the Dominion of Canada.

The criticism upon the complaint is unsubstantial. It is fairly to be inferred from what is stated that the crime was committed in Canada, and it is distinctly averred that appellant is a fugitive from justice from the District of Montreal, in that Dominion, and that the offense with which he is charged is an offense within the treaties between the United States and Great Britain. Besides this, it is stated that deponent's information is based upon authenticated copies of a warrant issued by the police magistrate of Montreal and of the complaint upon which that warrant was issued, and upon certain depositions submitted and to be filed with the present complaint; the depositions being those taken in Montreal. It is clear that the intent was to charge that the offense was committed in Canada.

As to the effect of the evidence: The Commissioner doubtless held that the fact of possession, taken in connection with the other facts of the case, raised a presumption either that appellant was a party to the burglary or that he afterwards obtained possession of the bills with guilty knowledge. Appellant disputes the inference, and, assuming it to be well founded, insists that there is nothing in the law of probabilities to sustain an inference that "possession by a man during a visit of a few days to Montreal of goods that were stolen more than three years previously in British Columbia makes it more probable

that he received the goods in Canada than that he received them in the United States." There is nothing in the evidence to require the inference that appellant was paying a brief visit to Montreal. It appears that he has a brother who is in business in Chicago, and that he himself was in that city in the summer of 1914, and, on three occasions, with intervals of several weeks, exchanged Canadian money there for United States currency. This is consistent with the inference that he was then exchanging part of the stolen money, but does not require the inference that he had a fixed place of abode in Chicago. The stolen bills that were in appellant's possession in Montreal in February, 1915, are not shown to have been removed from the Dominion after the time they were stolen from the bank in September, 1911. As it was a reasonable inference—they being "new bills"—that they had never before been used in exchange, and because so many of them were found together in the hands of appellant and his confederate three and a half years after the burglary, it was further inferable that they had been retained during the intervening period with the purpose of awaiting such opportunity for passing them as might come from relaxed vigilance on the part of the authorities; and since the Dominion of Canada is the natural and convenient market for bills of the Bank of Montreal, it was inferable that the bills had not been taken out of the Dominion since the time they were stolen; and, if not, it followed that appellant must have been within the Dominion when he received them. That they were received with knowledge that they had been stolen, might be inferred from the fact of the burglary coupled with the suspicious circumstances (only a part of which we have referred to) attending the efforts to exchange them for other forms of property.

The Commissioner deemed the evidence sufficient to sustain the charge (Rev. Stat., § 5270), and since he had jurisdiction of the subject-matter and of the accused, and

the offense is within the treaty, his finding cannot be reversed on *habeas corpus* if he acted upon competent and adequate evidence. *McNamara* v. *Henkel*, 226 U. S. 520, 523.

It is insisted that the Montreal affidavits, essential to show that the alleged offense was committed within the Dominion, were incompetent because taken *ex parte*, in the absence of appellant and without opportunity for cross-examination. The Treaty of 1842 provides in Article X that extradition shall only be had "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed." Section 5271, Rev. Stat., as amended by act of August 3, 1882, §§ 5 and 6 (c. 378, 22 Stat. 215, 216), provides that any depositions, warrants, or other papers or copies thereof shall be admissible in evidence at the hearing if properly authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country, and that the certificate of the principal diplomatic or consular officer of the United States resident in the foreign country shall be proof of such authentication. The Montreal affidavits, complaints, warrant, etc., are properly authenticated in accordance with this provision. It is one of the objects of § 5271 to obviate the necessity of confronting the accused with the witnesses against him; and a construction of this section, or of the treaty, that would require the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty. *Rice* v. *Ames*, 180 U. S. 371, 375; *Yordi* v. *Nolte*, 215 U. S. 227, 231.

All of the objections savor of technicality. And since the jurisdiction of the Commissioner is clear, and the evidence abundantly sufficient to furnish reasonable ground for the belief that appellant has committed within

the Dominion of Canada a crime that is an offense under the laws of the Dominion, as well as under those of Illinois (2 Jones & Add. Ill. Stat. Ann., § 3892), and is covered by the terms of the treaty, and that he is a fugitive from justice, a fair observance of the obligations of the treaty requires that he be surrendered. *Glucksman* v. *Henkel*, 221 U. S. 508, 512.

Final order affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.* DUNLEVY.

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

No. 290. Argued May 14, 15, 1916.—Decided June 5, 1916.

A party to an action does not after final judgment still remain in court and subject without further personal service to whatsoever orders may be entered under the title of that cause.

Interpleader proceedings brought by a garnishee are not essential concomitants of the original action in which the judgment was rendered on which the garnishment is based, but are collateral and require personal service on the judgment debtor.

In Pennsylvania, a judgment debtor is not a party to a garnishment proceeding to condemn a claim due him from a third person, nor is he bound by a judgment discharging the garnishee.

Any personal judgment which a state court may render against one not voluntarily submitting to its jurisdiction, and who is not a citizen of the State, nor served with process within its border, no matter what the mode of service, is void because the court has no jurisdiction over his person.

214 Fed. Rep. 1, affirmed.

THE facts, which involve the effect of a garnishee proceeding in one State and pleaded in an action in another State, are stated in the opinion.

Mr. James H. McIntosh, with whom *Mr. E. J. McCutchen*, *Mr. Warren Olney, Jr.*, *Mr. Charles W. Willard* and *Mr. J. M. Mannon, Jr.*, were on the brief, for petitioner.

Mr. Nat Schmulowitz, with whom *Mr. Frank W. Taft* and *Mr. Clarence Coonan* were on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the court.

Respondent, Effie J. Gould Dunlevy, instituted this suit in the Superior Court, Marin County, California, January 14, 1910, against petitioner and Joseph W. Gould, her father, to recover $2,479.70, the surrender value of a policy on his life which she claimed had been assigned to her in 1893, and both were duly served with process while in that State. It was removed to the United States District Court, February 16, 1910, and there tried by the judge in May, 1912, a jury having been expressly waived. Judgment for amount claimed was affirmed by the Circuit Court of Appeals. 204 Fed. Rep. 670. 214 Fed. Rep. 1.

The insurance company by an amended answer filed December 7, 1911, set up in defense (1) that no valid assignment had been made, and (2) that Mrs. Dunlevy was concluded by certain judicial proceedings in Pennsylvania wherein it had been garnished and the policy had been adjudged to be the property of Gould. Invalidity of the assignment is not now urged; but it is earnestly insisted that the Pennsylvania proceedings constituted a bar.

In 1907 Boggs & Buhl recovered a valid personal judgment by default, after domiciliary service, against Mrs. Dunlevy, in the Common Pleas Court at Pittsburgh, where she then resided. During 1909, "the tontine dividend period" of the life policy having expired, the insurance

company became liable for $2,479.70 and this sum was claimed both by Gould, a citizen of Pennsylvania, and his daughter, who had removed to California. In November, 1909, Boggs & Buhl caused issue of an execution attachment on their judgment and both the insurance company and Gould were summoned as garnishees. He appeared, denied assignment of the policy and claimed the full amount due thereon. On February 5, 1910,—after this suit was begun in California—the company answered, admitted its indebtedness, set up the conflicting claims to the fund and prayed to be advised as to its rights. At the same time it filed a petition asking for a rule upon the claimants to show cause why they should not interplead and thereby ascertain who was lawfully entitled to the proceeds and further that it might be allowed to pay amount due into court for benefit of proper party. An order granted the requested rule and directed that notice be given to Mrs. Dunlevy in California. This was done, but she made no answer and did not appear. Later the insurance company filed a second petition, and, upon leave obtained thereunder, paid $2,479.70 into court, March 21, 1910. All parties except Mrs. Dunlevy having appeared, a feigned issue was framed and tried to determine validity of alleged transfer of the policy. The jury found, October 1, 1910, there was no valid assignment and thereupon under an order of court the fund was paid over to Gould.

Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy, the Court of Common Pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company and if found to exist then to condemn and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the State such disposition of the property would have been binding on her. *Chicago,*

R. I. & P. Ry. v. *Sturm*, 174 U. S. 710; *Harris* v. *Balk*, 198 U. S. 215, 226, 227; *Louis. & Nash. R. R.* v. *Deer*, 200 U. S. 176; *Balt. & Ohio R. R.* v. *Hostetter*, 240 U. S. 620; Shinn on Attachment and Garnishment, § 707. See *Brigham* v. *Fayerweather*, 140 Massachusetts, 411, 413. But the interpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer* v. *Neff*, 95 U. S. 714; Shinn on Attachment and Garnishment, § 674. See *Cross* v. *Armstrong*, 44 Oh. St. 613, 623, 625.

Counsel maintain that having been duly summoned in the original suit instituted by Boggs & Buhl in 1907 and notwithstanding entry of final judgment therein, "Mrs. Dunlevy was in the Pennsylvania court and was bound by every order that court made whether she remained within the jurisdiction of that court after it got jurisdiction over her person or not"; and hence, the argument is, "When the company paid the money into court where she was it was just the same in legal effect as if it had paid it to her." This position is supposed to be supported by our opinion in *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, where it is said (p. 353): "If a judicial proceeding is begun with jurisdiction over the person of the party concerned it is within the power of a State to bind him by every subsequent order in the cause. *Nations* v. *Johnson*, 24 How. 195, 203, 204. This is true not only of ordinary actions but of proceedings like the present. It is within the power of a State to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the adminis-

tration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives, by the order of the Probate Court."

Of course the language quoted had reference to the existing circumstances and must be construed accordingly. The judgment under consideration was fairly within the reasonable anticipation of the executor when he submitted himself to the Probate Court. But a wholly different and intolerable condition would result from acceptance of the theory that after final judgment a defendant remains in court and subject to whatsoever orders may be entered under title of the cause. See *Wetmore* v. *Karrick*, 205 U. S. 141, 151; Freeman on Judgments, 4th ed., § 103. The interpleader proceedings were not essential concomitants of the original action by Boggs & Buhl against Dunlevy but plainly collateral and when summoned to respond in that action she was not required to anticipate them. *Smith* v. *Woolfolk*, 115 U. S. 143, 148, 149; *Reynolds* v. *Stockton*, 140 U. S. 254, 269; *Owens* v. *Henry*, 161 U. S. 642, 646; *Hovey* v. *Elliott*, 167 U. S. 409; Freeman on Judgments, 4th ed., § 143.

It has been affirmatively held in Pennsylvania that a judgment debtor is not a party to a garnishment proceeding to condemn a claim due him from a third person and is not bound by a judgment discharging the garnishee (*Ruff* v. *Ruff*, 85 Pa. St. 333); and this is the generally accepted doctrine. Shinn on Attachment and Garnishment, § 725. Former opinions of this court uphold validity of such proceedings upon the theory that jurisdiction to condemn is acquired by service of effective process upon the garnishee.

The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the State, nor served with process within its

borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person. *Pennoyer* v. *Neff, supra;* Freeman on Judgments, 4th ed., § 120a; Black on Judgments, 2d ed., §§ 904 and 905.

We are of opinion that the proceedings in the Pennsylvania court constituted no bar to the action in California and the judgment below is accordingly

Affirmed.

DUEL *v.* HOLLINS.

WIENER, LEVY & CO. *v.* HOLLINS.

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

Nos. 352, 353. Argued May 4, 5, 1916.—Decided June 5, 1916.

A bankrupt firm of brokers having, prior to bankruptcy carried on marginal transactions for several different customers in shares of stock of the same corporation amounting in the aggregate to more than the number of shares of that stock in their possession at the time of the bankruptcy, and none of such shares being identified as the particular shares carried for any of the respective customers, but all of whom demanded their full quota of shares and offered to pay the amount due thereon, *held* that:

Brokers and their customers stand in the relation of pledgee and pledgor.

In dealings between brokers and customers stock certificates issued by the same corporation lack individuality; they are, like receipts for coin, to be treated as indistinguishable tokens of actual values.

As between themselves, after paying the amount due the broker on a marginal transaction, the customer has a right to demand from the broker delivery of stock purchased for his account and such a delivery may be made during insolvency without creating a preference.

The fact that the bankrupt broker in this case did not have sufficient shares of stock of a corporation on hand at the time of his

bankruptcy to satisfy the demands of all of his customers entitled to shares of that particular stock *held* not to prevent such customers from obtaining any of such shares, and require that all of such shares go into the general estate, but *held* that all of such customers were entitled to such shares and on demanding the same and paying the amounts respectively due thereon, should participate *pro rata* in a division of the shares actually on hand.

219 Fed. Rep. 544, reversed and 212 Fed. Rep. 317, affirmed.

THE facts, which involve the relative rights of the trustee in bankruptcy of a firm of brokers and various customers entitled to shares of stocks carried on margin by such brokers, are stated in the opinion.

Mr. Frederick W. Longfellow, with whom *Mr. Lewis L. Delafield* was on the brief, for appellant in No. 352.

Mr. Stuart McNamara, with whom *Mr. Carl A. de Gersdorff* was on the brief, for appellants in No. 353.

Mr. William C. Armstrong, with whom *Mr. Charles K. Beekman* was on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Hollins & Company, brokers and members of the New York Stock Exchange, went into bankruptcy November 13, 1913.

On October 13, 1912, they purchased for appellant Duel a hundred shares of Amalgamated Copper Company stock—"Copper"—and received certificates therefor which they subsequently disposed of by deliveries on account of sales for customers.

October 25, 1912, they purchased for one Bamberger thirty shares of "Copper," received a certificate therefor and pledged this for their own benefit with the National Bank of Commerce.

February 25, 1913, they purchased for appellants Wiener, Levy & Company fifty shares of "Copper" and received a certificate. About June 13, 1913, this passed out of their control "for and in behalf of another customer."

Prior to November 1, 1913, they were directed to purchase for one Landau a hundred shares of "Copper," and their books charge them as carrying this number for his account.

At the close of business November 7, 1913, they were responsible to customers for two hundred and eighty shares of "Copper"—Bamberger thirty, Duel one hundred, Wiener, Levy & Company fifty, Landau one hundred; and they held in actual possession—"in the box"—only two certificates for fifty shares each. November 10, 1913, they used these in making delivery on a short sale. On the same day that sale was "covered" and on November 11 they received and placed in their box a certificate (No. 29373) for one hundred shares.

When bankruptcy occurred (November 13) their entire liability to "long" customers on account of "Copper" arose from purchases of two hundred and eighty shares as above narrated; and they actually held only certificate No. 29373, received two days before. To secure their own loans they had on pledge with Kings County Trust Company and National Bank of Commerce, respectively, certificates for fifty and thirty shares; and they also had an outstanding short sale of one hundred shares.

In the deposition of Allaire, bankrupts' cashier, it is said:

"The said certificate No. 29373 was never marked or otherwise identified by Hollins & Co. as the property of any particular person or customer, or placed in any envelope bearing any indication that the said stock was held for the special account of any particular customer or

person, and no memorandum appears upon the books or records of Hollins & Co. to the effect that said stock was purchased or held for the special or particular account of any one customer or person.

. . .

"It was the practice of Hollins & Co. to use certificates of stock on hand in making deliveries thereof, indiscriminately and without regard to particular certificates or certificate numbers, excepting only cases where customers deposited certificates of stock standing in their own names as margin for their own accounts, where such certificates were usually retained in kind, but at no time from the 1st day of November, 1913, until and including the 13th day of November, 1913, were there any certificates for Amalgamated Copper stock standing in the name of any customers.

"Certificate No. 29373 representing 100 shares of Amalgamated Copper stock was not purchased or received for the account of any member of the firm of Hollins & Co., or for the personal account of said firm as a whole, but was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper stock due said firm on balance on said date."

The record indicates that all transactions in question were made in pursuance of the usual contracts for speculative purchases and sales of stock upon margins.

By timely petitions appellants claimed that in adjusting their accounts for final settlement with bankrupts' estate they were entitled to have allotted to them respectively 100/280 and 50/280 of the one hundred shares of "Copper" represented by certificate No. 29373. The District Court, Southern District of New York (212 Fed. Rep. 317), sustained their position and ordered accordingly, but the Circuit Court of Appeals reached a different conclusion and reversed the order. 219 Fed. Rep. 544.

The facts of the present case differ in some respects from those presented in *Gorman* v. *Littlefield*, 229 U. S. 19; but we think a logical application of principles there approved requires disagreement with the Circuit Court of Appeals and approval of order in the District Court.

In view of our former opinions it must be taken as settled: That bankrupts and their customer stood in the relation of pledgee and pledgor. That in their dealings stock certificates issued by same corporation lacked individuality and, like fac-simile storage receipts for gold coin, could properly be treated as indistinguishable tokens of identical values. That as between themselves, after paying amount due brokers, the customer had a right to demand delivery of stocks purchased for his account; and such delivery might have been made during insolvency without creating a preference. *Richardson* v. *Shaw*, 209 U. S. 365; *Thomas* v. *Taggart*, 209 U. S. 385; *Sexton* v. *Kessler*, 225 U. S. 90; *Gorman* v. *Littlefield*, 229 U. S. 19.

Summing up the doctrine of *Richardson* v. *Shaw* concerning legal relationship between customer and broker in buying and holding shares, we said in *Gorman* v. *Littlefield* (pp. 23–24): "It was held that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another. It was therefore

concluded that the turning over of the certificates for the shares of stock belonging to the customer and held by the broker for him did not amount to a preferential transfer of the bankrupt's property."

And we there further declared (pp. 24–25): "It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker. *Richardson* v. *Shaw*, *supra*. It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind and to keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant. Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt."

When the bankruptcy which occasioned *Gorman* v. *Littlefield* took place the broker's box contained certificates, not specifically allotted, for three hundred and fifty shares of the designated stock and the appellant's claim for two hundred and fifty was the only one presented by a customer. We held that under the circumstances no more definite identification was essential, and approved his contention. If in the instant cause a certificate for two hundred and eighty shares of "Copper" instead of one hundred had been on hand the four customers for whom that number were purchased might successfully claim them under rule approved in Gorman's case. And merely because the one actually in the box represented insufficient shares fully to satisfy all is not enough to prevent application of that rule so far as the circumstances will permit. The District Court properly awarded to appellants their *pro rata* parts of the one hundred shares.

Decree of Circuit Court of Appeals reversed, and decree of District Court affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE HUGHES, dissenting:

In *Gorman* v. *Littlefield*, 229 U. S. 19, the reasoning embodied in the following extract from the opinion (p. 24) was, as I take it, essential to vindicate the conclusion reached by the court: "It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically pur-

chased for the appellant, to buy others of like kind and keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant."

In the present case, it does not appear that at the time of the inception of the bankruptcy proceedings certificates were found in the brokers' possession equal in amount to those which should have been on hand; several customers are laying claim to the shares that were on hand; and it affirmatively appears that the brokers, having sold the shares specifically purchased for these customers, had not bought others of like kind, nor kept on hand certificates sufficient for the claims of the customers upon them. Not only was no stock kept on hand to answer the claims aggregating 280 shares, but it affirmatively appears that the 100 shares that were on hand were not acquired with intent to make restitution. The deposition of Allaire, the only man having knowledge upon the subject, was that Certificate No. 29,373, representing 100 shares of Amalgamated Copper Stock, "was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper Stock due said firm on balance on said date"—the date being one unconnected with any transaction for account of the appellants or either of them.

It is one thing to infer an intent to make restitution to a customer when the acts have been done that are necessary to effect restitution; it is an entirely different matter to infer an intent to make restitution when no restitution has in fact been made. The presumption of an intent to restore fractional interests in this case must rest on the merest fiction; and such a fiction ought not to be indulged in cases of this character, where it will inevitably result in creating a series of arbitrary

preferences, contrary to the equity of the Bankruptcy Act.

I think the decree of the Circuit Court of Appeals (219 Fed. Rep. 544) ought to be affirmed, and am authorized to say that MR. JUSTICE HUGHES concurs in this dissent.

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

PETITION FOR A WRIT OF EXECUTION.

No. 2, Original. Submitted June 5, 1916.—Decided June 12, 1916.

A State should be given an opportunity to accept and abide by the decision of this court; and, in a case in which the legislature has not met in regular session since the rendition of the decision, motion for execution will be not granted, but denied without prejudice to renew after the next session of the legislature.

THE facts are stated in the opinion.

Mr. John Garland Pollard, Attorney General of the State of Virginia, for complainant.

Mr. A. A. Lilly, Attorney General of the State of West Virginia, with whom *Mr. John H. Holt* was on the brief, for defendant.

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

In the original cause of *Commonwealth of Virginia* v. *State of West Virginia,* on June 14, 1915, a decree was rendered in favor of Virginia and against West Virginia for the sum of $12,393,929.50 with interest thereon at the rate

of five percentum from July 1st, 1915, until paid. 238 U. S. 202. Virginia now petitions for a writ of execution against West Virginia on the ground that such relief is necessary as the latter has taken no steps whatever to provide for the payment of the decree. West Virginia resists the granting of the execution on three grounds: (1) "Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her Legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen;" (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if in the exercise of jurisdiction such a judgment was entered.

Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.

The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the legislature of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment.

And it is so ordered.

STATE OF MISSOURI *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

MOTION TO STRIKE A DEFENSE FROM THE ANSWER.

No. 16, Original. Argued May 2, 3, 1916.—Decided June 12, 1916.

In exerting the public rate-making power a State cannot, without violating the Federal Constitution, make the rates so low as to be confiscatory; and although the State may not be sued without its consent, an individual, even though he be a state officer, may be enjoined from doing an act violating the Federal Constitution.

From the power to fix railroad rates there results the duty to provide the opportunity of testing their repugnancy as a unit to the Constitution in case confiscation were charged.

In virtue of the due process provision of the Fourteenth Amendment, a State may not, by mandamus, compel a railroad to comply with rates fixed by a state law unless an opportunity is afforded to test the question of confiscation. *Chicago &c. Ry.* v. *Minnesota*, 134 U. S. 418.

This court has recognized the right of a railroad company to test the rates prescribed by a state statute as a unit and to obtain an injunction, restraining state officers from enforcing the law in its entirety, if it is found to be confiscatory.

The right to test a rate-making law as a unit is not exclusive of the right to test it by resisting in each particular case an individual effort to enforce a single rate prescribed.

The practice which has arisen of qualifying as "without prejudice" the decree in rate cases in which assertions of confiscation have not been upheld, and when the situation justified the qualification, is not so as to leave the controversy open as to the period dealt with by the decree, but so as not to prejudice property rights in the future, if from future operation and changed conditions confiscation in the future should result. *Knoxville* v. *Water Co.*, 212 U. S. 1.

The qualification of a decree dismissing a bill in a case brought by a railroad company to enjoin state officers from enforcing a rate statute as without prejudice, does not leave the matter open so that in a subsequent individual case brought by the State to recover excess fares paid during the period covered by the company's suit the defendant can attack the constitutionality of the law as a whole.

The fact that the State was not a party to the company's suit in which a decree dismissing the bill without prejudice was entered, and could not have been made a party without its consent, does not make such decree inapplicable in the individual suit of the State to recover excess fares paid during the period covered by the company's suit, and such defense should be struck from the answer.

Quære, whether a suit by a railroad company against state officers to enjoin enforcement of a rate-making statute is not a class suit binding upon all.

Quære as to the ultimate right to recover for excess rates paid pending a stay while the constitutionality of a rate-fixing statute was pending, in the absence of a condition to that effect imposed when the injunction was issued.

THE facts, which involve the construction and effect of the decision by this court in the *Missouri Rate Cases*, 230 U. S. 474, are stated in the opinion.

Mr. John T. Barker, Attorney General of the State of Missouri, with whom *Mr. Lee B. Ewing*, *Mr. W. T. Rutherford* and *Mr. Kenneth C. Sears* were on the brief, for complainant:

The injunction suit brought by defendant railroad in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant and defendant will not be heard to deny such right and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out.

Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the State. It cannot litigate the question against individuals. This would be a collateral attack; and, as a direct method is provided, that method is exclusive. Numerous authorities support these contentions.

Mr. O. M. Spencer and *Mr. Frank Hagerman*, with whom *Mr. Chester W. Dawes* was on the brief, for defendant:

The motion erroneously assumes that the question of confiscation was here (230 U. S. 474) settled and upon its merits finally adjudicated.

If, as the answer alleges, the two-cent statutory fare requirement was confiscatory, then the complainant cannot recover, and any defense which so shows is, of course, proper.

Complainant erroneously seeks to have this court now decide this question: If an injunctive decree against the enforcement by state officers of the penal provisions of a state railroad statute fixing rates is entered, either on the merits or without prejudice, but subsequently set aside, are passengers, without more, entitled, as a common-law right, to sue for and recover any excess in rates collected while injunction was in force?

But even to such claim confiscation is a defense.

The first contention is that the State has a common-law right (if not superseded by a statute) arising out of a violation of a rate statute.

This common-law right of action for excess fares has, however, been superseded by exclusive penal remedies, which cannot and are not sought to be here enforced.

The rates upon which a recovery is attempted to be based were not those scheduled.

The liability, if any, being only for statutory penalties, these were by the injunction proceedings put definitely, not contingently, in a state of legal suspense.

The next contention rests upon doctrine of restitution, which has no application, for that:

In contesting the validity of the rates the railroad company changed its status from a mere public-service corporation to a constitutional contestant of an alleged legislative attempt to take the property without due process of law and every act done by reason of the injunction or which thereby became permissible was, unless so secured, *damnum absque injuria*, so that it did not

legally cause any damage for which restitution is sought, damage legally caused being the sole basis of restitution.

Restitution cannot be asserted by one who was not a party to the suit, nor where the judgment was without prejudice to the merits, which the defendant now desires to litigate. Numerous authorities support these contentions.

Mr. Ernest E. Watson, Mr. H. A. Abernethy, Mr. W. T. Alden, Mr. Campbell Cummings, Mr. H. L. McCune, Mr. F. W. Paschal and *Mr. Clifford B. Allen,* by leave of the court, filed briefs as *amici curiæ.*

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

A preliminary outline is essential to clear the way for an understanding of the case. By original action here brought the State sues to recover a sum of money for passenger fares in excess of the rate established by law paid by its officers when traveling within the State on state business. Answering, the railroad alleges among other defenses that the rates fixed by law were so low as to be confiscatory and hence repugnant to the Constitution of the United States. The matter for decision arises on a motion on behalf of the State to strike out this defense on the ground that the right to assert it is barred by a decree of this court establishing that the rates fixed by the state law were lawful and not confiscatory,—a decree the conclusive effect of which, it is asserted, the railroad company is estopped from denying.

The case as made by the pleadings and by the record in which the decree relied on was rendered, of which we take judicial notice, is this: In April, 1905, by law Missouri established certain freight rates. Almost at once the defendant company and others filed their bills in

the Circuit Court of the United States for the Western District of Missouri against the State Board of Warehouse Commissioners, the Attorney General of the State and certain shippers alleged to be representative, to enjoin the carrying out of the rate-fixing law on the ground that to enforce the rates which it fixed would result in confiscation and a taking of the property of the railroads in violation of the Constitution. An injunction was granted prohibiting the carrying into effect of the rate law. While these suits were pending the State by law fixed a passenger rate and, repealing the freight law which had been enjoined, enacted another, and by supplemental bills both these laws were assailed on the grounds upon which the other law had been attacked and injunctions were awarded restraining their enforcement. After much testimony offered on the issue of confiscation, the court permanently enjoined the enforcement of the state statutes. On review in this court, as to the railroad now before us and others, this conclusion was held to be erroneous and the decree which was entered here reversed and remanded the case with directions to dismiss the bill without prejudice. *Missouri Rates Cases*, 230 U. S. 474, 509.

Although the contentions respectively pressed in argument are numerous, their solution depends upon the application of a few well settled principles which we proceed to state in order to test all the propositions by applying them and thus avoid redundancy.

1. In *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, considering a law fixing railroad rates in the light of two settled rules, (a) that in exerting the public rate-making power the rates cannot be made so low as to be confiscatory without violating the Constitution, and (b) that although a State is not subject to suit without its consent there is always the right to enjoin an individual, whether he is a state officer or not, from doing an act violating the Constitution, that is, from taking property

unlawfully, it was held that both these propositions controlled in the fullest degree in the legislative fixing of railroad rates. In fact it was in that case decided that from the act of fixing railroad rates by law there resulted the duty to provide an opportunity for testing their repugnancy as a unit to the Constitution in case there was a charge that they were confiscatory. It was accordingly held that in virtue of the due process of law provision of the Fourteenth Amendment the State could not by mandamus compel a railroad to comply with rates fixed by a state law unless an opportunity was afforded to test the question of confiscation.

Developing and applying this doctrine in many cases, it came to pass that on the complaint of a railroad as to the confiscatory character of rates fixed by state law, the right was recognized to test the rates as a unit and therefore to obtain an injunction restraining the enforcement of the state law in its entirety and that for such purpose any officers of the State having any power to directly enforce the law or by indirection to give effect to the same in any manner whatever were qualified as defendants to stand in judgment for the relief asked. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Minnesota Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S. 605.

2. While it is true that the comprehensive right thus recognized was broader and more efficacious than would be the right of a railroad merely to resist in each particular case an individual effort to enforce a single rate fixed by law (see *Ex parte Young*, 209 U. S. 123), it is true also that the recognized broader right was not, unless it was availed of, exclusive of the latter and narrower one, that is, the right to resist separate attempts to enforce a rate. *St. Louis & San Francisco Ry.* v. *Gill*, 156 U. S. 649. This

principle was but a recognition of the fact that the broader right to invoke a complete remedy to enjoin the law and thus prevent the enforcement of the rates, did not take away the narrower right of a railroad to stand upon the defensive and merely resist the attempt to enforce the rate in each particular case because of its confiscatory character. One right was not destructive of the other because there was freedom to elect which of the two would be pursued.

3. Resulting from the principles just stated, recognizing that the operation of a decree enjoining the giving effect to a rate law because of its alleged confiscatory character differed materially both as to the public interest and that of the railroad from the consequences which would arise from a mere decree rejecting the complaint of a person as to an individual and consummated grievance based on the claim that an illegal rate had been charged, it came to pass that a form of decree came to be applied in rate cases to meet and provide for this difference. In other words, in a rate case where an assertion of confiscation was not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as "without prejudice", not to leave open the controversy as to the period with which the decree dealt and which it concluded, but in order not to prejudice rights of property in the future if from future operation and changed conditions arising in such future it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in

conditions arose. The doctrine in the first aspect nowhere finds a more lucid statement than the one made on behalf of the court by Mr. Justice Moody in *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1. It has since been repeatedly applied in language which in the completest way makes the meaning of the limitation without prejudice in such a case clear and leaves no ground for any dispute whatever on the subject. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Northern Pacific Ry.* v. *North Dakota*, 216 U. S. 579; *Louisville* v. *Cumberland Tel. & Tel. Co.*, 225 U. S. 430; *Missouri Rate Cases*, 230 U. S. 474; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153. A complete illustration of the operation of the qualification is afforded by the *North Dakota Case*, just cited, since in that case as a result of the qualification "without prejudice" the case was subsequently re-opened and upon a consideration of new conditions arising in such future period a different result followed from that which had been previously reached. *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585. As to the second aspect, that is the significance of the limitation without prejudice as applied to a decree which enjoined the rates as confiscatory, the meaning of the reservation as we have stated it was in express terms through an abundance of precaution defined and stated in the opinion in the *Missouri Rate Cases*, 230 U. S. 474, 508.

Let us test the merit of the respective contentions by these propositions.

(a) It is insisted that the right obtains to assert as against the individual suit of the State the existence of the confiscation for the very period covered by the previous finding that there was a failure to establish the confiscation, because the reservation without prejudice which was made in that decree leaves the whole subject open for a renewed attack as to individuals and indeed by general complaint as to the unconstitutionality of the law as a whole. But this proposition simply disregards the founda-

tion upon which such a reservation came to be applied, as we have just pointed out, in cases involving an assault upon the present and future operation of a law fixing rates. In other words, the contention but accepts the doctrine previously announced and yet repudiates the cases by which that doctrine was established by affixing a meaning to the reservation "without prejudice" as used in the cases wholly destructive of the sole object and purpose for which in those cases the reservation came to be applied. Again it is said, conceding that the limitation without prejudice when applied to a rate case under the authorities has the significance which we have affixed to it, that meaning should only prevent the re-opening of the inquiry as to the period embraced by the testimony in the case and therefore should not be extended so as to prevent the re-opening from the time at least of the close of the testimony. This, it is said, must be the case since there might well be a change in conditions between the time when the proof in a case was taken and the entry of the final decree. But this contention again disregards the doctrine upon which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words it treats the reservation without prejudice as looking backward and overthrowing that which was concluded by the decree instead of considering it in its true light, that is, as looking forward to the future and providing for conditions which might then arise.

(b) Conceding for the argument's sake the controlling influence of what we have said, nevertheless the contention is that the previous decree is here inapplicable since the State was not a party to the litigation in which the decree was entered, indeed, could not have been made a party without its consent. But once more the argument proceeds upon a disregard of the previous cases upon the authority of which the right was exercised to obtain on the charge of confiscation the exertion of judicial au-

thority to stay or suspend every vestige of power asserted by the state statute fixing rates until the controversy was determined. In other words, the proposition ignores the doctrine settled by the previous cases that there inhered in, and went along with, the rate-making power a duty on the part of the State to afford means for judicially deciding a question of confiscation when asserted. It is true, as we have previously pointed out, that because there was a right on the part of a railroad to sue to prevent the execution of the state power manifested in the rate-making law, it did not follow that the railroad was deprived of its right to resist the enforcement of the law by way of defense when an attempt was made to enforce the law against it. But it is true also, as we have seen, that the right to elect between the two was undoubted,—an election the potency of which was pointed out in the *Gill Case*, *supra*, and was moreover in the clearest way fully expounded in the *Young Case*, *supra*, p. 166. This being true, it is obvious that the question here is not how far the decree relied upon was binding upon parties who were not technical defendants, but how far is it binding upon the railroad. In other words, it is whether when there has been an election to obtain a remedy by proceedings against particular defendants comprehensive enough to restrain the giving effect of every vestige of state power which was embraced in the authority exerted by the State in passing the rate-making law, it can now be said by the railroad in order to frustrate or limit the decree rendered in the case that the restraint did not operate as against the rate-making power so far as the interest of the State is concerned because the State was not a party. The right to restrain the whole power having been enjoyed for the purpose of the complaint as to confiscation which was made, the contrary cannot be asserted in order to escape the effect of the decree holding that such complaint was erroneously made. In last analysis

the contention comes simply to asserting that the settled rule of *Ex parte Young*, 209 U. S. 123, and the cases which preceded it was wrong and there was no right to restrain the complete enforcement of the rate law without the presence of the State as a technical party. And the cogency of this consideration is made quite clear by bearing in mind as expressly pointed out in the *Young Case, supra*, p. 166, that the power which the court possessed by virtue of the bringing of the suit at the instance of the railroad to enjoin and suspend the whole rate-making law comprehensively included the right to stay proceedings brought in other courts which would have tended to set aside or frustrate the authority to completely exercise the jurisdiction acquired.

As it results from what we have said that in our opinion by the application of the most elementary principles of estoppel the railroad may not be heard to disavow what it asserted in order to secure the suspension of the rate law during the suit, it follows that it was without right in this case to assert the defense of confiscation and the motion to strike out the same must therefore prevail.

As the view which we have taken of the controversy has not rendered it necessary to consider whether in any event the suit was not a class suit binding upon all, into that subject we have not entered. Additionally, we have not considered and express no opinion upon the arguments dealing with questions of the ultimate right to recover in the absence of a condition to that effect imposed when the injunction was issued, in view of the terms of the injunction bond, etc., etc.

The motion to strike out the defense of confiscation from the answer is granted.

MR. JUSTICE MCKENNA dissents.

REID *v.* FARGO, AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY.

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

No. 279. Argued March 13, 1916.—Decided June 12, 1916.

In the Second Circuit, the practice is well established that an appeal from the decree of the District Court to the Circuit Court of Appeals in an admiralty case by one of the parties opens the case for a trial *de novo*. *Irvine* v. *The Hesper*, 122 U. S. 256.

The owner of an automobile delivered it to an express company in London to forward to New York, declaring its value to be far in excess of $100; the express company boxed it and delivered it to a carrier and accepted a bill of lading with a limitation of $100 liability; on arrival at destination a stevedore discharged the cargo and the rope by which the automobile was being hoisted broke and the automobile was seriously damaged: in a suit *in personam* in admiralty against the express company and to which the carrier and the stevedore had been made parties held *that:*

The breaking of the rope in this case illustrates, as by analogy, the rule of *res ipsa loquitur* and throws the responsibility on the stevedore furnishing the rope and handling the article, unless such breaking can be explained as resulting from a hidden defect, which in this case is without support in the evidence.

The breaking of the rope appearing from the evidence to have probably resulted from straining and cutting, the stevedore was responsible for the damage and the decree should be against him primarily.

In case of failure to collect from the stevedore the carrier is responsible to the extent of the limited amount stated in the bill of lading, and in case there is still a deficiency, the express company, even though only a forwarder, is liable by reason of having, without the authority of the shipper and with knowledge of the value of the article entrusted to it, accepted from the carrier a bill of lading limiting its liability.

THE facts, which involve the jurisdiction and power of the Circuit Court of Appeals on appeal from the Dis-

trict Court in Admiralty and the liability of forwarders, carriers and stevedores in connection with the shipment and delivery of an automobile, are stated in the opinion.

Mr. Oscar R. Houston, with whom *Mr. Howard S. Harrington* was on the brief, for petitioner.

Mr. Walter F. Taylor for Fargo, President.

Mr. Roscoe H. Hupper, with whom *Mr. Norman B. Beecher* was on the brief, for International Marine Co.

Mr. Livingston Platt, with whom *Mr. Frank H. Platt* was on the brief, for T. Hogan & Sons.

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

This controversy thus arose: In December, 1910, Reid, the petitioner, delivered in London to the American Express Company an automobile to be carried to New York. The Express Company, in a communication concerning the shipment, was informed that the car was worth about $3,900. The car was boxed by the Express Company and by it delivered to the Minnewaska, a steamship belonging to the International Mercantile Marine Company, bound for New York. The Express Company shipped the car in its own name as consignor to itself in New York as consignee and no express notice was given to the ship of the real value of the package and its contents. The bill of lading issued by the Steamship Company expressly limited the liability to $100 and contained the following clause: "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency on which basis the freight is adjusted, and the Carrier's liability shall in no case exceed that sum, unless a value

in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid." On the arrival of the ship at New York, T. Hogan & Sons, Incorporated, stevedores, were employed to discharge the cargo. A sling was placed around the box containing the car and a fall with a hook attached to it was affixed to the sling and by a winch the car was lifted up from the hold through the hatchway. When it had passed above the hatchway a hook attached to another tackle was fastened to the sling, this second tackle being used to swing the package toward and over the side of the ship to land it on the pier. This was not accomplished, however, because as the package swung over the side of the ship toward the pier the sling broke and the car fell into the water and was seriously damaged.

In November, 1911, Reid filed his libel in the District Court of the United States for the Southern District of New York against the Express Company to recover from it the amount of damage caused to the automobile. Before answering the Express Company, in conformity to Admiralty Rule 59 of this court (210 U. S. 565) and with Rule 15 in Admiralty for the Southern District of New York,[1] filed two petitions, one against the Steamship Company and the other against Hogan & Sons, to make them parties defendant on the ground that if there was any liability on the part of the Express Company

[1] Rule 15 in admiralty of the United States District Court for the Southern District of New York is as follows:

If a defendant shall, by petition on oath, filed before answer, or within such further time as the court may allow, allege fault in any other party, in respect of the matters complained of in the libel, or shall allege that he is entitled to contribution or indemnity from any other party in respect of such matters, and shall pray that such other party be brought into the suit as a party defendant in analogy with the provisions of Admiralty Rule 59 of the Supreme Court, process on such petition may be issued and the cause shall proceed otherwise as in cases under the 59th Rule.

on the libel of Reid, both the Steamship Company and Hogan & Sons were responsible therefor, and asking a decree over against each of them separately in case there was any decree against the Express Company. Thereupon the Express Company answered the original libel denying responsibility on the ground among others that it was a mere forwarder. Subsequently both Hogan & Sons and the Steamship Company answered not only the petitions of the Express Company making them parties defendant but also the original libel, traversing the alleged liability on various grounds. The latter company, however, referring to the limitation of liability to $100 in the bill of lading which it had issued, admitted its responsibility to that extent and alleged that the sum thereof had been offered and declined.

In March, 1913, an interlocutory decree was entered holding that Hogan & Sons were primarily responsible and that the Express Company was secondarily so, and that when the amount of the loss was ascertained Reid would therefore have the right to recover the amount from Hogan & Sons, and in addition to recover from the Express Company any part of the sum which he was unable to collect under execution from Hogan & Sons. The final decree which thereafter fixed the amount at $2,724.40 carried out the interlocutory decree. Nobody appealed from the interlocutory decree and the Express Company did not appeal from the final decree fixing its secondary liability. Hogan & Sons, however, did appeal. The court below, considering that on the appeal the case was before it for a trial *de novo* and therefore that the rights and liabilities of all the parties must be considered from that point of view, reversed the decree below and held that error had been committed in the decree rendered against Hogan & Sons, because the proof did not establish that they had been negligent. As to the Express Company it was also held that error had been

committed in decreeing it to be liable secondarily because in receiving the automobile it had acted in the capacity of a mere forwarder and had discharged its obligations in that respect. As to the decree which dismissed the Steamship Company, it was held that error had been committed because that company as an insurer was liable, not however exceeding the amount of $100, the limitation stated in the bill of lading. As the result of the allowance of a petition for certiorari the correctness of these conclusions is now before us for decision.

At the threshold it is insisted that the court below had no authority to consider the case as before it for a new trial, that is, *de novo*, and to award relief upon that theory, and that consequently it erred in reviewing the interlocutory decree which was not appealed from by which the Steamship Company was dismissed and allowing a recovery against that company, and also in reviewing both the interlocutory and final decrees so far as it was essential to grant relief to the Express Company because that company had not appealed. It is not denied that in the Second Circuit the right to a *de novo* trial was considered as settled by *Munson S. S. Line* v. *Miramar S. S. Co., Limited*, 167 Fed. Rep. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a *de novo* trial in the court below authoritatively resulted from the ruling in *Irvine* v. *The Hesper*, 122 U. S. 256,—a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the *Miramar Case*. Entertaining this view, we do not stop to consider the various arguments

which are here pressed upon our attention tending at least indirectly to establish the non-existence of the right to the trial *de novo* in the court below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever.

It is conceded that if the grounds relied upon to fix liability as against the Express Company, the Steamship Company and Hogan & Sons are established, there is a right to an independent recovery as to each, whatever may be the recourse of these parties to recover over as against each other. Which of the defendants, if any, was liable primarily for the loss, is then to be considered. We first approach this question from the point of view of Hogan & Sons, because undoubtedly that company was in possession and control of the car at the time it dropped into the river and was damaged. While there is some confusion and various slight contradictions in the testimony, we are of the opinion that the trial court was right in holding that the loss occurred through the fault of Hogan & Sons, and therefore that the court below erred in reversing the decree against that company. And without undertaking to review the testimony, to all of which we have given a careful consideration, we content ourselves with briefly pointing out the general points of view which have led us to the conclusion stated. Without saying that the mere fact of the dropping of the automobile into the water in the course of delivery from the ship's hold to the pier serves to speak for itself on the issue of responsibility, that is, to bring the case within the principle of *res ipsa loquitur*, we are of the opinion that by analogy the case well illustrates that rule for this reason: Some cause must be found for the dropping of the car into the river, and only

two theories on this subject may be deduced from the proof, either that the accident to the car occurred without fault as the result of the breaking of the rope composing the sling because of some unseen and hidden defect in such rope, or that it was occasioned by some act of negligence or want of care in handling the car. The first, we are of opinion, is without any substantial support in the proof; in fact, to accept it would conflict with direct and positive proof to the contrary. That view, therefore, could only be sustained by substituting imagination for proof. The second, on the contrary, we are of opinion, finds cogent support from the proof which could only be escaped by overthrowing it by the process of imagination to which we have just referred. It is unquestioned that when the sling was put around the box containing the car preparatory to attaching the hook in order to hoist it, no blocks or other means were used to prevent the rope from being worn or cut by the edges of the box. The presumption that the rope was strong and efficient, arising from the fact that it held the weight of the box until it was lifted above the hatch and until by the swinging motion the danger of straining or cutting of the ropes upon the edges was more likely to result, gives adequate ground for the inference that such cutting and straining occurred and led to the severance of the rope and the precipitation of the car into the water. And this inference is supported by various other circumstances which we do not stop to recapitulate.

Were the Steamship Company and the Express Company in the order stated liable to Reid, the libellant, dependent upon his inability to make under execution the amount of the decree from Hogan & Sons, is then the only remaining question. In substance this question, however, is negligible since in the argument at bar it was conceded that T. Hogan & Sons, Incorporated, were amply solvent and that there was no question of their ability

to respond to any decree which might be rendered against them. To avoid, however, all miscarriage of right from any possible, though improbable, change of conditions, without going into detail or stating the considerations which control our conclusion on the subject, we content ourselves with saying, first, that as to the Steamship Company we are of the opinion that on the failure to make the amount of the decree against Hogan & Sons, the libellant will be entitled to recover over against that company to the amount of $100, to which its liability was limited as stated in the bill of lading under which the shipment was made; second, that even looking upon the Express Company as a forwarder, under the circumstances of the case and the terms of the bill of lading under which the car was shipped by that company, the trial court rightly held it liable and that recovery against it on failure to enforce the decree against Hogan & Sons will also obtain.

It follows that the decree below must be reversed and the cause remanded to the trial court with directions to set aside its decree in so far as it dismissed the Steamship Company from the case and to enter a decree in conformity with this opinion.

Reversed and remanded.

LANCASTER *v.* KATHLEEN OIL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 336. Submitted April 26, 1916.—Decided June 12, 1916.

As one not in possession may not maintain an action to quiet title, and, as in Oklahoma, one may not maintain a suit in ejectment as lessee under an oil or gas mining lease, an adequate remedy at law

does not exist in this case; and therefore equity has jurisdiction of a suit brought by the holder of an oil and gas lease on lands in Oklahoma to restrain those claiming under another lease from interfering with the property.

If such leases cover Indian allottee land and have been approved by the Secretary of the Interior the case arises under the laws of the United States and a Federal court has jurisdiction.

A suit by one lessee against another, the prayer of the complaint in which is not only recovery of possession of the property but also an injunction restraining defendant from asserting rights under his lease, cannot be regarded as a mere suit for ejectment; and if the bill clearly shows that both plaintiff and defendant claim under leases of Indian lands, the validity of which depends upon the construction of Acts of Congress and the effect of approval given by the Secretary of the Interior, the case is one arising under the laws of the United States of which the District Court has jurisdiction.

In such a case the statements of the bill can determine the jurisdiction of the District Court as they are not mere anticipatory statements of a possible defense to be set up by defendant.

THE facts, which involve the jurisdiction of the District Court of a suit involving the validity of gas and oil leases on lands of allottee Indians, are stated in the opinion.

Mr. William F. Tucker and *Mr. Hulette F. Aby* for appellants.

Mr. George S. Ramsey, Mr. Edward H. Chandler, Mr. Edgar A. de Meules, Mr. Malcolm E. Rosser and *Mr. Sol H. Kuffman* for appellees.

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

This direct appeal is prosecuted to reverse the decree of the court below dismissing the suit on the ground that the bill alleged no cause of action within the jurisdiction of the court as a Federal court.

Briefly summarized, the bill alleged that in 1903 Lizzie Brown received from the United States a patent to certain

described land in Oklahoma as her homestead allotment as a member of the Creek tribe of Indians; that she died in March, 1912, leaving surviving as her sole heirs her husband, Josiah Brown, and four minor children, all of whom were made defendants. It was alleged that Brown, the father, was appointed guardian of the children and that in April, 1912, he and the children as owners in fee of the land in question made an oil and gas mining lease to the plaintiffs which was recorded April 18, 1912; that notwithstanding this lease about two months later, that is, June 2, 1912, Brown on his own behalf and as guardian made an oil and gas mining lease covering the identical land to the Kathleen Oil Company, also made a defendant, which lease was approved by the Secretary of the Interior and was duly recorded. It was alleged that plaintiffs entered upon the land under their lease prepared to drill for oil, but, learning of the subsequent lease to the Kathleen Oil Company, withdrew and made an application to the Secretary of the Interior to cancel his approval of that lease, which was denied. It was averred that the Kathleen Oil Company had entered into its lease with full knowledge of the prior lease to the plaintiffs, but that it had nevertheless gone into possession and was operating under its lease and was producing and selling oil and gas. The bill then alleged that the plaintiffs' lease, although not approved by the Secretary, was valid, and that the subsequent lease to the defendant company which was approved by the Secretary of the Interior was void because by the act of Congress of May 27, 1908, c. 199, 35 Stat. 312, the land of Lizzie Brown descended to her heirs free from any restriction against leasing the same for oil and gas mining purposes, and because if that act did impose restrictions as to such a lease, it was void for repugnancy to the Constitution of the United States. The prayer was that the defendant company be enjoined from entering on the land and from

continuing to operate under its lease, that all the defendants be restrained from interfering in any manner with the plaintiffs in conducting operations under their lease and from asserting or claiming any right to the oil and gas deposits under the land or the right to mine and remove the same, and that the defendant company account to the plaintiffs for the gas and oil which it had removed.

The defendants moved to dismiss on the ground that the court was without jurisdiction as a Federal court to entertain the cause. The motion was granted and a decree of dismissal entered, and for the purpose of this direct appeal the court certified under the statute that the dismissal had been ordered because "the essential and appropriate allegations of the cause of action asserted in said bill of complaint did not disclose a case arising under the Constitution or a law or treaty of the United States."

As it is apparent that the court below erred if the allegations concerning the validity of the lease of the plaintiffs, and the invalidity of that of the defendant company were material to the cause of action stated in the bill, we come at once to that question. In support of the proposition that such allegations were not material, it is argued that the suit was the equivalent of an action at law in ejectment to recover possession of the leased premises, but was brought in equity because under the law of Oklahoma a lessee of an oil and gas mining lease under the circumstances here disclosed had no right to sue in ejectment. *Kolachny* v. *Galbraith*, 26 Oklahoma, 772. Further it is said that as in a suit in ejectment it is only necessary to allege a right of possession by the plaintiff and a wrongful possession by the defendant, averments by anticipation of assumed defects in the plaintiffs' title to be alleged by the defendant and of the causes which would be relied upon to establish want of title in the defendant are not relevant or essential and are to be disregarded in determin-

ing the question of the jurisdiction of the court as a Federal court. This it is said was expressly decided in *Taylor* v. *Anderson,* 234 U. S. 74, and that case is relied upon as conclusive of this controversy.

But without questioning in the slightest degree the doctrine expounded or the conclusion reached in the *Taylor Case,* we think it can here have no application, since we are of the opinion that the assumption that the cause of action alleged in the bill under consideration is the equivalent of a suit in ejectment is wholly without foundation. We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an injunction forever restraining the defendant company from asserting any rights under its lease and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease and the effect to be given to such approval.

It is said, however, if the bill be thus construed, the suit is in substance one to quiet title and under the well settled rule such a suit can be brought only by one in possession. *Whitehead* v. *Shattuck,* 138 U. S. 146; *Boston &c. Mining Co.* v. *Montana Ore Co.,* 188 U. S. 632. But this contention overlooks the reason upon which the rule is based, as pointed out in the cases relied upon, which is that one out of possession has an adequate remedy at law by a suit in ejectment. As it is conceded that the legal remedy was not here available, and that there was hence jurisdiction in a court of equity to determine the right of possession, it is clear that the rule has no application and that the court had equitable jurisdiction to determine all the issues presented by the bill.

That the bill as thus construed states a cause of action within the jurisdiction of the court below as a Federal court is in substance conceded and is demonstrated by the ruling in *Wilson Cypress Co.* v. *Del Pozo*, 236 U. S. 635, 643–644.

It follows from what we have said that the court below erred in dismissing the cause for want of jurisdiction as a Federal court, and its decree must be reversed and the cause remanded for further proceedings in conformity with this opinion.

And it is so ordered.

PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF KENNEDY *v.* BECKER, AS SHERIFF OF ERIE COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 666. Argued April 7, 1916.—Decided June 12, 1916.

Power to preserve fish and game within its border is inherent in the sovereignty of the States subject to any valid exercise of authority under the provisions of the Federal Constitution.

The reservation to the Seneca Tribe of hunting and fishing privileges on the lands conveyed to Robert Morris by the treaty of the Big Tree of 1797 was one in common with the grantees and others to whom the privilege might be extended, but subject to the necessary power of appropriate regulation by the State having inherent sovereignty over the land.

Tribal Seneca Indians are subject to the fish and game laws of the State of New York as to lands ceded by the Tribe to Robert Morris by the Big Tree Treaty of 1797 and which are not within the Seneca Indian Reservation notwithstanding the reservation of hunting and fishing contained in said Treaty.

The fact that the Indians in this case are wards of the United States un-

der the care of an Indian agent does not derogate from the authority of the State to enforce its fish and game laws as against Indians on territory within the State and outside of any Indian reservation. 215 N. Y. 42, affirmed.

THE facts, which involve the construction of the Big Tree Treaty of 1797 between the Seneca Indians and Robert Morris and the effect of a reservation of right to fish and hunt on the ceded lands and also the power and sovereignty of the State of New York over the said lands, are stated in the opinion.

Mr. George P. Decker for plaintiff in error and also *Mr. Charles Warren*, Assistant Attorney General of the United States, with whom *Mr. W. W. Dyer* was on the brief for the United States in support of the contentions of plaintiff in error:

The clause of the treaty relating to fishing and hunting rights is to be construed as reserving to the Indians a free and perpetual right to take fish and game on the lands ceded, at least for their own subsistence and by the means and methods then known and practiced by them.

The Seneca and other New York tribal Indians are wards, not of the State, but of the United States.

The hunting and fishing rights involved are a part of the original Indian rights of occupancy, reserved in the very instrument of cession, never relinquished, and continuously held under the ancient Indian title. The *locus in quo*, therefore, always remained an Indian reservation *pro tanto*.

The reserved rights of hunting and fishing are secured to the Seneca Indians by the word of the United States given at a public treaty, which is the supreme law of the land.

The operation of the state fish and game laws was excluded by the exercise of Federal power. See the Hartford Convention; the Treaty of the Big Tree; the Indian

Intercourse Act of May 19, 1796, § 12; Extracts from Stone's Life of Red Jacket, and the following cases: *In re Blackbird*, 109 Fed. Rep. 139; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27; *Dick* v. *United States*, 208 U. S. 40; *Eubank* v. *Richmond*, 226 U. S. 137; *Fellows* v. *Blacksmith*, 19 How. 366; *Geer* v. *Connecticut*, 161 U. S. 519; *Geofroy* v. *Riggs*, 133 U. S. 258; *George* v. *Pierce*, 85 Misc. Rep. 105; *Holden* v. *Joy*, 17 Wall. 211; *Johnson* v. *Gearlds*, 234 U. S. 422; *Jones* v. *Meehan*, 175 U. S. 1; *The Kansas Indians*, 5 Wall. 737, 760; *In re Lincoln*, 129 Fed. Rep. 247; *The New York Indians*, 5 Wall. 761; *Nor. Pac. Ry.* v. *United States*, 227 U. S. 355, 362, 367; *Cusic* v. *Daly*, 212 N. Y. 183; *Perrin* v. *United States*, 232 U. S. 478, 484; *Sligh* v. *Kirkwood*, 237 U. S. 52, 58; *State* v. *Campbell*, 53 Minnesota, 354; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Kagama*, 118 U. S. 375, 384; *United States* v. *Pelican*, 232 U. S. 442; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Winans*, 198 U. S. 371; *Ward* v. *Race Horse*, 163 U. S. 504; *Winters* v. *United States*, 207 U. S. 564; *Worcester* v. *Georgia*, 6 Pet. 515, 581.

Mr. Herbert B. Lee and *Mr. Blaine F. Sturgis*, with whom *Mr. E. E. Woodbury*, Attorney General of the State of New York, and *Mr. A. Frank Jenks* were on the brief, for defendant in error:

New York State has jurisdiction to punish tribal Indians for violations of its laws enacted in the exercise of its police power when such violations occur outside the limits of their reservations.

The reservation of the privilege to fish and hunt on the lands ceded to Robert Morris by the treaty of "Big Tree" does not prevent the prosecution of Tribal Indians violating the Conservation Law on the lands covered by such reservation. See The Hartford Convention of December, 1786, and *Clairmont* v. *United States*, 225

U. S. 551; *Commonwealth* v. *Alger*, 7 Cush. 53, 84; *Compagnie Francaise &c.* v. *State Board of Health*, 186 U. S. 380; *Ex parte Tilden*, 218 Fed. Rep. 920; *Fletcher* v. *Peck*, 6 Cranch, 87; *Geofroy* v. *Riggs*, 133 U. S. 258; *Johnson* v. *M'Intosh*, 8 Wheat. 543; *New York &c. R. R.* v. *Bristol*, 151 U. S. 556; *Patsone* v. *Pennsylvania*, 232 U. S. 138; Tucker's Limitation on Treaty-Making Power, 381; *United States* v. *Kagama*, 118 U. S. 375; *Ward* v. *Race Horse*, 163 U. S. 504.

Mr. Chief Justice White delivered the opinion of the court after reading the following memorandum:

This opinion by direction of the court had been prepared by Mr. Justice Hughes and was approved before his resignation. After that event it was again considered and was re-adopted.

Fayette Kennedy, Warren Kennedy, and Willis White, Jr., three Seneca Indians, residing on the Cattaraugus Reservation, under the charge of an Indian Agent of the United States, were arrested for spearing fish in Eighteen Mile Creek, in Erie County, State of New York, at a place outside the Reservation, and there having certain fish in their possession, in violation of § 176 of the Conservation Law of that State. A justice of the peace committed them to the custody of the sheriff, and a writ of *habeas corpus* was sued out upon the ground that the commitment was invalid. It was alleged that the persons arrested were tribal Indians, as above stated, and that the place where the offense was committed was within the territory included in "certain grants . . . under sanction of the United States of America, whereby . . . the right was reserved to the said Indians to fish in the waters on and in said lands." The Supreme Court at Special Term discharged the petitioners, holding that the ancient grants, agreements and treaties mentioned, and

particularly the treaty made between the Seneca Nation of Indians and Robert Morris in the year 1797, permitted these Indians to fish in the waters in question "at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York." The Appellate Division of the Supreme Court, Fourth Department, reversed the order and remanded the three Indians to custody (165 App. Div. 881); and the order of the Appellate Division was affirmed by the Court of Appeals. The court entertained the Federal question presented, and decided that the state law, notwithstanding the treaty, was applicable. 215 N. Y. 42.

Section 176 of the Conservation Law of New York prohibits the taking of fish, or having the same in possession, except as permitted by the article of which it is a part. The validity of these provisions with respect to those subject to the jurisdiction of the State is not questioned. The controversy relates solely to the state power over these Indians.

The argument for the plaintiffs in error has taken a wide range and embraces an extended history of the dealings with the Six Nations. We do not find it to be necessary to review this interesting history as the question to be determined is a narrow one. The *locus in quo* is within the State of New York being within one mile from the point where Eighteen Mile Creek empties into Lake Erie. It is not within the territorial limits of the Indian Reservation on which the Senecas reside. It is within the territory which was ceded by the Seneca Nation to Robert Morris by the treaty of the 'Big Tree,' of September 15, 1797 (7 Stat. 601), and the question turns upon the construction of this treaty, that is, on the consequences which attached to the reservation therein of fishing and hunting rights upon the lands then granted. These lands were a part of the tract covered by the compact made in 1786 between the State of New York and the

Commonwealth of Massachusetts known as the Hartford Convention. (Journals of Congress, Vol. IV, p. 787.) By the terms of this compact for the settlement of existing controversies, Massachusetts ceded, granted and released to New York all its "claim, right and title" to the "government, sovereignty and jurisdiction" of the lands, while New York ceded, granted and released to Massachusetts "the right of preëmption of the soil from the native Indians, and all other the estate, right, title and property" which the State of New York had. Subsequently Massachusetts sold to Robert Morris its "preemptive right." By § 12 of the Federal Indian Intercourse Act of May 19, 1796, c. 30, 1 Stat. 469, 472, it was provided that no conveyance of lands "from any Indian, or nation or tribe of Indians" should be valid unless "the same be made by treaty, or convention, entered into pursuant to the constitution"; and this was subject to a proviso as to the proposal and adjustment of compensation by state agents in the presence and with the approval of commissioners of the United States. The lands in question were accordingly conveyed to Robert Morris by the treaty above mentioned. From the preamble (as shown by the original on file in the State Department, a copy of which has been produced by the Government) it appears that the conveyance was made under the authority of the United States, and in the presence of the United States Commissioner, and the treaty was proclaimed by the President after ratification by the Senate on April 11, 1798. The convention is in the form of an indenture by which (identifying the tract as being part of that embraced in the Hartford Convention) these lands were granted by the sachems, chiefs and warriors of the Seneca Nation to Robert Morris "his heirs and assigns forever." The lands—which were soon resold —thus passed by the conveyance into private ownership and were subject to the jurisdiction and sovereignty of the

State of New York. The grant contained the following reservation which is in question here:—"Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this non-exclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *à prendre*, to the extent defined; that is not questioned. The right asserted in this case is against the State of New York. It is a right sought to be maintained in derogation of the sovereignty of the State. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the State apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the State.

It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (*Geer* v. *Connecticut*, 161 U. S. 519; *Ward* v. *Racehorse*, 163 U. S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does,

go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the

grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States* v. *Winans*, 198 U. S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised."

We have assumed the applicability of the state law in question, as its construction is determined by the decision of the state court. We also assume that these Indians are wards of the United States, under the care of an Indian agent, but this fact does not derogate from the authority of the State, in a case like the present, to enforce its laws at the *locus in quo*. *Ward* v. *Racehorse, supra; United States* v. *Winans, supra.* There is no question of conflict with any legislation of Congress or with action under its authority; for the case rests on the construction of the treaty. The only action of Federal authority, that is pertinent, is found in the convention itself. It should be added that we have not considered any question relating to conduct or fishing rights upon territory, not ceded, which is comprised within the Indian Reservation; nor is it necessary to deal with other matters which have been discussed in argument touching the relation of the State of New York to the Indians within its borders.

We find no error in the judgment of the state court and it is accordingly affirmed.

Judgment affirmed.

STATE OF OHIO ON RELATION OF DAVIS *v.* HILDEBRANT, SECRETARY OF STATE OF OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 987. Submitted May 22, 1916.—Decided June 12, 1916.

Whether the guarantee of a republican form of government has been disregarded by the action of the people of a State in amending its Constitution presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution.

Under the referendum amendment of 1912 to the constitution of Ohio, the people of that State having disapproved of the state redistricting law passed after Congress had enacted the apportionment act of 1911, and the state court having held that under the referendum amendment the legislative power was reserved in the people to be expressed by referendum *held*, that:

The decision of the highest court of the State, that under such amendment the legislative power of the State is now vested not only in the General Assembly but also in the people by referendum and that a law disapproved by the referendum was no law, is conclusive here.

Nothing in the act of Congress of August 8, 1911, 37 Stat. 13, apportioning representation among the States, prevents the people of a State from reserving a right of approval or disapproval by referendum of a state act redistricting the State for the purpose of congressional elections.

THE facts, which involve the construction and effect of the referendum amendment of 1912 to the constitution of the State of Ohio, are stated in the opinion.

Mr. Sherman J. McPherson for plaintiff in error.

Mr. Edward C. Turner, Attorney General of the State of Ohio, *Mr. Edmond H. Moore* and *Mr. Timothy S. Hogan*, for defendants in error.

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

By an amendment to the constitution of Ohio adopted September 3, 1912, the legislative power was expressly declared to be vested not only in the Senate and House of Representatives of the State, constituting the General Assembly, but in the people in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the General Assembly. And by other constitutional provisions the machinery to carry out the referendum was created. Briefly they were this: Within a certain time after the enactment of a law by the Senate and House of Representatives and its approval by the Governor, upon petition of six percentum of the voters the question of whether the law should become operative was to be submitted to a vote of the people and if approved, the law should be operative, and if not approved, it should have no effect whatever.

In May, 1915, the General Assembly of Ohio passed an act redistricting the State for the purpose of congressional elections by which act twenty-two congressional districts were created in some respects differing from the previously established districts, and this act after approval by the Governor was filed in the office of the Secretary of State. The requisite number of electors under the referendum provision having petitioned for a submission of the law to a popular vote, such vote was taken and the law was disapproved. Thereupon in the Supreme Court of the State the suit before us was begun against state election officers for the purpose of procuring a mandamus directing them to disregard the vote of the people on the referendum disapproving the law and to proceed to discharge their duties as such officers in the next congressional election upon the assumption that the action by way of referendum was void and that the law which was disapproved was

subsisting and valid. The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the State and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress. Indeed it was in substance charged that both from the point of view of the state constitution and laws and from that of the Constitution of the United States, especially § 4 of Article I providing that "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to Places of choosing Senators", and also from that of the provisions of the controlling act of Congress of August 8, 1911 (c. 5, 37 Stat. 13) apportioning representation among the States, the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void. The court below adversely disposed of these contentions and held that the provision as to referendum was a part of the legislative power of the State, made so by the Constitution, and that nothing in the act of Congress of 1911 or in the constitutional provision operated to the contrary and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus.

Without going into the many irrelevant points which are pressed in the argument and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States referred to.

1. As to the state power, we pass from its consideration,

since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the State had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit.

2. So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since under the act of Congress dealing with apportionment which preceded the act of 1911, by § 4 it was commanded that the existing districts in a State should continue in force "until the legislature of such State in the manner herein prescribed shall redistrict such state,"(act of February 7, 1891, c. 116; 26 Stat. 735), while in the act of 1911 there was substituted a provision that the redistricting should be made by a State "in the manner provided by the laws thereof." And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do

it, of excluding the possibility of making the contention as to referendum which is now urged. Cong. Rec., Vol. 47, pp. 3436, 3437, 3507.

3. To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of Article I of the Constitution, and hence void even if sanctioned by Congress because beyond the constitutional authority of that body, and hence that it is the duty of the judicial power so to declare, we again think the contention is plainly without substance for the following reasons: It must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form in violation of the guarantee of the Constitution. Const., § 4, Art. IV. But the proposition and the argument disregard the settled rule that the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. In so far as the proposition challenges the power of Congress as manifested by the clause in the act of 1911 treating the referendum as a part of the legislative power for the purpose of apportionment where so ordained by the state constitutions and laws, the argument but asserts, on the one hand, that Congress had no power to do that which from the point of view of § 4 of Article I, previously considered, the Constitution expressly gave the right to do. In so far as the proposition may be considered as asserting, on the other hand, that any attempt by Congress to recognize the referendum as a part of the legislative authority of a State is obnoxious to a republican form of government as provided by § 4

of Article IV, the contention necessarily but reasserts the proposition on that subject previously adversely disposed of. And that this is the inevitable result of the contention is plainly manifest, since at best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guarantee of a republican form of government, has done something which it is deemed is repugnant to that guarantee, therefore there was automatically created judicial authority to go beyond the limits of judicial power and in doing so to usurp congressional power on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control free from judicial interference.

It is apparent from these reasons that there must either be a dismissal for want of jurisdiction because there is no power to reëxamine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied. In view, however, of the subject-matter of the controversy and the Federal characteristics which inhere in it, we are of opinion, applying the rule laid down in *Swafford* v. *Templeton*, 185 U. S. 487, the decree proper to be rendered is one of affirmance and such a decree is therefore ordered.

Affirmed.

BROWN *v.* PACIFIC COAST COAL COMPANY.

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

No. 303. Argued March 14, 1916.—Decided June 12, 1916.

In a case where its jurisdiction rests on diverse citizenship, it is the duty of the Federal court to follow the applicable decisions of the state court.

The Supreme Court of the State of Washington, having in an earlier and similar case to the one pending in the Federal court, decided that under the Mining Act of that State there is a duty on the mine owner to supply ventilation that will prevent accumulations of gas, which duty cannot be delegated, and that the gas tester is a representative of the principal,and not a fellow servant of other employees engaged in mining, *held*, that it was the duty of the Circuit Court of Appeals to have followed that ruling and to hold that the gas tester was not a fellow servant.

Even though in the earlier case in the state court, the words of the state Supreme Court might have been *obiter dicta*, if they stated the principle of the decision, it was the duty of the Federal court to follow them, even though the state court may have previously held otherwise.

214 Fed. Rep. 255, reversed; 211 Fed. Rep. 869, affirmed.

THE facts, which involve the validity of a judgment of the Circuit of Appeals in an action for personal injuries, and the duty of the Federal court to follow the applicable decisions of the state court in such cases, are stated in the opinion.

Mr. H. R. Lea, with whom *Mr. Charles F. Consaul* and *Mr. Charles C. Heltman* were on the brief, for petitioner.

Mr. C. H. Farrell, with whom *Mr. W. B. Stratton*, *Mr. J. H. Kane* and *Mr. Stanley J. Padden* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries caused to the petitioner, the plaintiff, a miner, by an explosion of gas in a coal mine, in consequence, it is alleged, of the defendant's neglect of its duty so to ventilate the mine as to make an explosion impossible. The trial judge left to the jury questions of the plaintiff's contributory negligence or assumption of risk, but instructed them that the law required the defendant to provide a sufficient amount of ventilation; that the duty of the inspection, prevention and removal of any accumulation of gas was a personal duty of the defendant that could not be delegated; and that an employee, one of whose duties was to test for gas, was not a fellow servant of the miners so far as he was engaged in the performance of that duty. There was a verdict for the plaintiff which was set aside by the Circuit Court of Appeals. 211 Fed. Rep. 869; 128 C. C. A. 247. 214 Fed. Rep. 255; 130 C. C. A. 625.

The duty of the fire-boss who exploded the gas was to test for gas as well as to fire the shots in blasting, which last he was about to do. It is unnecessary to go into further details, as the only matter that requires discussion is whether the Circuit Court of Appeals was right in reversing the judgment on the ground that this man was a fellow servant of the plaintiff and that the defendant's duty to secure ventilation was not absolute. The statute of 1897, which was in force at the time of the accident, September 7, 1910, enacts that the owner or operator of every coal mine 'shall provide in every coal mine a good and sufficient amount of ventilation for such persons and animals as may be employed therein,' fixing a minimum amount, 'and said air must be made to circulate through the shafts, levels, stables, and working places of each mine and on the traveling roads to and from all

such working places.' Then the division of mines into districts or splits and the number of men to be employed in each are provided for, and then the act goes on 'Each district or split shall be ventilated by a separate and distinct current of air, conducted from the down-cast through said district, and thence direct to the up-cast. . . . In all mines where fire-damp is generated, every working place shall be examined every morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book,' etc. Laws of 1897, c. 45, § 4. Bal. Wash. Code, § 3165. Rem. & Bal. Code, § 7381.

In the case of a similar accident occurring under the same law the Supreme Court said "the duty of inspection, prevention, and removal of any accumulation of gas is imposed on the coal company. This duty is personal, and cannot be delegated. . . . The gas tester, under the facts in this case, was not a fellow servant with the plaintiff. He was the representative of principal duties of the defendant." The refusal of the instruction that the gas tester was a fellow servant with the plaintiff, a miner, was upheld. *Costa* v. *Pacific Coast Co.*, 26 Washington, 138, 142, 143. The language of this case was quoted and the same principle applied in *Czarecki* v. *Seattle & San Francisco Ry. & Navigation Co.*, 30 Washington, 288, 294, 295. And the same words were repeated by the judge to the jury in the present case.

When this case came before the Circuit Court of Appeals it seems to have been thought that *Costa* v. *Pacific Coast Co.* arose under an earlier statute. Upon a petition for rehearing the court merely stated that no decision of the Supreme Court had been found that held the person required to examine the working places every morning to be the representative of the master, and that the fire-boss must be regarded as a fellow servant with the plaintiff. We are unable to reconcile this view with the

language that we have quoted. It now is suggested that there is a distinction between the point decided there and here, the failure there having been to warn the miner, and that the remarks of the court were *obiter dicta*. We shall go into no nice inquiry upon this point. The statements were statements of the principle of the decision and it was the duty of the Circuit Court of Appeals to follow them. Still less does it matter in a case like this, if, as is said, the latter court had decided otherwise at an earlier time.

Concerning the facts to which the ruling here dealt with applied, it is enough to say that the evidence warranted a finding by the jury that the defendant had neglected the duties absolutely imposed upon it, without now going into the details of the different views that might have been taken. The other matters that have been argued here, as to the plaintiff's contributory negligence, etc., need not be mentioned further than to say that we see no ground in them for a different result from that which we have reached.

Judgment reversed.

Judgment of District Court affirmed.

SUPREME LODGE, KNIGHTS OF PYTHIAS *v.* MIMS.

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

No. 345. Argued May 1, 2, 1916.—Decided June 12, 1916.

Where the case necessarily turns on the construction of act of Congress, which is the charter of one of the parties, a Federal question is presented, and this court has jurisdiction under § 237, Jud.

Code, if the construction contended for by plaintiff in error was rejected by the court below.

Under § 4 of the Act of June 29, 1894, constituting the charter of the Knights of Pythias, giving a right to have by-laws and to amend the same, the corporation had power to raise rates for life benefits to such point as was necessary for it to go, and a member continuing to remain therein was obligated to pay the assessments fixed by the laws as amended.

THE facts, which involve the construction of the charter granted by act of Congress to the Knights of Pythias and the rights and obligations of a holder of its insurance certificates, are stated in the opinion.

Mr. M. M. Crane, with whom *Mr. H. P. Brown, Mr. Edwin Crane, Mr. James P. Goodrich, Mr. Ward H. Watson, Mr. James E. Watson* and *Mr. Sol. H. Esarey* were on the brief, for plaintiff in error.

Mr. Lawrence C. McBride, with whom *Mr. Joseph E. Cockrell, Mr. Thomas F. West* and *Mr. Edward Gray* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit against a corporation chartered by Congress on June 29, 1894 (c. 119; 28 Stat. 96), to recover all sums paid by the plaintiff, the defendant in error, to the defendant and its predecessors; the ground alleged being that the defendant, the plaintiff in error, has demanded monthly dues in excess of its rights and thereby has entitled the plaintiff to recover all that he had paid, with interest.

The facts are as follows: The plaintiff originally took out two certificates of insurance from an earlier corporation of the same name, the charter of which expired on

August 5, 1890. In May, 1885, he surrendered these certificates and took out a new one in what was called the Fourth Class by which, in consideration of his original declarations and representations and of the payment "of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws" the sum of $3,000 was to be paid to the plaintiff's wife, or such other beneficiary as he might direct in proper form, upon notice and proof of death and good standing at the time; provided, as hereafter stated. It was further stipulated that any violation of the conditions mentioned or the requirements of the laws governing this Rank should avoid all claims. By the certificate of incorporation the corporation had power 'to alter and amend its Constitution and By-laws at will'; the laws of 1880, then in force, provided that 'these laws [regulating assessments *inter alia*,] may be altered or amended at any regular session of the Supreme Lodge K. of P.'; and by his original application the plaintiff agreed to conform to the laws and regulations of the order then in force or that might thereafter be enacted, or submit to the penalties therein contained.

The plaintiff contends that his contract took him out of these reiterated provisions for possible change; and his ground is that by Article V, § 4, of the laws of 1884, creating the Fourth Class, the endowment fund for the payment of benefits in that class was to be derived from monthly payments from each member for each one thousand dollars of endowment, to be graded according to the age of the member at the time of making application, and his expectancy of life, the age to be taken at the nearest birthday, "Said monthly payments shall be based upon the average expectancy of life of the applicant, and shall continue the same so long as his membership continues." A table appended gave the rate for the different ages from

21 to 60. At that time members were transferred to the Fourth Class at the original entry age, which in the plaintiff's case was 42. These same laws of 1884 repeated the former provision as to amendment by the Supreme Lodge, now requiring a two-thirds vote. The recension of 1886 repeated the last-mentioned provision and set forth a form of application by which the applicant agreed not only, as heretofore, that he, but also that 'this contract shall be controlled' by the laws then in force or that might be enacted thereafter. The power to alter was applied in 1888 to the payments to be made by the Fourth Class. The Board of Control was ordered to rerate members transferred to the Fourth Class as the plaintiff was, so that thereafter they should pay as of the age at which they were transferred instead of that at which they first became members. Thereafter the plaintiff paid as of the age of 48.

After the charter expired in 1890 the business was kept going under the same name by a voluntary association, the plaintiff paying his assessments as before, until on June 29, 1894, the act of Congress mentioned incorporated certain persons named, 'officers and members of the Supreme Lodge, Knights of Pythias' by the name of 'The Supreme Lodge Knights of Pythias' and authorized them to use the powers 'incidental to fraternal and benevolent corporations within the District of Columbia.' By the third section of the charter "all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge Knights of Pythias, mentioned in § 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time." This is the main ground upon which the defendant is

sought to be charged with the certificate issued by the former corporation. By § 4 "said corporation shall have a constitution, and shall have power to amend the same at pleasure; *provided*, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State." Amendments to the laws of the association were adopted this same year, 1894, by one of which the existing rates were retained and it was provided that each member of the endowment rank should continue to pay the same amount each month thereafter so long as he remained a member, 'unless otherwise provided for by the Supreme Lodge or Board of Control of the endowment rank.' A similar provision was made in 1900, but the rate for the age of 48 was made $2.45 or $7.35 for the $3,000 in the certificate. The plaintiff paid the rates as established from time to time.

The split came in 1910. In that year the corporation passed a law providing for a rerating of every member of the Fourth Class on January 11, 1911, in accordance with his attained age and occupation, under which the plaintiff's monthly payment would be raised to $34.80, unless he accepted one of several options offered to him. It should be added that his occupation played no part as it was not ranked as hazardous. He was notified, but declined to pay or otherwise accede to the change. On January 20, 1911, he tendered $22.05 for the months of January, February and March of that year, the tender was refused and in May this suit was begun. The Court of Civil Appeals affirmed a judgment for the plaintiff on a verdict directed by the trial court, modifying it so far as to confine the recovery to payments made since the issue of the certificate of 1885, with interest. An application to the Supreme Court for a writ of error was refused.

There is a motion to dismiss but as the case necessarily will turn on the construction of the present charter, an act of Congress, and the defendant justifies under it, the

motion is denied. *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 258. There is no ground for treating the plaintiff as not having come into the new company by virtue of § 3. That section provided for his doing so and when he was treated and acted as a member the presumption is conclusive that he did so in pursuance of the law that authorized it.

We assume without argument that by § 3 of the charter and his assent thereto the plaintiff became a member of the organization with whatever rights he might have as such. It is not to be conceived however that the charter was intended to create a privileged class or that the right of the corporation to amend its laws was less in his case than in that of one joining after 1894. As to later members we can have no doubt, notwithstanding the difference of opinion in state courts, that the right to amend extends to a change in the rates to be paid. Persons who join institutions of this sort are not dealing at arm's length with a stranger whose mode of providing for payment does not concern them, but only his promise to pay. They are joining a club the members of which have to pay any benefit that any member can receive. The corporation is simply the machine for collection and distribution. Its charter expressly provides by § 5 that it 'shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.' It is manifest therefore that it would be a perversion of its purposes, if through some ambiguity of phrase the necessary source of benefits were closed in favor of certain members while their right to insist upon payment remained. The essence of the arrangement was that the members took the risk of events, and if the assessments levied at a certain time were insufficient to pay a benefit of a certain amount, whether from diminution of members or any other cause, either they must pay more or the beneficiary take less.

The same conditions applied to the original corporation, and the plaintiff testifies that he understood them. He says in so many words that he knew that the only source of revenue to meet his and other policies was from assessments of the insured, and that if, after a proper rate was fixed for a membership of five thousand, the membership fell to two thousand, the rate would have to be increased if the obligations were to be met. The statute and the words of the law of the company under which the plaintiff entered the Fourth Class should be construed in the light of these considerations. In determining his rights it is important to bear in mind that there was no specific promise to him like the promise to pay in the certificate but that his whole reliance is upon a law of the corporation, and that he had notice that all laws of the corporation were liable to be repealed. The only language in the certificate bearing on the matter pointed to possible changes, one condition being the payment of all monthly payments 'as required.' It was obvious and understood that to pay a benefit an increase in the assessment might be necessary. In our opinion the present charter like the first must be construed to authorize such an increase and the clause in the law of 1884 relied upon—that the payments should continue the same so long as the membership continued—was not a contract but was a regulation subject to the possibility inherent in the case. More than ambiguous words in an amendable law would be needed to establish a departure from the ground on which the relation of the parties obviously stood and to create a privilege that attacked the corporation in its very life. Compare the language in *Royal Arcanum* v. *Green*, 237 U. S. 531, 542, and the same case below, *sub. nom Reynolds* v. *Royal Arcanum*, 192 Massachusetts, 150, 157.

The persons incorporated in 1894 were described as officers and members of the Supreme Lodge then existing, that is, of a voluntary association, and it was the rights

and duties of that association that the defendant assumed, if we are to take the words in their literal sense. We spend no time upon the inquiry what those rights and duties were, because, as we have said, we assume that the plaintiff acquired a standing in the new company. But in the second stage as in the first the law establishing the Fourth Class had received a practical construction as being open to change, by the continued rating of the plaintiff at 48 instead of 42 as at first, and although the plaintiff says in a general way that he protested, he paid, and he had notice of what the earlier companies asserted to be their rights when he came into the new one that asserted the same and put them in force as against him. We mention these details to show that the plaintiff suffers no injustice and meets with no surprise when we state our opinion that the assumption under § 3 of the new charter of a relation with the plaintiff that originally arose under a law of the old corporation was not the assumption of a contract for immutable assessments, and decide that the power to amend given by § 4 included the power to raise the rates to such point as was necessary for the corporation to go on.

The plaintiff's certificate did not absolutely promise to pay $3,000 if the plaintiff had performed the conditions. It contained a proviso by which if one monthly payment by members holding an equal amount of endowment should not be sufficient to pay the sum, the amount of the monthly payment should be the benefit received. If all other Fourth Class certificates were in similar form it may be asked whether it was reasonable to increase the assessments rather than to allow the payments to abate. The answer in addition to what we already have said is that unless the corporation continued to make substantial payments at death it could not go on. On the evidence, at the end of 1910 the plaintiff's certificate was worth very little or nothing. It well may have been

thought better to rehabilitate the class rather than to allow their certificates to become waste paper. At all events that was the prevailing view in the republic to which the plaintiff belonged, and as we have said the charter authorized it to be enforced. It is unnecessary to discuss the options that were offered in the alternative, but it is proper to remember that for many years the plaintiff has been insured, and although by what he is not likely to regard as bad fortune his beneficiary has not profited by it, she would have if he had died. As he happily has lived, he has to bear the burdens incident to the nature of the enterprise into which he went open eyed.

Judgment reversed.

SOUTHERN SURETY COMPANY *v.* STATE OF OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 124. Submitted December 9, 1915.—Decided June 12, 1916.

By reason of the conditions arising out of the presence of the Five Civilized Tribes no organized territorial government was ever established in the Indian Territory; and, in the absence of an organized local government, prosecutions for crime were, regardless of their nature, commenced and prosecuted in the name of the United States.

Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way.

Adultery is a punishable offense only when the common or statute law of the State so makes it, and where punishable, it is cognizable only in the courts of the State.

Forts, arsenals and like places within the exterior limits of a State, but over which exclusive jurisdiction has been ceded to the United States, are not regarded as a part of the State but are excepted out of it.

Quære whether Congress can deal with the crime of adultery committed by tribal Indians within a State.

Under §§ 16 and 20 of the Oklahoma Enabling Act and schedule 28 of the constitution of Oklahoma, the State took the place of the United States in regard to a prosecution for adultery, neither of the parties thereto being Indians, commenced in Indian Territory in one of the temporary courts of the United States, and all essential parts of the prosecution including the bail bond of which the United States was obligee passed to the State with power of enforcement thereof.

34 Oklahoma, 781, affirmed.

THE facts, which involve the construction of the Oklahoma Enabling Act and the jurisdiction of the state court of cases formerly pending in the temporary courts of Indian Territory, are stated in the opinion.

Mr. C. S. Arnold for plaintiff in error.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, *Mr. R. E. Wood* and *Mr. Smith C. Matson,* for defendant in error.

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

This is an action on a bail bond given by an accused held upon a charge of adultery to await the action of the grand jury at McAlester in the Indian Territory. The bond was given shortly before Oklahoma became a State, named the United States as the obligee and called for the accused's appearance before the temporary court of McAlester at the next term and from term to term until discharged. When the courts of the new State were organized an indictment for the adultery was returned against the accused in the state court at McAlester. He did not appear, a forfeiture was declared and the State sued on the bond, the surety alone being reached by the process. There was a judgment for the State, which

was affirmed, 34 Oklahoma, 781, and the surety sued out this writ of error.

The Federal questions presented involve the construction and application of the Enabling Act and are, first, whetherafter the admission of the State the further proceedings upon the charge of adultery were to be had in a Federal court or in a state court, and, second, whether by operation of law the State became the beneficiary of the bond and entitled to sue on it.

By reason of the conditions arising out of the presence of the Five Civilized Tribes no organized territorial government was ever established in the Indian Territory. Up to the time it became a part of the State of Oklahoma it was governed under the immediate direction of Congress, which legislated for it in respect of many matters of local or domestic concern which in a State are regulated by the state legislature, and also applied to it many laws dealing with subjects which under the Constitution are within Federal rather than state control. In what was done Congress did not contemplate that this situation should be of long duration, but on the contrary that the Territory should be prepared for early inclusion in a State. Courts designated as "United States courts" were temporarily established and invested with a considerable measure of civil and criminal jurisdiction, and there was also provision for beginning public prosecutions before subordinate magistrates. There being no organized local government, such prosecutions, regardless of their nature, were commenced and conducted in the name of the United States, and in taking bail bonds it was named as the obligee.

The Enabling Act, June 16, 1906, c. 3335, 34 Stat. 267; March 4, 1907, c. 2911, *ibid.* 1286, provided that the new State should embrace the Indian Territory as well as the Territory of Oklahoma. It contemplated that the State, by its constitution, would establish a system of courts of its own, and provided for dividing the State into two dis-

tricts and creating therein United States courts like those in other States. The temporary courts were to go out of existence and this made it necessary to provide for the disposition of the business pending before them in various stages. To that end the following provisions, among others not material here, were embodied in an amendment to the act, 34 Stat. 1286, 1287:

"Sec. 16. . . . Prosecutions for all crimes and offenses committed within the Territory of Oklahoma or in the Indian Territory, pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this Act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a State."

"Sec. 20. That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territory become a State, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States courts in the Indian Territory; . . . All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be prosecuted to a final determination in the State courts of Oklahoma under the laws now in force in that Territory."

Section 28 of the schedule to the state constitution referred to these and other closely related provisions and

said, they "are hereby accepted and the jurisdiction of the cases enumerated therein is hereby assumed by the courts of the State."

Thus by the concurrent action of Congress and the State all prosecutions, pending in the temporary courts of the Indian Territory, for offenses which would not have been cognizable in a court of the United States had they been committed within a State, were to be proceeded with in the courts of the State, as successors to the temporary courts. In other words, the test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a State when the offenses were committed. In this view it is plain that the prosecution in question was rightly proceeded with in the state court. Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way. It is a punishable offense only where the common or statute law of the State makes it such, and where punishable, it is cognizable only in the courts of the State. Of course, we exclude from present consideration forts, arsenals and like places within the exterior limits of a State, but over which exclusive jurisdiction has been ceded to the United States, because they are regarded, not as part of the State, but as excepted out of it. And we pass the question of the power of Congress to deal with such offenses in respect of tribal Indians within a State, because the statute under which this prosecution arose was general in its terms, and because it is not claimed that either of the participants in the adulterous act was an Indian.

Some reliance is placed upon § 14 of the Enabling Act, which refers in part to offenses committed prior to the State's admission, but of this section it is enough for present purposes to say that when it is read in connection with the provisions of §§ 16 and 20 before quoted it is apparent that it was intended to mark the line separating

the jurisdiction of the Federal courts in the two districts, as between themselves, and not the line separating their jurisdiction from that of the state courts.

Because no indictment was returned in the temporary court at McAlester before the State was admitted, it is contended that this prosecution was not "pending" in that court in the sense of §§ 16 and 20. These sections included all pending "causes, proceedings, and matters," as well as "prosecutions" and "cases," and evidently were designed to be very comprehensive. The accused not only was held by a magistrate to await the action of the grand jury at the next term of the temporary court, but gave bail for his appearance in the court at that term. After this was done we think a prosecution or proceeding was pending in the court in the sense of the statute. That no indictment was returned in that court is explained by the fact that the court, through the State's admission, went out of existence before an indictment could be found and returned in regular course.

The Enabling Act and the state constitution united in declaring that the state courts, in respect of the prosecutions which were to be transferred to them, should be the successors of the temporary courts. The bail bond was given several months after the act and the state constitution were adopted. Indeed, the State's admission was imminent at the time. So, the bond must be taken as given with the approaching change in mind and as meaning that the accused's appearance should be in the state court as the legal successor of the temporary court, if the latter should go out of existence before the time for appearance arrived. The law existing when a contract is made and affecting its performance becomes a part of it. *Northern Pacific Ry. Co.* v. *Wall, ante,* p. 87.

The Enabling Act, when taken in connection with the schedule to the state constitution, leaves no doubt that the State was to take the place of the United States in

dealing with and conducting this prosecution. The bail bond was essentially a part of the proceeding that was transferred and was without force or value in any other connection. So, when the power and duty resting upon the United States were passed to the State there went with them the right to use and enforce the bond as the United States might have done, had the proceeding remained in its control; in other words, the State became by operation of law the beneficiary of the bond, and was entitled to sue on it when its condition was broken.

Judgment affirmed.

DAYTON, TRUSTEE, ETC. *v.* STANARD, TREASURER OF PUEBLO COUNTY, COLORADO.

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

No. 404. Submitted January 7, 1916.—Decided June 12, 1916.

Under § 64a of the Bankruptcy Act the holders of tax certificates who have paid taxes and assessments on property of the bankrupt at tax sales of such property, which sales have been declared invalid, are entitled to be reimbursed the amount paid, on cancellation of their certificates, out of the general fund of the bankrupt's estate, with legal interest, but not with the larger interest and penalties imposed by statute in tax sale redemptions.

220 Fed. Rep. 441, modified and affirmed.

THE facts, which involve the rights, under § 64a of the Bankruptcy Act, of the holders of tax sale certificates of land of the bankrupt, are stated in the opinion.

Mr. Harvey Riddell for petitioner.

Mr. Horace Phelps for respondents.

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

This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in *custodia legis* and was sold without leave of court. Because of this the court held the sales invalid and entered a decree canceling the certificates of purchase and enjoining the County Treasurer from issuing tax deeds thereon. Thus far there is no room to complain. *Wiswall* v. *Sampson,* 14 How. 52; *Barton* v. *Barbour,* 104 U. S. 126; *In re Tyler,* 149 U. S. 164; *In re Eppstein,* 156 Fed. Rep. 42. The court further directed in its decree that the several tracts be sold by the trustee free from any lien for the taxes and assessments, and that the holders of the certificates of purchase be severally reimbursed out of the proceeds of the respective tracts, but not out of the general assets, for the taxes and special assessments paid thereon, with the interest and penalties which accrued prior to the time the trustee took possession. Upon appeal to the Court of Appeals that court modified the decree by requiring that the certificate holders be reimbursed for the amounts paid at such sales and for subsequent taxes, together with interest thereon, "as provided by the laws of Colorado on redemption from tax sales of land," the same to be paid "out of the general fund, regardless of the amount which the property may bring at bankruptcy sale." 220 Fed. Rep. 441.

The trustee urges, first, that the certificate holders should not be reimbursed at all; second, that, if reimbursed, they should not be allowed any interest or penalties other than such as accrued prior to the time when the trustee qualified and took possession, and, third, that they should not be reimbursed out of the general

assets, but only out of the proceeds of the trustee's sale of the tracts for which they severally had certificates.

Considering the plain provision in § 64a of the Bankruptcy Act of 1898 (30 Stat. 544), that "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt . . . in advance of the payment of dividends to creditors," we entertain no doubt of the propriety of requiring that the certificate holders, who had paid the taxes and assessments at the sales, be reimbursed upon the cancellation of their certificates, or of requiring that the reimbursement be out of the general assets. The taxes and assessments were not merely charges upon the tracts that were sold, but against the general estate as well.

And while we are of opinion that the certificate holders were entitled to interest upon the amounts paid at the ordinary legal rate, applicable in the absence of an express contract, we think they were not entitled to the larger interest required to be paid on redemption from tax sales. They were not in a position to stand upon the terms of the redemption statute, for the sales were invalid, and the only recognition which they could ask was such as resulted from an application of equitable principles to their situation. The decree of the Circuit Court of Appeals is modified to conform to what is here said respecting the allowance of interest. In other respects it is affirmed.

Decree modified and affirmed.

UNITED STATES *v.* NICE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 681. Argued April 24, 1916.—Decided June 12, 1916.

The General Allotment Act of 1887 discloses that the tribal relation of the Indians, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments; and subsequent legislation shows repeated instances in which the tribal relation of allottee Indians was recognized as continuing during the trust period.

Congress has power to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a State, whether upon or off an Indian reservation.

When Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, tribal relations may be dissolved and the national guardianship ended, but the time and manner of ending the guardianship rests with Congress.

Legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred.

Words in a statute, although general, must be read in the light of the statute as a whole and with due regard to the situation in which they are to be applied.

Under the General Allotment Act of 1887 and the act of March 2, 1889, making allotments of lands in the Rosebud Reservation, tribal relations and government wardship were not disturbed by the allotments or the trust patents; and during the trust period Congress has power to regulate or prohibit the sale of intoxicating liquor to Allottee Indians, and so held as to the act of January 30, 1897, c. 109, 29 Stat. 506.

In view of many enactments of Congress since the decision of this court in *Matter of Heff*, 197 U. S. 488, reflecting the intent of Congress in regard to sale of intoxicating liquor to Indians, this court is constrained to and does overrule that decision.

THE facts, which involve the construction and constitutionality of the provisions of the act of January 30,

1897, prohibiting the sale of intoxicating liquors to allottee Indians, are stated in the opinion.

Mr. Assistant Attorney General Warren for the United States:

The Government contends that the *Pelican Case*, 232 U. S. 214, decided in 1914, is inconsistent with the *Heff Case*, 197 U. S. 488, and must be deemed to overrule it. In the *Pelican Case* it was alleged that murder of an Indian had been committed by a white man in Indian country. Unless the crime took place in Indian country it was not punishable by Federal law, since Congress, though having the power to punish murder of an Indian ward in any locality, had only partially exercised its power, and had confined its legislation to murder in the Indian country. Unless the murder was of an Indian ward of the Government, the crime was not punishable by Federal law, since the state laws extended to crimes committed even in Indian country by a white man (or non-Indian) against another white man (or non-Indian), and Congress had no power to punish such crimes. The murdered Indian was an allottee having the same status as the Indian in the *Heff Case* and in the case at bar. This court held (1) that the allotted land where the murder was committed was Indian country; (2) that the murdered man was an Indian ward under protection of the Government, and that the Federal and not the state law applied to him.

The Government now contends that if an allottee Indian is still capable of protection by Federal law against murder, as a ward, he is capable of protection, as a ward, by Federal law against sale of liquor.

If this court shall hold that the *Pelican* and *Heff Cases* cannot be reconciled, the Government submits that it should reconsider and overrule the *Heff Case*.

It is the contention of the Government in this case that

allottee Indians, even after the Allotment Act of 1887, still remained members of Indian tribes; that the Indian Liquor Act of January 30, 1897, was a valid exercise of the power of Congress under the commerce clause, and not an exercise of police power, and that Congress by the Allotment Act of 1887 did not in fact relinquish, and had no power in law, to relinquish, to the State, its exclusive constitutional regulation of commerce with the Indian tribes and their members.

The power of Congress to regulate commerce with the Indian tribes is exclusive.

Commerce "with the Indian tribes" includes commerce with the individual members of a tribe.

The act of January 30, 1887, is a regulation of commerce with the Indian tribes.

The history of Federal legislation prohibiting sale of liquor to Indians shows that the *Heff Case* was wrong in treating the act of 1897 merely as an exercise of the police power. It was enacted under the commerce clause of the Constitution; and the power to regulate trade with the Indian tribes belongs exclusively to Congress as long as any Indian tribal status exists. The *Heff Case* is inconsistent with *United States* v. *Holliday*.

The tribal relations of the Sioux Indians, in fact, still continue. It has also been shown that the Indian in the case at bar is a member of the Sioux Tribe, and in fact under the care of an Indian agent.

It is for Congress and not for this court to say when the tribal existence shall be deemed to have terminated.

Congress when it terminates tribal status, does so in express terms.

The grant of citizenship does not *ipso facto* terminate tribal status. An Indian allottee, even though a citizen, is still an Indian, and an Indian ward as well.

The General Allotment Act of 1887, conferring citizenship on allottee Indians and subjecting allottees to state

laws, did not abolish tribes nor deprive Congress of power to regulate commerce with tribal allottees.

The act of 1887 did not repeal in express terms Rev. Stat., § 2139, by which statute Congress was exercising its constitutional power to regulate commerce with the Indians; and even if it did so repeal, it could not debar Congress from enacting similar legislation in the future.

Congress has no authority to delegate a power vested by the Constitution in it exclusively.

Even if Congress, by the act of 1887, intended to adopt existing state laws upon the subject of the liquor traffic, and thus by implication to abandon its own regulation (a seemingly untenable implication), nevertheless it retained the power to exercise control over regulation of commerce with the Indian tribes, and this power it exercised by passing the liquor-traffic acts of 1892 and 1897.

Congress, by the act of 1887, clearly did not terminate the tribal relationship or status of the allottee Indians. Hence it had no power irrevocably to commit the regulation of commerce with the Indian tribes into the hands of the States. And when by the act of 1897 it exercised power to regulate, it had the right to do so. Numerous authorities support these contentions.

Mr. O. D. Olmstead, with whom *Mr. W. B. Backus* and *Mr. W. J. Hooper* were on the brief, for defendant in error:

The decision of the District Court was based on the construction given to the statute under which the indictment was drawn in *In re Heff,* 197 U. S. 48. The defendant in error stands on the decision in that case, and respectfully contends that this decision correctly construes the statute, and that, thereunder, he is not guilty of an offense.

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

This is a prosecution for selling whiskey and other intoxicating liquors to an Indian in violation of the act of January 30, 1897, c. 109, 29 Stat. 506. According to the indictment, the sale was made August 9, 1914, in Tripp County, South Dakota; the Indian was a member of the Sioux tribe, a ward of the United States and under the charge of an Indian agent; and the United States was still holding in trust the title to land which had been allotted to him April 29, 1902. A demurrer was sustained and the indictment dismissed on the ground that the statute, in so far as it purports to embrace such a case, is invalid, because in excess of the power of Congress. The case is here on direct writ of error under the Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246.

By the act of 1897 the sale of intoxicating liquor to "any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship," is denounced as a punishable offense.

The allotment to this Indian was made from the tribal lands in the Rosebud Reservation, in South Dakota, under the act of March 2, 1889, c. 405, 25 Stat. 888, the eleventh section (p. 891) of which provided that each allotment should be evidenced by a patent, inaptly so called, declaring that for a period of twenty-five years—and for a further period if the President should so direct—the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the end of that period would convey the

same to him or his heirs in fee, discharged of the trust and free of all charge or encumbrance; that any lease or conveyance of the land, or contract touching the same, made during the trust period, should be null and void, and that each allottee should "be entitled to all the rights and privileges and be subject to all the provisions" of § 6 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388. The act of 1889 recognized the existence of the tribe, as such, and plainly disclosed that the tribal relation, although ultimately to be dissolved, was not to be terminated by the making or taking of allotments. In the acts of March 3, 1899, c. 450, 30 Stat. 1362, and March 2, 1907, c. 2536, 34 Stat. 1230, that relation was recognized as still continuing, and nothing is found elsewhere indicating that it was to terminate short of the expiration of the trust period.

By the General Allotment Act of 1887 provision was made for allotting lands in any tribal reservation in severalty to members of the tribe, for issuing to each allottee a trust patent similar to that just described and with a like restraint upon alienation, and for conveying the fee to the allottee or his heirs at the end of the trust period. Its sixth section, to which particular reference was made in § 11 of the act of 1889, declared that, upon the completion of the allotments and the patenting of the lands, the allottees should have "the benefit of and be subject to the laws, both civil and criminal, of the State or Territory" of their residence, and that all Indians born in the United States who were recipients of allotments under "this act, or under any law or treaty," should be citizens of the United States and entitled to all the rights, privileges and immunities of such citizens. This act, like that of 1889, disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians

having allotments under the act was recognized during the trust period as still continuing.

With this statement of the case, we come to the questions presented for decision, which are these: What was the status of this Indian at the time the whiskey and other liquors are alleged to have been sold to him? And is it within the power of Congress to regulate or prohibit the sale of intoxicating liquor to Indians in his situation?

The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a State, whether upon or off an Indian reservation, is well settled. It has long been exercised and has repeatedly been sustained by this court. Its source is two-fold; first, the clause in the Constitution expressly investing Congress with authority "to regulate commerce . . . with the Indian tribes", and, second, the dependent relation of such tribes to the United States. Of the first it was said in *United States* v. *Holliday*, 3 Wall. 407, 417: "Commerce with the Indian tribes, means commerce with the individuals composing those tribes. . . . (p. 418). The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of a member of the tribe with whom it is carried on. . . . (p. 419). This power residing in Congress, that body is necessarily supreme in its exercise." And of the second it was said in *United States* v. *Kagama*, 118 U. S. 375, 383: "These Indian tribes *are* the wards of the Nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."

What was said in these cases has been repeated and applied in many others.[1]

Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.[2] Thus in *United States* v. *Holliday*, a prosecution for selling spirituous liquor to a tribal Indian in Michigan when not on a reservation, the contention that he had become a citizen was dismissed as "immaterial"; in *Hallowell* v. *United States*, a prosecution for taking whiskey upon an allotment held by a tribal Indian in Nebraska, the fact that he had been made a citizen was held not to take the case out of the congressional power of regulation; and in *United States* v. *Sandoval*, a prosecution for introducing intoxicating liquors into an Indian pueblo in New Mexico, it was held that whether the In-

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[1] *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *Dick* v. *United States*, 208 U. S. 340; *United States* v. *Sutton*, 215 U. S. 291; *Hallowell* v. *United States*, 221 U. S. 317; *Ex parte Webb*, 225 U. S. 663; *United States* v. *Wright*, 229 U. S. 226; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Pelican*, 232 U. S. 442; *Perrin* v. *United States*, 232 U. S. 478; *Johnson* v. *Gearlds*, 234 U. S. 422; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 545.

[2] *United States* v. *Holliday*, 3 Wall. 407; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308; *United States* v. *Rickert*, 188 U. S. 432, 445; *United States* v. *Celestine*, 215 U. S. 278; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 311–316; *Hallowell* v. *United States*, 221 U. S. 317, 324; *United States* v. *Sandoval*, 231 U. S. 28, 48; *Eells* v. *Ross*, 64 Fed. Rep. 417; *Farrell* v. *United States*, 110 Fed. Rep. 942; *Mulligan* v. *United States*, 120 Fed. Rep. 98.

dians of the pueblo were citizens need not be considered, because that would not take from Congress the power to prohibit the introduction of such liquors among them.

The ultimate question then is, whether § 6 of the act of 1887—the section as originally enacted—was intended to dissolve the tribal relation and terminate the national guardianship upon the making of the allotments and the issue of the trust patents, without waiting for the expiration of the trust period. According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred. Upon examining the whole act, as must be done, it seems certain that the dissolution of the tribal relation was in contemplation; but that this was not to occur when the allotments were completed and the trust patents issued is made very plain. To illustrate: Section 5 expressly authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands "as such tribe shall, from time to time, consent to sell", directs that the purchase money be held in the Treasury "for the sole use of the tribe", and requires that the same, with the interest thereon, "shall be at all times subject to appropriation by Congress for the education and civilization of such tribe . . . or the members thereof." This provision for holding and using these proceeds, like that withholding the title to the allotted lands for twenty-five years and rendering them inalienable during that period, makes strongly against the claim that the national guardianship was to be presently terminated. The two together show that the Government was retaining control of the property of these Indians, and the one relating to the use by Congress of their moneys in their "education and civilization" implies the retention of a control reaching far beyond their property.

As pointing to a different intention, reliance is had

upon the provision that when the allotments are completed and the trust patents issued the allottees "shall have the benefit of and be subject to the laws, both civil and criminal, of the State" of their residence. But what laws was this provision intended to embrace? Was it all the laws of the State, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress? The words, although general, must be read in the light of the act as a whole and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the State. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the State were not to have any bearing upon the execution of any direction Congress might give in this matter. The Constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation, and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject or of adopting and enforcing new ones if deemed advisable.

The act of 1887 came under consideration in *United States* v. *Rickert*, 188 U. S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the

horses, cattle and other personal property issued to them by the United States and used on their allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition", held that the State was without power to tax the lands and other property, because the same were being held and used in carrying out a policy of the Government in respect of its dependent wards, and that the United States had such an interest in the controversy as entitled it to maintain a bill to restrain the collection of the taxes.

In addition to the fact that both acts—the general one of 1887 and the special one of 1889—disclose that the tribal relation and the wardship of the Indians were not to be disturbed by the allotments and trust patents, we find that both Congress and the administrative officers of the Government have proceeded upon that theory. This is shown in a long series of appropriation and other acts and in the annual reports of the Indian Office.

As, therefore, these allottees remain tribal Indians and under national guardianship, the power of Congress to regulate or prohibit the sale of intoxicating liquor to them, as is done by the act of 1897, is not debatable.

We recognize that a different construction was placed upon § 6 of the act of 1887 in *Matter of Heff*, 197 U. S. 488, but after reëxamining the question in the light of other provisions in the act and of many later enactments clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled.

Judgment reversed.

UNITED STATES *v.* QUIVER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 682. Submitted April 28, 1916.—Decided June 12, 1916.

The policy reflected by the legislation of Congress and its administration for many years is that the relations of the Indians among themselves are to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise.

Section 316 of the Penal Code does not embrace the offense of adultery committed by one Indian with another Indian on an Indian reservation.

THE facts, which involve the construction and application of certain provisions of the act of March 3, 1887, and § 316, Penal Code, are stated in the opinion.

Mr. Assistant Attorney General Warren for the United States:

The United States District Court for the District of South Dakota has jurisdiction of a prosecution for the offense of adultery committed by Indians upon an Indian reservation (formerly a portion of the "Great Sioux" Reservation) located within the boundaries of the State and district.

Rev. Stat., § 2145, is still in force and not repealed by § 328, Fed. Penal Code, and gives to the Federal courts jurisdiction to try all crimes committed in Indian country except such specific crimes and class of crimes as are expressly excepted in said section and in § 2146.

Adultery is not an offense against the person or property of any person, and is not included within the provision excepting from the operation of Rev. Stat., § 2145, offenses by one Indian against the person or property

of another Indian. Jurisdiction over the adultery committed in the Indian country in the case at bar, therefore, vested in the Federal court under Rev. Stat., § 2145.

The enactment of the statutes incorporated in §§ 328, 329, Criminal Code, neither expressly nor impliedly repealed or superseded the provisions of § 2145, Rev. Stat.

The Enabling Act of the State of South Dakota in nowise supersedes Rev. Stat., § 2145, so far as offenses committed by Indians upon Indian reservations within that State are involved, and § 329, Penal Code, was enacted in order to broaden the scope of jurisdiction of the United States District Court for the District of South Dakota and not to repeal the jurisdiction it already had under Rev. Stat., § 2145.

The offense of adultery is sufficiently defined in § 316, Criminal Code, upon which the indictment is based. Numerous authorities sustain these contentions.

Mr. A. G. Granger and *Mr. Geo. A. Jeffers* for defendant in error.

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

This is a prosecution for adultery committed on one of the Sioux Indian Reservations in the State of South Dakota. Both participants in the act were Indians belonging to that reservation. The statute upon which the prosecution is founded was originally adopted as part of the act of March 3, 1887, c. 397, 24 Stat. 635, and is now § 316 of the Penal Code. The section makes no mention of Indians, and the question for decision is, whether it embraces adultery committed by one Indian with another Indian on an Indian reservation. The District Court answered the question in the negative.

At an early period it became the settled policy of Con-

gress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian Intercourse Acts of May 19, 1796, c. 30, 1 Stat. 469, and of March, 1802, c. 13, 2 Stat. 139, provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other; and the act of June 30, 1834, c. 161, § 25, 4 Stat. 729, 733, while providing that "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country", qualified its action by saying, "the same shall not extend to crimes committed by one Indian against the person or property of another Indian." That provision with its qualification was later carried into the Revised Statutes as §§ 2145 and 2146. This was the situation when this court, in *Ex parte Crow Dog*, 109 U. S. 556, held that the murder of an Indian by another Indian on an Indian reservation was not punishable under the laws of the United States and could be dealt with only according to the laws of the tribe. The first change came when, by the act of March 3, 1885, c. 341, § 9, 23 Stat. 362, 385, now § 328 of the Penal Code, Congress provided for the punishment of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny when committed by one Indian against the person or property of another Indian. In other respects the policy remained as before. After South Dakota became a State, Congress, acting upon a partial cession of jurisdiction by that State, c. 106, Laws 1901, provided by the act of February 2, 1903, c. 351, 32 Stat. 793, now § 329 of the Penal Code, for the punishment of the particular offenses named in the act of 1885 when

committed on the Indian reservations in that State, even though committed by others than Indians, but this is without bearing here, for it left the situation in respect of offenses by one Indian against the person or property of another Indian as it was after the act of 1885.

We have now referred to all the statutes. There is none dealing with bigamy, polygamy, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers.

But counsel for the Government invite attention to the letter of the statute and urge that adultery is not an offense "by one Indian against the person or property of another Indian", and therefore is not within the exception in § 2146 of the Revised Statutes. It is true that adultery is a voluntary act on the part of both participants and strictly speaking not an offense against the person of either. But are the words of the exception to be taken so strictly? Murder and manslaughter are concededly offenses against the person and much more serious than is adultery. Was it intended that a prosecution should lie for adultery but not for murder or manslaughter? Rape also is concededly an offense against the person and is generally regarded as among the most heinous, so much so that death is often prescribed as the punishment. Was it intended that a prosecution should lie for adultery where the woman's participation is voluntary, but not for rape where she is subjected to the same act forcibly and against her will? Is it not obvious that the words of the exception are used in a sense which is more consonant with reason? And are they not intended to be in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of

the tribe, save when Congress expressly or clearly directs otherwise? In our opinion this is the true view. The other would subject them not only to the statute relating to adultery, but also to many others which it seems most reasonable to believe were not intended by Congress to be applied to them. One of these prohibits marriage between persons related within and not including the fourth degree of consanguinity computed according to the rules of the civil law and affixes a punishment of not more than fifteen years' imprisonment for each violator. To justify a court in holding that these laws are to be applied to Indians, there should be some clear provision to that effect. Certainly that is not so now. Besides, the enumeration in the acts of 1885 and 1903, now §§ 328 and 329 of the Penal Code, of certain offenses as applicable to Indians in the reservations carries with it some implication of a purpose to exclude others.

Judgment affirmed.

ABBOTT *v.* BROWN, UNITED STATES MARSHAL FOR SOUTHERN DISTRICT OF FLORIDA.

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

No. 611. Argued April 13, 1916.—Decided June 12, 1916.

A rule of the District Court requiring motions for new trials to be made within four days after entry of the verdict is a mere regulation of practice, a breach of which is only an error of procedure, not affecting the jurisdiction of the court.

After reviewing the statutes relating to the terms of the District Courts of Florida and the provisions of the Judicial Code and the Rules of Court relating thereto and to the granting of new trials, *held*, that:

Such statutory provisions are designed to render the District

Courts readily accessible to applicants for justice in all branches of the jurisdiction; and, while they require those courts to be always open only as courts of admiralty and of equity, they permit special terms to be held at any time for the transaction of any kind of business.

General Rule No 1, of the District Court for the Southern District of Florida, providing for day to day adjournments during the absence of the presiding judge, should be liberally construed so as to keep the court open from the beginning of one statutory term to the beginning of the next, *Harlan* v. *McGourin*, 218 U. S. 442; and an adjournment made pursuant to that rule does not bring the term to an end, nor is an order for a new trial made after such an adjournment, and before the beginning of the next term, beyond the jurisdictional power of the judge.

One is not estopped from asserting that the judge making an order for a new trial had jurisdiction to make the same, because in another proceeding he had moved to quash an indictment for subornation of perjury, in connection with such new trial, on the ground that the judge acted beyond his jurisdiction in granting the motion, because not made within the time prescribed by a rule of court, the indictment being quashed on a different ground and one not taken by the defendant.

THE facts, which involve the jurisdiction of the District Court to grant new trials during or after the term, are stated in the opinion.

Mr. Charles B. Parkhill for appellant.

Mr. Assistant Attorney General William Wallace, Jr., for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a final order discharging a writ of *habeas corpus* and remanding appellant to the custody of the United States Marshal. The facts are as follows: Appellant was indicted in the United States District Court for the Southern District of Florida, at Tampa,

for a violation of a section of the Criminal Code, and in the month of March, 1912, was tried and found guilty. On the twelfth day of the same month he was sentenced to confinement in the penitentiary at Atlanta for the term of one year and six months. On the same day, and after passing the sentence, the court entered the following order: "Ordered that court be adjourned in accordance with General Rule No. 1, and all orders and other matters be entered as of the term. Thereupon court is adjourned as ordered." After the entry of this order, Judge Locke, the district judge, went to Jacksonville, in the same district, and the deputy clerk noted on the minutes from day to day that court was open in accordance with General Rule No. 1, after which he entered orders made from time to time by the court in vacation. On May 24, 1912, appellant filed a motion for a new trial upon the ground of newly discovered evidence, with several affidavits in support of it. On June 26 Judge Locke, at Jacksonville, granted this motion, and made a proper order, pursuant to which appellant was brought to trial on February 11, 1913, when the jury disagreed. He was again tried on March 13, 1914, and the jury returned a verdict of not guilty. Thereafter, and in February, 1915, the persons who had made the affidavits in support of the motion for a new trial were indicted for perjury, and appellant was indicted for subornation of perjury. Appellant demurred to this indictment and moved to quash it upon the ground that Judge Locke had no jurisdiction to grant a new trial because the motion was not filed within four days after the verdict. The demurrer and motion to quash were heard by the then presiding judge, who sustained the demurrer and quashed the indictment upon the ground that Judge Locke had no power or authority, after the making of the adjournment order of March 12, 1912, to vacate or set aside the sentence passed upon appellant on that date.

Thereafter, and on March 20, 1915, the Government procured a commitment to be issued upon the original judgment of conviction, and it is under this writ that appellant is now held in custody.

Two questions arise: (1) Were the order for a new trial, and the trial proceedings had thereunder, null and void? (2) If not, should they nevertheless be so regarded as against appellant, because of what he did in obtaining the quashing of the indictment for subornation of perjury?

Under the first head, counsel for appellee cites a rule of the district court reading thus: "Motions for new trials shall be made within four days after the entry of the verdict, during which time no judgment shall be entered, except by leave of court," etc. We find in the record no evidence that there was such a rule; but, assuming we may take judicial notice of its existence, it was a mere regulation of practice, and a breach of it would be, at the utmost, a mere error of procedure, not affecting the jurisdiction.

The principal insistence, and the ground upon which the court rested the decision that is now under review, is that the adjournment order of March 12 brought the term to an end, so far as criminal business was concerned, and left the court without jurisdiction to entertain the motion of May 24 or grant a new trial thereon, because a court of law cannot set aside or alter its final judgment after the expiration of the term at which it was rendered, except pursuant to an application made within the term. *United States* v. *Mayer*, 235 U. S. 55, 67.

The order of March 12 must be read in connection with the General Rule to which it refers, and this must be interpreted in the light of the law regulating the terms and the business of the court. General Rule No. 1 is as follows:

"The law requiring the court to be always open for the transaction of certain kinds of business which may be

transacted under the statutes, and under the orders of the judge who may at the time be absent from the place in which the court is held, and which business can be transacted by the clerk under the orders of the judge, and is transacted from day to day in the court, it is ordered that, pending the temporary absence of the presiding judge of this district from the district, or the division of the district in which business is presented to be transacted, the clerk be present, either by himself or his deputy, daily, for the transaction of business, and upon such days as there is business to be transacted the court be opened, and that a record of the same be entered upon each of said days upon the minutes."

The provisions of law referred to are to be found in the Judicial Code (act of March 3, 1911, c. 231; 36 Stat. 1087, 1108), of which § 76 divides the State of Florida into two districts, northern and southern, and provides: "Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction."

Other sections to be considered are: Section 9 (§§ 574 and 638, Rev. Stat.), which declares that the District Courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing pleadings, issuing and returning process, and making interlocutory motions, orders, etc., preparatory to the hearing upon the merits; § 10 (§ 578, Rev. Stat.), requiring such courts to hold monthly adjournments of their regular terms for the trial of criminal causes when the business requires it;

and § 11 (§ 581, Rev. Stat.), which declares that a special term of the District Court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge, and that any business may be transacted at such special term which might be transacted at a regular term.

The provision of § 76 which requires the District Court to be open at all times for the purpose of hearing and deciding admiralty causes traces its origin to the act of February 23, 1847 (c. 20; 9 Stat. 131), which established the southern district of Florida, evidently for the especial purpose of disposing of admiralty business; and this particular provision was carried into the Revised Statutes as § 575. It covers the *hearing and deciding* of admiralty causes, while the provision now found in § 9, Jud. Code (§§ 574 and 638, Rev. Stat.), which originated in an act of August 23, 1842 (c. 188, § 5; 5 Stat. 517), relates to interlocutory proceedings "*preparatory to the hearing.*"

The statutory provisions referred to are designed to render the District Courts readily accessible to applicants for justice in all branches of the jurisdiction; and while they *require* those courts to be always open only as courts of admiralty and as courts of equity, they *permit* "special terms" to be held at any time for the transaction of any kind of business.

The celebrated remark of Lord Eldon: "The Court of Chancery is always open," (*Temple* v. *Bank of England*, 6 Ves. Jun. 770, 771), evidenced the great adaptability of the practice of that court to the needs of litigants; and modern legislation has shown a strong tendency to reform the practice of common law courts by facilitating the transaction of their business in vacation. The sections we have quoted from the Judicial Code indicate a policy of avoiding the hardships consequent upon a closing

of the court during vacations. The General Rule in question was evidently designed to carry out this policy and should receive a liberal interpretation consonant with its spirit: that is, as keeping the term alive, by adjournments from day to day, pending the temporary absence of the presiding judge, so that court might and should be actually opened upon such days as there was business of any character to be transacted. Thus interpreted, its effect was not different from that of the rule which this court, in *Harlan* v. *McGourin*, 218 U. S. 442, 449, 450, construed as keeping the court open from the beginning of one statutory term until the beginning of the next. Judge Locke so construed the General Rule and the adjournment order made under it, when he entertained and granted the motion for new trial filed May 24, 1912, and we are satisfied that he committed no jurisdictional error in so doing. It is obvious that the order for a new trial necessarily vacated the sentence of March 12, 1912, and that the subsequent acquittal of appellant exhausted the power of the court under the first indictment.

Nor is appellant, in our opinion, estopped to assert the jurisdiction of Judge Locke to entertain the motion for a new trial. The estoppel is sought to be based upon the position he is said to have taken in demurring to and moving to quash the indictment for subornation of perjury. The record shows, however, that the demurrer and motion were based upon the ground that the motion for new trial was not filed within four days after verdict. This was true in fact, but the court in effect held it not well founded in law; for it proceeded to sustain the demurrer and quash the indictment upon another ground, and one not taken by appellant, viz., that the adjournment order of March 12, 1912, brought the term to a conclusion and deprived Judge Locke of power to set aside the final judgment and sentence passed upon ap-

pellant on that day. The fundamental ground of an estoppel is wanting, and we need not weigh other considerations that might operate against it.

The judgment of conviction having been vacated by an order of the court made within the scope of its power and jurisdiction, there remains no legal foundation for the commitment issued on March 20, 1915, and appellant is entitled to be discharged from custody.

Final order reversed, and the cause remanded for further proceedings in conformity with this opinion.

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

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* HILTON-GREEN, EXECUTORS OF WIGGINS.

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

No. 126. Argued December 9, 1915.—Decided June 12, 1916.

Material representations in an application for life insurance which are incorrect, if known to be untrue by the assured when made, and nothing else appearing, invalidate the policy issued by the insurer relying on such representations, without further proof of actual conscious design to defraud.

The general rule, which imputes an agent's knowledge to the principal, does not apply when the third party knows there is no foundation for the ordinary presumption, and he is acquainted with circumstances plainly indicating that the agent will not advise the principal.

The rule imputing agents' knowledge to the principal is intended to protect those exercising good faith and not as a shield for unfair dealing.

While § 2765, Florida Statutes, undertakes to designate as agents of insurance companies certain persons, in fact, acting for such companies in some particulars, it does not fix the scope of their authority as between the company and third persons, and does not raise special agents with limited authority into general ones with unlimited power.

One consciously permitting an application containing material misrepresentations to be presented by subordinate agents to officers of a life insurance company, under circumstances which he knows negatives any probability of the actual facts being revealed, and later accepting policies which he knew were issued in reliance upon statements both false and material, can claim nothing under such policies.

An applicant for insurance should exercise toward the company the ame good faith which he may rightfully demand from it; the relationship demands fair dealing by both parties.

211 Fed. Rep. 31, reversed.

THE facts, which involve the construction and effect of an application for life insurance policy containing false statements, and the liability of the company issuing policies in reliance thereon, are stated in the opinion.

Mr. Frederick L. Allen, with whom *Mr. Emmett Wilson, Mr. Philip D. Beall* and *Mr. Murray Downs,* for petitioner.

Mr. W. A. Blount, with whom *Mr. A. C. Blount* and *Mr. B. F. Carter* were on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Respondents sued to recover upon four policies, not different except as to numbers, for $7,662.00 each and dated December 16, 1908, on the life of their testator Wiggins, who died March 26, 1910. By various pleas the insurance company set up that the application upon which policies were based contained material representations both false and fraudulent. In reply the executors denied truth of each plea and also alleged that if the appli-

cation contained any misrepresentations the actual circumstances were known to company when policies issued.

Two separate application blanks, each plainly printed upon a large single sheet, were filled out and presented. They are substantially identical except medical examiner's report upon one, dated December 15, 1908, is signed by Geo. C. Kilpatrick, M. D., in two places, while the other, dated December 16, 1908, is twice signed by J. S. Turberville, M. D. (Under the company's rules where insurance applied for amounted to $30,000 two medical examinations were required.)

At the top of each sheet the following appears: "THIS APPLICATION made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract of insurance, subject to the charter of the company and the laws of the State of New York. I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided."

Immediately thereafter are statements concerning assured's address, occupation, birth, character of policy desired, etc., and finally this, alleged and shown to be untrue: "22. I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or associations: None, and no such application

is now pending or awaiting decision." And this part of the paper concludes:

"Dated at Pine Barren, Fla. Dec. 15, 1908.

Signature of person whose life is proposed for insurance, } CILBEY L. WIGGINS

I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt No.—.

J. D. TORREY Soliciting Agent,

[by rubber stamp]

J. D. TORREY, MANAGER,
MOBILE, ALA."

On lower portion of the same page, under caption "Medical Examiner's Report," are sundry statements, ostensibly by applicant, concerning his health, history, etc.—among them the following, alleged and shown to be untrue:

"3. (a) What illnesses, diseases, or accidents have you had since childhood? Pneumonia. Number of attacks: One. Date of each: 1899. Duration: 30 days. Severity: Not severe. Results: Complete recovery."

"4. State every physician whom you have consulted in the past five years. None."

"8. Have you undergone any surgical operation? No."

"13. (a) Have you ever been under treatment at any asylum, cure, hospital or sanitarium. No."

"16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No."

This division ends thus:

"Dated at Pine Barren, State of Florida the 15 day of December 1908

Witness:

GEO. C. KILPATRICK, M. D.

I certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.

CILBEY L. WIGGINS
Signature of person examined."

At the top of reverse page, under "Medical Examiner's Report (Continued)", there are many answers purporting to be replies to inquiries propounded by medical examiner concerning applicant's figure, apparent age, measurements, pulse, results of physical examination and personal investigations, etc. And then the following:

"I certify that I have made this examination at Pine Barren, Fla., on this 15 day of December, 1908, and that the foregoing questions have been put, and the answers of the applicant recorded as stated.

GEO. C. KILPATRICK, M. D.
Medical Examiner."

The four policies, after being signed in New York by the president, secretary, and registrar of the company, were delivered to assured in Florida. Among others, they contain these clauses:

"This policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, a copy of which is indorsed hereon or attached hereto." "Agents are not authorized to modify this policy or to extend the time for paying a premium."

During summer of 1907 assured suffered serious pains in his head and, after consulting more than one physician, went to a sanitarium at Montgomery, Alabama, and was there operated on for a cystic enlargement of the lower jaw caused by an impacted wisdom tooth. He was confined to the sanitarium for ten days and remained under

immediate care of a physician from July 16th to August 13th, 1907.

Early in November, 1908, he applied to Prudential Insurance Company of America through J. C. Hogue, a special agent operating under J. R. Tapia, its manager at Mobile, Alabama, for insurance amounting to $40,000. The application was accompanied, according to its requirements, by two medical reports dated November 3d and 4th, signed respectively by Dr. J. C. McLeod and Dr. Geo. C. Kilpatrick. Several weeks later the company indicated unwillingness to accept risk because of location but the application although marked "withdrawn" was retained. At this time Wiggins had $30,000 insurance with the Prudential, $20,000 with the Equitable, and $5,000 with fraternal insurance companies.

The application of petitioner now under consideration resulted from earnest and persistent solicitation by the same J. C. Hogue. The circumstances under which papers were prepared and signed are not entirely clear; but it appears without contradiction that they were not signed by assured in Torrey's presence—there was no personal acquaintance between the two men. Also that neither medical report was signed by assured in presence of Dr. Geo. C. Kilpatrick or Dr. J. S. Turberville; and that neither physician made the personal examination certified by him. The physicians filled the blanks and signed their names at Hogue's request and because of his representations. Through Torrey, petitioner's district manager at Mobile, the application was forwarded to New York, and, relying upon its statements, officers there issued policies and sent them to assured with copies of application papers which by reference were incorporated therein. So far as appears, assured accepted them without objection and paid the premiums.

An effort was made to show that facts concerning Wiggins' medical history, former unsuccessful application to

Prudential and circumstances surrounding transactions now in question were known by Hogue, the medical examiners, or Torrey, each of whom it is claimed was petitioner's agent.

Assured was sixty-one years of age, president of a lumber company, apparently a man of considerable wealth, and experienced in insurance matters.

At conclusion of evidence counsel for insurance company asked a directed verdict. This was refused; and the court in effect instructed the jury: That in order for company successfully to defend upon ground of false statements these must have been material and made by Wiggins with knowledge of their falsity and with a fraudulent purpose—that is, with intent to deceive. That if they believed it knew of their falsity when application was accepted, no defense could be based upon them. That it knew the actual facts if the jury "should find that an agent whose knowledge would be the knowledge of the defendant did so know." But if the jury found that falsity of statements was within knowledge of Hogue and Torrey and medical examiners and further found an understanding, tacit or express, between Wiggins and said agents to procure the policies by collusive coöperation to conceal the truth, there could be no recovery. Excerpts which follow fairly indicate general import of charge:

"The contract of insurance in this case as expressed by the policies, embraces the statements and representations of Wiggins, the deceased, made to the agent, Hogue, or to Kilpatrick, or Turberville, the medical examiners. Such statements were required to be truthfully made, and was a condition for the issuance of the contract, and this contract provides that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties. Whether the representations made by Wiggins in his application for insurance had been rejected; or whether he had been treated in a cure, san-

itarium or hospital; or whether he had undergone a surgical operation; or whether he had had any illness or disease; or whether he had consulted a physician for his health, to serve as a defense by the company to this action, depends on whether such statements were knowingly false and fraudulently made.

"If Wiggins knew they were false, and that he made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; provided, that the company at the time it accepted the application of the deceased as an insurance risk, had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance.

"The knowledge of the agent of the insurance company would be the knowledge of the company, and if the agent representing the company in taking the application, or the statements of the medical examiners had knowledge of the falsity of the statements, then the insurance company would be estopped from setting up such false statements or misrepresentations of which they had knowledge before the issuance of the policy as a defense to this action.

. . .

"If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the agents Hogue, and Torrey and Turberville knew they were false, and you further find from the evidence that there was an understanding, tacit or expressed, between Wiggins and the said agents to procure the policies by collusive co-operation to conceal the truth from the company as to the several matters inquired about, then such conduct upon the part of Wiggins would avoid the policies, and the plaintiffs could not recover in this action."

Petitioner made timely objections and presented special

requests, setting forth its theory, which were denied. The Circuit Court of Appeals affirmed a judgment upon verdict for respondents. Among other things it said (211 Fed. Rep. 31, 34–35):

"That, under the language of the policies involved in this suit, the defendant, to avoid the policies for false representations, must establish their falsity, materiality, and the knowledge of the insured, actual or imputed, of their falsity.

. . .

"This leaves for consideration the representation of the insured that he had been examined by Dr. Turberville, defendant's medical examiner, and that the answers recorded by the medical examiner in his report were correct. In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of their falsity. It had such knowledge, if at all, because of the knowledge of its agents and examiners, who handled the matter for it."

And further (p. 37): "The statute [§ 2765, General Statutes of Florida—copied in margin] [1] prescribes that every

[1] "2765. *Agents.*—Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal

person who receives money for an insurance company in payment of a contract of insurance, or who directly or indirectly causes to be made any contract of insurance, shall be deemed to all intents and purposes an agent or representative of such company. Under this description, we think Torrey, the defendant's Mobile manager, Hogue, the soliciting agent, and the two medical examiners were agents of the defendant to all intents and purposes, and so, for the purpose of charging it with notice of what they knew, when the policies were written."

All parties treat the policies as Florida contracts. The medical examiners' reports are plainly integral parts of application and by apt words the latter became an essential constituent of the policies.

Considered in most favorable light possible, the above quoted incorrect statements in the application are material representations; and, nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud. *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335, 345; *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S. 183, 189; *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543, 556–557; May on Insurance, 4th ed., § 181.

The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows

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thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

there is no foundation for the ordinary presumption—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. The rule is intended to protect those who exercise good faith and not as a shield for unfair dealing. *The Distilled Spirits*, 11 Wall. 356, 367; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 156; *American Natl. Bank* v. *Miller*, 229 U. S. 517, 521, 522; Mechem on Agency, 2d ed., § 1815.

Section 2765 of the Florida statutes, *ante*, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons and certainly does not raise special agents with limited authority into general ones possessing unlimited power. We assume Hogue, Torrey and the medical examiners were in fact designated agents of the company with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. See *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304, 310; *New York Life Ins. Co.* v. *Russell*, 77 Fed. Rep. 94, 103; *Wood* v. *Firemen's Insurance Co.*, 126 Massachusetts, 316, 319; *John R. Davis Lumber Co.* v. *Hartford Fire Ins. Co.*, 95 Wisconsin, 226, 234–235.

The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the

representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties. *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519, 529, 533, 534; *Assurance Co.* v. *Building Association*, 183 U. S. 308, 361; *U. S. Life Ins. Co.* v. *Smith*, 92 Fed. Rep. 503.

Considered with proper understanding of the law, there is no evidence to support a verdict against petitioner and the trial court should have directed one in its favor.

Judgment of the Circuit Court of Appeals is reversed and the cause remanded to the United States District Court, Northern District of Florida, for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE PITNEY dissents.

HOLMES *v.* CONWAY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 335. Argued May 1, 1916.—Decided June 12, 1916.

The due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

All the requirements of the due process provision of the Fourteenth Amendment are complied with, provided the person condemned has sufficient notice and is afforded adequate opportunity to defend.

An attorney having obtained certain funds from the clerk of the court, the court in a summary proceeding directed him, after a full hearing to restore the same; on appeal this order was affirmed, and on re-

hearing the attorney set up that he had been denied due process of law by not being given adequate notice or a fair opportunity to defend. *Held* that, as the record does not sustain his contention in those respects, this court cannot say that he has been deprived of a Federal right.

92 Kansas, 787; 93 *Id.* 246, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of a judgment of a state court, are stated in the opinion.

Mr. Leonard S. Ferry, with whom *Mr. Thomas F. Doran* and *Mr. John S. Dean* were on the brief, for the plaintiff in error:

The Supreme Court of Kansas affirmed the judgment of the District Court on the ground that summary proceedings may be employed in enforcing claims against attorneys for acts done in a professional capacity. Summary proceedings must be based upon notice, and the party must be apprised of the nature and purpose of the proceedings, and have an opportunity to be heard. 37 Cyc. 530; 4 Cyc. 975; *In re Wall*, 107 U. S. 265; *Jefferie* v. *Laurie*, 23 Fed. Rep. 786; *Lynde* v. *Lynde*, 58 L. R. A. 471; *Galpin* v. *Page*, 18 Wall. 368; *Union Bldg. Ass'n* v. *Soderquist*, 87 N. W. Rep. (Ia.) 432; *Simon* v. *Croft*, 182 U. S. 427; *Rees* v. *Watertown*, 19 Wall. 107, 122; *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389; *Davis* v. *Board of Commissioners*, 65 Minnesota, 310; *Kuntz* v. *Sumpton*, 2 L. R. A. (Ind.) 655; *Davidson* v. *New Orleans*, 96 U. S. 97; 3 Words & Phrases, pp. 2244, 2245; *Hooker* v. *Los Angeles*, 188 U. S. 318.

The judgment affirmed by the Supreme Court of Kansas was rendered against plaintiff in error without due process of law, as required by the Fourteenth Amendment, as no notice was given him, and no adequate opportunity to defend was afforded him. *Louis. & Nash. R. R.* v. *Schmidt*, 177 U. S. 230; *Simon* v. *Croft*, 182 U. S.

427; *Davis* v. *Board of Comm.*, 65 Minnesota, 310; *Kuntz* v. *Sumpton*, 2 L. R. A. 655; *Hooker* v. *Los Angeles*, 188 U. S. 318.

A man's business, occupation, profession, or calling is his property, and is protected and guaranteed by the Constitution of the United States. *Slaughter-House Cases*, 16 Wall. 36; *Consolidated Steel Co.* v. *Murray*, 80 Fed. Rep. 821; *Ex parte Burr*, 9 Wheat. 922.

There was no appearance for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiff in error, Holmes, a lawyer practicing before the courts of Kansas, maintains that judgment has been rendered against him, in a cause where he appeared as counsel, without notice or opportunity to defend, contrary to inhibitions of the Fourteenth Amendment.

Acting for one Hess, he instituted proceedings against defendant in error in the District Court, Woodson County, Kansas, seeking personal judgment on a note and foreclosure of mortgage on real estate. Judgment was rendered November 16, 1910, for $2,612.00; and the sheriff sold the land January 19, 1911, to Hess for $1,700.00, subject to redemption within eighteen months. An assignment prepared by Holmes immediately transferred the certificate of purchase to C. F. Harder, but no public record of this transaction was made until August 24, 1912.

An insured building on the mortgaged property burned shortly before sheriff's sale and, upon motion presented by Holmes, the court made an order "restraining and enjoining the said defendant Conway from in any manner disposing of said insurance policies upon the buildings on said mortgaged premises, or disposing of any moneys

collected." Questions arose concerning validity of policies and following an agreement between Holmes and Hogueland, attorney for Conway, a compromise was effected under which the companies paid $1,075.00—$500.00, February —, 1911, and $575.00, March —, 1911. Conway and his attorney claimed that under the agreement this sum was to be applied towards redeeming the land. Holmes claimed it was to go towards discharging the personal judgment.

On February 24, 1911, $500.00 of the insurance money was paid into court by Hogueland. The clerk gave a receipt reciting, "the same being in part payment of the redemption in the above entitled cause." On the next day this sum was withdrawn by Holmes and, as he claims, remitted to Hess. On March 31, 1911, Hogueland delivered a draft for remainder of insurance money to Holmes, who claims that he remitted proceeds to Hess. Conway paid into court $738.03, July 15, 1912, which, with the $1,075.00 above referred to, made up amount necessary to redeem property sold by sheriff, and the clerk gave him a redemption receipt.

Exactly when Holmes began to represent Harder is not clear—certainly it was not later than June 1, 1911. In August, 1912, Holmes as counsel entered a motion for an order directing the sheriff to convey to Harder the land theretofore sold. Conway resisted, claiming that by paying the necessary sum he had redeemed the property. Solution of the issue presented depended upon professional conduct of Holmes, and his affidavits were put in evidence. The motion was denied; but a rehearing was granted and took place in February, 1913. Additional proofs, including two more of his own affidavits, were offered by Holmes, then present in court, and taken under consideration. April 30, 1913, Holmes still being present, the court denied motion for instruction to sheriff and further "ordered, adjudged and decreed, that the plaintiff A. E.

Hess and S. C. Holmes, his attorney of record, within thirty days from this date, . . . return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest . . . down to the day such sum is paid into the office of the clerk of this court . . . to be used in the redemption and cancellation of certificate of purchase issued by the sheriff of Woodson County, Kansas, to A. E. Hess, plaintiff herein."

Without suggesting to the trial court that he had been surprised or prejudiced because no formal notice had been served upon him or that he wished the order set aside or desired to present additional proof or take any further action whatsoever, and when the thirty days were about to expire, Holmes entered appeals to the Supreme Court of the State for himself and Harder, and on very general assignments of errors, making no mention of Federal right, the controversy was there again presented and considered upon its merits.

Among other things the Supreme Court said (92 Kansas, 787):

"On the eve of the sheriff's sale Holmes and Hogueland, as attorneys for their respective clients, agreed that the insurance money should be applied to the redemption of the land. Hess purchased at the sheriff's sale subject to this condition, and when he assigned the certificate of purchase he and Holmes knew that the insurance money would go to redeem the land and not to satisfy the excess judgment. This is the turning point in the case. Mr. Holmes claims that he understood the agreement with Mr. Hogueland differently. After carefully considering all the strong arguments for his view this court, as already stated, feels that the trial court was best able to determine the matter. The result is that Holmes could draw the first payment of insurance money from the clerk of the court, who had received and receipted for it for redemption

purposes, for the benefit of no one but the holder of the certificate of purchase, who at that time was Harder; and Holmes received the proceeds of the draft for the second installment of insurance money for the benefit of Harder. Soon afterwards Holmes is found in court engaged in the protection of Harder's interests as a holder of the certificate of purchase. Holmes had complete knowledge of all the facts relating to the insurance money. Harder's son and agent, F. H. Harder, was informed that Holmes had received $1075 to apply in redemption of the premises, and Harder himself is non-committal on the subject of his knowledge.

. . .

"On February 24, 1911, Conway through his attorney paid to the clerk of the district court the sum of $500 as redemption money and took the clerk's receipt accordingly. Holmes could rightfully withdraw this money for no purpose unless to pay it to Harder. The draft for $575 which he cashed was redemption money also, and if not paid to Harder ought to be in the hands of the clerk. It is conceded that Harder received none of the money. The order therefore is a summary one made by the court in a pending proceeding to secure restoration to the treasury of the court of moneys arising from the litigation, which the attorney has diverted, p. 796.

. . .

"In the present case the court was acting in its own behalf to secure the return of money belonging in its own custody. By the motion directed against the sheriff filed for his client, Harder, the attorney himself instituted the investigation of his professional conduct. That was the only substantial issue in the case, and he was fully heard, both as a witness and as an attorney, in justification of his course. The evidence which justifies the denial of an order against the sheriff justifies the order against him." P. 797.

A petition for rehearing was presented and considered by the Supreme Court. Therein for the first time Holmes set up a claim under the Fourteenth Amendment. In its opinion denying application, the court said (93 Kansas, 246, 255):

"Holmes still insists that the order upon him to restore to the clerk of the court the redemption money which came into his possession was irregular for informality of procedure. The form of procedure in summary disciplinary proceedings is not controlling so long as the essentials of fair notice and opportunity to be heard are present. In this case Harder's right to a deed depended upon what his attorney's professional conduct had been. That was the primary issue tendered by the motion to require the sheriff to make a deed and the attorney himself filed the motion and brought on the investigation. A trial was had in which all the facts were developed, Holmes and Hogueland gave their versions of the agreement with respect to the application of the insurance money. The money was traced, step by step, from the insurance company through Holmes to Hess. Holmes was necessarily compelled to describe and to defend his conduct and did so by his own testimony and by other evidence which he adduced. The result was that in legal effect he stood before the court as one of its officers who had diverted from its treasury funds arising from the litigation. Then the attorney asked for another hearing which was granted. While on the face of the record he appeared as the attorney for Harder, the substance of the issue still was what the character of his professional conduct had been. The nature of the charge against him had been fully disclosed at the first trial. It appeared in detail and in writing in the affidavits filed in the case. It was that charge which he knew he must meet at the second trial, which he had secured. He had from August of one year to February of the next year in which to prepare. To say that he did not

make due preparation would be to impute to him unfaithfulness to Harder. He had command of the case, took such testimony from his former client, Hess, as he desired, and presented such other evidence as he desired, including additional affidavits of his own. At the final trial he was given full opportunity to defend in his own way and to an extent satisfactory to himself. Consequently every requirement of due process of law has been satisfied and the court was not called upon to go through the ceremonious performance of instituting and prosecuting another proceeding, for the sake of stating the charges, giving notice, and having a hearing, before entering the disciplinary order."

The sole question presented for our determination is whether plaintiff in error has been deprived of a Federal right.

Considering Holmes' position as an officer of the court and patient hearings accorded him, his own testimony and duty to offer in evidence whatever was obtainable and material, his actual presence at every stage of the proceedings, his failure to suggest surprise or desire for any further hearing, the inquiry touching his conduct pending for many months, his perfect acquaintance with all the unusual circumstances including his own liability and looking at the substance and not mere form of things, we are unable to say that he has been deprived of adequate notice or fair opportunity to defend and thereby denied due process of law. The cause undoubtedly presents difficulties not to be ignored; and our conclusion is restricted to the peculiar circumstances before us.

In *Louis. & Nash. R. R.* v. *Schmidt*, 177 U. S. 230, 236, the principles applicable here are announced and applied. "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its

requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

Affirmed.

MR. JUSTICE PITNEY dissents.

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

IT IS ORDERED BY THE COURT that Sections 2 [1] and 9 [2] of Rule 10 of this Court be, and the same are hereby, amended so as to read as follows:

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor, the Clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising fee, and other probable fees, and upon application therefor shall furnish the same to the party docketing the case. If such estimated sum be not paid within ninety days after the cause is docketed, it shall be the duty of the Clerk to report that fact to the Court, and thereupon the cause will be dismissed, unless good cause to the contrary is shown.

9. When the record is filed, or within twenty days thereafter, the plaintiff in error or appellant may file with the Clerk a statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within thirty days thereafter, may designate in writing, filed with the Clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the Clerk shall print those parts only; and the Court will consider nothing but those parts of the record and the points so stated. If at the hearing it shall appear that any material

[1] See 210 U. S. 479.

[2] See 210 U. S. 481.

part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the Court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the Court shall think proper.

The fees of the Clerk under Rule 24, Section 7,[1] shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

These amendments shall go into effect May 1, 1916. (Promulgated March 20, 1916.)

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[1] See 210 U. S. 492.

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

Order: It is ordered by the Court that Rule 37 of this Court [1] be amended by adding the following section:

4. In any case where the time for presenting a petition for certiorari is expressly limited by statute and where the court has adjourned for the term, the petition may be presented during such adjournment and within the period prescribed, by filing it, together with the printed record and briefs, in the office of the clerk, and such filing shall have the same effect as a presentation in open court.

Promulgated June 12, 1916.

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[1] See 210 U. S. 501.

OPINIONS PER CURIAM, FROM JANUARY 17, 1916, TO JUNE 12, 1916.

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 and 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. F. P. B. Sands* for the plaintiff in error. *Mr. Conrad H. Syme* and *Mr. Robert L. Williams* (by special leave) 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. Ford W. Thompson* for the plaintiff in error. *Mr. Truman P. Young* and *Mr. Charles H. Daues* 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 and 12 for the plaintiff in error, and submitted by defendant in error. 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. C. E. Morgan, 3d,* and *Mr. R. Stuart Smith* 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, Mr. Frederic D. McKenney* and *Mr. John G. Williams* for the plaintiff in error. *Mr. Martin M. Hugg* and *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 R. 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 Company. 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.

No. 186. Cyrus Bradley, Plaintiff in Error, *v.* Spokane & Inland Empire Railroad Company. In error to the Supreme Court of the State of Washington. Argued for plaintiff in error and submitted for defendant in error, January 18, 1916. Decided January 24, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 344; *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Parker* v. *McLain*, 237 U. S. 469, 471; (2) *Ross* v. *Oregon*, 227 U. S. 150; *Moore-Mansfield Co.* v. *Electrical Co.*, 234 U. S. 619; *Willoughby* v. *Chicago*, 235 U. S. 45. *Mr. Fred B. Morrill* and *Mr. William Hudson Smiley* for the plaintiff in error. *Mr. Will G. Graves* for the defendant in error.

No. 199. J. J. Broussard, Plaintiff in Error, *v.* R. R. Baker, Chief of Police of the City of Beaumont, Tex. In error to the Court of Criminal Appeals of the State of Texas. Submitted January 20, 1916. Decided January 24, 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, 382; (2) *Fischer* v. *St. Louis*, 194 U. S. 361; *Davis* v. *Massa-*

chusetts, 167 U. S. 43; (3) *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389; *Washington* v. *Miller*, 235 U. S. 422, 429; *Roby* v. *South Park Commissioners*, 238 U. S. 610. *Mr. Frederick S. Tyler* for the plaintiff in error. No appearance for defendant in error.

No. 207. THE COUNTY OF SIOUX, NEBRASKA, PLAINTIFF IN ERROR, *v.* NEWTON RULE. In error to the Supreme Court of the State of Nebraska. Submitted January 20, 1916. Decided January 24, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. Allen G. Fisher* for the plaintiff in error. *Mr. Albert W. Crites* for the defendant in error.

No. 343. JOHN H. STROSNIDER, APPELLANT, *v.* EDMUND M. ALLEN, WARDEN, ETC. Appeal from the District Court of the United States for the Northern District of Illinois. Motion to dismiss or affirm submitted January 17, 1916. Decided January 24, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Urquhart* v. *Brown*, 205 U. S. 179; *Ex parte Spencer*, 228 U. S. 652, 659–661; *Frank* v. *Mangum*, 237 U. S. 309, 328, 329. *Mr. Benjamin C. Bachrach* for the appellant. *Mr. Patrick J. Lucey* and *Mr. Lester H. Strawn* for the appellee.

No. 222. TALLULAH FALLS RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* MACON COUNTY SUPPLY COMPANY. In error to the Supreme Court of the State of North Carolina. Submitted January 24, 1916. Decided February 21, 1916. *Per Curiam.* Judgment reversed with costs upon the authority of *Southern Railway* v. *Reid*, 222 U. S. 424;

Yazoo & Mississippi Valley Railroad v. *Greenwood Grocery Co.*, 227 U. S. 1; *Charleston & Western Carolina Railway* v. *Varnville Furniture Co.*, 237 U. S. 597. *Mr. Hamilton McWhorter* for the plaintiff in error. No appearance for the defendant in error.

No. 227. ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* CHARLES W. COUSINS. In error to the Supreme Court of the State of Minnesota. Argued January 25, 1916. Decided February 21, 1916. *Per Curiam.* Judgment reversed with costs upon the authority of *Delaware, Lackwanna & Western Railroad* v. *Yurkonis*, 238 U. S. 439; *Shanks* v. *Delaware, Lackawanna & Western Railroad*, 239 U. S. 556. *Mr. W. S. Horton* and *Mr. Blewett Lee* for the plaintiff in error. *Mr. Samuel A. Anderson* for the defendant in error.

No. 794. PAUL DAECHE, APPELLANT, *v.* ALBERT BOLLSCHWEILER, UNITED STATES MARSHAL, ETC. Appeal from the District Court of the United States for the District of New Jersey. Motion to dismiss or affirm submitted January 31, 1916. Decided February 21, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Fay* v. *Crozer*, 217 U. S. 455; *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285, 288; *Hendricks* v. *United States*, 223 U. S. 178, 184; (2) *Benson* v. *Henkel*, 198 U. S. 1, 10–11; *Pierce* v. *Creecy*, 210 U. S. 387, 401–402; (3) *Glasgow* v. *Moyer*, 225 U. S. 420; *Johnson* v. *Hoy*, 227 U. S. 245; *Henry* v. *Henkel*, 235 U. S. 219. *Mr. Merritt Lane, Mr. John W. Ockford* and *Mr. Otto F. Seggel* for the appellant. *The Attorney General* and *The Solicitor General* for the appellee.

Nos. 230, 231, 232 and 233. SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* W. C. THURSTON. In error to the Supreme Court of the State of North Carolina. Submitted January 25, 1916. Decided February 21, 1916. *Per Curiam.* Judgments reversed with costs upon the authority of *Southern Railway* v. *Reid*, 222 U. S. 424; *Yazoo & Mississippi Valley Railroad* v. *Greenwood Grocery Co.*, 227 U. S. 1; *Charleston & Western Carolina Railway* v. *Varnville Furniture Co.*, 237 U. S. 597. *Mr. John K. Graves* for the plaintiff in error. No appearance for the defendant in error.

No. 546. THE VALLEY STEAMSHIP COMPANY, PLAINTIFF IN ERROR, *v.* JOHN J. WATTAWA; and

No. 547. THE VALLEY STEAMSHIP COMPANY, PLAINTIFF IN ERROR, *v.* JOSEPH MRAZ. In error to the Supreme Court of the State of Ohio. Motion to dismiss submitted February 21, 1916. Decided February 28, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364, 366; *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 268–269; *Stratton* v. *Stratton*, 239 U. S. 55. *Mr. Frank S. Masten* for the plaintiff in error. *Mr. George H. Eichelberger* for the defendants in error.

No. 740. MARTHA L. STINE, PLAINTIFF IN ERROR, *v.* MISSOURI STATE LIFE INSURANCE COMPANY. In error to the District Court of the United States for the Eastern District of Missouri. Motion to dismiss submitted February 21, 1916. Decided February 28, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Cornell* v. *Green*, 163 U. S. 75, 79–80; *Arkansas* v. *Schlierholz*, 179 U. S. 598, 601; *Lampasas* v. *Bell*, 180

U. S. 276, 282; *Itow* v. *United States*, 233 U. S. 581, 583–584. *Mr. Frederick N. Judson* and *Mr. John F. Green* for the plaintiff in error. *Mr. James C. Jones* for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF DAVID LAMAR, PETITIONER. Submitted February 21, 1916. Decided February 28, 1916. Motion for leave to file petition for writ of mandamus herein and that a rule to show cause issue denied. It is further ordered that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to bring up the record in the case of *David Lamar, Plaintiff in Error,* v. *The United States*. *Mr. A. Leo Everett* for the petitioner.

No. —. Original. *Ex parte:* IN THE MATTER OF WALTER BRANDT, PETITIONER. Submitted February 21, 1916. Decided February 28, 1916. Motion for leave to file petition for writ of mandamus denied. *Mr. Frans E. Lindquist* for the petitioner.

No. 819. THE STATE OF SOUTH DAKOTA EX REL., R. O. RICHARDS ET AL., PLAINTIFFS IN ERROR, *v.* M. D. WHISMAN, AS COUNTY AUDITOR OF BEADLE COUNTY, SOUTH DAKOTA. In error to the Supreme Court of the State of South Dakota. Motion to dismiss or affirm submitted February 28, 1916. Decided March 6, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Parker* v. *McLain*, 237 U. S. 469, 471–472; (2) *Luther* v. *Borden*, 7 How. 1; *Taylor* v. *Beckham*, 178 U. S. 548;

Pacific States Telegraph &c. Co. v. *Oregon*, 223 U. S. 118; *O'Neill* v. *Leamer*, 239 U. S. 244, 248. *Mr. Webster Ballinger* and *Mr. T. H. Null* for the plaintiffs in error. *Mr. Clarence C. Caldwell* and *Mr. Samuel Herrick* for the defendant in error.

No. 241. HITCHMAN COAL & COKE COMPANY, APPELLANT AND PETITIONER, *v.* JOHN MITCHELL, INDIVIDUALLY, ET AL. Appeal from and petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. Argued March 2 and 3, 1916. Decided March 13, 1916. *Per Curiam.* (1) Appeal dismissed for want of jurisdiction upon the authority of *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Omaha Electric Light & Power Co.* v. *Omaha*, 230 U. S. 123; *St. Anthony Church* v. *Pennsylvania R. R.*, 237 U. S. 575, 576–577.

(2) Considering the petition for certiorari hitherto filed and upon which action was previously postponed until the merits of the case came to be disposed of, it is ordered that the said petition be, and the same is granted, the record on appeal to stand as a return to the writ of certiorari. It is further ordered that the case on the return to the writ of certiorari be placed on the docket for argument before a full bench. *Mr. George R. E. Gilchrist* and *Mr. Hannis Taylor* for the appellant. *Mr. Charles E. Hogg* and *Mr. Charles J. Hogg* for the appellees.

No. 484. CHARLES A. THATCHER, APPELLANT AND PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA ET AL. Appeal from and in error to the United States Circuit Court of Appeals for the Sixth Circuit. Motion to dismiss or affirm submitted February 28, 1916. Decided March 13, 1916. *Per Curiam.* Dismissed for want of

jurisdiction upon the authority of *Ex parte Bradley*, 7 Wall. 364, 376; *Ex parte Robinson*, 19 Wall. 513. *Mr. Rhea P. Cary* and *Mr. Everett V. Abbot* for the appellant and plaintiff in error. *The Attorney General* and *The Solicitor General* for the appellees and defendants in error.

No. 108. Farmers & Merchants State Bank of Waco, Appellant, *v.* M. C. H. Park, Trustee of the Slayden-Kirksey Woolen Mill, Bankrupt. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. Submitted March 16, 1916. Decided March 20, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *First National Bank* v. *Littlefield*, 226 U. S. 110, 112; *Washington Securities Co.* v. *The United States*, 234 U. S. 76, 78; *Wright Blodgett Co.* v. *The United States*, 236 U. S. 397, 402; *National Bank of Athens* v. *Shackelford, Trustee*, 239 U. S. 81, 82, and cause remanded to the District Court of the United States for the Western District of Texas. *Mr. O. L. Stribling* for the appellant. *Mr. James D. Williamson, Mr. John Neethe* and *Mr. Rhodes S. Baker* for the defendant in error.

No. 295. Rosa Falco, Representing her Minor Child, Manuel Adoaldo Tiberio Catinchi y Falco, Appellant, *v.* The Succession of Salvador Suau Mulet, Composed of his Widow, Maria Hernandez Rodriguez et al. Appeal from the Supreme Court of Porto Rico. Argued for the appellees and submitted for the appellant March 16, 1916. Decided March 20, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 244, Judicial Code, *Elzaburu* v. *Chaves*, 239 U. S. 283, 285; *Gsell* v. *Insular Collector*, 239 U. S. 93.

Mr. Jose R. F. Savage for the appellant. *Mr. Edward S. Paine* for the appellees.

No. 721. DAVID H. GLASS, APPELLANT, *v.* ALFRED H. WOODMAN ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm and petition for writ of certiorari submitted March 13, 1916. Decided March 20, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Omaha Electric Light & Power Co.* v. *Omaha*, 230 U. S. 123; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575, 576–577; (2) *St. Louis &c. R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247, 250; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, 104; *Shulthis* v. *McDougal*, 225 U. S. 561, 568. The petition for writ of certiorari is denied. *Mr. W. F. Guthrie* and *Mr. Emmet H. Gamble* for the appellant. *Mr. John S. Leahy*, *Mr. Walter H. Saunders* and *Mr. Irvin V. Barth* for the appellee.

No. 294. F. P. SEEKATZ, PLAINTIFF IN ERROR, *v.* THE MEDINA VALLEY IRRIGATION COMPANY ET AL. In error to the District Court of the United States for the Western District of Texas. Argued for the plaintiff in error and submitted for the defendant in error March 15 and 16, 1916. Decided March 20, 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) *Mississippi & Red River Boom Co.* v. *Patterson*, 98 U. S. 403; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196

U. S. 239; *Mason City &c. Railroad* v. *Boynton*, 204 U. S. 570; (3) *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226, 244–245; *Bauman* v. *Ross*, 167 U. S. 548, 593; *Backus* v. *Fort Street Depot Co.*, 169 U. S. 557, 569; (4) *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Hairston* v. *Danville & Western Ry.*, 208 U. S. 598; *O'Neill* v. *Leamer*, 239 U. S. 244, 253–254. *Mr. C. L. Bass*, *Mr. T. T. VanderHoeven* and *Mr. Joseph W. Bailey* for the plaintiff in error. *Mr. Floyd McGown* for the defendant in error.

No. —. Original. *Ex parte:* In the Matter of Paul Bukva, Petitioner. Submitted March 13, 1916. Decided March 20, 1916. Motion for leave to file petition for writ of mandamus denied. *Mr. William Wilhelm* for the petitioner.

No. —. Original. *Ex parte:* In the Matter of William Sage, Jr., Petitioner. Submitted March 17, 1916. Decided March 20, 1916. Motion for leave to file petition for writ of mandamus denied. *Mr. Edward A. Alexander* for the petitioner.

Nos. 365 and 367. United Railways Company of St. Louis, Plaintiff in Error, *v.* The City of St. Louis. In error to the Supreme Court of the State of Missouri. Argued April 4 and 5, 1916. Decided April 10, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Holden Land Co.* v. *Inter-State Trading Co.*, 233 U. S. 536, 541; *Mellon Co.* v. *Mc-*

Cafferty, 239 U. S. 134; (2) *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Parker* v. *McLain*, 237 U. S. 469, 471; *Stewart* v. *Kansas City*, 239 U. S. 14; (3) *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Chicago Dock Co.* v. *Fraley*, 228 U. S. 680; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 143; *St. Louis &c. Ry. Co.* v. *Arkansas ex rel. Norwood*, 235 U. S. 350, 366.

No. 366. St. Louis & Suburban Railway Company et al., Plaintiffs in Error, *v.* The City of St. Louis;

No. 368. United Railways Company of St. Louis, Plaintiffs in Error, *v.* The City of St. Louis;

No. 369. United Railways Company of St. Louis, Plaintiff in Error, *v.* The City of St. Louis;

No. 370. United Railways Company of St. Louis. Plaintiff in Error, *v.* The City of St. Louis;

No. 371. United Railways Company of St. Louis, Plaintiff in Error, *v.* The City of St. Louis, and

No. 372. St. Louis Transit Company, Plaintiff in Error, *v.* The City of St. Louis. In error to the Supreme Court of the State of Missouri. Dismissed for the want of jurisdiction. *Mr. Henry S. Priest* for the plaintiffs in error. *Mr. Truman P. Young* and *Mr. Charles H. Daues* for the defendant in error.

No. 731. H. E. Filler, Appellant, *v.* Ben Steele, Sheriff, etc. Appeal from the District Court of the United States for the Western District of Pennsylvania. Argued April 5, 1916. Decided April 10, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of: (1) *Ex parte Parks*, 93 U. S. 18, 21; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Frank* v. *Mangum*, 237 U. S. 309, 326; (2) *Allen* v. *Georgia*, 166 U. S. 138, 140; *Felts* v. *Murphy*, 201 U. S. 123, 129; *Twining* v. *New Jersey*, 211 U. S. 78; *Jordan* v. *Massachusetts*, 225 U. S. 167; (3) *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S.

596, 600; *Overton* v. *Oklahoma*, 235 U. S. 31; *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. Ralph D. Hurst* and *Mr. Thomas H. Greevy* for the appellant. *Mr. C. Ward Eicher*, *Mr. George E. Barron* and *Mr. Cecil E. Heller* for the appellee.

No. 460. The Missouri Pacific Railway Company, Plaintiff in Error, *v.* The Larabee Flour Mills Company. In error to the Supreme Court of the State of Kansas. Motion to dismiss or affirm submitted April 10, 1916. Decided April 17, 1916. *Per Curiam.* Dismissed for want of jurisdiction with 10 per centum damages upon the authority of—

(1) *Roberts* v. *Cooper*, 20 How. 467, 481; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Clark* v. *Keith*, 106 U. S. 464; *Chaffin* v. *Taylor*, 116 U. S. 567, 572; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456; *Illinois* v. *Illinois Central R. R.*, 184 U. S. 77, 90–93.

(2) *Missouri Pacific Railway* v. *Larabee Flour Mills Co.*, 211 U. S. 612; *Missouri Pacific Railway* v. *Larabee Flour Mills Co.*, 234 U. S. 459. *Mr. B. P. Waggener*, *Mr. W. P. Waggener* and *Mr. A. E. Crane* for the plaintiff in error. *Mr. Joseph G. Waters* and *Mr. Charles Blood Smith* for the defendant in error.

No. 863. Allison Manchester, Plaintiff in Error, *v.* The Board of Water Commissioners of the City of Hartford;

No. 864. Allison Manchester et al., Plaintiffs in Error, *v.* The Board of Water Commissioners of the City of Hartford; and

No. 865. Emma Manchester et al., Plaintiffs in Error, *v.* The Board of Water Commissioners of the

City of Hartford. In error to the Supreme Court of Errors of the State of Connecticut. Argued April 12, 1916. Decided April 17, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 160; *Clark* v. *Nash*, 198 U. S. 361, 367–369; *Hairston* v. *Danville & Western Ry.*, 208 U. S. 598; *Union Lime Co.* v. *Chicago & N. W. Ry.*, 233 U. S. 211, 218–219; *O'Neill* v. *Leamer*, 239 U. S. 244, 253; *Mount Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30, 32. *Mr. Edward H. Rogers*, *Mr. Birdsey E. Case* and *Mr. Edward D. Robbins* for the plaintiffs in error. *Mr. Edward M. Day* and *Mr. Alvan Waldo Hyde* for the defendants in error.

No. —. Original. *Ex parte:* In the Matter of James J. Griffin and Gordon M. Peacock, Petitioners. Submitted April 10, 1916. Decided April 17, 1916. Motion for leave to file petition for a writ of mandamus denied. *Mr. Arthur E. Dowell* for the petitioner.

No. 312. Mary Mulcare et al., Administrators, etc., Plaintiffs in Error, *v.* The City of Chicago. In error to the Supreme Court of the State of Illinois. Argued April 20, 1916. Decided April 24, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Missouri* v. *Lewis*, 101 U. S. 22; *Cincinnati Street Railway* v. *Snell*, 193 U. S. 30, 35–37. *Mr. Hiram T. Gilbert* and *Mr. John W. Walsh* for the plaintiffs in error. *Mr. Chester E. Cleveland* for the defendants in error.

No. 188. Kansas City, Mexico & Orient Railway Company, Plaintiff in Error, *v.* The State of Texas.

In error to the Supreme Court of the State of Texas. Argued April 17 and 18, 1916. Decided April 24, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of:

(1) *Jones* v. *Montague*, 194 U. S. 147; *Richardson* v. *McChesney*, 218 U. S. 487; *Stearns* v. *Wood*, 236 U. S. 75.

(2) *Kansas City Star Co.* v. *Julian*, 215 U. S. 589; *Forbes* v. *State Council of Virginia*, 216 U. S. 396–399; *St. Louis & San Francisco Railway* v. *Shepherd*, 240 U. S. 240.

(3) *Henkel* v. *Cincinnati*, 177 U. S. 170; *Fullerton* v. *Texas*, 196 U. S. 192, 194; *Allen* v. *Arguimbau*, 198 U. S. 149, 156; *Cleveland & Pittsburgh R. R.* v. *Cleveland*, 235 U. S. 50, 55.

(4) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Parker* v. *McLain*, 237 U. S. 469, 471. See *Pinney* v. *Nelson*, 183 U. S. 144, 147; *Abilene National Bank* v. *Dolley*, 228 U. S. 1, 5; *Lake Shore & Michigan So. Ry.* v. *Ohio*, 173 U. S. 285, 289, *et seq.*; *Cincinnati, Indianapolis & W. Ry.* v. *Connersville*, 218 U. S. 336; *Missouri Pacific Railway* v. *Kansas*, 216 U. S. 262, 283 *et seq.* *Mr. Herbert S. Garrett*, *Mr. Robert Lynn Batts* and *Mr. John A. Eaton* for the plaintiff in error. *Mr. Benjamin F. Looney* and *Mr. Frank L. Snodgrass* for the defendant in error.

No. 793. Ignatius Timothy Tribich Lincoln, Appellant, *v.* James M. Power, Marshal, etc. Appeal from the District Court of the United States for the Eastern District of New York. Argued April 24, 1916. Decided May 1, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of (1) *In re Luis Oteiza y Cortes*, 136 U. S. 330, 334; *Ornelas* v. *Ruiz*, 161 U. S. 502, 508;

Bryant v. *The United States*, 167 U. S. 104, 105; *Terlinden* v. *Ames*, 184 U. S. 270, 278; *Elias* v. *Ramirez*, 215 U. S. 398, 406–407; *McNamara* v. *Henkel*, 226 U. S. 520, 523; (2) *David Kauffman & Sons Co.* v. *Smith*, 216 U. S. 610; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580; *Manila Investment Co.* v. *Trammell*, 239 U. S. 31. *Mr. John Neville Boyle* and *Mr. Addison S. Pratt* for the appellant. *The Attorney General* and *Mr. Charles Fox* for the appellees.

No. 135, October term, 1914. WILSON CYPRESS COMPANY, APPELLANT, *v.* ENRIQUE DEL POZO Y MARCOS ET AL. Submitted April 24, 1916. Decided May 1, 1916. Motion for leave to file in the trial court a supplemental bill in the nature of a bill of review denied. *Mr. William W. Dewhurst*, *Mr. Joseph H. Jones*, and *Mr. John C. Jones* for the petitioners. *Mr. John C. Cooper* in opposition thereto.

No. 324. DANIEL A. LONG, PLAINTIFF IN ERROR, *v.* JOHN E. SHEPARD. In error to the Supreme Court of the State of Oklahoma. Submitted April 26, 1916. Decided May 8, 1916. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *National Foundry & Pipe Co.* v. *Oconto Water Works Supply Co.*, 183 U. S. 216, 237; *Vandalia R. R.* v. *Indiana*, 207 U. S. 359, 367; *Brinkmeier* v. *Missouri Pacific Ry.*, 224 U. S. 268, 270. *Mr. Lewis C. Lawson* and *Mr. C. Dale Wolfe* for the plaintiff in error. No appearance for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF ELBERT R. ROBINSON, PETITIONER. Submitted April 28,

1916. Decided May 8, 1916. Motion for leave to file petition denied. *Mr. George W. Ellis* for the petitioner.

No. 189. ANNA C. DUNHAM ET AL., PLAINTIFFS IN ERROR, *v.* CLARA V. KAUFFMAN ET AL. In error to the Supreme Court of the State of Ohio. Argued May 4, 1916. Decided May 22, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 137. (2) *The Pennsylvania College Cases*, 13 Wall. 190; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561; *Missouri Pacific Ry.* v. *Kansas*, 216 U. S. 262, 274–275. (3) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658; *Parker* v. *McLain*, 237 U. S. 469, 471. *Mr. D. K. Watson* for the plaintiff in error. *Mr. Charles C. Pavey* for the defendants in error.

No. 344. ROBERT D. KINNEY, PLAINTIFF IN ERROR, *v.* PLYMOUTH ROCK SQUAB COMPANY ET AL. In error to the United States Circuit Court of Appeals for the First Circuit. Argued by the plaintiff in error May 1, 1916. Decided May 22, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Weir* v. *Rountree*, 216 U. S. 607; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575. (2) *Provident Savings Society* v. *Ford*, 114 U. S. 635, 641–642; *Metcalf* v. *Watertown*, 128 U. S. 586, 588; *Pope* v. *Louisville, New Albany &c. Ry.*, 173 U. S. 573, 580–581. See *United States ex rel. Kinney* v. *United States Fidelity & Guaranty Co.*, 222 U. S. 283;

Kinney v. *Plymouth Rock Squab Co.*, 236 U. S. 43. *Mr. Robert D. Kinney pro se.* No appearance for the defendants in error.

No. 333. THE FIRST NATIONAL BANK OF DEFIANCE, PLAINTIFF IN ERROR, *v.* WILLIAM A. KEHNAST ET AL. In error to the Supreme Court of the State of Ohio. Argued April 28 and May 1, 1916. Decided May 22, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Chemical National Bank* v. *City Bank of Portage*, 160 U. S. 646; *Leathe* v. *Thomas*, 207 U. S. 93; *Mellon* v. *McCafferty*, 239 U. S. 134. (2) *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778, 781; *Whittemore* v. *Amoskeag National Bank*, 134 U. S. 527; *Petri* v. *Commercial National Bank of Chicago*, 142 U. S. 644; *Hermann* v. *Edwards*, 238 U. S. 107. *Mr. Robert Newbegin* and *Mr. Henry Newbegin* for the plaintiff in error. *Mr. Tellis T. Shaw, Mr. Harold W. Fraser, Mr. Henry B. Harris* and *Mr. E. J. Marshall* for the defendants in error.

No. 362. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* JOHN H. MOUNTS. In error to the Supreme Court of the State of Oklahoma. Argued for plaintiff in error May 5, 1916. Decided June 5, 1916. *Per Curiam.* Judgment reversed with costs and cause remanded for further proceedings upon the authority of *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Missouri &c. Ry.* v. *Harriman*, 227 U. S. 657; *Atchison, Topeka &c. Ry.* v. *Robinson*, 233 U. S. 173; *Georgia, Florida &c. Ry.* v. *Blish Milling Co.*, 241 U. S. 190. *Mr. R. A. Kleinschmidt, Mr. W. F. Evans* and *Mr. E. H. Foster* for the plaintiff in error. No appearance for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF ELBERT R. ROBINSON, PETITIONER. Submitted May 22, 1916. Decided June 5, 1916. Motion for leave to file an amended petition denied. *Mr. Richard E. Westbrooks* for the petitioner.

No. 578. ORANGE WILSON WHITE, PLAINTIFF IN ERROR, *v.* THE STATE OF WYOMING. In error to the Supreme Court of the State of Wyoming. Motion to dismiss submitted June 5, 1916. Decided June 12, 1916. *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. Railway*, 228 U. S. 596, 600; *Overton* v. *Oklahoma*, 235 U. S. 31; *Parker* v. *McLain*, 237 U. S. 469, 471–472. *Mr. A. E. L. Leckie* for the plaintiff in error. *Mr. Douglas A. Preston* for the defendant in error.

No. 687. TIMOTHY HEALY, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER, ETC. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss and petition for writ of certiorari submitted June 5, 1916. Decided June 12, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Whitney* v. *Dick*, 202 U. S. 132, 135; *McClellan* v. *Carland*, 217 U. S. 268, 278. Petition for writ of certiorari herein granted. *Mr. Marshall B. Woodworth* for the appellant. *The Attorney General* and *The Solicitor General* for the appellee.

No. —. Original. *Ex parte:* IN THE MATTER OF WATTS, WATTS & CO., LTD., PETITIONER. Submitted June 5,

1916. Decided June 12, 1916. Motion for leave to file petition for writ of mandamus denied. *Mr. J. Parker Kirlin*, *Mr. John M. Woolsey* and *Mr. Mark W. Maclay, Jr.*, for petitioner.

No. —. Original. *Ex parte:* In the Matter of John H. Sears, as Trustee, Petitioner. Submitted June 5, 1916. Decided June 12, 1916. Motion for leave to file petition for writ of mandamus denied. *Mr. Carroll G. Walter* for the petitioner.

No. 225. Martin H. Free, Plaintiff in Error, *v.* The Western Union Telegraph Company. Motion submitted May 22, 1916. Decided June 12, 1916. Motion to vacate judgment of dismissal herein of January 24, 1916, and to restore case to the docket granted. *Mr. Frederick S. Tyler* and *Mr. B. I. Salinger* for the plaintiff in error. *Mr. Rush Taggart* and *Mr. Francis Raymond Stark* for defendant in error. See page 684, *post.*

Decisions on Petitions for Writs of Certiorari from January 17, 1916, to June 12, 1916.

No. 735. ST. LOUIS UNION TRUST COMPANY, PETITIONER, *v.* MARY E. MELLEN ET AL. January 24, 1916. Ordered that the order entered herein on December 20, 1915, denying the petition for writ of certiorari, be vacated and set aside and the petition for writ of certiorari granted. (See 239 U. S. 648.) *Mr. W. F. Wilson* and *Mr. Enoch A. Chase* for the petitioner. *Mr. J. H. Everest* and *Mr. R. M. Campbell* for the respondents.

No. 720. WALDO P. CLEMENT ET AL., PETITIONERS, *v.* D. W. JAMES. January 24, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John R. Abney* and *Mr. Hollins N. Randolph* for the petitioners. *Mr. Alexander W. Smith, Mr. Theodore A. Hammond, Mr. Victor Lamar Smith* and *Mr. Alexander W. Smith, Jr.*, for the respondent.

No. 768. YEE KONG, PETITIONER, *v.* W. W. SIBRAY, IMMIGRATION INSPECTOR, ET AL. January 24, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrie C. Barton* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondents.

No. 784. HOUSTON OIL COMPANY OF TEXAS ET AL., PETITIONERS, *v.* CORNELIA G. GOODRICH ET AL. January 31, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Thomas M. Kennerly* and *Mr. Wil-*

liam L. Marbury for the petitioners. *Mr. William D. Gordon* for the respondents.

No. 221. WILLIAM A. STOWE, PLAINTIFF IN ERROR, *v.* EMMA F. TAYLOR. January 31, 1916. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts or other proper proceeding under the act of Congress of December 23, 1914, denied. *Mr. Hollis R. Bailey* for the plaintiff in error, in support of the petition. No opposition.

No. 763. THE NATIONAL BANK OF COMMERCE OF SEATTLE, PETITIONER, *v.* THE UNITED STATES. January 31, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James A. Kerr* and *Mr. E. S. McCord* for the petitioner. No brief for the respondent.

No. 804. GEORGE L. DURE, RECEIVER, ETC., PETITIONER, *v.* WILLIAM C. WRIGHT, TRUSTEE, ETC. January 31, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John R. L. Smith* for the petitioner. *Mr. Orville A. Park* and *Mr. George S. Jones* for the respondent.

No. 805. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PETITIONER, *v.* THE UNITED STATES. February 21, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

Mr. Richard V. Lindabury for the petitioner. *The Attorney General* and *Mr. Assistant to the Attorney General Todd* for the respondent.

No. 821. BRUCE BORLAND, PETITIONER, *v.* THE NORTHERN TRUST SAFE DEPOSIT COMPANY. February 21, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George P. Fisher* and *Mr. Josiah McRoberts* for the petitioner. *Mr. George Dudley Seymour, Mr. Robert H. Parkinson* and *Mr. Wallace R. Lane* for the respondent.

No. 824. NATIONAL BRAKE & ELECTRIC COMPANY, PETITIONER, *v.* NIELS A. CHRISTENSEN ET AL. February 21, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Parker W. Page, Mr. Thomas B. Kerr, Mr. J. Snowden Bell* and *Mr. Charles A. Brown* for the petitioner. *Mr. Joseph B. Cotton, Mr. Willet M. Spooner* and *Mr. William R. Rummler* for the respondents.

No. 820. CLARK PEASE, PETITIONER, *v.* RATHBUN-JONES ENGINEERING COMPANY. February 28, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Perry J. Lewis* and *Mr. E. C. Brandenburg* for the petitioner. *Mr. James D. Walthall* for the respondent.

No. 827. WILLIAM FILENE'S SONS COMPANY, PETITIONER, *v.* CHARLES F. WEED ET AL. February 28, 1916. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the First Circuit granted. *Mr. James Butler Studley, Mr. Louis D. Brandeis, Mr. W. H. Dunbar* and *Mr. Francis B. James* for the petitioner. *Mr. Charles F. Choate, Jr.*, and *Mr. Frederick H. Nash* for the respondents.

No. 831. Robert H. Gardiner, etc., Petitioner, *v.* William S. Butler & Company (Inc.), etc. February 28, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Bentley W. Warren* and *Mr. Francis B. James* for the petitioner. *Mr. Charles F. Choate, Jr.*, and *Mr. Frederick H. Nash* for the respondents.

No. 825. Antonio Ciffo, Petitioner, *v.* Marie Ciffo. February 28, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles F. Carusi* for the petitioner. *Mr. W. Gwynn Gardiner* for the respondent.

No. 834. Joseph H. Courtney, Trustee, etc., Petitioner, *v.* Eugene A. Georger. February 28, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles P. Hine* and *Mr. Rufus S. Day* for the petitioner. *Mr. E. H. Letchworth* for the respondent.

No. 836. St. Louis & Southwestern Railway Company, Petitioner, *v.* Cecelio Maciel et al. Feb-

ruary 28, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. B. Perkins* and *Mr. Edward A. Haid* for the petitioner. *Mr. Perry J. Lewis* for the respondent.

No. 841. PRESS PUBLISHING COMPANY, PETITIONER, *v.* CASSIUS E. GILLETTE. February 28, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph H. Choate* and *Mr. Howard Taylor* for the petitioner. *Mr. D. Cady Herrick* for the respondent.

No. 844. HARRY B. HOLLINS, PETITIONER, *v.* A. LEO EVERETT, RECEIVER, ETC. February 28, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles K. Beekman* and *Mr. William C. Armstrong* for the petitioner. *Mr. Leonard B. Smith* for the respondent.

No. 851. MARY C. KEYSER ET AL., PETITIONERS, *v.* W. H. MILTON, RECEIVER, ETC. February 28, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Francis B. Carter*, *Mr. W. A. Blount* and *Mr. A. C. Blount* for the petitioners. *Mr. W. H. Watson* for the respondent.

No. 852. EL DIA INSURANCE COMPANY, PETITIONER, *v.* WILLIAM S. SINCLAIR. February 28, 1916. Petition for

a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wendell P. Barker* for the petitioner. *Mr. William Otis Badger, Jr.*, for the respondent.

No. 839. W. E. MARTIN, JR., TRUSTEE, ETC., PETITIONER, *v.* COMMERCIAL NATIONAL BANK OF MACON, GA. March 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Rudolph S. Wimberly* for the petitioner. *Mr. George S. Jones* and *Mr. Orville A. Park* for the respondent.

No. 840. JESSE ISIDOR STRAUS ET AL., ETC., PETITIONERS, *v.* VICTOR TALKING MACHINE COMPANY. March 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Edmond E. Wise* and *Mr. Walter C. Noyes* for the petitioners. *Mr. Frederick A. Blount* and *Mr. Hector T. Fenton* for the respondent.

No. 862. UNION TRUST COMPANY, PETITIONER, *v.* MINNIE KAHN GROSMAN ET AL. March 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. William H. Atwell* for the petitioner. *Mr. Francis Marion Etheridge* and *Mr. J. M. McCormick* for the respondents.

No. 797. JACOB BLUMENTHAL, TRADING AS J. BLUMENTHAL & COMPANY, ET AL., PETITIONERS, *v.* BENJAMIN L.

STRAT ET AL., ETC. March 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. George F. Deiser* for the petitioner. No appearance for the respondents.

No. 871. TUBULAR WOVEN FABRIC COMPANY, PETITIONER, *v.* NATIONAL METAL MOLDING COMPANY. March 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William Quinby, Mr. F. W. Lehmann, Mr. Frank Y. Gladney, Mr. Livingston Gifford* and *Mr. Peter G. Gerry* for the petitioner. *Mr. Charles F. Perkins* for the respondent.

No. 878. CECIL F. ADAMSON, PETITIONER, *v.* DAVID C. GILILLAND. March 13, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Percy B. Hills* for the petitioner. No appearance for the respondent.

No. 848. GEORGE RUE, PETITIONER, *v.* THE UNITED STATES. March 13, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Cecil H. Smith* for the petitioner. No brief for the respondent.

No. 877. EDWARD W. G. MEERS ET AL., PETITIONERS, *v.* ALBERT CHILDERS. March 13, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Eighth Circuit denied. *Mr. Julian C. Wilson*, *Mr. Walter P. Armstrong* and *Mr. Daniel W. Baker* for the petitioners. No appearance for the respondents.

No. 870. Oscar J. Weeks, etc., Petitioner, *v.* The United States. March 20, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Walter Jeffreys Carlin* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 880. The City of Colorado, Texas, Petitioner, *v.* Clarisse M. Harrison. April 3, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Toombs Neill* for the petitioner. *Mr. James T. Neville* for the respondent.

No. 894. Alvin H. Stout, Petitioner, *v.* The United States. April 3, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. L. Stuart* and *Mr. W. A. Ledbetter* for the petitioner. No brief for the respondent.

No. 898. William E. Crutchley, Petitioner, *v.* National Fireproofing Company. April 3, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Daniel W. Baker* for the petitioner. *Mr. Walter C. Clephane* and *Mr. Alan O. Clephane* for the respondent.

No. 901. C. W. JOHNSON, TRUSTEE, ETC., PETITIONER, *v.* LOUISVILLE WOOLEN MILLS. April 3, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. David A. Sachs* and *Mr. David A. Sachs, Jr.*, for the petitioner. *Mr. Keith L. Bullitt* for the respondent.

No. 909. GEORGE A. FULLER COMPANY, PETITIONER, *v.* OTIS ELEVATOR COMPANY. April 10, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Edward S. Duvall, Jr.*, for the petitioner. *Mr. Frederic D. McKenney* and *Mr. John Spalding Flannery* for the respondent.

No. 911. CLARK PEASE ET AL., PETITIONERS, *v.* RATHBUN-JONES ENGINEERING COMPANY. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. E. C. Brandenburg* and *Mr. Perry J. Lewis* for the petitioners. No appearance for the respondent.

No. 924. VICTOR HERBERT ET AL., PETITIONERS, *v.* THE SHANLEY COMPANY. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Nathan Burkan* and *Mr. W. J. Hughes* for the petitioners. *Mr. Abraham S. Gilbert* for the respondent.

No. 930. THE JOHN CHURCH COMPANY, PETITIONER, *v.* HILLIARD HOTEL COMPANY ET AL. April 10, 1916. Peti-

tion for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Moses H. Grossman* for the petitioner. *Mr. Levi Cooke* for the respondents.

No. 583. Helen Hise et al., Petitioners, *v.* Western Coal & Mining Company. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John H. Vaughn* for the petitioners. *Mr. Edward J. White* and *Mr. Thomas B. Pryor* for the respondent.

No. 683. Monadnock Mills, Petitioner, *v.* Henry E. Fushey, Administrator, etc. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. H. W. Parker* for the petitioner. *Mr. George F. Morris* and *Mr. Joseph Madden* for the respondent.

No. 861. Gold Medal Camp Furniture Manufacturing Company, Petitioner, *v.* The Telescope Cot Bed Company. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles F. Fawsett* for the petitioner. *Mr. Alan D. Kenyon* for the respondent.

No. 906. Percy B. Sullivan, Petitioner, *v.* The United States. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

the Seventh Circuit denied. *Mr. Leslie A. Gilmore* and *Mr. Frank S. Bright* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 917. FRANKLIN HUFF ET AL., PETITIONERS, *v.* THE UNITED STATES. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. L. Bartlett, Mr. Marion Smith, Mr. John D. Little, Mr. Arthur G. Powell* and *Mr. M. F. Goldstein* for the petitioners. *The Attorney General, The Solicitor General,* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 922. BELER WATER HEATER COMPANY, PETITIONER, *v.* PITTSBURGH WATER HEATER COMPANY. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Melville Church* for the petitioner. No appearance for the respondent.

No. 931. PAUL ENGLISH ET AL., PETITIONERS, *v.* ELLA WYMAN BROWN ET AL. April 10, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. H. C. Brome* and *Mr. Andrew Foulds, Jr.,* for the petitioners. *Mr. Chauncey G. Parker* for the respondents.

No. 937. HENRY C. CALLAGHAN, PETITIONER, *v.* THE COMMONWEALTH OF MASSACHUSETTS. April 10, 1916.

Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied. *Mr. Bernard J. Killian*, *Mr. Charles Toye*, and *Mr. Joseph F. O'Connell* for the petitioner. No appearance for the respondent.

No. 905. W. A. GAINES & COMPANY, PETITIONER, *v.* HELLMAN DISTILLING COMPANY, ETC. April 17, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James Love Hopkins*, *Mr. Edmund F. Trabue* and *Mr. D. W. Lindsay* for the petitioner. *Mr. W. T. Ellis* and *Mr. Luther Ely Smith* for the respondent.

No. 916. W. G. SIMPSON ET AL., PETITIONERS, *v.* THE UNITED STATES. April 17, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William H. Atwell* for the petitioners. No brief for the respondent.

No. 921. CHARLES T. TUCKER, PETITIONER, *v.* THE UNITED STATES. April 17, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles T. Tucker, pro se*, *Mr. Nathaniel H. Maxwell* and *Mr. Francis B. James* for the petitioner. *The Attorney General*, *The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 933. JOHN K. ROSE, ETC., ET AL., PETITIONERS, *v.* PETER MCCLELLAND, JR. April 17, 1916. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Fifth Circuit denied. *Mr. J. J. Darlington, Mr. Richard I. Munroe* and *Mr. Marshall Surratt* for the petitioners. *Mr. Francis Marion Etheridge* and *Mr. Joseph Manson McCormick* for the respondent.

No. 944. ANN S. HOPKINS, PETITIONER, *v.* LAWRENCE HULL, TRUSTEE, ETC. April 17, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Grattan Macmahon* for the petitioner. *Miss Winifred Sullivan* for the respondent.

No. 946. ALEXANDER NISBET, AS COMMISSIONER, ETC., PETITIONER, *v.* THE FEDERAL TITLE & TRUST COMPANY. April 17, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Elijah N. Zoline* and *Mr. John T. Bottom* for the petitioner. *Mr. Ernest Morris* and *Mr. William W. Grant, Jr.*, for the respondent.

No. 954. THE UNITED STATES, AS TRUSTEE, ETC., PETITIONER, *v.* HIRAM CHASE. April 24, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. Hiram Chase* and *Mr. William R. King* for the respondent.

No. 923. R. L. MOULDEN, TRUSTEE, ETC., PETITIONER, *v.* PARLIN & ORENDORFF IMPLEMENT COMPANY ET AL.

April 24, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jesse P. Yates* for the petitioners. *Mr. Francis Marion Etheridge,* and *Mr. Joseph Manson McCormick* for the respondents.

No. 948. MASON & HANGER COMPANY, PETITIONER, *v.* MICHAEL SHARON. April 24, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Herman S. Hertwig* for the petitioner. *Mr. Sydney A. Syme* for the respondent.

No. 956. STEARNS COAL & LUMBER COMPANY, PETITIONER, *v.* JOHN S. VAN WINKLE ET AL. April 24, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James N. Sharp* for the petitioner. *Mr. James Garnett* for the respondents.

No. 938. HARRY OLIVER, PETITIONER, *v.* THE UNITED STATES. May 1, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George A. Knight* and *Mr. Charles J. Heggerty* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 949. JOHN P. BROGAN, PETITIONER, *v.* THE NATIONAL SURETY COMPANY. May 1, 1916. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Sixth Circuit denied. *Mr. John A. Cline* for the petitioner. *Mr. Thomas H. Hogsett* for the respondent.

No. 856. GEORGE W. BOWEN, ETC., PETITIONER, *v.* DICKS PRESS GUARD MANUFACTURING COMPANY ET AL. May 8, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles F. Fawsett* for the petitioner. Respondents for themselves.

No. 955. THE MAYOR AND CITY COUNCIL OF BALTIMORE, PETITIONER, *v.* THE UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE. May 8, 1916. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland denied. *Mr. S. S. Field* for the petitioner. *Mr. Sylvan Hayes Lauchheimer* for the respondent.

No. 958. WILLIAM W. DOWNEY, RECEIVER, ETC., PETITIONER, *v.* HARTFORD FIRE INSURANCE COMPANY. May 8, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Malcolm Jackson* and *Mr. John O. Henson* for the petitioner. *Mr. W. Calvin Chesnut* and *Mr. John W. Davis* for the respondent.

No. 967. GUARANTY TRUST COMPANY OF NEW YORK ET AL., PETITIONERS, *v.* BETTENDORF AXLE COMPANY. May 8, 1916. Petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Alfred W. Kiddle* for the petitioners. *Mr. James R. Sheffield* for the respondent.

No. 970. THE BRONX NATIONAL BANK, PETITIONER, *v.* MARCUS ROSENTHAL, TRUSTEE, ETC. May 8, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles D. Folsom* and *Mr. John Hall Jones* for the petitioner. *Mr. Eugene L. Bondy* for the respondent.

No. 972. J. A. FELLERS, ADMINISTRATOR, ETC., PETITIONER, *v.* CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY. May 8, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John N. Hughes* for the petitioner. *Mr. S. H. Tolles* for the respondent.

No. 976. BATES COUNTY, IN THE STATE OF MISSOURI, ET AL., PETITIONERS, *v.* PERCY A. HIPPLE ET AL., ETC. May 8, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John T. Barker* for the petitioner. *Mr. William M. Williams* for the respondents.

No. 980. VIRGINIA RAILWAY & POWER COMPANY ET AL., PETITIONERS, *v.* CHARLES HALL DAVIS. May 8, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

Mr. E. Randolph Williams, Mr. Eppa Hunton, Jr., Mr. Henry W. Anderson, Mr. Charles Howland and *Mr. Arthur H. Van Brunt* for the petitioners. *Mr. James Mann* for the respondent.

No. 983. BRITISH STEAMSHIP COMPANY (LTD.), ETC., PETITIONER, *v.* MARY A. CLARKE. May 8, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Parker Kirlin, Mr. Charles R. Hickox* and *Mr. Mark W. Maclay, Jr.*, for the petitioner. *Mr. William A. Blount, Mr. A. C. Blount* and *Mr. F. B. Carter* for the respondent.

No. 984. THE NATIONAL CARBON COMPANY ET AL., PETITIONERS, *v.* THE OHIO MOTOR CAR COMPANY ET AL. May 22, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. B. Mente* for the petitioners. *Mr. Province M. Pogue* and *Mr. Harry M. Hoffheimer* for the respondents.

No. 996. W. L. WILSON, PETITIONER, *v.* FRANK WALDO ET AL. May 22, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Julius C. Martin, Mr. Thomas S. Rollins* and *Mr. George H. Wright* for the petitioner. *Mr. James H. Merrimon* for the respondents.

No. 999. CRESCENT MILLING COMPANY, PETITIONER, *v.* THE H. N. STRAIT MANUFACTURING COMPANY. May 22,

1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. C. Brandenburg* and *Mr. Harris Richardson* for the petitioner. *Mr. John I. Dille* for the respondents.

No. 973. ALICE STATE BANK ET AL., PETITIONERS, *v.* HOUSTON PASTURE COMPANY. May 22, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Henry W. Taft* and *Mr. Walter P. Napier* for the petitioners. *Mr. William D. Gordon* for the respondent.

No. 978. L. T. HAYS, PETITIONER, *v.* THE UNITED STATES. May 22, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Harry O. Glasser* for the petitioner. No brief for respondent.

No. 998. WILLIAM MCCOACH, COLLECTOR, ETC., PETITIONER, *v.* INSURANCE COMPANY OF NORTH AMERICA. May 22, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. G. W. Pepper* and *Mr. Bayard Henry* for the respondent.

No. 1018. WILLIAM H. MINER, PETITIONER, *v.* THE T. H. SYMINGTON COMPANY. June 5, 1916. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Charles C. Linthicum* and *Mr. George I. Haight* for the petitioner. *Mr. Melville Church* for the respondent.

No. 985. H. B. HOLLINS & COMPANY, PETITIONER, *v.* A. LEO EVERETT, AS RECEIVER, ETC. June 5, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles K. Beekman* and *Mr. William C. Armstrong* for the petitioners. *Mr. Leonard B. Smith* for the respondent.

No. 994. LEHIGH & WILKESBARRE COAL COMPANY, PETITIONER, *v.* HARTFORD & NEW YORK TRANSPORTATION COMPANY. June 5, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Jackson E. Reynolds* for the petitioner. *Mr. John W. Griffin* for the respondent.

No. 1005. WILLIAM H. COOPER, PETITIONER, *v.* THE UNITED STATES. June 5, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Griggs* for the petitioner. No brief filed for the respondent.

No. 1007. WILLIAM F. MURRAY, POSTMASTER, PETITIONER, *v.* POST PUBLISHING COMPANY. June 5, 1916. Petition for a writ of certiorari to the United States Cir-

cuit Court of Appeals for the First Circuit denied. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. Edmund A. Whitman* for the respondent.

No. 1015. William I. Lewis, etc., Petitioner, *v.* International Steam Pump Company et al. June 5, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Merritt Lane* and *Mr. W. Bourke Cockran* for the petitioner. *Mr. Charles H. Russell, Mr. Paul D. Cravath* and *Mr. William W. Green* for the respondents.

No. 1017. The District of Columbia, Petitioner, *v.* Washington Gas Light Company. June 5, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Conrad H. Syme* and *Mr. F. H. Stephens* for the petitioner. *Mr. Benjamin S. Minor, Mr. Colley W. Bell* and *Mr. J. J. Darlington* for the respondent.

No. 1022. Whitney Earle Harmon, Petitioner, *v.* The United States. June 5, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. A. Coulter Wells* for the petitioner. No brief filed for the respondent.

No. 1013. Marconi Wireless Telegraph Company of America, Petitioner, *v.* Emil J. Simon. June 12, 1916. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Second Circuit granted. *Mr. John W. Griggs* for the petitioner. *Mr. Walter H. Pumphrey, Mr. Zell G. Rowe* and *Mr. Harry Lea Dodson* for the respondent.

No. 1046. WATTS, WATTS & COMPANY, PETITIONER, *v.* UNIONE AUSTRIACA DE NAVIGAZIONE, ETC. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. J. Parker Kirlin, Mr. John M. Woolsey* and *Mr. Mark W. Maclay, Jr.*, for the petitioner. *Mr. Charles S. Haight* for the respondent.

No. 1041. FIELDS S. PENDLETON, PETITIONER, *v.* BENNER LINE. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted, conditioned on the petitioner furnishing a bond within twenty days in an amount to secure payment of the judgment, the amount of the bond to be satisfactory to the circuit justice and to be approved by him. *Mr. Avery F. Cushman* and *Mr. Harvey D. Goulder* for the petitioner. *Mr. D. Roger Englar* for the respondent.

No. 706. THE UNITED STATES EX REL. WILLIAM F. ARANT *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. June 12, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia to bring up the whole record and cause denied. *Mr. Samuel Maddox, Mr. H. Prescott Gatley* and *Mr. J. H. Carnahan* for Arant.

No. 764. CYNTHIA LINDSAY, PETITIONER, *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. T. Thompson* for the petitioner. *Mr. F. B. Daniels* and *Mr. William Burry* for the respondent.

Nos. 991 and 992. THE BADDERS CLOTHING COMPANY, PETITIONER, *v.* THE BURNHAM-MUNGER-ROOT DRY GOODS COMPANY ET AL. June 12, 1916. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. H. Harkless*, *Mr. D. R. Hite* and *Mr. Clifford Histed* for the petitioner. *Mr. Edwin A. Krauthoff* for the respondents.

No. 1001. JOHN W. ENRIGHT ET AL., PETITIONERS, *v.* ARTHUR YANCEY. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Grafton L. McGill* for the petitioners. *Mr. John Dymond, Jr.*, and *Mr. A. Griffen Levy* for the respondent.

No. 1006. UNION TERMINAL COMPANY ET AL., PETITIONERS, *v.* TURNER CONSTRUCTION COMPANY. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. T. G. Crawford* for the petitioners. *Mr. Richard P. Marks* for the respondent.

No. 1014. JAMES F. BISHOP, ADMINISTRATOR, ETC., PETITIONER, *v.* EDWARD B. PRYOR, RECEIVER, ETC.

June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. F. Thompson* for the petitioner. *Mr. John M. Zane, Mr. Charles F. Morse* and *Mr. J. L. Minnis* for the respondent.

No. 1019. THE FIRST NATIONAL BANK OF ROSWELL, PETITIONER, *v.* HOGGSON BROTHERS. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William C. Reid* for the petitioner. *Mr. Selden Bacon* for the respondent.

No. 1020. JOSEPH F. WILSON & COMPANY, CLAIMANT, ETC., PETITIONER, *v.* SOUTH ATLANTIC STEAMSHIP COMPANY. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Parker Kirlin, Mr. William R. Leaken* and *Mr. Mark W. Maclay, Jr.*, for the petitioner. *Mr. Samuel B. Adams* for the respondent.

No. 1024. CORNELIA E. CLEMENT, PETITIONER, *v.* MARY ANN WHITTAKER, ETC. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert H. McCarter* and *Mr. Gilbert Collins* for the petitioner. *Mr. Bayard Stockton* for the respondents.

No. 1026. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER, *v.* W. H. MCLAUGHLIN ET AL.

June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward A. Haid, Mr. A. L. Burford* and *Mr. W. T. Wooldridge* for the petitioner. *Mr. George B. Rose, Mr. W. E. Hemingway, Mr. J. F. Loughborough* and *Mr. V. M. Miles* for the respondents.

No. 1027. MALDONADO & COMPANY, PETITIONER, *v.* NEW YORK & CUBA MAIL STEAMSHIP COMPANY. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Daniel P. Hays* for the petitioner. *Mr. Norman B. Beecher* and *Mr. Roscoe H. Hupper* for the respondent.

No. 1028. J. BACON & SONS, PETITIONER, *v.* ROBERT C. KINKEAD. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Marshall Bullitt* for the petitioner. *Mr. H. H. Nettelroth* for the respondent.

No. 1036. MONTGOMERY WARD & COMPANY (INC.), PETITIONER, *v.* IOWA WASHING MACHINE COMPANY. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Taylor E. Brown* and *Mr. Clarence E. Mehlhope* for the petitioner. *Mr. Robert H. Parkinson* and *Mr. Wallace R. Lane* for the respondent.

No. 1039. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY ET AL., PETITIONERS, *v.* IDAHO-OREGON

LIGHT & POWER COMPANY ET AL. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles E. Rushmore* and *Mr. Wilton J. Lambert* for the petitioners. *Mr. James H. Richards* and *Mr. Oliver O. Haga* for the respondents.

No. 1040. GRAND TRUNK RAILWAY COMPANY, PETITIONER, *v.* THE UNITED STATES. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. G. W. Kretzinger, Jr.*, for the petitioner. No brief filed for respondent.

No. 1042. WILLIAM E. D. STOKES ET AL., PETITIONERS, *v.* HOWARD H. WILLIAMS ET AL. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles L. Craig* for the petitioners. *Mr. Albert C. Wall, Mr. Howard H. Williams* and *Mr. George C. Kobbe* for the respondents.

No. 1045. TRUSSED CONCRETE STEEL COMPANY, PETITIONER, *v.* CORRUGATED BAR COMPANY. June 12, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Fred L. Chappell* and *Mr. William S. Hodges* for the petitioner. *Mr. James A. Carr* for the respondent.

No. 1050. THE L. P. & J. A. SMITH COMPANY, PETITIONER, *v.* CALUMET TRANSIT COMPANY, ETC. June 12, 1916. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harvey D. Goulder* and *Mr. Frank S. Masten* for the petitioner. *Mr. William B. Cady* and *Mr. Francis S. Laws* for the respondent.

No. 1051. THE HAWGOOD & AVERY TRANSIT COMPANY, PETITIONER, *v.* THE MEAFORD TRANSPORTATION COMPANY; and

No. 1052. THE HAWGOOD & AVERY TRANSIT COMPANY, PETITIONER, *v.* ELLEN WILLIAMS, ADMINISTRATRIX, ETC. June 12, 1916. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harvey D. Goulder* for the petitioner. *Mr. Charles E. Kremer* and *Mr. George L. Canfield* for the respondents.

No. 1053. INDEPENDENT PNEUMATIC TOOL COMPANY, PETITIONER, *v.* BURKE ELECTRIC COMPANY. June 12, 1916. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John Robert Taylor* and *Mr. L. S. Bacon* for the petitioner. *Mr. Clifton V. Edwards* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM JANUARY 12, 1916, TO JUNE 12, 1916.

No. 173. CARRIE H. COLLINS ET AL., PLAINTIFFS IN ERROR, *v.* RUFUS PHILIPS ET AL., TRUSTEES, ETC., ET AL. In error to the Supreme Court of the State of Pennsyl-

vania. January 12, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles K. Robinson* and *Mr. James W. Collins* for the plaintiffs in error. *Mr. William J. Kyle* and *Mr. John C. Bane* for the defendants in error.

No. 177. D. F. Deaton, Plaintiff in Error, *v.* The Commonwealth of Kentucky. In error to the Court of Appeals of the State of Kentucky. January 13, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Edward S. Jouett* for the plaintiff in error. No appearance for the defendant in error.

No. 192. The United States, Appellant, *v.* Melven Booth, Administrator, etc. Appeal from the Court of Claims. January 17, 1916. Dismissed on motion of *Mr. Solicitor General Davis* for the appellant. *The Attorney General* for the appellant. *Mr. George A. King* for the appellee.

No. 206. J. C. McClelland, as State Auditor of the State of Oklahoma, et al., Appellants, *v.* Missouri, Kansas & Texas Railway Company. Appeal from the District Court of the United States for the Western District of Oklahoma. January 20, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles West* for the appellants. No appearance for the appellee.

No. 190. Rebecca Loth et al., Plaintiffs in Error, *v.* The City of St. Louis et al. In error to the Supreme

Court of the State of Missouri. January 20, 1916. Dismissed with costs on motion of *Mr. David Goldsmith* for the plaintiffs in error. *Mr. David Goldsmith* for the plaintiffs in error. *Mr. Truman P. Young* for the defendants in error.

No. 753. Chu Tai Ngan, Petitioner, *v.* Samuel W. Backus, Commissioner, etc. January 24, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit dismissed on motion of counsel for the petitioner. *Mr. O. P. Stidger* and *Mr. C. L. Bouve* for the petitioner. No brief for the respondent.

No. 225. Martin H. Free, Plaintiff in Error, *v.* The Western Union Telegraph Company. In error to the Supreme Court of the State of Wisconsin. January 24, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. B. I. Salinger* and *Mr. Frederick S. Tyler* for the plaintiff in error. *Mr. Rush Taggart, Mr. George H. Fearons* and *Mr. Francis Raymond Stark* for the defendant in error.

[Note: This judgment was set aside and case restored to docket June 12, 1916. See p. 656, *ante*.]

No. 251. Anna Young, Appellant, *v.* West End Street Railway Company et al. Appeal from the District Court of the United States for the District of Massachusetts. January 26, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Burton E. Eames* for the appellant. *Mr. Alexander Britton, Mr. Evans Browne* and *Mr. Charles A. Williams* for the appellees.

No. 252. AMY CURTIS, APPELLANT, *v.* WEST END STREET RAILWAY COMPANY ET AL. Appeal from the District Court of the United States for the District of Massachusetts. January 26, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Burton E. Eames* for the appellant. *Mr. Alexander Britton, Mr. Evans Browne* and *Mr. Charles A. Williams* for the appellees.

No. 868. CONGREGACION DE LA MISSION DE SAN VICENTE DE PAUL, APPELLANT, *v.* FRANCISCO REYES Y MIJARES AND EL BANCO ESPANOL FILIPINO. Appeal from the Supreme Court of the Philippine Islands. February 21, 1916. Docketed and dismissed with costs, on motion of *Mr. Evans Browne* for the appellees. *Mr. Evans Browne* for the appellees. No one opposing.

No. 313. W. C. HAGAN ET AL., PLAINTIFFS IN ERROR, *v.* MADISON F. LARKIN. In error to the Superior Court of Cochise County, State of Arizona. February 21, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Benjamin C. Tunnison* for the plaintiffs in error. No appearance for the defendant in error.

No. 544. SOUTHERN OREGON COMPANY, PLAINTIFF IN ERROR, *v.* W. W. GAGE, SHERIFF OF COOS COUNTY, ORE. In error to the Supreme Court of the State of Oregon. February 21, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Joseph Simon* and *Mr. John M. Gearin* for the plaintiff in error. No appearance for the defendant in error.

No. 584. Erie Railroad Company, Plaintiff in Error, *v.* George Prowski, as Administrator, etc. In error to the Supreme Court of the State of New York. February 21, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. George F. Brownell* for the plaintiff in error. No appearance for the defendant in error.

No. 243. The Curtice Brothers Company, Appellant, *v.* Harry E. Barnard et al. Appeal from the United States Circuit Court of Appeals for the Seventh Circuit. February 23, 1916. Dismissed without costs to either party, per stipulation of counsel. *Mr. Lawrence Maxwell* for the appellant. *Mr. Bert Winters* for the appellees.

No. 13, Original. The State of South Dakota, Complainant, *v.* Charles H. Cassill. February 29, 1916. Dismissed per stipulation of counsel. *Mr. Clarence C. Caldwell, Mr. Edward E. Wagner* and *Mr. Robert J. Gamble* for the complainant. *Mr. Charles H. Cassill, pro se.*

No. 298. Northern Express Company, Plaintiff in Error, *v.* The State of Washington. In error to the Supreme Court of the State of Washington. February 29, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Charles W. Bunn* for the plaintiff in error. *Mr. W. V. Tanner* for the defendant in error.

No. 10. Joe Judge and M. Bunting, Plaintiffs in Error, *v.* Frank M. Powers, Judge, etc., et al. In er-

ror to the Supreme Court of the State of Iowa. March 2, 1916. Dismissed with costs, on motion of *Mr. Frederick S. Tyler* for the plaintiffs in error. *Mr. B. I. Salinger* and *Mr. Frederick S. Tyler* for the plaintiffs in error. No appearance for the defendants in error.

No. 267. National Surety Company et al., Plaintiffs in Error, *v.* The United States to the use of J. A. Hollinger et al. In error to the United States Circuit Court of Appeals for the Third Circuit. March 6, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. A. C. Stamm* for the plaintiffs in error. *Mr. John E. Fox* for the defendants in error.

No. 221. William A. Stowe, Plaintiff in Error, *v.* Emma F. Taylor. In error to the Superior Court of the State of Massachusetts. March 8, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Hollis R. Bailey* for the plaintiff in error. *Mr. James H. Veahey* for the defendant in error.

No. 297. J. F. Cunningham, Appellant, *v.* J. P. Flournoy, Sheriff, etc., et al. Appeal from the District Court of the United States for the Western District of Louisiana. March 14, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Taliaferro Alexander* for the appellant. No appearance for the appellees.

No. 304. Massachusetts Bonding & Insurance Company, Plaintiff in Error, *v.* Realty Trust Com-

PANY ET AL. In error to the Supreme Court of the State of Georgia. March 15, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. John D. Little*, *Mr. Arthur G. Powell*, *Mr. Marion Smith*, *Mr. Max F. Goldstein* and *Mr. Eugene Dodd* for the plaintiff in error. *Mr. William A. Wimbish*, *Mr. Leonard Haas* and *Mr. Hudson Moore* for the defendants in error.

No. 738. JUDSON HARMON, RECEIVER, ETC., PLAINTIFF IN ERROR, *v.* ANDREW C. BROWN, ADMINISTRATOR, ETC. In error to the Supreme Court of the State of Indiana. March 17, 1916. Dismissed with costs, per stipulation. *Mr. John B. Elam* for the plaintiff in error. *Mr. James E. Watson* for the defendant in error.

No. 315. FRANCISCO GOENAGA Y OLSA ET AL., APPELLANTS, *v.* ELISA GALLARDO Y SEARY ET AL. Appeal from the District Court of the United States for Porto Rico. March 17, 1916. Dismissed with costs, on motion of counsel for the appellant. *Mr. N. B. K. Pettingill* for the appellants. *Mr. Frederic R. Coudert* and *Mr. Howard Thayer Kingsbury* for the appellees.

No. 932. GEORGE WAKEFIELD, APPELLANT, *v.* JOHN J. BRADLEY, MARSHAL, ETC., ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. April 3, 1916. Docketed and dismissed with costs, on motion of *Mr. Solicitor General Davis* for the appellees. *The Attorney General* for the appellees. No one opposing.

No. 276. LUCIUS E. JUDSON, AS TRUSTEE, ETC., PETITIONER, *v.* WILLIAM A. NASH, AS TRUSTEE, ETC., ET AL. On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. April 3, 1916. Dismissed with costs, on motion of counsel for the petitioner. *Mr. Oscar A. Lewis* for the petitioner. *Mr. John M. Bowers* for the respondent.

No. 526. WILLIAM WHALLEY, PLAINTIFF IN ERROR, *v.* PHILADELPHIA & READING RAILWAY COMPANY. In error to the Supreme Court of the State of Pennsylvania. April 3, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Augustus Trask Ashton* and *Mr. John C. Bell* for the plaintiff in error. *Mr. Wm. Clarke Mason* for the defendant in error.

No. 713. CHIN QUOCK WAH, APPELLANT, *v.* HENRY M. WHITE, COMMISSIONER, ETC. Appeal from the District Court of the United States for the Western District of Washington. April 3, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Joseph F. O'Connell* for the appellant. *The Attorney General* for the appellee.

No. 934. M. HEIMER, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Court of Appeals of the State of Georgia. April 5, 1916. Docketed and dismissed with costs on motion of *Mr. William Wallace, Jr.*, in behalf of counsel for the defendant in error. *Mr. Wm. Wallace, Jr.*, for the defendant in error. No one opposing.

No. 609. American Surety Company of New York, Plaintiff in Error, *v.* The State of Idaho, to and for the Use and Benefit of Clara Mills et al. In error to the Supreme Court of the State of Idaho. April 17, 1916. Dismissed, each party paying its own costs, per stipulation of counsel. *Mr. James H. Richards* and *Mr. Oliver O. Haga* for the plaintiff in error. *Mr. Joseph H. Peterson* for the defendants in error.

No. 718. S. S. White Dental Manufacturing Company, Petitioner, *v.* Oscar H. Pieper et al., etc. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. April 17, 1916. Dismissed with costs, on motion of counsel for the petitioner. *Mr. Henry N. Paul, Jr.*, *Mr. Joseph C. Fraley* and *Mr. Edward Rector* for the petitioner. *Mr. Charles A. Brown* for the respondent.

No. 461. George W. Caldwell et al., etc., Plaintiffs in Error, *v.* George W. Donaghey et al. In error to the Supreme Court of the State of Arkansas. April 24, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. J. W. Blackwood* for the plaintiffs in error. *Mr. W. E. Hemingway*, *Mr. G. B. Rose* and *Mr. J. F. Loughborough* for the defendants in error.

No. 789. Swift & Company, Plaintiff in Error, *v.* Agnes Catani. In error to the Supreme Court of the State of Pennsylvania. April 24, 1916. Dismissed per stipulation. *Mr. Charles B. Lenahan* for the plaintiff in error. *Mr. Rush Trescott* for the defendant in error.

No. 39. JOHN F. CUBBINS, APPELLANT, *v.* MISSISSIPPI RIVER COMMISSION ET AL. Appeal from the District Court of the United States for the Western District of Tennessee. April 24, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Barnette E. Moses* for the appellant. *Mr. H. F. Roleson* for the appellees.

No. 24. Original. *Ex parte:* IN THE MATTER OF THE MOTION PICTURE PATENTS COMPANY, PETITIONER. April 24, 1916. Petition for writ of mandamus dismissed on motion of counsel for petitioner. *Mr. Melville Church* for the petitioner.

No. 379. JAMES F. THRIFT, COMPTROLLER OF THE CITY OF BALTIMORE, PLAINTIFF IN ERROR, *v.* PHILIP D. LAIRD. In error to the Court of Appeals of the State of Maryland. April 28, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Alexander Preston* and *Mr. S. S. Field* for the plaintiff in error. *Mr. W. Cabell Bruce* for the defendant in error.

No. 346. THE UNITED STATES OF AMERICA, APPELLANT, *v.* THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY ET AL. Appeal from the District Court of the United States for the Southern District of Ohio. May 1, 1916. Dismissed on motion of *Mr. Solicitor General Davis* for the appellant. *The Attorney General* for the appellant. No appearance for the appellees.

No. 238. THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* KATE SETERA, AS ADMINISTRA-

TRIX, ETC. In error to the Supreme Court of the State of New York. May 1, 1916. Dismissed with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error. *Mr. Frederic D. McKenney* and *Mr. Harold J. Adams* for the plaintiff in error. No appearance for the defendant in error.

No. 771. A. S. DOWD, RECEIVER, ETC., ET AL., PLAINTIFFS IN ERROR, *v.* UNITED MINE WORKERS OF AMERICA ET AL. In error to the District Court of the United States for the Western District of Arkansas. May 2, 1916. Dismissed with costs on motion of *Mr. J. B. McDonough* for the plaintiffs in error. *Mr. James B. McDonough* for the plaintiffs in error. *Mr. George L. Grant* and *Mr. Henry Warrum* for the defendants in error.

No. 272. MARK CRAIG, PLAINTIFF IN ERROR, *v.* COMMONWEALTH OF KENTUCKY. In error to the Hardin County Quarterly Court, the State of Kentucky. Argued for defendant in error May 3, 1916. Decided May 3, 1916. Judgment reversed with costs and cause remanded for further proceedings upon confession of error by the defendant in error and motion of *Mr. Arthur H. Mann* for the defendant in error. *Mr. Hobson L. James* for the plaintiff in error. *Mr. Arthur H. Mann* for the defendant in error.

No. 377. PORTER LAWSON, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the Supreme Court of the State of Louisiana. May 4, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Taliaferro Alexander* for the plaintiff in error. No appearance for the defendant in error.

No. 306. THE UNITED STATES ET AL., APPELLANTS, *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY ET AL. Appeal from the District Court of the United States for the Eastern District of Illinois. May 22, 1916. Dismissed on motion of *Mr. Solicitor General Davis* for the appellants. *The Attorney General* for the appellants. *Mr. Edward A. Haid* and *Mr. Henry G. Herbel* for the appellees.

No. 387. THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* E. G. MASSINGALE, AS ADMINISTRATOR, ET AL. In error to the Court of Appeals of the State of Kentucky. May 22, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. John Galvin* and *Mr. Edward Colston* for the plaintiff in error. *Mr. James N. Sharpe* for the defendants in error.

No. 873. POSTAL TELEGRAPH COMPANY, APPELLANT, *v.* THE CITY OF PORTLAND. Appeal from the District Court of the United States for the District of Oregon. June 5, 1916. Dismissed with costs, on motion of counsel for the appellant. *Mr. William D. Fenton* and *Mr. Alfred A. Hampson* for the appellant. No appearance for the appellee.

No. 903. NICOLA CERRI, AS ITALIAN CONSULAR AGENT, ETC., PLAINTIFF IN ERROR, *v.* GIOVANNI PAGANO, ADMINISTRATOR, ETC. In error to the Supreme Court of the State of Ohio. June 5, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Newton D. Baker* for the plaintiff in error. No appearance for the defendant in error.

No. 727. CHARLES FRANK ET AL., APPELLANTS, *v.* UNION PACIFIC RAILROAD COMPANY ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. June 12, 1916. Dismissed with costs, on motion of counsel for the appellants. *Mr. Samuel Untermyer, Mr. Louis Marshall, Mr. Myron L. Learned* and *Mr. Abraham Benedict* for the appellants. *Mr. N. H. Loomis* for the appellees.

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Although State not suable without consent, state officer may be enjoined from doing act violative of Federal Constitution. *Missouri* v. *Chicago, B. & Q. R. R. Co.* 533

Even though government of Porto Rico has sovereign attributes and has only consented to be sued in its own courts, the solemn appearance in the United States District Court, and the taking of other steps by, its Attorney General, held to have amounted to a consent to be sued in that court, and thereafter government could not deny its jurisdiction. *Richardson* v. *Fajardo Sugar Co.* 44

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Suit for damages to business caused by threat to sue under patent law, not one of which state court cannot take jurisdiction. *American Well Works Co.* v. *Layne* 257

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In determining jurisdiction over incompleted structure in navigable waters to be used when completed as governmental aid to navigation, its location and purpose controlling from time it was begun. *The Raithmoor* 166

Jurisdiction exists of libel *in rem* against vessel for damages caused by its colliding with incompleted beacon in course of construction in navigable waters and which when completed is to be used solely as governmental aid to navigation. *Id.*

Jurisdiction over incompleted structure extends to that which is mere incident to such construction. *Id.*

Owner of automobile delivered it to express company in London to forward to New York, declaring its value to be far in excess of $100; the express company boxed it and delivered it to a carrier and accepted a bill of lading with a limitation of $100 liability; on arrival at destination a stevedore discharged the cargo and the rope by which the automobile was being hoisted broke and the automobile was seriously damaged: in a suit *in personam* in admiralty against the express company, to which carrier and stevedore had been made parties, held *that:* the breaking of the rope brings case by analogy within the rule of *res ipsa loquitur* and throws responsibility on stevedore unless such breaking can be explained as resulting from a hidden defect. In case of failure to collect from the stevedore carrier is responsible to extent of limited amount stated in bill of lading, and in case there is still a deficiency, the express company, even though only a forwarder, is liable by reason of having without the authority and with knowledge of the value of the article en-

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trusted to it accepted from the carrier a bill of lading limiting its liability. *Reid* v. *American Express Co.* 544
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Where highest court of State refuses to review judgment of intermediate appellate court, it is to latter court that writ of error from this court runs. *San Antonio & A. P. Ry.* v. *Wagner*. 476

Chinese person detained for deportation held not entitled to direct appeal from judgment of District Court dismissing petition for habeas corpus. *Chin Fong* v. *Backus* 1

A statutory provision adding ten per cent. to amount of judgment if affirmed on appeal does not deny due process of law; nor does due process require State to provide for suspension of judgment pending appeal. *Louisville & Nashville R. R. Co.* v. *Stewart* 261

In Second Circuit practice well established that appeal from decree in admiralty to the Circuit Court of Appeals opens case for trial *de novo*. *Reid* v. *American Express Co.*. . . 544

Circuit Court of Appeals is without power to compel party who has prosecuted both direct appeal from this court under § 238, Jud. Code, and writ of error from Circuit Court of Appeals, to elect which method he will pursue, and, in default of his withdrawing the direct appeal, to dismiss the writ of error. *Lamar* v. *United States* 103

Court will not assume that Congress intended to cut off opportunity to revise doubtful questions of law and fact by imposing penalty for reasonable delay in payment caused by appeal based on sufficient cause. *Pacific Mail S. S. Co.* v. *Schmidt*. 245

Sections 6509 and 6521, Mansfield's Digest, Laws of Arkansas, were not put in force in Indian Territory by Act of May 2, 1890; but *quære* as to § 6523. *Gidney* v. *Chappel*. 99

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Even though government of Porto Rico has sovereign attributes and has only consented to be sued in its own courts, the solemn appearance in the United States District Court, and the taking of other steps by, its Attorney General, *held*

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A transfer made by a bankrupt to his wife of certain valuable certificates of stock held to have been made before insolvency. *Stowe* v. *Harvey* 199
That bankrupt broker did not have sufficient shares of stock of corporation on hand at time of his bankruptcy to satisfy demands of all his customers entitled thereto, *held* not to prevent such customers from obtaining any of such shares and require that all of such shares should go into general estate. *Duel* v. *Hollins.* 523
Delivery by broker of stock purchased on margin, after payment of amount due, may be made during insolvency without creating preference. *Id.*
Under § 64a, holders of tax-certificates who have paid taxes and assessments on property of bankrupt at tax sales which have been declared invalid, are entitled to reimbursement out of general fund of bankrupt's estate, with legal interest, but not with larger interest and penalties imposed by statute in redemptions. *Dayton* v. *Pueblo County.* 588
Where agreement by way of compromise was made more than four months before petition filed, whereby payment was to be made from fund of which bankrupt entitled to residue, of all lienable claims, including claim of one who had waived right to file liens, but had subsequently filed claiming right so to do owing to failure of bankrupt to fulfil

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contract; *held*, that payments made to such party within the four-month period were not recoverable by the trustee as preferential. *Johnson* v. *Root Mfg. Co.* 160

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Where a bank holding a draft for collection, with instructions to deliver documents attached only on payment, permitted drawee to take possession of goods covered by the documents on his agreeing to deposit the proceeds thereof as sold, such action on the part of the collecting bank constituted a payment in law of the draft if the value of the goods was not less than the amount of the draft. *Russo-Chinese Bank* v. *National Bank of Commerce* 403

Such action of the collecting bank amounted to a misappropriation of the property and liability to account for its value immediately arose. *Id.*

Collecting bank became invested with ownership of goods and could not be excused from obligation to account by declaring that goods had disappeared without its knowledge; the relation of principal and agent existed and, as agent, collecting bank was obligated to act in good faith to protect rights of owner of draft. *Id.*

Even if bank, sending draft for collection, suffers no loss on account of guaranty from original owner, it may, in view of its relation to commercial paper, demand, as principal, an accounting from its correspondent, and resist an action to recover back money received upon the draft. *Id.*

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Where provision in bill applicable and valid effect must be given thereto. *Id.*

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Quære, whether attributing to interstate bill characteristics in conflict with general commercial rule would not constitute direct burden on interstate commerce. *Id.*

Where bill of interstate shipment requires notice of claim for misdelivery before action can be brought against initial carrier, such notice must be given to terminal carrier making misdelivery. *Georgia, F. & A. Ry.* v. *Blish Milling Co.* 190

A stipulation in bill of interstate shipment that shipper must, as condition precedent to right of recovery for injury to shipment while in transit, give notice thereof in writing to some officer or station agent of the initial carrier, is satisfied by notice to station agent of connecting or delivering carrier. *Northern Pacific Ry. Co.* v. *Wall*..... 87

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As between themselves, after paying amount due broker on marginal transaction, customer may demand from broker delivery of stock, purchased for his account, and such delivery made during insolvency is not preference. *Id.*

Where bankrupt broker did not have sufficient shares of stock of corporation on hand at time of bankruptcy to satisfy demands of all customers entitled thereto, held that such customers were entitled to such shares on demanding same, participating *pro rata* in division of shares actually on hand. *Id.*

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It will not be presumed that interstate carrier is conducting its affairs in violation of law. *Cincinnati, N. O. & T. Ry.* v. *Rankin*. 319

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Provision in interstate bill of lading is to be construed the same as to connecting or terminal carrier as to initial carrier. *Georgia, F. & A. Ry.* v. *Blish Milling Co.* 190

Where bill of lading of interstate shipment requires notice of claim for misdelivery before action can be brought against initial carrier, such notice must be given to terminal carrier making misdelivery. *Id.*

Bill of lading issued by initial carrier upon interstate shipment governs entire transportation and fixes obligations of all participating carriers to extent that its terms are applicable and valid. *Id.*

Effect of stipulation in bill of lading for notice of claim for misdelivery of shipment, cannot be escaped by form of action; and if suit cannot be maintained for damages against delivering carrier without such notice, it cannot be maintained for conversion. *Id.*

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IV. **Commerce Clause.**

Commerce which is subject to the control of Congress embraces the widest freedom, including the right to make all contracts having proper relation to subject. *Rosenberger* v. *Pacific Express Co.* 48

Texas statute of 1907, imposing special license taxes on express companies maintaining offices for C. O. D. shipments of intoxicating liquors, is an unconstitutional burden on and interference with interstate commerce, and does not justify an express company accepting such a shipment in refusing to deliver the same. *Id.*

Attempt by State to prohibit interstate shipments C. O. D. or prevent fulfillment of such contracts, is repugnant to the Constitution. *Id.*

See **Interstate Commerce.**

V. **Seventh Amendment.**

Exacts trial by jury according to course of common law, that is, by unanimous verdict. *Minneapolis & St. Louis R. R.* v. *Bombolis.* 211

Applies only to proceedings in Federal courts, and does not in any manner govern or regulate trials by jury in state courts, even in action brought under Federal act. *Minneapolis & St. Louis R. R.* v. *Bombolis.* 211

St. Louis & S. F. R. R. v. *Brown.* 223

Chesapeake & Ohio Ry. v. *Carnahan.* 241

Louisville & Nashville R. R. v. *Stewart* 261

Chesapeake & Ohio Ry. v. *Kelly* 485

Chesapeake & Ohio Ry. v. *Gainey* 494

Verdict in state court in action under Employers' Liability Act, which is not unanimous, but which is legal under laws of State, is not illegal under Amendment. *Minneapolis & St. Louis R. R.* v. *Bombolis* 211

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Louisville & Nashville R. R. v. *Stewart* 261

State court in enforcing right created by Federal statute does not derive its authority as a court from the United States, but from the State, and the Amendment does not apply to it. *Minneapolis & St. Louis R. R.* v. *Bombolis* 211

Has no application to an assessment or condemnation proceeding in a state court. *St. Louis & K. C. Land Co.* v. *Kansas City* 419

VI. **Fourteenth Amendment.**

1. *Generally:* State act creating rebuttable presumption having no foundation except on intent to destroy, held unconstitutional under Amendment. *McFarland* v. *American Sugar Co.* 79

2. *Due process of law:* Does not forbid a hearing upon a transcript of evidence formerly heard in court, and where the parties assented to the course pursued. *De la Rama* v. *De la Rama* 154

All requirements of provision complied with if person condemned has had sufficient notice and adequate opportunity to defend. *Holmes* v. *Conway* 624

Does not control mere forms of procedure in state courts or regulate practice therein. *Id.*

State may not, by mandamus, compel railroad to comply with rates fixed by state law unless opportunity afforded to test question of confiscation. *Missouri* v. *Chicago, B. & Q. R. R. Co.* 533

In exerting public rate-making power State cannot, without violating Constitution, make rates so low as to be confiscatory. *Missouri* v. *Chicago, B. & Q. R. R. Co.* 533

A State may require all claimants to the same water to submit their claims to an administrative board and to pay a reasonable fee for the expenses of such board in determining the relative rights of the various claimants; and an opportunity to be heard is not denied by accepting *ex parte* sworn statements if all testimony is to be subsequently reviewed by the court in a proceeding wherein testimony may be taken, nor is it a denial of due process of law to make the preliminary order of such a board effective pending final determination by the court, with suitable bonds. *Pacific Live Stock Co.* v. *Oregon Water Board* 440

Property owner entitled to be heard as to amount of his assessment for benefits, but not entitled to be heard as to

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assessments of all other property owners. *St. Louis & K. C. Land Co.* v. *Kansas City*..... 419
The question under Amendment is one of state power and not of state policy; of what State must accord, not what it may grant or withhold in its discretion. *Id.*
Owner of property which may be assessed for benefits to pay for property condemned, is not entitled to be made party to condemnation proceedings or be heard as to amount of awards; provision requires only those whose property is to be taken to have prior notice. *Id.*
Law imposing license fee to operate employment agencies and prohibiting agents from sending applicants to employer who has not applied for labor, is not unconstitutional as deprivation of property without due process of law. *Brazee* v. *Michigan*..... 340
Does not require State to provide for suspension of judgment pending appeal, nor prevent it making it costly in case judgment upheld; nor is due process denied by adding ten per cent. on amount of judgment affirmed. *Louisville & Nashville R. R. Co.* v. *Stewart*..... 261
An attorney having obtained certain funds from clerk of court, the court in a summary proceeding directed him, after full hearing, to restore the same, which order was affirmed on appeal, a contention, on rehearing, that he had been denied due process of law, held untenable. *Holmes* v. *Conway*..... 624
Act No. 10 of Extra Session, 1915, Louisiana Assembly, relating to business of sugar refining, held unconstitutional under provision. *McFarland* v. *American Sugar Co.*..... 79
Statutes of Oregon, establishing proceedings for ascertainment and adjudication of relative rights of claimants to same water, do not deny. *Pacific Live Stock Co.* v. *Oregon Water Board*..... 440
3. *Equal protection of the law:* Scheme of distribution of taxes and assessments which is palpably arbitrary and constitutes plain abuse may be condemned: mere fact that there may be inequalities is not enough to invalidate action of State. *St. Louis & K. C. Land Co.* v. *Kansas City*..... 419
Differences due to voluntary action and diverse individual choice may arise under equal laws, and not amount to denial of equal protection. *St. Louis & K. C. Land Co.* v. *Kansas City*..... 419
Law imposing license fee to operate employment agencies

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and prohibiting agents from sending applicants to employer who has not applied for labor, is not unconstitutional as denying equal protection. *Brazee* v. *Michigan* 340
Omission from a general order of a public utilities commission of concerns doing a small volume of business held not to amount to such a preference as to deny those affected by order equal protection. *Terminal Taxicab Co.* v. *District of Columbia* 252
Act No. 10 of Extra Session, 1915, Louisiana Assembly, relating to business of sugar refining, held unconstitutional under provision. *McFarland* v. *American Sugar Co.* 79

CONSTRUCTION:
General Principles: Every question of construction is unique, and an argument that might prevail in one case may be inadequate in another. *United States* v. *Jin Fuey Moy*. 394
Statute must be so construed, if fairly possible, as to avoid not only conclusion of unconstitutionality, but also grave doubts thereof. *Id.*
Exceptions from general policy which the law embodies are to be strictly construed and so interpreted as not to destroy remedial purpose intended. *Spokane & I. E. R. R. Co.* v. *United States* 344
General words in statute must be read in light of statute as a whole and with due regard to situation in which they are to be applied. *United States* v. *Nice* 591
Statute must fall as whole if it falls in sections without which there is no reason to suppose it would have been passed. *McFarland* v. *American Sugar Co.* 79
Validity of severable provisions of statute, not raised by charge against one violating it, nor considered by court below, not considered by this court. *Brazee* v. *Michigan* 340
Legislative declaration of intent of previous Act is not absolutely controlling. *Levindale Lead Co.* v. *Coleman* 432
Where decision of state court is necessary result of construction of state statute, this court accepts it as correct. *Pacific Live Stock Co.* v. *Oregon Water Board* 440
Where a criminal statute does not define a word used therein, its etymology must be considered and its ordinary meaning applied. *United States* v. *Lombardo* 73
Proper and reasonable construction of criminal statute must not be refused for fear of delay in prosecution of offenders. *Id.*

CONSTRUCTION—*Continued.* PAGE

While penal provision not be enlarged by interpretation, it must not be so narrowed as to fail to give full effect to its plain terms, as made manifest by its text and context. *Lamar* v. *United States*..... 103

Published rules relating to tariffs of interstate carriers must have a reasonable construction. *Menasha Paper Co.* v. *Chicago & N. W. Ry. Co.*..... 55

Of Federal Statutes: Where no repealing words in later act, former act relating to same or similar subject is repealed only by implication, which is not favored. *United States* v. *Hemmer*..... 379

When Congress contemplates production of an article within United States, court must construe act on hypothesis that such production takes place. *United States* v. *Jin Fuey Moy*..... 394

In construing statute which calls itself a registration or taxing act, does not purport to be in execution of a treaty, and contains a provision not required by any treaty, grave doubt arises whether such statute is entitled to supremacy claimed for treaties. *Id.*

In view of grave doubt as to constitutionality of Opium Registration Act of 1914 otherwise than as a revenue measure, this court construes it as such. *Id.*

Only definite words will warrant conclusion that Congress intended to strain its powers to make great proportion of citizens *prima facie* criminals by mere possession of article. *Id.*

Statute should be construed in light of obvious policy, and it would require clear language to show intent to impose restriction against alienation on allotted lands of non-Indians even if inherited from Indians. *Levindale Lead Co.* v. *Coleman*..... 432

Employers' Liability and Safety Appliance acts are *in pari materia*, and where former refers to any defect or insufficiency, due to employer's negligence, in its appliances, it is legislative intent to treat violation of latter act as negligence *per se*. *San Antonio & A. P. Ry.* v. *Wagner*..... 476

Legislation affecting Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred. *United States* v. *Nice*..... 591

Of State Constitutions and Statutes: Provisions in state statute held severable and, if unconstitutional, eliminable without destroying statute. *Brazee* v. *Michigan*.... 340

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Of Contracts: In construing contract court must first resort to all its words as associated, as well as conditions to which addressed and intended to provide for: one word cannot be made dominant. *Merrill-Ruckgaber Co.* v. *United States*.. 387

Contract with Government for construction of filtration plant construed and held to include roadway shown on annexed plans, and that contractor entitled to compensation for work done thereon. *White* v. *United States* 149

Question of proper construction of bill of lading of interstate shipment is a Federal one. *Georgia, F. & A. Ry.* v. *Blish Milling Co.*..... 190

Where provision in bill of lading applicable and valid effect must be given thereto. *Id.*

Whether, in construing an interstate bill of lading issued under the Carmack Amendment, due effect is given to the latter, is a Federal question. *Nor. Pac. Ry. Co.* v. *Wall*. 87

See **Contracts; Pure Food and Drugs Act.**

CONTRACTS:

In construing contract court must first resort to all its words as associated, as well as conditions to which addressed and intended to provide for: one word cannot be made dominant. *Merrill-Ruckgaber Co.* v. *United States*..... 387

As to freedom of contracts having relation to interstate commerce, and right of States to burden. See *Rosenberger* v. *Pacific Express Co.*..... 48

Laws in force at time and place of making contract and which affect its validity, performance and enforcement, enter into and form part of it, as if expressly referred to or incorporated therein. *Northern Pacific Ry. Co.* v. *Wall.* ... 87

Bill of lading is contract; and, if interstate, to be construed in light of provisions of Carmack Amendment. *Id.*

Parties to contract of an interstate shipment by rail made pursuant to Commerce Act cannot waive its terms; nor can carrier by conduct give shipper right to ignore such terms and hold carrier to different responsibility than that fixed by the agreement made under published tariffs and regulations. *Georgia, F. & A. Ry.* v. *Blish Milling Co.*..... 190

A provision in a government contract for liquidation of damages held to contain no element of deception or exorbitance and to be controlling on contractor. *Maryland Dredging Co.* v. *United States*..... 184

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Where a government contract provided that unless extraordinary and unforeseen conditions should supervene the time allowed was sufficient, such conditions must come into being after the commencement of the work, and not merely be thereafter discovered to have existed and still to exist. *Id.*

In construing government contract, held, that extent of promise for extension of time was confined to what engineer in charge would grant with sanction of chief engineer, and that latter was not, in absence of fraud, bound to give such sanction. *Id.*

A provision in a government contract that the time was sufficient unless extraordinary conditions should intervene, held not to amount to a promise for extension if such conditions do supervene. *Id.*

Contract with Government for construction of filtration plant construed and held to include roadway shown on annexed plans, and that contractor entitled to compensation for work done thereon. *White* v. *United States* 149

Where, under contract with Government, decision of supervising architect made final upon any dispute regarding interpretation of specifications, decision of Secretary of Treasury sustaining decision of architect held final. *Merrill-Ruckgaber Co.* v. *United States* 387

Contractor held bound to underpin walls of both of two buildings, notwithstanding specification referred to building and wall of one of buildings was only light or curtain wall. *Id.*

CONTRIBUTORY NEGLIGENCE. See **Employers' Liability Act.**

CONVERSION:

An express company accepting a C. O. D. shipment of intoxicating liquor is not justified in refusing to deliver the same because of an unconstitutional state statute imposing special licenses on such companies maintaining offices for such shipments; and held, that such refusal amounted to conversion of the goods. *Rosenberger* v. *Pacific Express Co.* 48

CORPORATIONS:

In determining status of corporation important thing is what it actually does and not what its charter says it may do. *Terminal Taxicab Co.* v. *District of Columbia.* 252

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Corporation chartered by Congress is not only creature of that law, but all its rights are dependent thereon, and suit by or against such corporation is one arising under laws of United States. *Bankers Trust Co.* v. *Texas & Pacific Ry.* . 295

Such corporation whose activities are intended to be and are carried on in different States, is not a citizen of a State within meaning of jurisdictional statute. *Id.*

While such corporation is a citizen of the United States, it is not within the declaration of the Fourteenth Amendment that citizens of the United States are citizens of the State in which they reside. *Id.*

Congress has not clothed railroad corporations organized under acts of Congress with state citizenship for jurisdictional purposes. *Id.*

State may not prevent foreign commercial corporations doing local business from exercising constitutional right to remove suits into Federal courts. *Wisconsin* v. *Philadelphia & Reading Coal Co.* 329

Section 1770f, Wisconsin Statutes, providing for revocation of license of foreign corporation in case it removes, or makes application to remove into Federal court, any action commenced against it by citizen of State is unconstitutional as beyond power of State. *Id.*

COURTS:

As a general rule courts have no power to interfere with performance by Land Department of administrative duties, but may, when functions of the Department are at an end, correct errors of law committed in such administration. *Lane* v. *Mickadiet*..... 201

Congress has power to invest subordinate Federal courts with original jurisdiction of suits at law or in equity arising under Constitution, laws or treaties of United States. *Bankers Trust Co.* v. *Texas & Pacific Ry.* 295

State court in enforcing right created by Federal statute does not derive its authority as a court from the United States, but from the State, and the Seventh Amendment does not apply to it. *Minneapolis & St. Louis R. R.* v. *Bombolis*..... 211

Statutory provisions relating to terms of District Courts of Florida and provisions of Judicial Code, held to permit special terms to be held at any time for transaction of any kind of business. *Abbott* v. *Brown*. 606

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General Rule No. 1 of District Court for Southern District of Florida, should be liberally construed so as to keep court open from beginning of one statutory term to beginning of next; and an adjournment made pursuant to that rule does not bring term to end. *Id.*

See **Appeal and Error; Jurisdiction; Practice and Procedure.**

CRIMINAL CODE:

For sections construed, see **Congress.**

CRIMINAL LAW:

Legislative power may not declare one guilty, or presumptively guilty, of a crime. *McFarland* v. *American Sugar Co.* 79

Attempt by Congress to make possession of article produced in any of the States a crime would raise gravest question of power. *United States* v. *Jin Fuey Moy* 394

While penal provision not to be enlarged by interpretation, it must not be so narrowed as to fail to give full effect to its plain terms, as made manifest by its text and context. *Lamar* v. *United States* 103

Proper and reasonable construction of criminal statute must not be refused for fear of delay in prosecution of offenders. *United States* v. *Lombardo*..... 73

Where in criminal prosecution there is proof of criminality, it is not error to refuse an instruction to acquit and to submit case to jury. *Lamar* v. *United States*..... 103

Sec. 32, Penal Code, prohibits and punishes the false assuming, with intent to defraud, to be an officer or employee of the United States; and also the doing in the falsely assumed character of any overt act to carry out the fraudulent intent, whether it would have been legally authorized had the assumed capacity existed or not. *Id.*

A member of the House of Representatives is an officer of the United States within the meaning of § 32, Penal Code. *Id.*

Indictment held to charge fraudulent intent under § 32, Penal Code, and to be sufficient under § 1025, Rev. Stat. *Id.*

Court will not, in order to accommodate venue of particular offense, introduce confusion into the law. *United States* v. *Lombardo*..... 73

Nature and jurisdiction of offense under § 6, White Slave Traffic Act. See *United States* v. *Lombardo*..... 73

CRIMINAL LAW—*Continued.* PAGE
What constitutes offense under § 215, Crim. Code. See *United States* v. *New South Farm*. 64
Section 316, Penal Code, does not embrace offense of adultery as between Indians on reservation. *United States* v. *Quiver*. 602
Under §§ 16, 20, Enabling Act, and sched. 28, constitution of Oklahoma, State took place of United States in prosecutions for adultery, neither party being Indian, commenced in Indian Territory, and all essential parts of prosecution, including bail bond, passed to State with power of enforcement. *Southern Surety Co.* v. *Oklahoma* 582
Quære, whether Congress can deal with crime of adultery committed by tribal Indians within State. *Id.*
Adultery is punishable offense only when common or statute law so makes it, and where punishable, is cognizable only in courts of State. *Id.*
See **Extradition.**

DAMAGES:
Where court explicitly enjoins jury that there must be proximate and causal relation between damages and negligence and refers to amount stated in declaration as limitation on amount of award, and there is no misunderstanding as to the purpose of such reference, there is no error. *Chesapeake & Ohio Ry.* v. *Carnahan* 241
When evidence shows that there will be future effects of injury, instruction justifying their inclusion in award of damages not error. *Id.*
Measure and apportionment under Employers' Liability Act. See *Chesapeake & Ohio Ry.* v. *Kelly* 485
Quære as to liability of United States to owner of tract of land part of which taken for erection of dike in navigable river. *United States* v. *Archer* 119

DECREES. See **Judgments and Decrees.**

DELIVERY. See **Interstate Commerce.**

DEMURRAGE. See **Interstate Commerce.**

DEPORTATION OF ALIENS. See **Aliens.**

DEPOSITIONS. See **Evidence; Extradition.**

DISTRICT COURTS. See **Jurisdiction.**

DISTRICT OF COLUMBIA: PAGE
Rights and duties and status of Terminal Taxicab Company. See **Common Carrier.**

DUE PROCESS OF LAW. See **Constitutional Law, VI.**

ELECTRIC RAILWAYS. See **Safety Appliance Act.**

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EMINENT DOMAIN. See **Condemnation of Land.**

EMPLOYERS' LIABILITY ACT:
Scope: Rights and obligations under Act depend upon it, and applicable principles of common law as interpreted and applied in Federal courts. *Southern Railway* v. *Gray* 333
In action by representatives of employee for his death, from negligence of interstate carrier by rail, defendants are entitled to insist upon applicable Federal law as exclusive measure of liability, whether plaintiff presents case under that or state law. *Osborne* v. *Gray* 16
Who within: Act applicable only where injured employee engaged in interstate commerce at time of injury. *Chicago, B. & Q. R. R.* v. *Harrington* 177
To bring a case under Act test is whether employee at time of injury was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. *Id.*
In absence of evidence showing that employee was engaged in interstate commerce, court cannot supply deficiency by taking judicial notice of fact. *Osborne* v. *Gray* 16
One engaged in removing coal from storage tracks to coal chutes is not engaged in interstate commerce, even though coal previously had been brought from another State and was to be used by locomotives in interstate hauls. *Chicago, B. & Q. R. R.* v. *Harrington.* 177
Defenses: Where contributory negligence of injured employee and defendant's violation of Safety Appliance Act concurrent proximate causes, former must be disregarded. *Spokane & I. E. R. R. Co.* v. *Campbell* 497
Even if injury resulted from improper management of a defective appliance covered by Safety Appliance Act, such misconduct would only amount to contributory negligence excluded from consideration. *San Antonio & A. P. Ry.* v. *Wagner* 476

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In saving defense of assumption of risk, Act places co-employee's negligence, where it is the ground of the action, in same relation as employer's own negligence would stand to question whether plaintiff is to be deemed to have assumed the risk. *Chesapeake & Ohio Ry.* v. *De Atley* 310

In trial under Act defendant is denied Federal right if denied fair opportunity to show negligence attributable to employee in diminution of damages; and, in absence of settled rule of practice, such evidence cannot be excluded because tendered without notice that it is restricted to diminution of damages. *Kansas City Southern Ry.* v. *Jones*..... 181

Assumption of risk: Under § 4, assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for safety of employees: in other cases it is retained. *Jacobs* v. *Southern Ry*.... 229

Baugham v. *New York, P. & N. R. R.*..... 237

Danger to brakeman at work in switching at one end of "manifest" train, arising from switching operations by another crew at the other end, is not an ordinary risk, and, in absence of notice or knowledge, is not an assumed one. *Chesapeake & Ohio Ry.* v. *Proffitt*..... 462

An experienced employee knowing material conditions and presence of pile of cinders, who attempts to board moving engine with vessel of water in his hand, considered as appreciating danger and assuming risk, even if employer were negligent in allowing cinders to remain. *Jacobs* v. *Southern Ry*..... 229

Negligence of employer: Negligence by employer is essential to recovery, and in absence of evidence to show why brakeman, sent to guard train, should go to sleep on track within short distance of curve, negligence not imputed to engineer of train for not stopping before striking him. *Southern Railway* v. *Gray*..... 333

Employers' Liability and Safety Appliance Acts are *in pari materia*, and where former refers to any defect or insufficiency, due to employer's negligence, in its appliances, it is legislative intent to treat violation of latter act as negligence *per se*. *San Antonio & A. P. Ry.* v. *Wagner* 476

Act abrogated common-law fellow servant rule by placing negligence of co-employee upon same basis as negligence of employer. *Ches. & Ohio Ry.* v. *De Atley*..... 310

Recovery under: Damages should be equivalent to compensation for deprivation of reasonable expectation of pecun-

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iary benefits that would have resulted from continued life of employee. *Ches. & Ohio Ry.* v. *Kelly*. 485
In estimating amount of damages recoverable, interest bearing capacity of present award must be considered, and whole loss sustained by beneficiaries during period that benefits cover cannot be included in verdict without rebate or discount. *Ches. & Ohio Ry.* v. *Kelly* 485
Ches. & Ohio Ry. v. *Gainey* 494
Computation, rate of interest, periods of rest, etc., in determining award under Act, are matters determined by law of forum; but proper measure of damages in cases arising under a Federal statute must be settled according to principles administered in Federal courts. *Ches. & Ohio Ry.* v. *Kelly* 485
Ascertained future benefits to be derived from a sum of money must be discounted from the amount of a present award. *Ches. & Ohio Ry.* v. *Kelly*. 485
While Act does not require damages to be apportioned among beneficiaries; *quære*, whether such apportionment is prohibited. *Id.*
A judgment in suit under Act set aside for error of instruction as to recovery by state appellate court cannot be reinstated by this court on writ of error to state appellate court after judgment for lesser amount on second trial has been affirmed by that court. *Louis. & Nash. R. R. Co.* v. *Stewart* 261
Practice and procedure: That after the close of testimony plaintiff suing under both Act and Safety Appliance Act withdrew his claim under latter, held not to amount to withdrawal of testimony in regard to defective condition of appliances entitling defendant to directed verdict on ground of assumption of risk. *St. L. & San F. R. R.* v. *Brown*. . . 223
Verdict in state court in action under Act, which is not unanimous, but which is legal under laws of State, is not illegal under Seventh Amendment. *Minneapolis & St. Louis R. R.* v. *Bombolis*. 211
St. Louis & S. F. R. R. v. *Brown* 223
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Louis. & Nash. R. R. v. *Stewart* 261
That trial court in action under Act, in instructing jury as to reduction of damages for contributory negligence, failed to define the word proportion, *held* not error. *St. Louis & San Francisco R. R.* v. *Brown*. 223
Quære, whether under Conformity Act trial court is required to adhere to state practice governing effect of general

EMPLOYERS' LIABILITY ACT—*Continued.* PAGE
verdict and special findings. *Spokane & I. E. R. R. Co.* v. *Campbell*. 497
Omission to plead or prove injury in interstate commerce, not made basis of assignment of error, *held* not ground for reversal; and also so held as to striking out certain special defenses. *San Antonio & A. P. Ry.* v. *Wagner* 476
Amendment of complaint so as to distinctly bring it under Act held not to amount to statement of new cause of action, and that it related back to commencement of suit. *Seaboard Air Line* v. *Renn*. 290
In action by representative of employee against interstate carrier, in absence of showing bringing injury within Federal act, question whether declaration permits recovery at common law is a state and not a Federal one. *Osborne* v. *Gray* 16
Interstate carrier, defendant in action for death of employee, failing to inform court as to actual movement of its trains and whether they were interstate, cannot complain of deprivation of Federal right because court does not take judicial notice of facts bearing thereon. *Id.*
Where, in action under Act, state trial and appellate courts have in effect held that conditions of assumption of risk were satisfied, this court, in absence of palpable error, simply announces concurrence. *Baugham* v. *N. Y., P. & N. R. R.* 237
See **Master and Servant.**

EMPLOYMENT AGENCIES. See **Constitutional Law; States.**

EQUAL PROTECTION OF THE LAW. See **Constitutional Law, VI.**

EQUITABLE LIENS. See **Liens.**

EQUITY:
As one not in possession may not maintain action to quiet title and, as in Oklahoma, one may not maintain ejectment as lessee under oil or gas mining lease, equity has jurisdiction of suit by such lessee to restrain claimants under another lease from interfering with property. *Lancaster* v. *Kathleen Oil Co.* 551

ESTOPPEL:
Even though one not party to action might be estopped by final decree if and when made, he cannot be brought into

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suit by ancillary proceedings before final decree as if already estopped. *Merriam* v. *Saalfield*. 22

One not estopped from asserting that judge making order for new trial had jurisdiction to make the same, because in another proceeding he had moved to quash an indictment for subornation of perjury, in connection with such new trial, on ground that judge acted beyond his jurisdiction in granting motion, because not made within time prescribed by a rule of court, the indictment being quashed on a different ground and one not taken by defendant. *Abbott* v. *Brown*. 606

Interstate carrier, defendant in action for death of employee, failing to inform court as to actual movement of its trains and whether they were interstate, cannot complain of deprivation of Federal right because court does not take judicial notice of facts bearing thereon. *Osborne* v. *Gray* 16

EVIDENCE:

Recitals in bill of lading, signed by both carrier and shipper, that lawful alternate rates based on valuations were offered, constitute admissions by shipper and *prima facie* evidence of choice, and cast on shipper burden of proof to contradict. *Cincinnati, N. O. & T. Ry.* v. *Rankin*. 319

Contradictory statements by witness prior to examination in case have no legal tendency to establish truth of their subject-matter. *Southern Railway* v. *Gray*. 333

That after the close of testimony plaintiff suing under both Employers' Liability Act and Safety Appliance Act withdrew his claim under latter, *held* not to amount to withdrawal of testimony in regard to defective condition of appliances entitling defendant to directed verdict on ground of assumption of risk. *St. L. & San Fran. R. R.* v. *Brown* 223

Whether methods substituted for grab-irons and handholds offer same, better, or adequate protection to employees, than those prescribed by Safety Appliance Act, is not question for expert testimony. *Spokane & I. E. R. R. Co.* v. *United States*. 344

Opportunity to be heard not denied by administrative board accepting *ex parte* sworn statements if all testimony is to be subsequently reviewed by the court in proceedings wherein testimony may be taken. *Pacific Live Stock Co.* v. *Oregon Water Board*. 440

While state legislature may go far in raising presumptions

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and changing burden of proof, there must be rational connection between fact proved and ultimate fact presumed. *McFarland* v. *American Sugar Co*. 79

Admissibility in extradition proceedings of authenticated copies of depositions, etc. See *Bingham* v. *Bradley*. 511

In absence of settled local rule of practice requiring counsel to announce in advance purpose for which evidence tendered, evidence as to contributory negligence in action under Federal Employers' Liability Act cannot be excluded because tendered without notice that it is restricted to diminution of damages. *Kansas City Southern Ry.* v. *Jones*. 181

When evidence admissible for one purpose only counsel need not announce its purpose. *Id.*

EXPERT TESTIMONY. See **Evidence.**

EXPRESS COMPANIES:

A company accepting a C. O. D. shipment of intoxicating liquor is not justified in refusing to deliver the same because of an unconstitutional state statute imposing special licenses on such companies maintaining offices for such shipments; and *held*, that such refusal amounted to conversion of the goods. *Rosenberger* v. *Pacific Express Co*. 48

EXTRADITION:

Where commissioner had jurisdiction, offense within treaty, and he acts upon competent and adequate evidence, his finding not reversible on habeas corpus. *Bingham* v. *Bradley*. 511

Illegal arrest by state or municipal authorities does not affect jurisdiction of United States commissioner. *Kelly* v. *Griffin*. 6

Fair observance of treaties with Great Britain requires that accused be surrendered where objections are technical and evidence furnishes reasonable ground for belief that accused had committed crime within treaty and law of place where found. *Bingham* v. *Bradley*. 511

One of objects of § 5271, Rev. Stat., is to obviate necessity of confronting accused with witnesses against him; and neither that section, nor Art. X, treaty of 1842 with Great Britain, should be so construed as to require demanding government to send its citizens to country where fugitive found to institute legal proceedings. *Id.*

Omission of formal act of release of one held under illegal

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arrest by state authorities *held* to furnish no ground for release on habeas corpus of one in custody of United States Marshal under extradition warrant. *Kelly* v. *Griffin* 6

A complaint charging person demanded with having committed in Canada perjury, obtaining money under false pretenses and receiving stolen property, states the first two offenses within meaning of treaty with Great Britain both in Canada where offenses committed and in Illinois where person demanded was arrested; but *quære* as to latter offense. *Id.*

Where complaint properly charges offense included in treaty and also charges one not included, court will not release on *habeas corpus* party demanded, presumption being that demanding country will respect treaty and try only for offense on which extradition allowed. *Id.*

Court will not presume that demanding government will suffer person surrendered to be tried for any offense other than that for which surrendered. *Bingham* v. *Bradley* 511

FACTS:

Where certiorari granted to review question of law, assumption that lower courts right where they agreed upon construction of facts. *Pacific Mail S. S. Co.* v. *Schmidt* 245

Where, on appeal from Court of Claims, findings of fact not sufficiently definite, the court, without expressing any opinion and reserving all questions of law, remands case for more particular findings on testimony already taken or, in discretion of court, on further testimony. *United States* v. *Archer* 119

A special finding supported by adequate evidence is controlling. *Russo-Chinese Bank* v. *National Bank of Commerce* 403

FALSE PERSONATION:

Section 32, Penal Code, prohibits and punishes the false assuming, with intent to defraud, to be an officer or employee of the United States; and also the doing in the falsely assumed character of any overt act to carry out the fraudulent intent, whether it would have been legally authorized had the assumed capacity existed or not. *Lamar* v. *United States*..... 103

Indictment held to charge fraudulent intent under § 32, Penal Code, and to be sufficient under § 1025, Rev. Stat. *Id.*

FEDERAL GOVERNMENT. See **Congress; United States.** PAGE

FEDERAL QUESTION:

Where case necessarily turns on construction of Act of Congress, which is charter of one of parties, a Federal question is presented. *Knights of Pythias* v. *Mims* 574

Question of proper construction of bill of lading of interstate shipment is a Federal one. *Georgia, F. & A. Ry.* v. *Blish Milling Co.* 190

Whether, in construing an interstate bill of lading issued under the Carmack Amendment, due effect is given to the latter, is a Federal question. *Nor. Pac. Ry. Co.* v. *Wall.* 87

Interpretation and effect of bill of lading of interstate shipment may present a Federal question even though there is no affirmative proof that carrier has filed tariff schedules. *Cincinnati, N. O. & T. Ry.* v. *Rankin* 319

Whether state court, in permitting amendment to complaint in action under Employers' Liability Act, disregarded provision of § 6 of Act limiting time to commence action, is a Federal question. *Seaboard Air Line* v. *Renn* 290

Ruling as to effect, with respect to supplemental proceeding, of decree in court of same State holding prior assessment void for want of notice, does not present Federal question. *St. Louis & K. C. Land Co.* v. *Kansas City* 419

In action by representative of employee against interstate carrier, in absence of showing bringing injury within Federal act, question whether declaration permits recovery at common law is a state and not a Federal one. *Osborne* v. *Gray* 16

FELLOW SERVANTS. See **Employers' Liability Act.**

FILING:

" File " means to deliver to office indicated and to send to such office through the mails. *United States* v. *Lombardo* .. 73

FINDINGS OF FACT. See **Facts.**

FISH AND GAME LAWS. See **Game Laws.**

FLORIDA:

Section 2765, Florida Statutes, does not fix scope of authority of agents of insurance companies as between company and third persons, and does not raise special agents with limited authority into general ones. *Mutual Life Ins. Co.* v. *Hilton-Green* 613

FOOD AND DRUGS ACT. See **Pure Food and Drugs Act.** PAGE

FOREIGN CORPORATIONS. See **Corporations.**

FORTS AND ARSENALS. See **Government Reservations.**

FOURTEENTH AMENDMENT. See **Constitutional Law, VI.**

FRATERNAL ORGANIZATIONS. See **Knights of Pythias.**

FRAUD:

Section 215, Crim. Code, prohibits using mails for fraudulent statements assigning to article to be sold qualities which it does not possess. *United States* v. *New South Farms* 64

There is deception and fraud within meaning of that section where article is not of character represented and hence does not serve purpose. *Id.*

Persons employing false representations as to use to which an article offered may be put, are engaged in scheme to defraud within meaning of § 215. *Id.*

GAME LAWS:

Power to preserve fish and game within its border is inherent in sovereignty of State, subject to any valid exercise of authority under Federal Constitution. *Kennedy* v. *Becker* ... 556

Tribal Seneca Indians are subject to fish and game laws of New York as to lands ceded by Big Tree Treaty of 1797. That Indians are wards of United States does not derogate from authority of State. *Id.*

GARNISHMENT:

In interpleader proceedings brought by garnishee, personal service on judgment debtor necessary. *New York Life Ins. Co.* v. *Dunlevy* 518

In Pennsylvania judgment debtor not party to garnishment proceeding to condemn claim due him from third person, nor bound by judgment discharging garnishee. *Id.*

GOVERNMENT RESERVATIONS:

Forts, arsenals and like places over which exclusive jurisdiction has been ceded to United States are not regarded as part of State. *Southern Surety Co.* v. *Oklahoma*..... 582

GREAT BRITAIN. See **Treaties.**

HABEAS CORPUS:

One held for extradition not entitled to release because complaint charging offense included in treaty also charges one not included. *Kelly* v. *Griffin*..... 6

HABEAS CORPUS—*Continued.* PAGE

Where extradition commissioner had jurisdiction, offense within treaty, and he acts upon competent and adequate evidence, his finding not reversible on habeas corpus. *Bingham* v. *Bradley*. 511

Omission of formal act of release of one held under illegal arrest by state authorities held to furnish no ground for release on habeas corpus of one in custody of United States Marshal under extradition warrant. *Kelly* v. *Griffin*. 6

Chinese person detained for deportation held not entitled to direct appeal from judgment of District Court dismissing petition for habeas corpus. *Chin Fong* v. *Backus*. 1

HEARING:

Opportunity to be heard not denied by administrative board accepting *ex parte* sworn statements if all testimony is to be subsequently reviewed by the court in proceedings wherein testimony may be taken. *Pacific Live Stock Co.* v. *Oregon Water Board*. 440

As to right of one whose property assessed for benefits in condemnation proceedings. See *St. Louis & K. C. Land Co.* v. *Kansas City*. 419

HEPBURN ACT:

Act requires railroad companies to provide and furnish transportation to shippers on reasonable request therefor. *Menasha Paper Co.* v. *Chicago & N. W. Ry. Co*. 55

See **Interstate Commerce.**

HOMESTEADS. See **Indians.**

IMMIGRATION. See **Aliens.**

IMPUTED KNOWLEDGE. See **Principal and Agent.**

INDIANS:

Legislation affecting Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred. *United States* v. *Nice* 591

Tribal relations may be dissolved and guardianship ended at such time and in such manner as Congress shall determine. *Id.*

Statute should be construed in light of obvious policy, and it would require clear language to show intent to impose restriction against alienation on allotted lands of non-Indians even if inherited from Indians. *Levindale Lead Co.* v. *Coleman* 432

Policy reflected by legislation is that relations of Indians

INDIANS—*Continued.* PAGE

among themselves are to be controlled by customs and laws of tribe, save where Congress expressly and clearly directs otherwise. *United States* v. *Quiver*..... 602

General Allotment Act of 1887 discloses that tribal relation, while ultimately to be broken up, was not to be dissolved by making or taking of allotments; and by subsequent legislation tribal relation of allottees was recognized as continuing during trust period. *United States* v. *Nice*..... 591

Under Acts of 1887 and 1889, tribal relations and wardship were not disturbed by the allotments or trust patents; and during trust period Congress has power to regulate or prohibit sale of intoxicating liquor to allottees. *Id.*

Restriction on alienation provisions of Osage Allotment Act of 1906 do not apply to lands, or interests therein, of white men in lawful possession who are non-members of tribe. *Levindale Lead Co.* v. *Coleman*..... 432

Later acts in regard to Osage allotments held not to attempt to import into earlier act a restriction wholly outside of its express terms and policy. *Id.*

Restrictions, such as in Osage Allotment Act of 1906, do not run with land until they attach and then only in accord with intendment of Act. *Id.*

Nothing in legislative history of act of 1884 indicates that it was passed as amendment to act of 1875, or that Congress deemed earlier act did not sufficiently protect Indians in retention of homesteads. *United States* v. *Hemmer*..... 379

Indian who made homestead entry prior to passage of act of 1884, but not final proof until thereafter, *held* to have made entry under act of 1875 and limitations of inalienability was according to that act. *Id.*

Provisions in act of 1875, relative to homestead entries, not repealed by act of 1884 relative to same subject. *Id.*

Under acts of 1906 and 1910, Secretary of Interior has exclusive authority and jurisdiction to determine heirs of allottee Indian entitled to succeed to allotment made under act of 1887, in case of his death during restricted period, including right to reopen and review previous administrative order on proper charges of newly discovered evidence or fraud. *Lane* v. *Mickadiet*..... 201

Tribal Seneca Indians are subject to fish and game laws of New York as to lands ceded by Big Tree Treaty of 1797. That Indians are wards of United States does not derogate from authority of State. *Kennedy* v. *Becker*..... 556

INDIANS—*Continued.* PAGE

Reservation to tribe of privilege of fishing and hunting on land conveyed by Treaty of Big Tree of 1797, *held* one in common with grantees and others to whom privilege might be extended, but subject to appropriate regulation by State. *Id.*

Congress has power to regulate or prohibit traffic in intoxicating liquor with tribal Indians within State, whether upon or off reservation. *United States* v. *Nice*..... 591

Matter of Heff, 197 U. S. 488, overruled. *Id.*

Section 316, Penal Code, does not embrace offense of adultery as between Indians on reservation. *United States* v. *Quiver*..... 602

Quære, whether Congress can deal with crime of adultery committed by tribal Indians within State. *Southern Surety Co.* v. *Oklahoma*..... 582

INDIAN TERRITORY:

No organized territorial government was ever established in the Territory, and prosecutions for crime were, regardless of their nature, commenced and prosecuted in the name of the United States. *Southern Surety Co.* v. *Oklahoma*..... 582

Sections 6509 and 6521, Mansfield's Digest, Laws of Arkansas, were not put in force in Indian Territory by Act of May 2, 1890; but *quære* as to § 6523. *Gidney* v. *Chappel*.... 99

Section 6525, Mansfield's Digest, Laws of Arkansas, was put in force in Indian Territory by Act of May 2, 1890. *Id.*

INDICTMENT AND INFORMATION See **Criminal Law.**

INJUNCTION:

Railroad has right to test rates prescribed by state statute as a unit, and to obtain injunction restraining state officers from enforcing law in its entirety if found to be confiscatory. *Missouri* v. *Chicago, B. & Q. R. R. Co.*..... 533

Although State not suable without consent, state officer may be enjoined from doing act violative of Federal Constitution. *Id.*

INSTRUCTIONS TO JURY:

Where charge as whole is fair, objections made at time, but which did not specifically draw attention of trial court to inaccuracies in portions thereof, cannot, where not dealt with by appellate court, be pressed in this court. *Seaboard Air Line* v. *Renn*..... 290

INSTRUCTIONS TO JURY—*Continued.* PAGE

Where court explicitly enjoins jury that there must be proximate and causal relation between damages and negligence and refers to amount stated in declaration as limitation on amount of award, and there is no misunderstanding as to the purpose of such reference, there is no error. *Ches. & Ohio Ry.* v. *Carnahan* 241

When evidence shows that there will be future effects of injury, instruction justifying their inclusion in award of damages not error. *Id.*

That trial court in action under Employers' Liability Act, in instructing jury as to reduction of damages for contributory negligence, failed to define the word proportion, held not error. *St. Louis & San Francisco R. R.* v. *Brown*..... 223

Where in criminal prosecution there is proof of criminality, it is not error to refuse an instruction to acquit. *Lamar* v. *United States*..... 103

INSURANCE:

Material misrepresentations in application, known to be untrue by assured when made, invalidate policy issued in reliance thereon, without further proof of actual conscious design to defraud. *Mutual Life Ins. Co.* v. *Hilton-Green* 613

Applicant should exercise toward insurer same good faith which he may rightfully demand from it: relationship demands fair dealing by both parties. *Id.*

One consciously permitting application containing material misrepresentations to be presented by subordinate agents to officers of life insurance company, under circumstances which he knows negative probability of actual facts being revealed, can claim nothing under policies which he knew were issued in reliance upon such misrepresentations. *Id.*

Section 2765, Florida Statutes, does not fix scope of authority of agents as between company and third persons, and does not raise special agents with limited authority into general ones. *Id.*

INTEREST:

A discretion is recognized in regard to allowing interest even in matters of tort, and court will not hold that court below erred in fixing date at which, but for law's delay, money would have been paid, even though appellate court reduced the amount awarded. *De la Rama* v. *De la Rama* 154

INTERPLEADER: PAGE

Interpleader proceedings brought by garnishee are collateral to action in which judgment rendered on which garnishment based, and require personal service on judgment debtor. *N. Y. Life Ins. Co.* v. *Dunlevy* 518

INTERSTATE COMMERCE:

1. *What constitutes:* Interstate commerce which is subject to the control of Congress embraces the widest freedom, including the right to make all contracts having proper relation to subject. *Rosenberger* v. *Pacific Express Co.*. 48

Although original interstate bill of lading of car shipment was surrendered for intrastate bill while car was in transit, if car moved in a continuous interstate commerce shipment from departure to destination, delivery at intermediate point and substitution of intrastate bill of lading is not such a new and distinct shipment as takes the car out of interstate commerce. *Atchison, T. & S. F. Ry. Co.* v. *Harold*. 371

2. *Scope of Commerce Act:* Rights and liabilities of parties to interstate shipment by rail depend upon acts of Congress, bill of lading and common-law principles. *Cincinnati, N. O. & T. Ry.* v. *Rankin* 319

Right of employee of interstate carrier by rail to recover for injury depends upon acts of Congress, to which all state legislation affecting subject-matter yields. *Spokane & I. E. R. R. Co.* v. *Campbell* 497

Prime object of Carmack Amendment was to bring about uniform rule of responsibility as to interstate commerce and interstate bills of lading. *A., T. & S. F. Ry. Co.* v. *Harold* 371

Under amendment, duty to issue bills of lading and the responsibilities thereunder is action of Congress and necessarily excludes state action in regard thereto. *Id.*

Amendment casts upon initial carrier responsibility with respect to entire transportation, including delivery. *Georgia, F. & A. Ry.* v. *Blish Milling Co* 190

The Hepburn Act requires railroad companies to provide and furnish transportation to shippers on reasonable request therefor. *Menasha Paper Co.* v. *Chicago & N. W. Ry. Co.* 55

3. *Power of Congress over:* Congress may require installation of safety appliances on cars used on highways of interstate commerce, irrespective of the use made of any particular car at any particular time. *Texas & Pacific Ry.* v. *Rigsby* . . 33

4. *Power of States over:* Power of States to control interstate

INTERSTATE COMMERCE—*Continued.* PAGE

C. O. D. shipments prior to enactment of Penal Code, not deducible from enactment of § 239 of that Code. *Rosenberger* v. *Pacific Express Co.* 48

Attempt by State to prohibit interstate shipments C. O. D. or prevent fulfillment of such contracts, is repugnant to the Constitution. *Id.*

Application by state court to interstate shipment of local rule investing innocent holder of bill of lading with rights not available to shipper is reversible error. *Atchison, T. & S. F. Ry. Co.* v. *Harold.* 371

Under Wilson Act State has power to prevent solicitation of orders for intoxicating liquors to be shipped from other States. *Rosenberger* v. *Pacific Express Co.* 48

5. *Burdens on and interference with:* The general rule against state burdens on interstate shipments, applicable to intoxicating liquor, has been modified so as to bring it under state control after delivery, but before sale, in its original package. *Rosenberger* v. *Pacific Express Co.* 48

Texas statute of 1907, imposing special license taxes on express companies maintaining offices for C. O. D. shipments of intoxicating liquors, is an unconstitutional burden on and interference with interstate commerce, and does not justify an express company accepting such a shipment in refusing to deliver the same. *Id.*

Quære, whether attributing to interstate bill of lading characteristics in conflict with general commercial rule would not, even in absence of legislation by Congress, constitute direct burden. *A., T. & S. F. Ry. Co.* v. *Harold* .. 371

6. *Tariffs:* Published rules relating to tariffs of interstate carriers must have a reasonable construction. *Menasha Paper Co.* v. *Chicago & N. W. Ry. Co.* 55

Where shippers under contract to deliver interstate shipments in car-load lots call upon interstate carriers for cars, carrier is bound to furnish them, and consignee cannot refuse delivery and by notifying carrier relieve itself of demurrage charges according to published tariff. *Id.*

Interstate carrier cannot, at request of consignee under contract to receive interstate shipments, declare embargo on the shipments and refuse to furnish cars for shippers; and if it temporarily does so and then removes embargo, latter act is but return to duty, and failure to notify consignee of its action does not relieve him from liability for demurrage provided by published tariff. *Id.*

INTERSTATE COMMERCE—*Continued.* PAGE

That interstate carrier complied with request of consignee having private siding to deliver daily thereon only the number of cars that could conveniently be handled, although more could actually be placed thereon, *held* not to relieve consignee from demurrage charges specified in published tariff on cars held by carrier awaiting consignee's convenience after arrival and readiness to deliver on siding. *Id.*

7. *Contracts:* Where carrier by rail offers rates for interstate shipments fairly based upon valuation, it may limit its liability by special contract. *Cin., N. O. & T. Ry.* v. *Rankin* 319

Parties to contract of an interstate shipment by rail made pursuant to Commerce Act cannot waive its terms; nor can carrier by conduct give shipper right to ignore such terms and hold carrier to different responsibility than that fixed by the agreement made under published tariffs and regulations. *Georgia, F. & A. Ry.* v. *Blish Milling Co.* 190

Where bill of lading of interstate shipment requires notice of claim for misdelivery before action can be brought against initial carrier, such notice must be given to terminal carrier making misdelivery. *Id.*

Provision in interstate bill of lading is to be construed the same as to connecting or terminal carrier as to initial carrier. *Id.*

Bill of lading issued by initial carrier upon interstate shipment governs entire transportation and fixes obligations of all participating carriers to extent that its terms are applicable and valid. *Id.*

A stipulation in bill of lading of interstate shipment that shipper must, as condition precedent to right of recovery for injury to shipment while in transit, give notice thereof in writing to some officer or station agent of the initial carrier, is satisfied by notice to station agent of connecting or delivering carrier. *Northern Pacific Ry. Co.* v. *Wall* 87

An interstate bill of lading is to be construed in the light of the Carmack Amendment. *Id.*

Where provision in bill of lading applicable and valid effect must be given thereto. *Georgia, F. & A. Ry.* v. *Blish Milling Co.* 190

Interpretation and effect of bill of lading of interstate shipment may present a Federal question even though there is no affirmative proof that carrier has filed tariff schedules. *Cincinnati, N. O. & T. Ry.* v. *Rankin* 319

See **Employers' Liability Act; Safety Appliance Act.**

INTOXICATING LIQUORS: PAGE

Congress has power to regulate or prohibit traffic in intoxicating liquor with tribal Indians within State, whether upon or off reservation. *United States* v. *Nice*..... 591

During trust period created by Indian allotment acts of 1887 and 1889, Congress has power to regulate or prohibit sale of intoxicating liquor to allottees; and so held as to act of 1897. *Id.*

Under the Wilson Act a State has power to prevent solicitation of orders for intoxicating liquors to be shipped from other States. *Rosenberger* v. *Pacific Express Co*..... 48

Power of States to control interstate C. O. D. shipments prior to enactment of Penal Code, not deducible from enactment of § 239 of that Code. *Id.*

The general rule against state burdens on interstate shipments, applicable to intoxicating liquor, has been modified so as to bring it under state control after delivery, but before sale, in its original package. *Id.*

Texas statute of 1907, imposing special license taxes on express companies maintaining offices for C. O. D. shipments of intoxicating liquors, is an unconstitutional burden on and interference with interstate commerce, and does not justify an express company accepting such a shipment in refusing to deliver the same. *Id.*

Matter of Heff, 197 U. S. 488, overruled. *United States* v. *Nice*..... 591

JUDGES:

Objection to competency of presiding judge not made in courts below and which could have been corrected if made in trial court, not open here except under most peremptory requirements of law. *De la Rama* v. *De la Rama*..... 154

JUDGMENTS AND DECREES:

State should be given opportunity to accept and abide by decision of this court; and where legislature has not met in regular session since rendition of decision, motion for execution denied without prejudice. *Virginia* v. *West Virginia*... 531

That State not party to company's suit in which decree dismissing bill without prejudice entered, does not make decree inapplicable in individual suit of State to recover excess fares paid during period covered by company's suit. *Missouri* v. *Chicago, B. & Q. R. R. Co.*..... 533

Qualification of decree dismissing bill to enjoin state officers from enforcing rate statute as without prejudice does not

JUDGMENTS AND DECREES—*Continued.* PAGE

leave matter open so that in subsequent individual case brought by State to recover excess fares paid during period covered by company's suit latter can attack constitutionality of law as a whole. *Id.*

Qualification as "without prejudice" of decrees in rate cases where assertions of confiscation not upheld, held not to leave controversy open as to period dealt with by decree, but to avoid prejudice as to property rights in future if confiscation should result. *Id.*

Personal judgment by state court against one not voluntarily submitting to jurisdiction, not citizen of State, nor served with process within its border, is void. *New York Life Ins. Co.* v. *Dunlevy* 518

It is not a denial of due process of law for a State to make a preliminary order of an administrative board effective pending final determination by court. *Pacific Live Stock Co.* v. *Oregon Water Board* 440

Under § 28, Jud. Code, remanding order of District Court is final and conclusive and not subject to review. *Id.*

Due process does not require State to provide for suspension of judgment pending appeal, nor prevent it making it costly in case judgment upheld; nor is due process denied by adding ten per cent. on amount of judgment affirmed. *Louisville & Nashville R. R. Co.* v. *Stewart.* 261

Doctrine of *res judicata* applies only when subsequent action has been brought. *Merriam* v. *Saalfield* 22

Even though one not party to action might be estopped by final decree if and when made, he cannot be brought into suit by ancillary proceedings before final decree as if already estopped. *Id.*

Only final judgment is *res judicata* as between parties; and decree is not *res judicata* as against third party participating in defense unless such against defendant himself. *Id.*

JUDICIAL CODE:

For sections construed, etc., see **Congress.**

JUDICIAL DISCRETION:

A discretion is recognized in regard to allowing interest even in matters of tort, and court will not hold that court below erred in fixing date at which, but for law's delay, money would have been paid, even though appellate court reduced the amount awarded. *De la Rama* v. *De la Rama* 154

JUDICIAL NOTICE: PAGE

Court cannot know judicially that no opium is produced in this country, nor so assume when construing statute itself purporting to deal with producers of article. *United States* v. *Jin Fuey Moy* 394

In action by representatives of deceased employee against carrier, court cannot, in absence of evidence that deceased was employed in interstate commerce when killed, take judicial notice of that fact. *Osborne* v. *Gray* 16

JUDICIAL POWER:

Judicial power of United States is wholly independent of state action and States may not, directly or indirectly, destroy, abridge, limit or render it inefficacious. *Wisconsin* v. *Philadelphia & Reading Coal Co.* 329

JUDICIARY. See **Courts; Judicial Discretion; Judicial Knowledge; Judicial Power; Jurisdiction.**

JURISDICTION:

I. **Generally.**

Rule of retention of cause by first of two courts of concurrent jurisdiction to exclusion of other courts and protection of its jurisdiction by injunction, applies only where there is substantial identity in rights asserted and purposes sought in the several suits. *Pacific Live Stock Co.* v. *Oregon Water Board* 440

Party to action does not, after final judgment, remain in court and subject, without further personal service, to whatsoever orders may be entered under title of cause. *New York Life Ins. Co.* v. *Dunlevy* 518

Presumption that if Congress has purpose to take class of suits out of usual jurisdictional restrictions relating thereto, it will make its purpose plain. *Bankers Trust Co.* v. *Texas & Pacific Ry.* 295

Provision in § 1 of Act of 1871, incorporating Texas & Pacific Ry., was not intended to confer jurisdiction upon any particular court, but merely render company capable of suing and being sued in any court of competent jurisdiction. *Id.*

A supplemental bill is not dependent or ancillary to original suit in sense that jurisdiction of it follows jurisdiction of original cause. *Merriam* v. *Saalfield* 22

Illegal arrest by state or municipal authorities does not affect jurisdiction of United States extradition commissioner. *Kelly* v. *Griffin* 6

JURISDICTION—*Continued.* PAGE

II. **Jurisdiction of this court.**

Whether District Court has acquired jurisdiction of person of defendant may be reviewed on direct appeal. *Merriam* v. *Saalfield*. 22

Where state court considered and disposed of Federal question adversely to plaintiff in error when asserted on application for rehearing, this court has jurisdiction under § 237, Jud. Code. *Atchison, T. & S. F. Ry. Co.* v. *Harold* 371

Where case necessarily turns on construction of Act of Congress, which is the charter of one of the parties, this court has jurisdiction under § 237, Jud. Code, if construction contended for by plaintiff in error was rejected below. *Knights of Pythias* v. *Mims*. 574

Where right of person of Chinese descent to enter country depends upon statutes regulating Chinese immigration, and not upon construction of treaties, direct appeal will not lie under § 238, Jud. Code, from judgment dismissing petition for habeas corpus of Chinese person detained for deportation. *Chin Fong* v. *Backus*. 1

III. **Of District Courts.**

Court of district where person harbored is without jurisdiction of offense of not filing certificate under § 6 of White Slave Traffic Act. *United States* v. *Lombardo* 73

Court is not lacking in jurisdiction to try criminal prosecution because presided over by judge of different district assigned to court conformably to Act of Oct. 3, 1913. *Lamar* v. *United States*. 103

Original jurisdiction of suits at law or in equity arising under Constitution, laws or treaties of United States is, by § 24, Jud. Code, vested in District Courts, subject to restriction as to amount in controversy. *Bankers Trust Co.* v. *Texas & Pacific Ry*. 295

Section 5 of Act of January 28, 1915, is amendatory of Judicial Code, and renders fact of incorporation under Act of Congress a negligible factor in determining whether suit by or against a railroad company is one arising under a law of the United States so as to give District Court jurisdiction thereof. *Id.*

A corporation incorporated under Act of Congress, whose activities are intended to be and are carried on in different States, is not a citizen of a State within meaning of jurisdictional statute. *Id.*

A suit by a citizen of a State against a railroad corporation

JURISDICTION—*Continued.* PAGE

organized and existing under an act of Congress is not a suit between citizens of different States of which court has jurisdiction. *Id.*

If oil and gas leases, to restrain interference with which holder has brought suit in equity, cover Indian allottee land and have been approved by Secretary of Interior, case arises under laws of United States and court has jurisdiction. *Lancaster* v. *Kathleen Oil Co.* 551

Statements of bill in equity, which are not merely anticipatory of a possible defense, can determine jurisdiction of court. *Id.*

Rule requiring motions for new trial to be made within four days after verdict is mere regulation of practice, breach of which does not affect jurisdiction. *Abbott* v. *Brown* 606

Order for new trial made by District Court for Southern District of Florida after adjournment, pursuant to General Rule No. 1, and before beginning of next term, is not beyond jurisdictional power of judge. *Id.*

IV. **Of State Courts.**

Court without jurisdiction to render personal judgment against one not voluntarily submitting, who is not citizen of State, nor served with process within its borders. *New York Life Ins. Co.* v. *Dunlevy* 518

The offense of adultery is cognizable only in courts of State. *Southern Surety Co.* v. *Oklahoma* 582

Suit for damages to business caused by threat to sue under patent law, not one of which state court cannot take jurisdiction. *American Well Works Co.* v. *Layne* 257

See **Admiralty; Equity.**

KANSAS:

Application by state court to interstate shipment of local rule investing innocent holder of bill of lading with rights not available to shipper is reversible error. *Atchison, T. & S. F. Ry. Co.* v. *Harold* 371

KNIGHTS OF PYTHIAS:

Under § 4 of the Act of June 29, 1894, constituting charter, giving a right to have by-laws and to amend the same, the corporation had power to raise rates for life benefits to such point as was necessary for it to go, and a member continuing to remain therein was obligated to pay the assessments fixed by the laws as amended. *Knights of Pythias* v. *Mims* 574

LAMAR, J., IN MEMORIAM. See p. v, *ante*. PAGE

LAND DEPARTMENT:

As a general rule courts have no power to interfere with performance by Land Department of administrative duties, but may, when functions of the Department are at an end, correct errors of law committed in such administration. *Lane* v. *Mickadiet*. 201

LAND GRANTS. See **Public Lands.**

LAW GOVERNING:

Laws in force at time and place of making contract and which affect its validity, performance and enforcement, enter into and form part of it, as if expressly referred to or incorporated therein. *Northern Pacific Ry. Co.* v. *Wall*.... 87

Policy reflected by legislation is that relations of Indians among themselves are to be controlled by customs and laws of tribe, save where Congress expressly and clearly directs otherwise. *United States* v. *Quiver*..... 602

Rights and obligations under Employers' Liability Act depend upon it, and applicable principles of common law as interpreted and applied in Federal courts. *Southern Railway* v. *Gray*..... 333

Rights and liabilities of parties to interstate shipment by rail depend upon acts of Congress, bill of lading and common-law principles. *Cincinnati, N. O. & T. Ry.* v. *Rankin*..... 319

Right of employee of interstate carrier by rail to recover for injury depends upon acts of Congress, to which all state legislation affecting subject-matter yields. *Spokane & I. E. R. R. Co.* v. *Campbell*..... 497

In action by representatives of employee for his death, from negligence of interstate carrier by rail, defendants are entitled to insist upon applicable Federal law as exclusive measure of liability, whether plaintiff presents case under that or state law. *Osborne* v. *Gray*..... 16

Computation, rate of interest, periods of rest, etc., in determining award under Employers' Liability Act, are matters determined by law of forum; but proper measure of damages in cases arising under a Federal statute must be settled according to principles administered in Federal courts. *Chesapeake & Ohio Ry.* v. *Kelly*..... 485

Whether a wrong is committed by one making statements to effect that an article sold by another infringes former's patent, depends upon law of State where act done and not

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upon patent law of United States. *American Well Works Co.* v. *Layne*. 257
Section 6525, Mansfield's Digest, Laws of Arkansas, was put in force in Indian Territory by Act of May 2, 1890. *Gidney* v. *Chappel* 99
Sections 6509 and 6521, Mansfield's Digest, Laws of Arkansas, were not put in force in Indian Territory by Act of May 2, 1890; but *quære* as to § 6523. *Id.*

LEASE. See **Oklahoma.**

LEGISLATIVE POWER:
Legislative power may not declare one guilty, or presumptively guilty, of a crime. *McFarland* v. *American Sugar Co.* 79
While state legislature may go far in raising presumptions and changing burden of proof, there must be rational connection between fact proved and ultimate fact presumed. *Id.*

See **Congress.**

LEVEES. See **Mississippi River; Riparian Rights.**

LICENSES. See **States.**

LIENS:
An agreement made by way of compromise, more than four months before filing of petition in bankruptcy, to pay from fund of which bankrupt entitled to residue, all lienable claims, held to create an equitable lien in favor of all parties thereto having color of right. *Johnson* v. *Root Mfg. Co.*. . . 160

LIFE INSURANCE. See **Insurance; Knights of Pythias.**

LIMITATION OF LIABILITY. See **Common Carriers.**

LIMITATIONS:
An amendment which merely expands or amplifies what was alleged in original complaint relates back to commencement of action and is not affected by intervening lapse of time; but an amendment which introduces a new or different cause of action is the equivalent of a new suit barred by the expiration of the period of limitation. *Seaboard Air Line* v. *Renn*. 290
Whether state court, in permitting amendment to complaint in action under Employers' Liability Act, disregarded provision of § 6 of Act limiting time to commence action, is a Federal question. *Id.*

LIQUORS. See **Intoxicating Liquors.** PAGE

LOCAL LAW:

Extent of authority conferred on city by its charter, construction of charter, and validity, scope and effect of ordinances and proceedings thereunder, and rights of parties thereto under state law, are matters of state law, as to which decisions of state courts controlling. *St. Louis & K. C. Land Co.* v. *Kansas City*. 419

See **Law Governing and Captions of Various States, Territories and Insular Possessions.**

LOUISIANA:

Act No. 10 of Extra Session, 1915, relating to business of sugar refining, held unconstitutional under equal protection and due process provisions of Fourteenth Amendment. *McFarland* v. *American Sugar Co.*. 79

MAILS:

Section 215, Crim. Code, prohibits using the mails for fraudulent statements assigning to article to be sold qualities which it does not possess. *United States* v. *New South Farms*. 64

There is deception and fraud within the meaning of § 215, where the article is not of the character represented and hence does not serve the purpose. *Id.*

Persons employing false representations as to use to which an article offered may be put, are engaged in scheme to defraud within meaning of § 215. *Id.*

MANDAMUS:

Mandamus will not lie to control conduct of Secretary of Interior concerning matter within his administrative authority. *Lane* v. *Mickadiet* 201

State may not, by mandamus, compel railroad to comply with rates fixed by state law unless opportunity afforded to test question of confiscation. *Missouri* v. *Chicago, B. & Q. R. R. Co.* 533

MARITIME LAW:

Under § 4529, Rev. Stat., as amended in 1898, shipowner not liable for penalty for delay in payment of seaman's wages during period between judgment and affirmance by appellate court, where reasonable cause for prosecuting appeal. *Pacific Mail S. S. Co.* v. *Schmidt* 245

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MARRIAGE: PAGE

Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way. *Southern Surety Co.* v. *Oklahoma*..... 582

MASTER AND SERVANT:

Employer not required to furnish latest, best and safest machinery and appliances, provided those in use are reasonably safe and suitable. *Chicago & N. W. Ry.* v. *Bower*.... 470

Continuance of an engineer in his employment on locomotive equipped with old style lubricator glass, after he has requested that new and safe style be substituted, held not to amount to assumption of extraordinary risk involved in retention of older appliance. *Id.*

Question whether appliance causing injury, which was not of latest type, was reasonably safe and suitable, held properly submitted to jury. *Id.*

In absence of knowledge of custom of employer in making up trains, brakeman not bound by custom unless it is such as reasonably careful employer would adopt. *Chesapeake & Ohio Ry.* v. *Proffitt*..... 462

Even if employee knows and assumes risk of inherently dangerous method of work, he does not assume increased risk attributable to negligence in pursuing it. *Id.*

Employee not bound to exercise care to discover dangers resulting from employer's negligence and not ordinarily incident to the employment. *Id.*

Employee not regarded as having assumed risk attributable to employer's negligence until he becomes aware of it. *Id.*

While employee assumes risks ordinarily incident to employment, so far as not attributable to negligence of employer or those for whom responsible, employee has right to assume that employer has exercised proper care as to safety of place and method of work. *Id.*

To subject employee without warning to unusual danger, not normally incident to employment, is itself an act of negligence. *Id.*

Under Mining Act of the State of Washington a gas-tester is the representative of the master and not a fellow-servant. *Brown* v. *Pacific Coast Coal Co.*..... 571

See **Employers' Liability Act; Safety Appliance Act.**

MEASURE OF DAMAGES. See **Damages.**

MEMBERS OF CONGRESS: PAGE

A member of the House of Representatives is an officer of the United States within the meaning of § 32, Penal Code. *Lamar* v. *United States*. 103

MERCHANTS. See **Chinese.**

MICHIGAN:

Law imposing license fee to operate employment agencies and prohibiting agents from sending applicants to employer who has not applied for labor, is not unconstitutional as deprivation of property without due process of law or as denying equal protection of the law. *Brazee* v. *Michigan*. 340

MINES AND MINING:

Under Mining Act of Washington it is the duty of mine owner to supply ventilation that will prevent accumulations of gas, which duty cannot be delegated, and gas-tester is a representative of the principal and not a fellow-servant of other employees engaged in mining. *Brown* v. *Pacific Coast Coal Co*. 571

MISBRANDING. See **Pure Food and Drugs Act.**

MISSISSIPPI RIVER:

Overflows are accidental and extraordinary and justify construction of levees for prevention of destruction to valley of river. *Cubbins* v. *Mississippi River Commission*. 351

Conditions in valley of river demonstrate that work of Federal and various state commissions in constructing series of levees is for purpose of prevention of destruction and improvement of navigation and not for purposes of reclamation. *Id.*

Congress had power to create Commission and through it to build levees to improve navigation, and Government is not responsible to riparian owners for deflection of water by reason thereof. *Id.*

There is no identity between the great valley of the Mississippi and the flood bed of that river, but the bank of that river is where it is found and does not extend over a vast and imaginary area. *Id.*

MUNICIPAL CORPORATIONS:

Extent of authority conferred on city by its charter, construction of charter, and validity, scope and effect of ordinances and proceedings thereunder, and rights of parties

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thereto under state law, are matters of state law, as to which decisions of state courts controlling. *St. Louis & K. C. Land Co.* v. *Kansas City*. 419

NAVIGABLE WATERS:

As to jurisdiction of admiralty of libel *in rem* against vessel for damages to beacon in navigable waters, see *The Raithmoor* 166

Quære as to liability of United States to owner of tract of land part of which taken for erection of dike in navigable river. *United States* v. *Archer* 119

NEGLIGENCE:

To subject employee without warning to unusual danger, not normally incident to employment, is itself an act of negligence. *Chesapeake & Ohio Ry.* v. *Proffitt* 462

While employee assumes risks ordinarily incident to employment, so far as not attributable to negligence of employer or those for whom responsible, employee has right to assume that employer has exercised proper care as to safety of place and method of work. *Id.*

Employee not regarded as having assumed risk attributable to employer's negligence until he becomes aware of it. *Id.*

Employee not bound to exercise care to discover dangers resulting from employer's negligence and not ordinarily incident to the employment. *Id.*

Even if employee knows and assumes risk of inherently dangerous method of work, he does not assume increased risk attributable to negligence in pursuing it. *Id.*

Engineer of approaching train, on seeing lights of brakeman sent out to guard latter's train, has right to presume that brakeman is standing on guard, and does not owe him duty to immediately stop train. *Southern Railway* v. *Gray* 333

See **Admiralty; Employers' Liability Act.**

NEW TRIAL:

Order for new trial made by District Court for Southern District of Florida after adjournment, pursuant to General Rule No. 1, and before beginning of next term, is not beyond jurisdictional power of judge. *Abbott* v. *Brown* 606

NOTICE:

Stipulation in bill of lading requiring notice of claim before action brought held satisfied by telegram from shipper to terminal carrier. *Georgia, F. & A. Ry.* v. *Blish Milling Co.* . . . 190

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Right of common carrier to require notice of claim before action brought; and sufficiency of such notice. *Id.*

Sufficiency of notice of injury to shipment under stipulation of bill of lading. See *Northern Pacific Ry. Co.* v. *Wall* 87

As to who entitled to notice in condemnation proceedings. See *St. Louis & K. C. Land Co.* v. *Kansas City* 419

OFFENSES:

Court will not, in order to accommodate venue of particular offense, introduce confusion into the law. *United States* v. *Lombardo* 73

Nature and jurisdiction of offense of failure to file certificate under § 6, White Slave Traffic Act. *Id.*

Effect of complaint in extradition proceedings to properly charge. See *Kelly* v. *Griffin* 6

OFFICERS OF UNITED STATES:

A member of the House of Representatives is an officer of the United States within the meaning of § 32, Penal Code. *Lamar* v. *United States* 103

Section 32, Penal Code, prohibits and punishes the false assuming, with intent to defraud, to be an officer or employee of the United States; and also the doing in the falsely assumed character of any overt act to carry out the fraudulent intent, whether it would have been legally authorized had the assumed capacity existed or not. *Id.*

OIL LEASES. See **Oklahoma.**

OKLAHOMA:

Under §§ 16, 20, Enabling Act, and sched. 28, constitution of Oklahoma, State took place of United States in prosecutions for adultery, neither party being Indian, commenced in Indian Territory, and all essential parts of prosecution, including bail bond, passed to State with power of enforcement. *Southern Surety Co.* v. *Oklahoma* 582

As one not in possession may not maintain action to quiet title and one may not maintain ejectment as lessee under oil or gas mining lease, equity has jurisdiction of suit by such lessee to restrain claimants under another lease from interfering with property. *Lancaster* v. *Kathleen Oil Co.* 551

OPIUM:

Court cannot know judicially that no opium is produced in this country, nor so assume when construing statute itself

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purporting to deal with producers of article. *United States* v. *Jin Fuey Moy* 394

OPIUM REGISTRATION ACT:
In view of grave doubt as to constitutionality of Act of 1914, otherwise than as a revenue measure, this court construes it as such. *United States* v. *Jin Fuey Moy* 394
" Any person not registered " in § 8 of Act, refers to those required to register, and one not in that class is not subject to the penalties prescribed. *Id.*

OREGON:
Statutes establishing proceedings for ascertainment and adjudication of relative rights of claimants to same water, do not deny due process of law. *Pacific Live Stock Co.* v. *Oregon Water Board* 440

OSAGE ALLOTMENTS. See **Indians.**

PARTIES:
Even though one not party to action might be estopped by final decree if and when made, he cannot be brought into suit by ancillary proceedings before final decree as if already estopped. *Merriam* v. *Saalfield* 22
One not a defendant, but estopped by decree because of having exercised control of defense, and who is not resident of district, cannot be brought into action by filing of supplemental bill, without service of original process within district. *Id.*
Owner of property which may be assessed for benefits to pay for property condemned is not entitled under due process provision of Fourteenth Amendment to be made party to condemnation proceedings or be heard as to amount of awards; provision requires only those whose property is to be taken to have prior notice. *St. Louis & K. C. Land Co.* v. *Kansas City* 419
In Pennsylvania judgment debtor not party to garnishment proceeding to condemn claim due him from third person, nor bound by judgment discharging garnishee. *New York Life Ins. Co.* v. *Dunlevy* 518

PAYMENT:
Where a bank holding a draft for collection, with instructions to deliver documents attached only on payment, permitted drawee to take possession of goods covered by the

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documents on his agreeing to deposit the proceeds thereof as sold, such action on the part of the collecting bank constituted a payment in law of the draft if the value of the goods was not less than the amount of the draft. *Russo-Chinese Bank* v. *National Bank of Commerce* 403

PENAL CODE:
For sections construed, etc., see **Congress.**

PENAL STATUTES:
While penal provision not to be enlarged by interpretation, it must not be so narrowed as to fail to give full effect to its plain terms, as made manifest by its text and context. *Lamar* v. *United States*. 103

PENALTIES AND FORFEITURES:
Under § 4529, Rev. Stat., as amended in 1898, shipowner not liable for penalty for delay in payment of seaman's wages during period between judgment and affirmance by appellate court, where reasonable cause for prosecuting appeal. *Pacific Mail S. S. Co.* v. *Schmidt* 245

PENNSYLVANIA:
Judgment debtor not party to garnishment proceeding to condemn claim due him from third person, nor bound by judgment discharging garnishee. *New York Life Ins. Co.* v. *Dunlevy*..... 518

PHILIPPINE ISLANDS:
The review of a decree affecting division of conjugal property made by the supreme court is by appeal and not writ of error. *De la Rama* v. *De la Rama*..... 154
In action of equitable nature proper method of review of judgment of supreme court under § 10, Act of 1902, is by appeal. *Montelibano* v. *La Compania Tabacos*..... 455

PLEADING:
Amendment of complaint so as to distinctly bring it under the Employers' Liability Act held not to amount to statement of new cause of action, and that it related back to commencement of suit. *Seaboard Air Line* v. *Renn*..... 290
An amendment which merely expands or amplifies what was alleged in original complaint relates back to commencement of action and is not affected by intervening lapse of time; but an amendment which introduces a new or different cause of action is the equivalent of a new suit barred by the expiration of the period of limitation. *Id.*

PLEDGOR AND PLEDGEE: PAGE

Brokers and their customers stand in the relation of pledgee and pledgor. *Duel* v. *Hollins*. 523

POLICE POWER:

State may require licenses for employment agencies and prescribe reasonable regulations in respect to them enforceable in legal discretion of commissioner. *Brazee* v. *Michigan* 340

See **States.**

PORTO RICO:

Even though government has sovereign attributes and has only consented to be sued in its own courts, the solemn appearance in the United States District Court, and the taking of other steps by, its Attorney General, held to have amounted to a consent to be sued in that court, and thereafter government could not deny its jurisdiction. *Richardson* v. *Fajardo Sugar Co*. 44

POST OFFICE. See **Mails.**

PRACTICE AND PROCEDURE:

Scope of review: This court has the power to, and in exceptional cases will, determine the merits on reversal of decision of Circuit Court of Appeals on question of its jurisdiction. *Lamar* v. *United States*. 103

Objection to competency of presiding judge not made in courts below and which could have been corrected if made in trial court, not open here except under most peremptory requirements of law. *De la Rama* v. *De la Rama* 154

An attempt to open questions of detail in trial court, no clear and important error being shown, and the matter being one of local administration, disallowed. *Id.*

Where charge as whole is fair, objections made at time, but which did not specifically draw attention of trial court to inaccuracies in portions thereof, cannot, where not dealt with by appellate court, be pressed in this court. *Seaboard Air Line* v. *Renn*. 290

Where state court has treated instrument involved as properly in evidence and has undertaken to determine its validity and effect, this court will not consider mooted questions of pleading as to whether instrument properly before court. *Cincinnati, N. O. & T. Ry.* v. *Rankin*. 319

Validity of severable provisions of statute, not raised by charge against one violating it, nor considered by court below, not considered by this court. *Brazee* v. *Michigan*. . . . 340

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In Second Circuit practice well established that appeal from decree in admiralty to the Circuit Court of Appeals opens case for trial *de novo*. *Reid* v. *American Express Co.*.. 544

Disposition of case: That state appellate court may have inaccurately expressed in one respect its reasons for affirmance, does not require this court to reverse, if in fact, no reversible error exists. *St. Louis & S. F. R. R.* v. *Brown* 223

Where, in action under Employers' Liability Act, state trial and appellate courts have in effect held that conditions of assumption of risk were satisfied, this court, in absence of palpable error, simply announces concurrence. *Baugham* v. *New York, P. & N. R. R.*..... 237

A judgment in suit under Employers' Liability Act set aside for error of instruction as to recovery by state appellate court cannot be reinstated by this court on writ of error to state appellate court after judgment for lesser amount on second trial has been affirmed by that court. *Louisville & Nashville R. R. Co.* v. *Stewart*..... 261

Opinion of both courts below and the jury being against defendant's contention that case should have been withdrawn from jury, this court affirms. *Id.*

Omission to plead or prove injury in interstate commerce, not made basis of assignment of error, *held* not ground for reversal; and also so held as to striking out certain special defenses. *San Antonio & A. P. Ry.* v. *Wagner*..... 476

Demurrer to indictment under § 215, Crim. Code, having been sustained, and Government having appealed, and appellee having contended that court below passed only on sufficiency of indictment and did not consider statute, *held*, that such contentions involved construction of the statute; but in reversing District Court as to action in sustaining demurrer there was no intention of controlling lower court in its construction of the indictment. *United States* v. *New South Farm* 64

Where, on appeal from Court of Claims, finding of fact not sufficiently definite, the court, without expressing any opinion and reserving all questions of law, remands case for more particular findings on testimony already taken or, in discretion of court, on further testimony. *United States* v. *Archer*.. 119

Following lower courts: Where certiorari granted to review question of law, assumption that lower courts right where

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they agreed upon construction of facts. *Pacific Mail S. S. Co.* v. *Schmidt*. 245
In absence of clear error this court will not disturb findings concurred in by lower courts. *Seaboard Air Line* v. *Renn*. . . 290
Decisions of state courts on matters of state law are controlling. *St. Louis & K. C. Land Co.* v. *Kansas City* 419
Where both courts below concurred in findings of fact and conclusions of law, this court, in absence of clear error, affirms. *Montelibano* v. *La Compania Tabacos* 455
Decision of highest state court that under a state constitutional amendment legislative power of State was vested not only in legislature but also in people by referendum, and that a law disapproved by referendum was no law, is conclusive here. *Davis* v. *Ohio* 565
Where decision of state court is necessary result of construction of state statute, this court accepts it as correct. *Pacific Live Stock Co.* v. *Oregon Water Board*. 440
Rule that local practice sanctioned by local courts should not be disturbed, applied. *De la Rama* v. *De la Rama* 154
In general: When evidence admissible for one purpose only counsel need not announce its purpose. *Kansas City Southern Ry.* v. *Jones*. 181
That after the close of testimony plaintiff suing under both Employers' Liability Act and Safety Appliance Act withdrew his claim under latter, *held* not to amount to withdrawal of testimony in regard to defective condition of appliances entitling defendant to directed verdict on ground of assumption of risk. *St. Louis & S. F. R. R.* v. *Brown*. . . 223
Where jurisdiction rests on diverse citizenship it is the duty of Federal court to follow applicable decisions of state court, and this even though the words of the state court may have been *obiter dicta*, if they stated the principle of the decision, and the state court may have previously held otherwise. *Brown* v. *Pacific Coast Coal Co*. 571
Quære, whether under Conformity Act trial court is required, in action under Employers' Liability Act, to adhere to state practice governing effect of general verdict and special findings. *Spokane & I. E. R. R. Co.* v. *Campbell* 497
Due process clause does not control mere forms of procedure in state courts or regulate practice therein. *Holmes* v. *Conway*. 624
Rule of District Court requiring motions for new trial to be made within four days after verdict is mere regulation of

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practice, breach of which does not affect jurisdiction. *Abbott* v. *Brown*. 606
Order for new trial made by District Court for Southern District of Florida after adjournment, pursuant to General Rule No. 1, and before beginning of next term, is not beyond jurisdictional power of judge. *Id.*
Amendment of Rule 10, §§ 2 and 9, relative to printing of record. See p. 633.

PREFERENCES. See **Bankruptcy.**

PRESUMPTIONS:
While state legislature may go far in raising presumptions and changing burden of proof, there must be rational connection between fact proved and ultimate fact presumed. *McFarland* v. *American Sugar Co.* 79
State act creating rebuttable presumption having no foundation except on intent to destroy, held unconstitutional under Fourteenth Amendment. *Id.*
Presumption that if Congress has purpose to take class of suits out of usual jurisdictional restrictions relating thereto, it will make its purpose plain. *Bankers Trust Co.* v. *Texas & Pacific Ry.* 295
It will not be presumed that interstate carrier is conducting its affairs in violation of law. *Cin., N. O. & T. Ry.* v. *Rankin*. 319
Engineer of train, on seeing lights of brakeman sent out to guard latter's train, has right to presume that brakeman is standing on guard. *Southern Railway* v. *Gray* 333
Court will not presume that demanding government will suffer person surrendered to be tried for any offense other than that for which surrendered. *Bingham* v. *Bradley* 511

PRINCIPAL AND AGENT:
Rule imputing agent's knowledge to principal not applicable when third party knows there is no foundation for ordinary presumption and is acquainted with circumstances plainly indicating that agent will not advise principal. *Mutual Life Ins. Co.* v. *Hilton-Green*. 613
Rule is not a shield for unfair dealing. *Id.*

PRIVILEGE TAX. See **States.**

PROCEDURE. See **Practice and Procedure.**

PROCESS: PAGE

Service essential to validity of personal judgment by state court where party does not voluntarily submit to jurisdiction and is not citizen of State. *New York Life Ins. Co.* v. *Dunlevy*. 518

Personal service on judgment debtor necessary in interpleader proceedings brought by garnishee. *Id.*

See **Appeal and Error; Certiorari; Habeas Corpus; Injunction; Jurisdiction.**

PUBLIC LANDS:

While Congress may exercise control over lands to which claims have attached under existing statutes, such lands are not regarded as public lands under acts of Congress passed thereafter. *United States* v. *Hemmer*. 379

Nothing in legislative history of act of 1884 indicates that it was passed as amendment to act of 1875, or that Congress deemed earlier act did not sufficiently protect Indians in retention of homesteads. *Id.*

Provisions in act of 1875 permitting Indians to make homestead entries, not repealed by act of 1884. *Id.*

Indian who made homestead entry prior to passage of act of 1884, but not final proof until thereafter, held to have made entry under act of 1875 and limitations of inalienability was according to that act. *Id.*

PUBLIC OFFICERS. See **Members of Congress.**

PUBLIC UTILITIES:

Corporation authorized by its charter to carry passengers and goods, but not to exercise any powers of a public service corporation, and which does such business, including carrying of passengers to and from railroad terminals and hotels under contracts therewith, and also does a garage business with individuals, held a common carrier within meaning of District of Columbia Public Utility Act of 1913, and subject to jurisdiction of Commission as to terminal and hotel business, but not as to garage business; and under the Act is bound to furnish information properly required by Commission in regard to former but not as to latter business. *Terminal Taxicab Co.* v. *District of Columbia* 252

Omission from a general order of a public utilities commission of concerns doing a small volume of business held not to amount to such a preference as to deny those affected by order the equal protection of the law. *Id.*

PURE FOOD AND DRUGS ACT: PAGE

While a distinctive name may be purely arbitrary, it must be one that distinguishes the article; and where more than one name, each descriptive of the article, are united, it amounts to misbranding if the article sold does not contain any of the article generally known individually by any of such names. *United States* v. *Coca Cola Co.*..... 265

A compound food product, the formula of which included a poisonous or deleterious ingredient, is not adulterated by the omission of such ingredient. *Id.*

Adulteration as used in § 7 is used in a special sense and an article may be adulterated by the adding of an injurious ingredient including component parts of the article itself; it is not to be confused with misbranding and provisions as to latter do not limit explicit provisions of § 7; and proprietary foods sold under descriptive names are within its provisions, including those on market when Act was passed. *Id.*

A poisonous or deleterious ingredient may be an added ingredient although it is covered by the formula and made a constituent of the article sold. *Id.*

Whether an added ingredient is poisonous or deleterious held to be a question for the jury. *Id.*

The fact that a formula has been made up and followed and a distinctive name therefor adopted does not suffice to take an article from § 7, subd. 5 of Act: the standard by which the combination is to be judged is not necessarily the combination itself. *Id.*

RAILROADS:

Have right to test rates prescribed by state statute as a unit, and to obtain injunction restraining state officers from enforcing law in its entirety if found to be confiscatory. *Missouri* v. *Chicago, B. & Q. R. R. Co.*..... 533

Right is not exclusive of right to test it by resisting in each particular case an individual effort to enforce a single rate prescribed. *Id.*

Engineer of approaching train, on seeing lights of brakeman sent out to guard latter's train, has right to presume that brakeman is standing on guard, and does not owe him duty to immediately stop train. *Southern Railway* v. *Gray*..... 333

Danger to brakeman at work in switching at one end of "manifest" train, arising from switching operations by another crew at the other end, is not an ordinary risk, and,

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in absence of notice or knowledge, is not an assumed one. *Chesapeake & Ohio Ry.* v. *Proffitt*..... 462
In absence of knowledge of custom of employer in making up trains, brakeman not bound by custom unless it is such as reasonably careful employer would adopt. *Chesapeake & Ohio Ry.* v. *Proffitt*..... 462
Continuance of an engineer in his employment on locomotive equipped with old style lubricator glass, after he has requested that new and safe style be substituted, held not to amount to assumption of extraordinary risk involved in retention of older appliance. *Chicago & N. W. Ry.* v. *Bower* 470
See **Common Carriers; Employers' Liability Act; Interstate Commerce; Rate Regulation; Safety Appliance Act.**

RATE REGULATION:
In exerting public power State cannot, without violating Constitution, make rates so low as to be confiscatory. *Missouri* v. *Chicago, B. & Q. R. R. Co.*..... 533
From power to fix railroad rates results duty to provide opportunity to test their repugnancy as a unit to Constitution in case confiscation charged. *Id.*
State may not, by mandamus, compel railroad to comply with rates fixed by state law unless opportunity afforded to test question of confiscation. *Id.*
Railroad has right to test rates prescribed by state statute as a unit, and to obtain injunction restraining state officers from enforcing law in its entirety if found to be confiscatory. *Id.*
Right to test rate-making law as a unit is not exclusive of right to test it by resisting in each particular case an individual effort to enforce a single rate prescribed. *Id.*
Qualification as "without prejudice" of decrees in rate cases where assertions of confiscation not upheld, *held* not to leave controversy open as to period dealt with by decree, but to avoid prejudice as to property rights in future if confiscation should result. *Id.*
Qualification of decree dismissing bill to enjoin state officers from enforcing rate statute as without prejudice does not leave matter open so that in subsequent individual case brought by State to recover excess fares paid during period covered by company's suit latter can attack constitutionality of law as a whole. *Id.*
That State not party to company's suit in which decree

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dismissing bill without prejudice entered, does not make decree inapplicable in individual suit of State to recover excess fares paid during period covered by company's suit. *Id.*
Quære as to ultimate right to recover for excess rates paid pending stay while constitutionality of statute pending, in absence of condition to that effect imposed when injunction issued. *Id.*
Quære, whether suit by railroad against state officers to enjoin enforcement of rate-making statute is not a class suit binding upon all. *Id.*

REAL PROPERTY. See **Condemnation of Land.**

RECORD:
Amendment of Rule 10, §§ 2 and 9, relative to printing. See p. 633.

REFERENDUM:
Nothing in Act of Congress of 1911, apportioning representation among States, prevents people of State from reserving right of approval or disapproval by referendum of a state act redistricting State for purpose of congressional elections. *Davis* v. *Ohio*..... 565

RELATION. See **Pleading.**

REMEDIES:
Right to test rate-making law as a unit is not exclusive of right to test it by resisting in each particular case an individual effort to enforce a single rate prescribed. *Missouri* v. *Chicago, B. & Q. R. R. Co.*..... 533

REMOVAL OF CAUSES:
State may not prevent foreign commercial corporations doing local business from exercising constitutional right to remove suits into Federal courts. *Wisconsin* v. *Philadelphia & Reading Coal Co*..... 329
Section 1770f, Wisconsin Statutes, providing for revocation of license of foreign corporation in case it removes, or makes application to remove, into Federal court, any action commenced against it by citizen of State is unconstitutional as beyond power of State. *Id.*
Nothing is accomplished by unsuccessful attempt to remove administrative proceeding into Federal court where

REMOVAL OF CAUSES—*Continued.* PAGE

District Court has by remanding order adjudged that removal not authorized. *Pacific Live Stock Co.* v. *Oregon Water Board* 440

Under § 28, Jud. Code, remanding order of District Court is final and conclusive and not subject to review. *Id.*

REPEALS. See **Construction.**

REPRESENTATIVES. See **Members of Congress.**

REPUBLICAN FORM OF GOVERNMENT. See **Congress.**

RES IPSA LOQUITUR. See **Admiralty.**

RES JUDICATA:

Doctrine furnishes a rule for decision of subsequent case between same parties or their privies respecting same cause of action, and only applies where the subsequent action has been brought. *Merriam* v. *Saalfield* 22

Only final judgment is *res judicata* as between parties; and decree is not *res judicata* as against third party participating in defense unless such against defendant himself. *Id.*

RESTRICTIONS ON ALIENATION. See **Indians.**

REVISED STATUTES:

For sections construed, etc., see Table of Statutes Cited in front of volume.

RIPARIAN RIGHTS:

Rights of riparian owners on opposite sides of a stream embrace authority of both, without giving rise to legal injury to other, to protect themselves from harm resulting from accidental or extraordinary floods, such as occur in the Mississippi River, by building levees if they so desire. *Cubbins* v. *Mississippi River Commission*. 351

General right to unrestrained flow of rivers and streams and duty not to unduly deflect or change same by works constructed for individual benefit, qualified by limitation as to accidental and extraordinary floods, prevail under Roman Law, in England, and in this country. *Id.*

Owner of land fronting on Mississippi River has no right to complain of the overflow of his land caused by building of levees along banks of river for purpose of confining water in times of flood within river and preventing it from spreading out from river into and over alluvial valley through

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which river flows to destination, although keeping water within river is to so increase its volume as to raise level and cause overflow complained of. *Id.*
State may require all claimants to same water to submit their claims to an administrative board and to pay a reasonable fee for the expenses of such board. *Pacific Live Stock Co.* v. *Oregon Water Board* 440
Statutes of Oregon, establishing proceedings for ascertainment and adjudication of relative rights of claimants to same water, do not deny due process of law. *Id.*

RIVERS. See **Mississippi River; Navigable Waters; Riparian Rights.**

RULES OF COURT:
Amendment of Rule 10, §§ 2 and 9, relative to printing of record. See p. 633.
Amendment of Rule 37, relative to presentation of petitions for certiorari. See p. 635.

SAFETY APPLIANCE ACT:
Right of private action by employee injured while engaged in duties unconnected with interstate commerce, but injured by defect in a safety appliance required by act of Congress, is within constitutional authority of Congress. *Texas & Pacific Ry.* v. *Rigsby* 33
Employee of railroad has right of action for damages sustained by reason of defective appliances in violation of Act, even though he was engaged at time in intrastate commerce. *Id.*
Amendment of 1903 enlarged scope of Act so as to embrace all vehicles used on any railway a highway of interstate commerce, whether or not employed at time in such commerce. *San Antonio & A. P. Ry.* v. *Wagner* 476
Exception exempting cars used upon street railways does not extend to cars used in regular interstate traffic and also to some extent used on street railways. *Spokane & I. E. R. R. Co.* v. *United States* 344
Cars used on electric railway doing interstate business held subject to Act in respect of grab-irons and hand-holds, notwithstanding use at terminals upon street railways. *Id.*
Electric interstate road is not exempted from requirements of Act because its terminals run over street railways. *Spokane & I. E. R. R. Co.* v. *Campbell* 497

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Congress may require installation of safety appliances on cars used on highways of interstate commerce, irrespective of the use made of any particular car at any particular time. *Texas & Pacific Ry.* v. *Rigsby* 33

If equipment is defective or out of repair, question of whether it is attributable to railroad company's negligence is immaterial. *Spokane & I. E. R. R. Co.* v. *Campbell*..... 497

Whether defective condition of car is or is not due to negligence of carrier is immaterial, an absolute duty being imposed. *Texas & Pacific Ry.* v. *Rigsby* 33

Section 4 does not relieve carrier from liability in a remedial action for death or injury of employee caused by, or in connection with, movement of a defectively equipped car. *Id.*

Quære, whether failure of coupler to work at any time does not sustain charge of violation. *San Antonio & A. P. Ry.* v. *Wagner* 476

Requires locomotives to be equipped with automatic couplers and protection extends to men when coupling, as well as uncoupling, cars. *Id.*

Whether methods substituted for grab-irons and hand-holds offer same, better, or adequate protection to employees, than those prescribed by Act, is not question for expert testimony. *Spokane & I. E. R. R. Co.* v. *United States*..... 344

Act may not be violated with impunity by omitting grab-irons and hand-holds because company deems provisions onerous or because it considers that it has adopted more expedient methods for protection of employees. *Id.*

Under § 8, Act of 1893, and § 5, Act of 1910, an employee is not deemed to have assumed risk although continuing in employment after knowledge of defect. *Texas & Pacific Ry.* v. *Rigsby* 33

Proof that employee violated an order is not proof that he did so wilfully, and where wilfulness not found, such violation is negligence and not departure from course of employment. *Spokane & I. E. R. R. Co.* v. *Campbell*..... 497

That employee may have violated an order does not take him from the protection of the Act, if brakes were defective and such defectiveness was proximate cause of injury. *Id.*

Disregard of Act is wrongful act, and where it results in damage to one of class for whose especial benefit it was enacted, right to recover damages from party in default is implied. *Texas & Pacific Ry.* v. *Rigsby*..... 33

State cannot make or enforce laws inconsistent with Act. *Id.*

SAFETY APPLIANCE ACT—*Continued.* PAGE

Employers' Liability and Safety Appliance Acts are *in pari materia*, and where former refers to any defect or insufficiency, due to employer's negligence, in its appliances, it is legislative intent to treat violation of latter act as negligence *per se*. *San Antonio & A. P. Ry.* v. *Wagner*..... 476

SALES:

Section 215, Crim. Code, prohibits using the mails for fraudulent statements assigning to article to be sold qualities which it does not possess. *United States* v. *New South Farms*..... 64

There is deception and fraud within the meaning of § 215, Crim. Code, where the article is not of the character represented and hence does not serve the purpose. *Id.*

Persons employing false representations as to use to which an article offered may be put, are engaged in scheme to defraud within meaning of § 215. *Id.*

SEAMEN'S WAGES. See **Maritime Law.**

SECRETARY OF INTERIOR:

Under Acts of 1906 and 1910, Secretary has exclusive authority and jurisdiction to determine heirs of allottee Indian entitled to succeed to allotment made under Act of 1887, in case of his death during restricted period, including right to reopen and review previous administrative order on proper charges of newly discovered evidence or fraud. *Lane* v. *Mickadiet*..... 201

Mandamus will not lie to control conduct of Secretary concerning matter within his administrative authority. *Id.*

SECRETARY OF TREASURY:

Decision in dispute regarding interpretation of specifications of Government contract held final. *Merrill-Ruckgaber Co.* v. *United States*..... 387

SENECA INDIANS. See **Indians.**

SOVEREIGNTY:

Even though government of Porto Rico has sovereign attributes and has only consented to be sued in its own courts, the solemn appearance in the United States District Court, and the taking of other steps by, its Attorney General, held to have amounted to a consent to be sued in that court, and thereafter government could not deny its jurisdiction. *Richardson* v. *Fajardo Sugar Co*..... 44

SPECIAL ASSESSMENTS. See **Condemnation of Land; Taxes and Taxation.** PAGE

STATES:

Legislative power may not declare one guilty, or presumptively guilty, of a crime. *McFarland* v. *American Sugar Co.* 79
While legislature may go far in raising presumptions and changing burden of proof, there must be rational connection between fact proved and ultimate fact presumed. *Id.*
Cannot make or enforce laws inconsistent with the Safety Appliance Act. *Texas & Pacific Ry.* v. *Rigsby* 33
May require all claimants to same water to submit their claims to an administrative board and to pay a reasonable fee for the expenses of such board. *Pacific Live Stock Co.* v. *Oregon Water Board* 440
Power to preserve fish and game within its border is inherent in sovereignty of State, subject to any valid exercise of authority under Federal Constitution. *Kennedy* v. *Becker* . . . 556
Tribal Seneca Indians are subject to fish and game laws of New York as to lands ceded by Big Tree Treaty of 1797. That Indians are wards of United States does not derogate from authority of State. *Id.*
Judicial power of United States is wholly independent of state action and States may not, directly or indirectly, destroy, abridge, limit or render it inefficacious. *Wisconsin* v. *Philadelphia & Reading Coal Co.* 329
Regulation of common carriers: State may not, by mandamus, compel railroad to comply with rates fixed by state law unless opportunity afforded to test question of confiscation. *Missouri* v. *Chicago, B. & Q. R. R. Co.* 533
In exerting public rate-making power State cannot, without violating Constitution, make rates so low as to be confiscatory. *Id.*
Regulation of corporations: State may not prevent foreign commercial corporations doing local business from exercising constitutional right to remove suits into Federal courts. *Wisconsin* v. *Philadelphia & Reading Coal Co* 329
Section 1770f, Wisconsin Statutes, providing for revocation of license of foreign corporation in case it removes, or makes application to remove, into Federal court, any action commenced against it by citizen of State, is unconstitutional as beyond power of State. *Id.*
Interstate commerce: The general rule against state burdens on interstate shipments, applicable to intoxicating liquor,

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has been modified so as to bring it under state control after delivery, but before sale, in its original package. *Rosenberger* v. *Pacific Express Co.* 48
Attempt to prohibit interstate shipments C. O. D. or prevent fulfillment of such contracts, is repugnant to the Constitution. *Id.*
Power to control interstate C. O. D. shipments prior to enactment of Penal Code, not deducible from enactment of § 239 of that Code. *Id.*
Under the Wilson Act a State has power to prevent solicitation of orders for intoxicating liquors to be shipped from other States. *Id.*
Police power: State may require licenses for employment agencies and prescribe reasonable regulations in respect to them enforceable in legal discretion of commissioner. *Brazee* v. *Michigan* 340
Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way. *Southern Surety Co.* v. *Oklahoma* 582
Republican form of government: Whether guarantee has been disregarded by action of people of State in amending its constitution presents no justiciable controversy, but involves exercise by Congress of authority vested in it by Constitution. *Davis* v. *Ohio* 565
Elections: Nothing in Act of Congress of 1911, apportioning representation among States, prevents people of State from reserving right of approval or disapproval by referendum of a state act redistricting State for purpose of congressional elections. *Davis* v. *Ohio* 565
Suits by and against: Although State not suable without consent, state officer may be enjoined from doing act violative of Federal Constitution. *Missouri* v. *Chicago, B. & Q. R. R. Co.* 533
State should be given opportunity to accept and abide by decision of this court; and where legislature has not met in regular session since rendition of decision, motion for execution denied without prejudice. *Virginia* v. *West Virginia* 531
In general: Forts, arsenals and like places over which exclusive jurisdiction has been ceded to United States are not regarded as part of State. *Southern Surety Co.* v. *Oklahoma* .. 582
Due process of law does not require State to provide for suspension of judgment pending appeal, nor prevent it making

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it costly in case judgment upheld. *Louisville & Nashville R. R. Co.* v. *Stewart*. 261

STATUTE OF LIMITATIONS. See **Limitations.**

STATUTES. See **Congress; Construction.**

STOCK BROKERS. See **Brokers.**

STOCK AND STOCKHOLDERS. See **Bankruptcy; Brokers.**

STOCK TRANSFERS:
In California, title to stock may be transferred by delivery of certificates and the corporate books are not open for public information. *Stowe* v. *Harvey*. 199

STREET RAILWAYS:
That the terminals of an electric interstate railroad run over street railways does not exempt it from requirements of Safety Appliance Act. *Spokane & I. E. R. R. Co.* v. *Campbell*. 497

SUIT AGAINST STATE. See **States.**

SUPPLEMENTAL BILL:
A supplemental bill is not dependent or ancillary to original suit in sense that jurisdiction of it follows jurisdiction of original cause. *Merriam* v. *Saalfield*. 22

TARIFFS:
Published rules relating to tariffs of interstate carriers must have a reasonable construction. *Menasha Paper Co.* v. *Chicago & N. W. Ry. Co.* 55

TAXES AND TAXATION:
Scheme of distribution of taxes and assessments which is palpably arbitrary and constitutes plain abuse may be condemned: mere fact that there may be inequalities is not enough to invalidate action of State. *St. Louis & K. C. Land Co.* v. *Kansas City*. 419
Owner of property which may be assessed for benefits to pay for property condemned is not entitled under due process provision of Fourteenth Amendment to be made party to condemnation proceedings or be heard as to amount of awards; provision requires only those whose property is to be taken to have prior notice. *Id.*
Property owner entitled to be heard as to amount of his

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assessment for benefits, but not entitled to be heard as to assessments of all other property owners. *Id.*
See **Condemnation of Land; States.**

TAX SALES:
Under § 64a of Bankruptcy Act, holders of tax-certificates who have paid taxes and assessments on property of bankrupt at tax sales which have been declared invalid, are entitled to reimbursement out of general fund of bankrupt's estate, with legal interest, but not with larger interest and penalties imposed by statute in redemptions. *Dayton* v. *Pueblo County*..... 588

TERMS OF COURT:
Statutory provisions relating to terms of District Courts of Florida and provisions of Judicial Code, *held* to permit special terms to be held at any time for transaction of any kind of business. *Abbott* v. *Brown*..... 606
General Rule No. 1 of District Court for Southern District of Florida, should be liberally construed so as to keep court open from beginning of one statutory term to beginning of next; and an adjournment made pursuant to that rule does not bring term to end. *Id.*

TERRITORIES. See **Indian Territory.**

TEXAS:
Statute of 1907, imposing special license taxes on express companies maintaining offices for C. O. D. shipments of intoxicating liquors, is an unconstitutional burden on and interference with interstate commerce, and does not justify an express company accepting such a shipment in refusing to deliver the same. *Rosenberger* v. *Pacific Express Co.*..... 48

TEXAS AND PACIFIC RAILWAY:
Provision in § 1 of Act of 1871 was not intended to confer jurisdiction upon any particular court, but merely render company capable of suing and being sued in any court of competent jurisdiction. *Bankers Trust Co.* v. *Texas & Pacific Ry.*..... 295

TREATIES:
Art. X of Extradition Treaty with Great Britain of 1842, not to be so construed as to require demanding govern-

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ment to send its citizens to country where fugitive found to institute legal proceedings. *Bingham* v. *Bradley* 511

Status of merchant, as defined by treaty with China of 1880, is that acquired in China. *Chin Fong* v. *Backus* 1

Reservation to tribe of privilege of fishing and hunting on land conveyed by Treaty of Big Tree of 1797, *held* one in common with grantees and others to whom privilege might be extended, but subject to appropriate regulation by State. *Kennedy* v. *Becker* 556

See **Extradition.**

TRIAL:

Due process of law does not forbid a hearing upon a transcript of evidence formerly heard in court, and where the parties assented to the course pursued. *De la Rama* v. *De la Rama* 154

TRIAL BY JURY:

Seventh Amendment exacts trial by jury according to course of common law—that is, by unanimous verdict. *Minneapolis & St. Louis R. R.* v. *Bombolis* 211

State court in enforcing right created by Federal statute does not derive its authority as a court from the United States, but from the State, and the Seventh Amendment does not apply to it. *Id.*

Seventh Amendment applies only to proceedings in Federal courts, and does not in any manner govern or regulate trials by jury in state courts, even in action brought under Federal act. *Minneapolis & St. Louis R. R.* v. *Bombolis* ... 211

St. Louis & S. F. R. R. v. *Brown* 223

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Verdict in state court in action under Employers' Liability Act, which is not unanimous, but which is legal under laws of State, is not illegal under Seventh Amendment. *Minneapolis & St. Louis R. R.* v. *Bombolis* 211

St. Louis & S. F. R. R. v. *Brown* 223

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UNITED STATES:

Congress had power to create Mississippi River Commission and through it to build levees to improve navigation, and

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Government is not responsible to riparian owners for deflection of water by reason thereof. *Cubbins* v. *Mississippi River Commission*..... 351

Quære, whether suit against Mississippi River Commission to enjoin construction of levees is not suit against United States. *Id.*

Quære as to liability to owner of tract of land part of which taken for erection of dike in navigable river. *United States* v. *Archer*..... 119

UNITED STATES COMMISSIONERS:

Illegal arrest by state or municipal authorities does not affect jurisdiction of United States extradition commissioner. *Kelly* v. *Griffin*..... 6

VENUE:

Court will not, in order to accommodate venue of particular offense, introduce confusion into the law. *United States* v. *Lombardo*..... 73

VIRGINIA V. WEST VIRGINIA:

State should be given opportunity to accept and abide by decision of this court; and where legislature has not met in regular session since rendition of decision, motion for execution denied without prejudice. *Virginia* v. *West Virginia*.. 531

WAIVER:

Parties to contract of an interstate shipment by rail made pursuant to Commerce Act cannot waive its terms; nor can carrier by conduct give shipper right to ignore such terms and hold carrier to different responsibility than that fixed by the agreement made under published tariffs and regulations. *Georgia, F. & A. Ry.* v. *Blish Milling Co.*..... 190

WASHINGTON STATE:

Under Mining Act it is duty of mine owner to supply ventilation that will prevent accumulations of gas, which duty cannot be delegated, and gas-tester is a representative of the principal and not a fellow-servant of other employees engaged in mining. *Brown* v. *Pacific Coast Coal Co.*..... 571

WATERS. See **Riparian Rights.**

WHITE SLAVE TRAFFIC ACT:

Under § 6 the required certificate must be filed in office of Commissioner of Immigration, and offense of not filing is not committed in another district where person is harbored;

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and District Court of that district has not jurisdiction of offense. *United States* v. *Lombardo* 73

Offense of failing to file certificate as required by § 6, is not a continuing one which, under § 42, Jud. Code, can be punished in either of more than one district. *Id.*

WILLS:

Sections 6509 and 6521, Mansfield's Digest, Laws of Arkansas, were not put in force in Indian Territory by Act of May 2, 1890; but *quære* as to § 6523. *Gidney* v. *Chappel* .. 99

Section 5625, Mansfield's Digest, Laws of Arkansas, was put in force in Indian Territory by Act of May 2, 1890. *Id.*

WILSON ACT:

Under Act State has power to prevent solicitation of orders for intoxicating liquors to be shipped from other States. *Rosenberger* v. *Pacific Express Co.* 48

Modifies general rule as to state burdens on interstate commerce so as to bring intoxicating liquor under state control after delivery, but before sale, in its original package. *Id.*

WISCONSIN:

Section 1770f, of statutes, providing for revocation of license of foreign corporation in case it removes, or makes application to remove, any action commenced against it by citizen of State, into Federal court, is unconstitutional as beyond power of State. *Wisconsin* v. *Phila. & Reading Coal Co.* .. 329

WORDS AND PHRASES:

General words in statute must be read in light of statute as a whole and with due regard to situation in which they are to be applied. *United States* v. *Nice* 591

Where a criminal statute does not define a word used therein, its etymology must be considered and its ordinary meaning applied. *United States* v. *Lombardo* 73

" Adulteration " as used in § 7 of the Pure Food and Drugs Act is used in a special sense. *United States* v. *Coca Cola Co.* 265

" Any person not registered " in § 8 of Opium Registration Act of 1914, refers to those required to register, and one not in that class is not subject to the penalties prescribed. *United States* v. *Jin Fuey Moy* 394

" File " means to deliver to office indicated and to send to such office through the mails. *United States* v. *Lombardo* .. 73

WRIT OF ERROR. See **Appeal and Error.**